
Implementing the Total Constitution: Towards a Normative Approach

**A Report on
the Status of Constitutional Implementation
to the Kenya Law Reform Commission**

Nairobi, August 2015

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Appendix 1: Sample Questionnaire

Appendix 2: Sample of Constitutional Cases

Appendix 3: Summary of Issues on Legislation

ACCRONYMS

ADR	Alternative Dispute Resolution
AG	Attorney General
CAJ	Commission on Administrative Justice
CBOs	Community Based Organisations
CIC	Commission for Implementation of the Constitution
CID	Criminal Investigations Department
CKRC	Constitution of Kenya Review Commission
CLE	Council of Legal Education
COE	Committee of Experts
CoG	Council of Governors
CPC	Criminal Procedure Code
CSOs	Community Service Orders
CUCs	Court User Committees
DANIDA	Danish International Development Agency
OAGDJ	Office of the Attorney General and the Department of Justice
EACC	Ethics and Anti-Corruption Commission
EDF	European Development Fund
EU	European Union
FBOs	Faith Based Organisations
FGD	Focus Group Discussions
FIDA	Federation of Women Lawyers
GJLOS	Governance, Justice, Law and Oder Sector
GJOK	Government of Kenya
ICJ	International Commission of Jurists
IDLO	International Development Law Organization
IEBC	Independent Electoral and Boundaries Commission
IED	Institute for Education in Democracy
IG	Inspector General
IGR	Intergovernmental Relations
IPMAS	Integrated Performance Management and Accountability System
IPOA	Independent Police Oversight Authority
JMVB	Judges and Magistrates Vetting Board
JSC	Judicial Service Commission
JTF	Judiciary Transformation Framework
JTI	Judicial Training Institute
KLRC	Kenya Law Reform Commission
KNCHR	Kenya National Commission on Human Rights
KPS	Kenya Prisons Service
KSL	Kenya School of Law
LSK	Law Society of Kenya
MOJNCCA	Ministry of Justice, National Cohesion and Constitutional Affairs
MTEF	Medium Term Expenditure Framework

MTP	Medium Term Programme
NALEAP	National Awareness and Legal Aid Programme
NCAJ	National Council on Administration of Justice
NCKK	National Council of Churches of Kenya
NCRC	National Crime Research Centre
NGEC	National Gender and Equality Commission
NGOs	Non- Governmental Organisations
NPSC	National Police Service Commission
NSAs	Non- State Actors
ODPP	Office of the Director of Public Prosecutions
PBOs	Public Benefits Organisations
SLO	State Law Office
SWAp	Sector Wide Reform Approach
TA	Transition Authority
TDR	Traditional Dispute Resolution
WB	World Bank
WPA	Witness Protection Agency

Foreword

One of the most distinctive features of our constitutional design is the express requirement for legislation to implement the Constitution, within stipulated timeframes. A review of the history of the process leading up to the drafting of the Constitution of Kenya (2010) confirms that concerns over constitutional implementation have been kept constantly in view: how to ensure that the new laws envisaged by the new Constitution would be promptly enacted. Therefore, in all the five draft constitutions preceding the enactment of the Constitution in 2010, express provisions were made for such scheduled constitutional implementation by legislation.¹

The enactment of implementing legislation has important functions worth noting. The first, straightforward function of legislation is to elaborate and thereby implement constitutional requirements: text, norms, values and principles. By this, legislation provides a complement to constitutional self-enforcement. Secondly, given the level of generality in constitution drafting, it is by legislation that much of the constitution finds its life. Legislation performs the function of constitution building, some type of continuing constitution making. Finally, in the context of legal continuity, legislation seeks to enact new laws or to reform existing laws, all of which must ultimately pass constitutional scrutiny. A recent provisional audit, by the Commission, of legislation in the statute book at the time reveals that there are provisions within it that are constitutionally non-compliant.

This report reviews the status of the enactment of legislation towards constitutional implementation. Its objective is to furnish particulars on the extent of constitutional implementation, the balance of legislation requiring enactment and the

¹Republic of Kenya, *Draft Bill: The Constitution of the Republic of Kenya* (Nairobi: Constitution of Kenya Review Commission, 2002), Article 292; the Republic of Kenya, *The Draft Constitution of Kenya* (Nairobi: National Constitutional Conference, 2004), Article 299; Republic of Kenya, *The Proposed New Constitution* (Nairobi: Government Printers, 2005), section 13 Sixth Schedule; and Republic of Kenya, *The Harmonized Draft Constitution* (Nairobi: Committee of Experts, 2009), Sixth Schedule and *The Revised Harmonized Draft Constitution* (Nairobi: Committee of Experts, 2009), Fifth Schedule.

areas of legal reform in post-enactment legislation. In law making processes which have normative and temporal limits, form can easily present itself as substance, political workarounds, intended or unintended, substituted for constitutional workouts. This challenge becomes the more critical given that constitutions tend to give the legislative organs plenary authority to create general legal norms, prohibitions being largely normative. An objective of this report is to identify some of the gaps, inconsistencies and abeyances in post-promulgation legislation.

The report finds that while constitutional implementation as envisaged by transitional provisions has been realized to a greater degree *formally*, there remains significant challenges to *substantial* realization of constitutional purposes. In the course of the interviews conducted during the compilation of this report, as corroborated by decisions of the courts of law and literature review of governance reports, it has emerged that the challenges to constitutional implementation are attributable to political culture, self interest, institutional interest, capacity constraints, constitutional fatigue, and political blockages to the legislative uptake of proposals arising from public participation and advisories from technical expert bodies.² Most of the interviewees considered that the attenuated quality of legislation is not so much a function of the technical difficulties inherent in the translation of constitutional intent into legislative outcomes as a result of lack of sustained political goodwill. According to some, there is the risk that constitutional values may be mechanically accommodated, rather than acculturated into governance.

The final part of the report turns to recommendations on how to deal with some of the challenges relating to misalignment or circumvention of constitutional purpose and legislative form. As it will become apparent to the reader, human rights constitute the single most important basis of challenge to much of the legislation enacted to implement the Constitution before the courts. As means of integrating human rights in the substance and process of legislation, one available option is to institutionalize a requirement that the introduction of all legislation to the cabinet or legislature for

² See for example, advisories by the Kenya National Commission on Human Rights on several proposed legislation, available at <http://www.knchr.org/ReportsPublications/Bills.aspx>.

debate and approval (including proposals amendment of laws or policies) contain a human rights impact statement. Such a statement could provide an assessment of whether a proposed law or policy is consistent with human rights and the reasons or justifications for any inconsistency. It could also note any limitation placed on a human right, as well as the limitation's purpose and justification and whether there is any less restrictive means of achieving the purpose. A framework legislation can be developed for such purpose.

Implementing the Total Constitution is a report authored by a consultant commissioned by the International Development Law Organization and the Kenya Law Reform Commission. The views expressed in it are not coextensive with the views of the institutions. The report is, however, the outcome of reflections from lead actors in constitutional implementation – the Constitutional and Human Rights Division of the High Court, the Commission on the Implementation of the Constitution, the Commission on Administrative Justice, the Kenya National Commission on Human Rights, the Council of Governors, the Office of the Director of Public Prosecutions, Law Society of Kenya, and civil society organizations including the Federation of Women Lawyers, Katiba Institute and Transparency International – each posing the question of how to ensure the journey towards the constitutional vision is on course.

PART 1: INTRODUCTION

1.0 Overview

A key feature of our constitutional design is the establishment of an elaborate structure of constitutional implementation. As a central pillar of its design, the Constitution of Kenya (2010) establishes an elaborate scheme of implementation structures, enforcement mechanisms and oversight processes. It creates a framework for constitutional implementation by requiring the enactment of legislation, implementation of legal and institutional reforms and enforcement of constitutionality by courts through an expanded jurisdiction on a wide range of constitutional questions, including non-implementation of the Constitution. It vests on the Supreme Court jurisdiction to render advisory opinions, at the request of the national government, any State organ, or any county government with respect to any matter concerning county government. It further establishes oversight mechanisms, mainly the Constitutional Implementation Oversight Committee and Commission for the Implementation of the Constitution, the former as a parliamentary committee and the latter as an independent institution. These oversight bodies are constitutionally mandated to co-ordinate with the Attorney General and the Kenya Law Reform Commission in preparing legislation for implementing the Constitution.³

This report reviews the status of constitutional implementation, more specifically, legislation enacted since the promulgation of the Constitution of Kenya. In the fifth year since the constitutional enactment, the time is ripe to review progress in the legislative aspect of constitutional implementation, with the objective of ascertaining the status of *legislative enactment* as against *constitutional purpose*. Such a review aims at two main objectives. First, it seeks to determine an agenda for the drafting and subsequent enactment of the remainder of legislation either expressly required to be enacted under the Fifth Schedule of the Constitution or implied in the architecture and normative scheme of the Constitution. Second, it aims to identify gaps

³Section 5 of the Sixth Schedule, Constitution of Kenya (2010).

and inconsistencies in post-promulgation legislation with a view to recommending review and harmonization of such laws to ensure compliance with the Constitution.

1.1 Legal Basis of the Legislative Audit

The Kenya Law Reform Commission is established under the Kenya Law Reform Commission Act (Act No. 19 of 2013). This Act is founded partly on the constitutional mandate of the Commission in constitutional implementation, enshrined in section 5(6)(b) of the Sixth Schedule to the Constitution. Under section 6 of the Act, the functions of the Commission are to –

- (i) keep under review all the law and recommend its reform to ensure among others,
 - ✓ that the law conforms to the letter and spirit of the Constitution;
 - ✓ that the law is, among others, consistent, harmonized, just, simple, accessible, modern and cost-effective in application; and
 - ✓ 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;
- (ii) 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;
- (iii) 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;
- (iv) formulate, by means of draft Bills or otherwise, any proposals for reform of national or county government legislation; and
- (v) advise the national or county governments on the review and reform of their legislation.

By its function in constitutional implementation and legal reform, the Commission has a mandate to audit existing legislation with a view to drafting legislative proposals to harmonize the Statutebook with the Constitution. This audit of post-promulgation laws has been conducted in pursuance of this mandate. Its overall objective is to identify the status of constitutional implementation and on the basis of its findings and recommendations, develop legislative proposals for the review, rationalization and harmonization of existing legislation and the drafting of legislative proposals to give effect to optimal constitutional implementation.

1.2 Purpose and Scope of the Legislative Audit

A transformation of the legal, policy and institutional framework for governance is the cornerstone of the Constitution of Kenya. The Constitution requires the state to take positive action to give effect to its text, norms, values and principles, the latter category including, the rule of law, democracy, social justice, human rights, good governance, integrity, transparency and accountability.⁴ Within the trinity of legislation, administration and adjudication, the Constitution expressly mandates post-enactment law making as the primary mechanism by which to implement more concrete and comprehensive legal provisions to give substantive effect to constitutional text, norms, values, principles and purposes. Accordingly, the Constitution requires Parliament to enact legislation required by the Constitution within the period stipulated in the Fifth Schedule. Similarly, while the Constitution sanctions legal continuity, by preserving laws in force before its promulgation, it requires these laws to be reviewed or interpreted with the adaptations and alterations necessary to bring them into conformity with the Constitution.⁵

The enactment of legislation and the legislative process generally therefore constitutes, in a sense, the core of post-enactment constitution building. This means by implication, a requirement that that all implementing legislation seek to revolve in the

⁴Preamble and Article 10 of the Constitution of Kenya (2010).

⁵Section 7 of the Sixth Schedule of the Constitution of Kenya (2010).

orbit of constitutional law, seeking to enforce the requirements entailed in the text, norms, values, principles and purposes of the Constitution. However, the apparent risk remains that constitutional implementation through legislation can easily become an end in itself, where parliamentary performance is measured by the quantity of implementing legislation enacted rather than its quality in terms of its compliance with constitutional text, norms, values, principles and purposes. Moreover, there is a further risk that the list of legislation required to be enacted under the Fifth Schedule to the Constitution may be viewed as the maximal limit of constitutional implementation.

This particular audit seeks to evaluate legislation enacted *after* the promulgation of the Constitution to gauge their congruence with the Constitution. In a constitutionalist system, all statutes must revolve in the orbit of constitutional law.⁶ All must be subject to the Constitution and must be consistent with it, or be at risk of invalidation. Although there is a presumption of validity of legislation in the absence of legal challenge and a judicial determination thereon, law reform provides a mechanism with which to audit such legislation to redress their normative deficiencies. Such a process of abstract review is not new. The procedure has grown in a number of commonwealth jurisdictions, by which parliamentary committees, justice departments or law reform agencies scrutinize proposed laws or existing laws to assess their potential or real implications on basic rights or on governmental function.⁷

1.3 Structure of the Report

The report is structured as follows. The first part outlines the purpose or the audit and a framework or standard for review of constitutional implementation. To the extent that any review of constitutional implementation is both a question of

⁶ See Ernest A. Young, *The Constitution outside the Constitution*, 117 *Yale Law Journal* 408 (Dec., 2007) and Ira C. Lupu, *Statutes Revolving in Constitutional Law Orbits*, 79 *Virginia Law Review* 1 (1993).

⁷ Brian Horrigan, "Legislative Scrutiny of Proposed Laws to Enhance Basic Rights, Parliamentary Democracy, and the Quality of Law-Making," in Adrienne Stone et al (eds) *Protecting Rights Without a Bill of Rights* (Aldershot: Ashgate, 2013).

description of the *fact* of implementation and its evaluation as against constitutional values, an evaluation standard is required. In the first part, elements of what may constitute a threshold for auditing constitutional implementation are examined. We adopt what we term a substantial implementation standard, by which is meant, the enactment of legislation in such form and substantive scope as to meet constitutional requirement not merely in terms of constitutional text, but also values, norms and purposes. That means a scenario in which constitutional implementation is viewed as incomplete (that being the only case that real life permits), but is nonetheless adequately substantial as to yield constitutional functionality as well as normativity.

The second part of the report is a review of the status of enactment of implementing legislation since the promulgation of the Constitution. In that part we examine the enactment of two categories of consequential legislation, namely, legislation expressly required to be enacted under the Fifth Schedule of the Constitution and legislation implied in the general architecture and normative scheme of the Constitution. As an analytical matter, almost all constitutional provisions and principles require implementing legislation to give them substance. In practical terms, however, the Constitution expressly mandates the enactment of legislation attached to specific textual provisions, norms, values and principles. The listed legislation should be viewed not so much as the outer limit of legislative requirement as the irreducible minima. This means that any assessment of constitutional implementation should not be content with an exercise in mechanical counting of legislation enacted under the Fifth Schedule of the Constitution, but rather a comprehensive review of how these and those implied in the normative scheme of the Constitution intersect to effect constitutional values, norms and purposes.

The third part of the report turns to a review of the enacted legislation, in light of the interviews conducted during this study, commentary by authoritative bodies and recent judicial determinations, more specifically on questions over constitutionality. While there have been a litany of cases challenging the constitutionality of statutes, it remains to analyse the emerging issues and their intersection with constitutional

implementation, the effect of the judicial overhang on legislation and inter-branch dialogue and generally, impact in the enforcement of constitutional purpose in the enactment of implementing laws.

PART 2: SUBSTANTIAL IMPLEMENTATION STANDARD

2.0 Legislative Minimalism

The design of constitutional implementation under our constitutional framework implies that the legislature in place at the time the Constitution was enacted or elected immediately following the promulgation of the Constitution has a dualist legislative competence, both in ordinary law making and constitution building. In the latter sense, the legislature is required to enact legislation whose objective is to elucidate the substance and advance the purposes of the constitution. This function of constitutional implementation makes the legislature a form of continuing constituent assembly, when engaged in deliberations towards the enactment of constitution building laws.⁸ This fact, of continuing constitution making has been acknowledged in recent judicial dicta, when the Chief Justice and President of the Supreme Court of Kenya stated: “In other words, constitution-making does not end with its promulgation; it continues with its interpretation [and we may add, the enactment of implementing legislation].”⁹

The 10th Parliament, the legislature in place when the Constitution was promulgated in 2010, enacted 173 Bills.¹⁰ Among these, about a third related directly to constitutional implementation, either as substantive legislation or as amendments to existing legislation. This legislative output is a significant increase when compared with previous parliaments, indeed the highest it has been, relative to its predecessors; for example, its immediate predecessor, the 9th Parliament, enacted about 67 Bills. This marked increase in legislative output is a function of different factors, most importantly the constitutional directive relating to scheduled constitutional implementation.

The one important point to be noted is that an increase in the number of legislation is not co-extensive with legislative maximalism. When examined more

⁸See eg Jon Elster, ‘Legislatures as Constituent Assemblies’, in Richard Bauman and TsviKahana, *The Least Examined Branch: The Role of Legislatures in the Constitutional State* (New York : Cambridge University Press, 2006), p. 181.

⁹ See *Speaker of the Senate & another v Attorney-General & 4 Others* [2013] eKLR.

¹⁰ See <http://www.parliament.go.ke/>

substantively, an increase in legislative output may only be relative to its antecedents. A substantive audit may instead reveal an approach, which we may term legislative minimalism, characterized by a tendency to enact or amend statutes only when there is an express constitutional, to view the Constitution only as a set of constraints on legislation, rather than an empowerment entailing positive obligation to advance constitutional values through legislation and not simply avoid violating the Constitution. In conducting this audit, this report follows that insight, probing the substantive scope rather than the formal aspects of legislative enactment, demonstrated in terms of the number of statutes enacted or amended.

To put it more bluntly, the Fifth Schedule of the Constitution, by which the legislature is directed to enact certain legislation, within specified timeframes is but only an inclusive rather than an exhaustive catalogue. To be sure, the Constitution leaves it open to legislators to choose the form of legislation, provided it meets its substantive requirements. However, nothing prevents the legislature from developing a legislative programme that is super-equivalent to Schedule 5, aimed at maximal constitutional implementation. This, the legislature can do, aided by constitutional values and purposes, and most importantly, the Constitution's drafting history, while maintaining fidelity to constitutional text and structure.¹¹

2.1 Towards a Substantial Implementation Standard

The evaluation of post-promulgation legislation presupposes some criterion for such exercise. This report adopts a criterion which is linked to the extent to which implementing legislation advances constitutional text, values and purposes. If legislation is to be evaluated from the perspective of constitutional implementation, the criterion must reflect notions about what is constitutionally required of legislation in terms of constitutional purpose: "a government based on the essential values of human

¹¹See for example, requirements for legislation are to be found in Constitution of Kenya Review Commission, Consequential legislation required to Implement the Constitution (Nairobi: CKRC, 2005) and the National Constitutional Conference, Report of the Technical Working Group on Transitional and Consequential Arrangements (Nairobi: CKRC, 2005)

rights, equality, freedom, democracy, social justice and the rule of law.”¹² This means that legislation is to be evaluated against constitutional principles and values: human rights, social justice, rule of law, devolution, good governance, integrity, transparency, accountability, democracy and participation of the people.

This audit is concerned with the implementation of the *total* constitution.¹³ The criterion for evaluation of implementing legislation we have adopted in the report is that of a substantial implementation standard. By this criterion is meant, legislative enactment that meets normatively, constitutional requirement not merely as a copy-out of constitutional text, but also in terms of its overriding values, principles and purposes. But it also means recognizing constitutional implementation as a continuous, if incomplete process, in which legislation does not so much exhaust implementation possibilities as give only but a substantial effect to constitutional provisions, values and purposes. The latter categories, values and purposes, imply not merely a counting of post-enactment legislation, but also a review of how legislation fits within the normative edifice and internal context of the Constitution.

Why a normative standard of legislative evaluation, in contrast with the descriptive method of a count of enacted legislation vis-à-vis the Fifth Schedule of the Constitution? The Constitution of Kenya is a normative document. As a transformative constitution, it seeks to transform many aspects of the social, political and economic order. The normative standard is based on this function. It also has foundations in constitutional text: the enshrinement of constitutional values and principles in the Constitution, and the explicit requirement that these values and principles bind all state organs and serve as a directive source to all persons whenever any of them –

- (i) applies or interprets the Constitution;
- (ii) enacts, applies or interprets any law; or

¹²The Preamble, the Constitution of Kenya. See also Article 10 of the Constitution of Kenya.

¹³This phraseology is borrowed from Mathias Kumm, “Who is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law” (2006) 7 German Law Journal 341.

(iii) makes or implements public policy decisions.¹⁴

PART 3: SUBSTANTIVE AUDIT

3.0 A Thematic Substantive Audit of Post-Enactment Legislation

A thematic approach, whereby several chapters of the Constitution are connected together and integrated within a theme, commends itself in the present analysis. In the part that follows, the report examines Chapters One (Sovereignty of the People and Supremacy of the Constitution), Two (The Republic) and Fifteen (Commissions and Independent Offices) as elements of the management of constitutionality and promotion of constitutionality; Chapters Three (Citizenship) and Four (Bill of Rights) as Human Rights and Citizenship; Chapter Five (Land and Environment) as Environmental and Natural Resources Governance; Chapter Six (Leadership and Integrity) and Chapter Thirteen (Public Service) as Public Service, Leadership and Integrity; Chapters Seven (Representation of the People), Chapter Eight (The Legislature) and Chapter Nine (The Executive) as Structure of Government; Chapter Ten (Judiciary) as the Judicial and Legal System; Chapter Eleven (Devolved Government) as Devolution of Power; Chapter Twelve (Public Finance) as Public Finance and Chapter Fourteen (National Security) as National Security.

3.1 Management of Constitutionality and Promotion of Constitutionalism

Values and principles have become part of contemporary discourse on constitutionalism, for they function in important ways to affect the shape and substance of constitutional outcomes. In India as in Ireland, for example, principles are explicitly enumerated within the constitutional text to serve as a directive source for political, social and economic development. In South Africa, the elevated status of constitutional principles is traceable to their unique constitution-making process, in which the

¹⁴Article 10 of the Constitution of Kenya.

adoption of a final document was contingent on certification by the Constitutional Court that a set of mandated principled commitments had been scrupulously followed by the Constitutional Assembly.¹⁵ During the constitution making process in Kenya, the one important concern was to develop a normative and structural framework to facilitate the internalization of constitutionalism and supervision of constitutionality.¹⁶

The Constitution of Kenya embodies and prescribes values and principles that together constitute its foundation. These values and principles, not exhaustive by their enumeration, include the aspirations and ideals declared in the preamble; the national values and principles of governance inscribed under Article 10; the provisions under Article 11 on culture as the foundation of the nation and as the cumulative civilization of the people; the principles and objects that proclaim constitutional purposes in each of the chapters of the Constitution; and the overarching precepts that underlie the constitutional design, including those inscribed as objects and purposes of review in the legal framework for constitution making including the following: establishment of a free and democratic system of Government that enshrines good governance, constitutionalism, the rule of law, human rights and gender equity, accountability, separation of powers, and checks and balances between state organs; promotion of the peoples' participation in the governance of the country through democratic, free and fair elections and the devolution and exercise of power; and respecting ethnic and regional diversity and communal rights.¹⁷

The Constitution provides various mechanisms to enforce values and principles. First, values and principles including the Bill of Rights constitute the background normative framework for legislation, public policies and their application; they bind all state organs, State officers, public officers and all persons whenever any of them applies or interprets the Constitution, enacts, applies or interprets any law or makes or

¹⁵Gary Jacobsohn, "Constitutional Values and Principles," in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford: OUP, 2012).

¹⁶Constitution of Kenya Review Commission, *Final Report of the Commission* (Nairobi: CKRC, 2005), p. 311.

¹⁷Constitution of Kenya Review Act, 1997 (No. 13 of 1997), Constitution of Kenya Review Act (Cap 3A Laws of Kenya) and the Constitution of Kenya Review Act (No. 9 of 2009), all repealed.

implements public policy decisions.¹⁸ Second, there is an express constitutional requirement for enactment of legislation and development of the law to promote values and principles. This positive duty vests not merely in legislative enactment, but also in the requirement that courts of law merely not apply the law mechanically but also “develop the law to the extent that it does not give effect to a right or fundamental freedom.”¹⁹ Third, the Constitution mandates as part of its interpretive and implementation framework, direct application of constitutional values and principles, supervised by courts of law and constitutional commissions. This report focuses on the second form, namely, legislation to give effect to constitutional values and principles.

3.1.1 Status of Constitutional Implementation of Express Requirements

Constitutional values and principles under the Constitution are both normative and imperative; they are normative as they provide the vision of the society we should become, but they are also imperative because there are express provisions under the Constitution of Kenya requiring the enactment of legislation and development of jurisprudence to promote values and principles prescribed or implied as part of constitutional implementation. As part of constitutional implementation, constitutional values and principles are enacted as overarching norms or purposes in legislation or as specific legislation aiming to advance the particular normative requirements. There is additionally, specific legislation that seeks to advance the national values and principles, which will be discussed in subsequent parts of this report.

3.1.2 Review of Implementing Legislation

There are various invocations and inscriptions of constitutional values and principles in legislation enacted since the promulgation of the Constitution of Kenya.

¹⁸ Articles 10(1)(b) & (c) and 20(1) of the Constitution of Kenya (2010).

¹⁹ Article 20(3)(b) of the Constitution of Kenya (2010).

These will be analyzed under each of the thematic areas of this part of the report. The one thing that needs noting is that although at the textual level, these values and principles of managing constitutionality and promoting constitutionalism have been incorporated in legislation, it still remains to unpack their precise substance and meaning. Thus legislation has tended to copy-out from constitutional text rather than elaborate constitutional meaning, curtailing deliberation on the subject and leaving much of their implementation of values and principles to the judicial process of interpretation. Similarly, some interviewees considered that incorporation of values and principles may be formulaic or merely perfunctory.

In view of the nature of constitutional values and principles, their legislation is inevitably an incomplete, dynamic process of sedimentation and accumulation. But there are also areas in which the requirement for legislation is express and direct, with established timelines. For example, in the area of culture broadly conceived, there is an express requirement for legislation. This affirmation of culture under the Constitution bestows upon Parliament a duty to legislate laws to preserve, promote and protect culture as part of national goals; to promote cultural diversity as a foundation of an open and democratic society and social, economic and cultural development of the nation; to protect and promote Kenya's languages; to promote the development of culture through research and knowledge management. Moreover, in light of the constitutional provisions relating to culture and alternative dispute resolution, there is a requirement to undertake law reform to deal with the deep-seated colonial attitude that much of African customary law is inherently backward, immoral and repugnant to justice unless proven otherwise.²⁰ The proposed Protection of Traditional Knowledge and Traditional Cultural Expressions Bill, 2015, deals in part with these imperatives.

In view of the history of constitution making, it is clear that there was an intention towards further legislation on values and principles to support the

²⁰Government of Kenya, National Policy on Culture and Heritage (Nairobi: Government Printer, 2009).

management of constitutionality and promote constitutionalism as follows:²¹

- (i) Affirmative action to promote equity and inclusiveness;
- (ii) Public participation framework legislation to promote deliberative democracy and participation of the people in governance and public affairs;
- (iii) Civic education legislation; and
- (iv) Framework legislation to promote national unity through recognition of cultural diversity, including the Languages of Kenya Bill, 2015.

At the institutional level, there are various legislation establishing independent offices and commissions as required by the Constitution. To streamline the appointments process, there has been enacted the Independent Offices Appointment Act (No 8 of 2011). However, there have been proposals for a reexamination of different aspects of legislation governing the establishment of commissions to strengthen their role in supporting constitutional democracy and constitutionalism. These are highlighted in the appendix.²² The one other missing link is the establishment of a legislative and institutional framework for civic education. There is an implied requirement, from the obligation of bestowed by Article of the Constitution in every person to respect, uphold and defend the Constitution, for civic education. This implied requirement is clear from the history of constitution making. The Constitution of Kenya Review Commission thus stated:

Civic education courses on the constitution should be compulsory in schools. As people read our report, they should constantly be thinking of their own responsibility for the mobilisation and enforcement of the constitution. The people in whose name the constitution has been designed are its ultimate custodians.²³

3.2 Human Rights and Citizenship

²¹Constitution of Kenya Review Commission, Consequential legislation required to Implement the Constitution (Nairobi: CKRC, 2005).

²²See for example, Institute for Education in Democracy, Dynamics of Democracy: Strategies for Future Elections (Nairobi: IED, 2014).

²³Constitution of Kenya Review Commission, The Peoples' Choice (Nairobi: CKRC, 2002).

Human rights constitute the cornerstone of modern constitutionalism. As with transformative constitutions of our time, the principle of human rights looms large in the normative framework of the Constitution of Kenya; it features prominently among the values inscribed in the preamble and national values and principles enshrined under Article 10, and in addition, in a comprehensive Bill of Rights, declared by the Constitution as an integral part of the democratic state, “the framework for social, economic and cultural policies.”²⁴ By the Bill of Rights, all state organs are bound to prescribed normative standards, which may not be limited except by law, to the extent that the limitation is reasonable and justifiable in an open and democratic society.²⁵ Further, human rights as constitutional rights and normative principles bind all persons whenever any of them enacts, applies or interprets any law or makes or implements public policy decisions.²⁶ Its other salient feature is that it recognises constitutional rights outside the Constitution – the enumeration of rights neither makes finite the aggregate of human rights and fundamental freedoms nor precludes the implementation and enforcement of other rights and fundamental freedoms not enumerated in the Bill of Rights, but otherwise recognised or conferred by law.²⁷ Also incorporated are international treaties ratified by the state, and general rules of international law, which form part of the law of Kenya.²⁸

Human rights, then, constitutes one of the cornerstones of the Constitution. Its counterpart, citizenship, complements rights by enabling members of the political community to claim equal rights, by fact of being members of the political community. As a human right, perhaps the most important right, citizenship determines the enjoyment of social peace; any person who has no citizenship is deprived of the right to protection and unassailability. As with human rights, citizenship provides for the direct

²⁴Article 19 of the Constitution of Kenya (2010).

²⁵Article 20 of the Constitution of Kenya (2010).

²⁶ Articles 10(1)(b) and (c) of the Constitution of Kenya (2010). See also Article 20(1) of the Constitution.

²⁷Article 20 of the Constitution of Kenya (2010). For this concept, see Young, *The Constitution Outside the Constitution*

²⁸Articles 2(5) & 2(6) of the Constitution of Kenya (2010).

relationship between the citizen and the state, founded on the principle of formal equality of all citizens, as individuals, not members of communities. Because citizenship is a pillar of national identity, it is foundational to the Constitution, one of whose functions is to create that shared national identity. Therefore, one of the objects of the new Constitution is to address some of the pathologies of citizenship rules that obtained since the advent of colonialism, including discrimination against women and minority groups. In terms of implementation, the Constitution mandates the enactment of legislation to, among other things, prescribe the duties and rights of citizens, procedures by which a person may become a citizen and the procedures for revocation of citizenship.²⁹

In evaluating legislation from the human rights and citizenship perspective, it is not enough simply to examine the required human rights legislation; the assessment must also turn on the conformity of legislation generally with the human rights framework, both substantively and procedurally. This entails, for our purposes, evaluating legislation based on the following principles and purposes of the Constitution:

- (i) Equality and non-discrimination
- (ii) Participation, empowerment and inclusion
- (iii) Accountability, transparency and rule of law
- (iv) Linkages to human rights standards.³⁰

3.2.1 Status of Constitutional Implementation of Express Requirements

The one important feature of the Constitution of Kenya is that it contains a comprehensive Bill of Rights whose provisions set out guaranteed rights and freedoms in detail, taking into account modern developments in the corpus of international human rights norms and comparative jurisprudence. This expansion of the scope of human rights protections under the Constitution bestows a duty on the state to observe,

²⁹Article 18 of the Constitution of Kenya (2010).

³⁰For the rights-based approach to legislation, see United Nations Office of the High Commissioner for Human Rights, at <http://www.ohchr.org>.

respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights, by among other things enacting and implementing policy, administrative and legislative measures aimed at giving effect to those human rights obligations. In this sense, the Constitution provides but only the foundation for further steps to be taken as part of human rights implementing policy or legislation.

Much of the implementation of the chapters on the Bill of Rights and Citizenship requires the enactment of legislation and policies. There are specific constitutional requirements for the state to: enact and implement legislation to fulfil its international obligations in respect of human rights and fundamental freedoms (Article 23(4)); take legislative, policy and other measures, including the setting of standards, to achieve the progressive realisation of guaranteed economic and social rights (Article 23(2)); enact legislation to give original jurisdiction in appropriate cases to subordinate courts 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 (Article 23(2)); take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination (Article 27(6)); take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender (Article 27(8)) and, in accordance with the Fifth Schedule of the Constitution, enact legislation to provide for freedom of the media as provided under Article 34, family related rights under Article 45, consumer protection under Article 46, fair administrative action under Article 47, fair hearing under Article 50, rights of persons detained, held in custody or detained under Article 51 and the establishment of a single or several national human rights institutions under Article 59.

The status of constitutional implementation is presented in the table below.

Table 2: Fifth Schedule Requirement under Chapter Four (The Bill of Rights)

Constitutional Provision	Legislation Enacted /Proposed	Purpose
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Constitutional Provision	Legislation Enacted /Proposed	Purpose
Article 34: Freedom of the media	Media Council Act (No. 46 of 2013)	The object of the Act is to give effect to Article 34 (5) of the Constitution; to establish the Media Council of Kenya; to establish the Complaints Commission, and for connected purposes
Article 45: Family	<ol style="list-style-type: none"> 1. Marriage Act (No. 4 of 2014) 2. Matrimonial Property Act (No. 49 of 2013) 3. Protection Against Domestic Violence Act (No. 2 of 2015) 	<ol style="list-style-type: none"> 1. The object of the Act is to amend and consolidate the various laws relating to marriage and divorce and for connected purposes; 2. The object of the Act is to provide for the rights and responsibilities of spouses in relation to matrimonial property and for connected purposes. 3. The object of the Act is to provide for the protection and relief of victims of domestic violence; to provide for the protection of a spouse and any children or other dependent persons, and to provide for matters connected therewith or incidental thereto.
Article 46: Consumer rights	<ol style="list-style-type: none"> 1. Consumer Protection Act (No. 46 of 2012) 2. Competition Act (No. 12 of 2010) 	<ol style="list-style-type: none"> 1. The object of the Act is to provide for the protection of the consumer prevent unfair trade practices in consumer transactions and to provide for matters connected with and incidental thereto 2. The object of the Act is to promote and safeguard competition in the national economy; to protect consumers from unfair and misleading market conduct; to provide for the establishment, powers and functions of the Competition Authority and the Competition Tribunal, and for connected purposes.
Article 47: Fair administrative action	Fair Administrative Action Act (No. 4 of 2015)	The object of the Act is to give effect to Article 47 of the Constitution, and for connected purposes
Article 50: Fair hearing	Victim Protection Act (No. 17 of 2014)	The object of the Act is to give effect to Article 50 (9) of the Constitution; to provide for protection of victims of crime and abuse of power, and to provide them with better information and support services to provide

Constitutional Provision	Legislation Enacted /Proposed	Purpose
		for reparation and compensation to victims; to provide special protection for vulnerable victims, and for connected purposes
Article 51: Rights of persons detained, held in custody or imprisoned	Persons Deprived of Liberty Act (No. 24 of 2014)	The object of the Act is to give effect to Articles 29(f) and 51 of the Constitution and for connected purposes.
Article 59: Kenya National Human Rights and Equality Commission	<ol style="list-style-type: none"> 1. Commission on Administrative Justice Act (No. 23 of 2011) 2. Kenya National Commission on Human Rights Act (No. 14 of 2011) 3. National Commission on Gender and Equality Act (No. 15 of 2011) 	<ol style="list-style-type: none"> 1. The object of the Act is to restructure the Kenya National Human Rights and Equality Commission and to establish the Commission on Administrative Justice pursuant to Article 59(4) of the Constitution; to provide for the membership, powers and functions of the Commission on Administrative Justice, and for connected purposes 2. The object of the Act is t to restructure the Kenya National Human Rights and Equality Commission and to establish the Kenya National Commission on Human Rights pursuant to Article 59(4) of the Constitution; to provide for the membership, powers and functions of the Kenya National Commission on Human Rights, and for connected purposes. 3. The object of the Act is to establish the National Commission on Gender pursuant to Article 59 of the Constitution; to provide for the functions and powers, qualification of, and appointment procedure for members of the Commission; and for connected purposes.

The human rights framework is coupled normatively with provisions on citizenship under the Constitution of Kenya, because provisions relating to both aspects of the Constitution aim to promote and protect rights in a complementary manner. Moreover, the statement of principles and values – the purpose of government – underscores the centrality of the rights of the citizen in the new constitutional

framework. However, beyond rights, the Constitution enshrines principles of good citizenship that place key responsibilities on every citizen to ensure the promotion and defense of the values and aspirations of the new constitutional order. In accordance with the Fifth Schedule and Article 18 of the Constitution, there have been enacted two main legislations: the Kenya Citizenship and Immigration Act (No. 12 of 2011) and Kenya Citizens and Foreign Nationals Management Service (No. 31 of 2011).

3.2.2 Review of Gaps and Implementation Legislation

A Bill of Rights constitutes the minimum prescriptions of justice and good government, and its operationalization is in large part a function of development of the law by the courts and legislation by law making organs. With the exception of self-enforcement of fundamental rights and freedoms, the Bill of Rights means nothing unless the courts give it concrete meaning and legislative bodies define its content through implementing legislation to translate broad human rights commitments into detailed and concrete programmes. Hence the constitutional requirement for the enactment of legislation under the Fifth Schedule, in terms of the timelines set therein. As with other parts of the Constitution, the enactment of legislation to give effect to the Bill of Rights is necessarily an incremental, cumulative process.

The preceding part indicates that much of the legislation expressly sanctioned for enactment under the Fifth Schedule of the Constitution has been promulgated. However, it is also discernible that much of the legislation is plagued by a narrow conception of rights, emphasizing anti-statist aspects of constitutional rights, rather than advancing holistic human freedom and well-being. As alluded earlier, the legislation envisaged under the Schedule constitutes but the minimum prescriptions required to give full effect to the Bill of Rights. It remains now to evaluate the scope of the legislation and the extent to which human rights have shaped their content. In the course of the interviews, interlocutors suggested various improvements to the scope and content of human rights legislation. It was also noted that institutionalized

mechanisms are also needed to ensure that human rights are taken into account during the formulation and adoption of policies and legislation – some type of human rights vetting.³¹The following part turns to specific aspects of human rights legislation.

(1) Civil and Political Rights

The bulk of the protections guaranteed in the Bill of Rights are civil and political rights: right to life; right to equality and freedom from discrimination; human dignity; freedom and security of the person; freedom from slavery, servitude and forced labour; right to privacy; freedom of conscience, religion, belief and opinion; freedom of expression, freedom of the media, access to information, freedom of association, freedom of assembly, demonstration, picketing and petition; political rights; freedom of movement and residence; protection of right to property, right to access to justice; rights of arrested persons; right to fair hearing, and rights of persons detained, held in custody or imprisoned. At the core of these rights is the requirement to give effect to the principles of non-discrimination and equality, which are also rights in themselves.

The enactment of legislation envisaged under the Fifth Schedule of the Constitution constitutes the first frontier of constitutional implementation. A range of interviewees expressed concerns regarding the scope and nature of legislation on civil and political rights. There was the view that within the overarching framework of rights, there is need for legislation seeking to promote civil and political rights to ensure there is substantive rather than formal equality by focusing on positive obligations or by promoting equality rather than merely seeking to prevent or remedy discrimination. Second, there were also specific proposals on gaps and deficiencies in legislation. A review of literature reveals that some of these proposals accord with recommendations for legislative development by international human rights

³¹See for example, Brian Horrigan, "Legislative Scrutiny of Proposed Laws to Enhance Basic Rights, Parliamentary Democracy, and the Quality of Law-Making," in Adrienne Stone et al (eds) *Protecting Rights Without a Bill of Rights* (Aldershot: Ashgate, 2013).

bodies, trends in human rights jurisprudence and policy statements. These include the following:

3. *Equality and freedom from discrimination (Article 27)*: The Constitution envisages wide ranging legal reforms to remedy discriminatory aspects of legislation. In addition, there have been proposals for a framework affirmative action legislation to provide for implementation of substantive equality. The National Action Plan: Towards the Implementation of the Kenya Women's National Charter, the State Report to the United Nations Convention on the Elimination of All Forms of Discrimination Against Women, the Final Technical Working Committee on Citizenship and The Bill of Rights (2005), feature the following legislation to achieve substantive equality:

- (i) Affirmative Action Bill
- (ii) Equal Opportunity Bill
- (iii) Persons With Disabilities Bill, 2015
- (iv) Children Act (Amendment) Bill, 2014
- (v) Refugees Bill, 2013

4. *Freedom and security of the person (Article 29)*: The right to security requires the provision of reasonable and appropriate measures to protect the physical or psychological security of every person, whether or not the person is in detention. This obligation arises when public authorities know or ought to know of the existence of a real and imminent risk to the physical or psychological security of an identified individual or group of individuals, whether from state or private agents. According to the Universal Periodic Review of the United Nations Human Rights Council and Concluding observations on the second periodic report of Kenya by the United Nations Committee Against Torture, the state has undertaken to enact additional legislation to implement the right to security of the person. These include the Prevention of Torture Bill and the Child Justice Bill.

5. *Access to information (Article 35)*: Access to information is one of the keys to a democratic and open society. It is by access to information that public participation and accountability of government to the people is enabled, thereby enhancing the capacity of citizens to exercise their rights. In view of its importance, policy statements and human rights reports envisage the enactment of the following:³²

- (i) Freedom of Information Bill
- (ii) Protected Disclosure Bill

(2) Economic, Social and Cultural Rights

Economic and social rights, as with civil and political rights, impose upon the state the duty to respect, protect and fulfill fundamental guarantees. In international human rights, the obligation to respect requires the state to refrain from interfering with the enjoyment of economic, social and cultural rights, for example, by arbitrary forced evictions. The obligation to protect requires the state to prevent violations of such rights by third parties. Finally, the obligation to fulfil requires the state to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realization of economic, social and cultural rights.³³ This requirement accords with Article 21(2) of the Constitution, which requires the state to take legislative, policy and other measures, including the setting of standards, to achieve the progressive realization of economic and social rights. Also envisaged is comprehensive legislative review with a view to identifying existing legislation or policies negatively affecting the exercise of economic rights subject and their repeal.

The nature of economic, social and cultural rights requires the state to take specific action to facilitate the enjoyment of the rights and, therefore, assume an active, not a passive role. These rights impose binding obligations over and above any moral obligations, which are in contrast essentially discretionary in nature. It remains to enact

³²Republic of Kenya, Draft Access to Information Policy (Nairobi: Government of Kenya, 2001); Republic of Kenya, Universal Periodic Review of the United Nations Human Rights Council (Nairobi: Government of Kenya, 2012).

³³Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, (Maastricht:1997).

much of legislation on economic, social and cultural rights; as at the fifth year since the promulgation of the Constitution, only a few statutes, such as the Social Assistance Act (No. 24 of 2013) and the Basic Education Act (No. 14 of 2013), have been enacted. While recognizing the discretion of the state in determining the legislative form, the view was advanced during the interviews that much of proposed legislation focuses on the *negative* obligation to *respect* than the *positive* obligation to *fulfill* economic, social and cultural rights, that the conception of economic, social and cultural rights is further overly procedural, privileging means at the expense of ends, and resulting in formal rather than substantive guarantees. This observation applies as much to specific legislation as the proposed generic law, The Preservation of Human Dignity and Enforcement of Economic and Social Rights Bill, 2015.

1. Right to the highest attainable standard of health (Article 43(1)(a))

The Constitution guarantees the right to health, “which includes the right to health care services, including reproductive health care.” The Vision 2030 anchors health as a critical component of the socio-economic pillar, with the goal to “provide equitable and affordable health care at the highest affordable standards to her citizens.” Similarly, the Kenya Health Policy (2012-2030) aims at “attaining the highest possible health standards in a manner responsive to the population needs.” Its touchstone is to ensure the provision of essential health care; elimination of communicable conditions; prevention, treatment and control of epidemic, endemic, occupational and other diseases; reduced burden of non-communicable conditions; reduced burden of violence and injuries; reduced exposure to health risk factors; improvement of all aspects of environmental and industrial hygiene; and strengthened collaboration with health related sectors.

The right to the highest attainable standard of health constitutes a bundle of rights and freedoms: It extends not only to physical health, but also mental and social well-being, the enjoyment of health care and the underlying determinants of

health. Although there are several policy developments aimed at the promotion of various aspects of the right to health, it remains to legislate the content and scope of the right to health as envisaged under the Constitution of Kenya and international human rights law, in terms of accessibility (availability, affordability, physical proximity and equity), quality (effectiveness, safety, appropriateness, safety, acceptability, timeliness and responsiveness) and sustainability.³⁴ Moreover, it also remains to review legislation to ensure non-discrimination, particularly as it relates to the health rights of older persons, women, children, persons with disabilities, and indigenous peoples. Within the functional competence of the national government, the enactment of the following provide a framework for implementation of the right to health:

- (i) Health Bill, 2015
- (ii) Environmental Health and Sanitation, 2015
- (iii) Mental Health Bill, 2014
- (iv) Reproductive Healthcare and Rights Bill, 2014

2. Right to accessible and adequate housing, and to reasonable standards of sanitation (Article 43(1)(b))

Accessible and adequate housing and sanitation constitute one of the foundations of an adequate standard of living. Despite its importance, accessible and adequate housing and sanitation remains elusive to significant numbers of the population, particularly more so in urban areas. Only 32% of the population has access to improved sanitation with 14% still practicing open defecation. Approximately some 21 million Kenyans use unsanitary or shared latrines and a further 5.6 million people practice open defecation (OD). According to official surveys, the quality and adequacy of low-income housing is better in rural areas than in urban areas; rural houses are less crowded and are more likely to have better access to sanitation facilities than houses located in dense urban slums. This situation becomes the more acute considering that

³⁴Committee on Economic, Social and Cultural Rights, The right to the highest attainable standard of health, Comment No. 14 (Geneva: UNECOSOC, 2000).

whereas the rural population accounts for approximately 65 per cent of the total population and the urban population approximately 35 per cent in Kenya, by 2030 the proportion of the population living in urban areas is estimated to reach 60 per cent.³⁵ In this context, constitutional protection of the right to accessible and adequate housing provides an important means with which to advance fundamental protections.

The right to accessible and adequate housing and reasonable standards of sanitation is one of the protections guaranteed by the Constitution. The Vision 2030 aims to provide adequate and decent housing to the population in a sustainable environment. The Housing Policy for Kenya similarly aims at the following: to facilitate progressive realization of the right to adequate housing by all; to facilitate access to land and security of tenure for all socio-economic groups; to eliminate legal and customary barriers, where they exist, to women's equal access and control of land and finance; and to assist the low-income earners and economically vulnerable groups in housing improvement and production.³⁶ The common thread in all these frameworks is the acknowledgement that an adequate standard of living cannot be achieved without accessible and adequate housing. To give effect to the imperative, the Constitution requires the enactment of legislation on accessible and adequate housing.

The right to accessible and adequate housing is coupled with the right to reasonable standards of sanitation under the Constitution. This coupling signifies that the right to reasonable standards of sanitation underpins a range of human rights and freedoms, social, economic and cultural: the right to a clean and healthy environment, the right to the highest attainable standard of health, the right to accessible and adequate housing, food of acceptable quality, clean and safe water of adequate quantity, and the right to education. No less important is sanitation to civil and political rights, including the right to life, the right to equality, the right to privacy and the right to human dignity. Conversely, inadequate or poor sanitation impacts social, economic and cultural

³⁵ Kenya Vision 2030: A Globally Competitive and Prosperous Kenya (Nairobi: Government of Kenya, 2007).

³⁶ Sessional Paper Housing Policy for Kenya

development and human rights, with grave consequences to individuals, households and the nation as a whole.

To implement the right to accessible and adequate housing, and to reasonable standards of sanitation, the following legislation are required to delineate the scope and content of the right:

- (i) Housing Bill
 - (ii) Water Bill
 - (iii) Environmental Health and Sanitation Bill
 - (iv) Built Environment Bill
 - (v) Evictions and Resettlement Procedures Bill
 - (vi) Landlord and Tenant Bill
 - (vii) Metropolitan Areas Bill
 - (viii) Spatial Planning Bill
 - (ix) Community Land Bill
3. Right to be free from hunger, and to have adequate food of acceptable quality
(Article 43(1)(c))

The one important objective of the Constitution is to address through structural and substantive means, the basic needs of all citizens. Its conception of the state anchors the notion of the state as a service rendering organization for the promotion of the economic and social rights of its citizens and for the welfare of the nation. By promoting basic needs, it aims to ensure that every person has goods and services which are essential to human life in comfort and dignity, including adequate food, health, shelter, education, a safe and clean environment, culture and economic security.

Food security, food safety, and food sufficiency have been at the core of public policy in Kenya. The Sessional Paper No. 10 of 1965 on African Socialism sought to eradicate hunger through increased food production and land reform. Its dividends were however suboptimal. Currently, as a result of steady decline in agriculture, the country currently produces only about 60 percent of its food requirements. Consequently, it is estimated

that about 46.7 percent of Kenyans (16.3 million people) are food poor, and cannot meet the cost of a basic food bundle.³⁷The enforcement of food safety or quality norms has also been hampered by institutional fragmentation and regulatory failure.

In this context, the Constitution enshrines the right to be free from hunger and to have adequate food of acceptable quality. Its main objective is to provide protection to the rights of the disadvantaged, to the quality of food and to ensure their enjoyment of the range of rights guaranteed under the Constitution. To implement this right, legislation is required to define the scope and normative content of the right. Key among the enactments include the Breast milk Substitutes (Regulation and Control) Act (No 34 of 2012), the Consumer Protection Act (No 46 of 2012), the Agriculture, Fisheries and Food Authority Act (No 13 of 2013), and the Price Control (Essential Goods) Act (No. 26 of 2011), which was passed with the aim of regulating the prices of essential commodities so as to secure their availability at reasonable prices. It is the case though really that the effects of the latter law are suboptimal, for market fundamentals are controlling.

It therefore remains to enact an overarching framework legislation covering the multiple dimensions of food security, food quality and food adequacy. Among the legislation requiring consideration are the Food Security Bill, 2014 and the Environmental Health and Sanitation Bill.

4. Right to clean and safe water in adequate quantities (Article 43(1)(d))

The Constitution of Kenya guarantees every person the right to clean and safe water in adequate quantities. While it leaves open to the legislative, executive and judicial bodies to define the scope of each of these elements, it enrolls the obligations of the state in obligated international law. As with all human rights which are enshrined in international law, these obligations are to respect, protect and fulfill the guarantee of the right to clean and safe water in adequate quantities, taking into account the

³⁷National Social Protection Policy (2011).

overarching principles of non-discrimination, inclusion of vulnerable groups, participation and empowerment, transparency and accountability. The obligation to respect requires that state to refrain from interfering directly or indirectly with the right to water without substantial justification. The obligation to protect requires that the state should ensure that no third party, private individual or organization interferes with the right to water. The obligation to fulfill requires that a government take steps, within its maximum available resources, to ensure access to the right to clean and safe water in adequate quantities.

In the context of devolution and division of functions under the Constitution, the national government is required to develop national policy on access to clean and safe water in adequate quantities and enact framework legislation on the management of water as a resource, a service and a right. The latter include the Water Bill, 2014 and the Environmental Health and Sanitation Bill.

5. Right to social security (Article 43(1)(e))

The right to social security is one of the rights guaranteed under the Constitution. The Constitution further enshrines the principle of social justice. In line with the international human rights framework, the objective of the guarantee of the right to social security is to ensure, within maximum available resources, access to a social security scheme that provides a minimum essential level of benefits to all individuals and groups, more particularly vulnerable groups such as orphans and vulnerable children, older persons, the destitute, persons with disabilities and the unemployed, that will enable them to acquire at essential health care, basic shelter and housing, water and sanitation, foodstuffs, and basic education.

It remains to define in a comprehensive legal framework the scope and content of the right to social security. Although there are many interventions in the social assistance area, in the form of special funds for different social groups, their scope is limited and narrow, and their effectiveness has been undermined by a lack of coherence and

absence of legislative framework. Recent statutes enacted to implement the Constitution only define some elements of the right to social security. Key among these is The Social Assistance Act (No. 24 of 2013), whose objective is to provide for the rendering of social assistance to persons in need as defined by statute and The Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act (No 56 of 2012), whose object is to make provision for the prevention, protection and provision of assistance to internally displaced persons and affected communities. However, the legislation does not fully address the perennial challenges that include low effective coverage, limited range, scope and adequacy of benefits; limited funding; and mismanagement of resources.³⁸ There has thus been proposed for enactment a number of legislation including The National Social Security Pensions Trust Bill, The Equality and Equal Opportunities Bill and The Senior Citizens Care and Protection Bill, 2014.

6. Right to education (Article 43(1)(f))

The Constitution guarantees every person the right to education under Article 43 (1)(f). Complementing this textual guarantee is Article 53 (1) (b) of the Constitution which provides that children have the right to basic and compulsory education; Article 54 (1) (b) of the Constitution which provides that persons with disabilities have the right to access educational institutions; Article 55 (a) of the Constitution which provides that the State shall ensure that youth have access to relevant education and training; and Article 56 (b) of the Constitution which provides that the State shall provide minorities and marginalised groups with special opportunities in education. Further legal anchorage is found in the Children's Act (No. 8 of 2001), which also acknowledges and protects the right to education of every child.

To implement the right to education, it is envisaged that there will be enacted legislation in line with the constitutional requirement under Article 43(1)(f). In addition, there is a requirement to enact legal reforms to align the education sector with the

³⁸Republic of Kenya, Kenya National Social Protection Policy (Nairobi: GoK, 2011).

Constitution.³⁹ The Basic Education Act (No 14 of 2013) has been passed into law to regulate the provision of basic education and adult basic education. The law also clarifies the roles of the national and county Governments as regards education as provided for in the Fourth Schedule of the Constitution. However, it remains to enact a legal framework that would :

- (i) Enhance access and improve availability of opportunities for education for all individuals and groups;
- (ii) Ensure equity and gender mainstreaming in access to education;
- (iii) Integrate the special needs of children with disabilities, refugee children and internally displaced children
- (iv) Enhance affordability of secondary education and reduce cost barriers to enhance access to higher education
- (v) Provide opportunities for further education and training

3.3. Structure of Government

The structure of government is one of the most important functions of a constitution, by allocating power among the organs of the state, by demarcating the relations between them and by defining their composition. As a power map, which structures government, the constitution also determines the organization of politics, and thereby the accommodation of group interests and participation by the people in governance. Its other function is to define the procedures and requirements for the exercise of power by the organs of government, taking into consideration the principles of separation of powers and democratic accountability.

The Constitution of Kenya establishes what has been termed a presidential form of government. In relation to the executive, the government at the national level is

³⁹ Republic of Kenya, *Aligning Education and Training to the Constitution of Kenya* (2010) and *Kenya Vision 2030 and Beyond* (Nairobi: GoK, 2012).

headed by the President, who is the head of state and government, and in that capacity, exercises the executive authority of the Republic, with the assistance of the Deputy President and Cabinet Secretaries. The Constitution regulates the powers and functions of the President and Deputy President (Articles 131- 133, 147) as it does define the manner of election of the President and Deputy President (Articles 136- 140, 148), transition procedures (Article 141), and cabinet functions and procedures (Articles 152- 154).

The legislature at the national level is a bicameral structure comprising the National Assembly and the Senate. The Constitution defines their powers and functions (Articles 94- 96), composition (Articles 97- 98), and procedures (Articles 109 - 125). The design of the legislature, in terms of its powers, composition and procedures of the bicameral Parliament is directly related to the structure of devolved government, discussed later in this report. It is also a function of the structural dictates of the functions of legislatures, namely, representation, law making and government oversight.

3.3.1 Status of Constitutional Implementation of Express Requirements

Constitutional provisions on the structure of government are largely self-enforcing institutional arrangements: Each organ of government or state organ is required to adhere to its specified constitutional competences as a matter of political prudence. Without more, the principle of separation of powers for example, is largely self-enforcing, except where the courts are invited to determine legal questions related thereto. However, the Constitution also enshrines requirements for enactment of legislation to give structure and function to various elements of the system of government. There is a requirement for legislation on the electoral system and electoral process, the management of political parties, promotion of representation of marginalised groups, and parliamentary procedures, including the right to petition Parliament.

As part of constitutional implementation, there have been enacted several legislation related to the structure of government. The table below shows a sample of the legislation:

Table *****: Requirements under Chapter Seven, Eight, Nine (Representation of the People, Legislature and Executive)

Constitutional Provision	Type of enactment	Comments
Legislation on elections (Article 82)	1. Elections Act (No 24 of 2011) 2. Publication of Electoral Opinion Polls Act (No 39 of 2012)	The Elections Act repeals the National Assembly and Presidential Elections Act (Cap. 7) and the Election Offences Act (Cap 66).
Electoral disputes (Article 87)	Elections Act (No 24 of 2011)	The Elections Act provides mechanisms for elections dispute resolution.
Independent Electoral and Boundaries Commission (Article 88)	Independent Electoral and Boundaries Commission Act (No 9 of 2011)	The Act makes provision for the appointment and effective operation of the Independent Electoral and Boundaries Commission established by Article 88 of the Constitution, and for connected purposes.
Legislation on political parties (Article 92)	Political Parties Act (No 11 of 2011)	The Political Parties Act provides for the registration, regulation and funding of political parties.
Promotion of representation of marginalised groups (Article 100)	1. Elections Act (No 24 of 2011) 2. Political Parties Act (No 11 of 2011)	The legislation is only marginal to the promotion of representation of marginalised groups.
Vacation of office of member of Parliament (Article 103)	1. Elections Act (No 24 of 2011) 2. Political Parties Act (No 11 of 2011)	The Acts implicate some aspects of the manner of vacation of office of member of Parliament. The provisions of both legislation are scanty.
Right of recall (Article 104)	Elections Act (No 24 of 2011)	The Act provides procedures for recall of a Member of Parliament.
Determination of questions of membership of Parliament (Article 105)	1. Elections Act (No 24 of 2011) 2. Political Parties Act (No 11 of 2011)	The provisions of legislation are scanty.

Constitutional Provision	Type of enactment	Comments
Right to petition Parliament (Article 119)	Petitions to Parliament (Procedure) Act (NO. 22 of 2012)	The Act provides for the procedure for the exercise of the right pursuant to Articles 37 and 119 of the Constitution and to enhance public participation in the parliamentary and legislative process and for connected purposes.
Power of mercy (Article 133)	Power of Mercy Act (No 21 of 2011)	The Act makes provision with respect to the power of mercy pursuant to Article 133 of the Constitution.
Assumption of office of president (Article 141)	Assumption of the Office of President Act (No 21 of 2012)	The Act provides for the procedure and ceremony for the assumption of the Office of President by the President-elect, in accordance with Article 141 of the Constitution and for connected purposes

3.3.2 Review of Implementing Legislation

A substantive review of legislation on the electoral system and political parties legal regime was expressly excluded from the terms of reference of this report.⁴⁰ A review of legislation on the structure of government reveals that much of the legislation envisaged under the Fifth Schedule of the Constitution has been enacted. Additionally, there have been enacted other legislation on the general architecture of the system of government, such as the Independent Offices Appointment Act (No 8 of 2011), the Office of the Attorney General Act (No. 49 of 2012), and the Office of Director of Public Prosecutions Act (No. 2 of 2013), discussed elsewhere in this report.⁴¹

3.4. Devolution

⁴⁰ Kenya Law Reform Commission (KLRC) & International Development Law Organization (IDLO), Consultancy: Audit of Post-Constitutional Promulgation Legislation (Excluding Post-Promulgation Electoral and Political Parties Legal Regime) (May 2015).

⁴¹See sections on the Management of Constitutionality and Constitutionalism and Judicial and Legal System.

The principle of devolution of power is a key pillar of the normative and institutional architecture of the Constitution of Kenya. At the normative level, devolution is one of the national values and principles. Its objects are to: promote democratic and accountable governance; foster national unity by recognising diversity; give powers of self-governance to the people and enhance public participation; recognise the right of communities to manage their own affairs; protect and promote the interests and rights of minorities and marginalised communities; promote social and economic development; ensure equitable sharing of national and local resources throughout Kenya; facilitate the decentralisation of state organs, their functions and services; and enhance checks and balances and the separation of powers.⁴²

Devolution of power, like similar concepts underlying our constitutional design, is nowhere defined. Its purposes, expressly stipulated in the Constitution, and its structure, delineate two main forms: 'devolved government' and 'decentralisation.'⁴³ At its most basic, devolved government comprises mainly the aggregate institutional and functional edifice of county governments and its overarching institutional complements for intergovernmental relations – the linkages between national and county governments; the system of cooperation between national and county governments; the system of cooperation between county governments and intergovernmental dispute resolution.⁴⁴ The other variant of devolution of power under the Constitution requires the 'decentralisation of state organs, their functions and services' as well as every county government to 'decentralise its functions and the provision of its services to the extent that it is efficient and practicable to do so.'⁴⁵ By this requirement, the national government or national state organs, including commissions, offices, agencies or other public bodies established under the Constitution, is obligated to "ensure reasonable access to its services in all parts of the Republic, so far as it is appropriate to do so having regard to the nature of the service."⁴⁶ Similarly, the decentralization of county governments aims "to promote social and economic development and the provision of

⁴²Article 174 of the Constitution of Kenya.

⁴³ Articles 174(h) and 176(2) of the Constitution of Kenya.

⁴⁴Articles 189- 191 of the Constitution of Kenya.

⁴⁵ Articles 174(h) and 176(2) of the Constitution of Kenya.

⁴⁶Article 6(3) of the Constitution of Kenya.

proximate, easily accessible services.”⁴⁷

As with other parts of the Constitution, constitutional provisions on devolution of power are expressed in general terms, and much of their implementation rests on the promulgation and enforcement of national and county legislation. This part focuses on an assessment of devolution legislation enacted by Parliament since the promulgation of the Constitution of Kenya. In evaluating devolution legislation, this report adopts a principle-based approach, whereby the assessment turns on the conformity of legislation with the principles and purposes of devolution as outlined in the Constitution thus:

- (i) to promote democratic and accountable exercise of power;
- (ii) to foster national unity by recognising diversity;
- (iii) to give powers of self-governance to the people and enhance the participation of the people in the exercise of the powers of the State and in making decisions affecting them;
- (iv) to recognise the right of communities to manage their own affairs and to further their development;
- (v) to protect and promote the interests and rights of minorities and marginalised communities;
- (vi) to promote social and economic development and the provision of proximate, easily accessible services throughout Kenya;
- (vii) to ensure equitable sharing of national and local resources throughout Kenya;
- (viii) to facilitate the decentralisation of State organs, their functions and services, from the capital of Kenya; and
- (ix) to enhance checks and balances and the separation of powers.⁴⁸

3.4.1 Status of Constitutional Implementation of Express Requirements

Legislation constitutes much of the institutional framework of devolved government; constitutional implementation of devolution is not so much dependent on

⁴⁷ Article 174(f) of the Constitution of Kenya.

⁴⁸ Article 174 of the Constitution of Kenya.

direct application of constitutional provisions as framework legislation within which the national and county governments are required to operate. To oversimplify, there are three forms of legislation, which may intersect in various ways: constitutive legislation, facilitative legislation and regulatory legislation. Constitutive legislation define the procedures for the constitution of devolved government, for example, the election of the governor or members of the county assembly. Their function is to complement the Constitution's constructive function of devolution. Facilitative legislation provide for the means through which various actors exercise rights, powers, privileges and obligations that accrue from the normative and structural imperatives of devolution. Finally, regulatory legislation provide policy direction to ensure among others a threshold of good practices across county governments.

In respect of devolved government, the Constitution expressly requires the enactment of legislation to govern the following: the election and removal of the speaker of a county assembly (Article 178); establishment, governance and management of urban areas and cities (Article 184); support for county governments (Article 190); removal of a county governor (Article 181); vacation of office of member of county assembly (Article 194); public participation and county assembly powers, privileges and immunities (Article 196); county assembly gender balance and diversity (Article 197) and legislation to effect Chapter eleven (Article 200 and Sixth Schedule, section 15). The status of the enactment of these legislation under the Fifth Schedule is as follows.

Table 3: Fifth Schedule Requirements under Chapter Eleven (Devolved Government)

Constitutional Provision	Legislation Enacted	Comments
Article 178: Speaker of County assembly	County Governments Act (No. 17 of 2012)	Provides for among other things the removal of speaker from office.
Article 181: Removal of County Governor	County Governments Act (No. 17 of 2012)	Provides procedures for removal of a County Governor.
Article 184: Urban areas and cities	Urban Areas and Cities Act 2011 (No. 13 of 2011)	Provides for establishment, classification, governance and management of urban areas and cities.

Constitutional Provision	Legislation Enacted	Comments
Article 190: Support for county governments	Intergovernmental Relations Act (No. 2 of 2012)	Enacted to establish a framework for consultation and co-operation between the national and county governments and amongst county governments.
Article 194: Vacation of office of member of County assembly	County Governments Act (No. 17 of 2012)	The County Governments Act (No. 17 of 2012) is silent on the subject.
Article 196: Public participation and County assembly powers, Privileges and Immunities	County Governments Act (No. 17 of 2012)	Provides for citizen participation, civic education and the powers, privileges and immunities of county assemblies, their committees and members under Article 196 of the Constitution.
Article 197: County assembly gender balance and diversity	County Governments Act (No. 17 of 2012)	Provides the requirement that community and cultural diversity of a county is reflected in its county assembly and county executive committee as contemplated in Article 197 of the Constitution.
Article 200 and Section 15, Sixth Schedule: Legislation to effect Chapter eleven	County Governments Act (No. 17 of 2012) National Governments Co-ordination Act (No. 1 of 2013) Urban Areas and Cities Act 2011 (No. 13 of 2011) Intergovernmental Relations Act (No. 2 of 2012) Transition to Devolved Government Act (No 1 of 2012)	Enacted.

3.4.2 Review of Gaps and Inconsistencies in Legislation

As with other aspects of constitutional implementation, the enactment of legislation required under the Fifth Schedule to the Constitution regulating devolved government constitutes only the minimum prescriptions. But it is also clear that the design of devolved government under the Constitution gives Parliament a wide, even maximalist legislative competence; Article 200 of the Constitution requires Parliament to enact legislation providing for all matters necessary or convenient to give effect to the requirements of the chapter on devolved government. In light of the division of powers and functions between the national and county governments, these powers are certainly not plenary, but the nature of the design of devolution, with its emphasis on national policy formulation makes them significant enough to be more than minimalist. Thus the Constitution provides: “For greater certainty, Parliament may legislate for the Republic on any matter.”⁴⁹

The enactment of legislation to give effect to devolution is necessarily an incremental and cumulative process of change and adaptation. The preceding part indicates that much of the statutes expressly sanctioned for enactment under the Fifth Schedule of the Constitution have been promulgated. However, as alluded earlier, the legislation envisaged under the Fifth Schedule constitutes but the minimum prescriptions required to give full effect to the structure and principles of devolved government; strengthening devolution requires the enactment of more legislation, such as The County Assemblies Powers and Privileges Bill, The County Public Participation Bill and The Public Appointments (County Assemblies Approval) Bill, 2014, The County Retirement Scheme Bill, 2014, The County Assembly Services Bill, 2014, The County Early Childhood Education Bill, 2014, The County Industrial Development Bill, 2013 etc. It also remains to enact legislation to guide the structure and functions of regional blocks which have been established by contiguous counties or those with similar interests and needs. Such legislation would formalize and strengthen the current unofficial and loosely organized groupings of counties. In addition, legislative

⁴⁹Article 186(4) of the Constitution of Kenya.

reform of the entire statute book is also required to align legislation with the principles, purposes and structure of devolution.

Within the newly enacted implementing legislation, which is the subject of this report, there are also areas in which legislative silences, gaps and inconsistencies abound. It remains now to highlight the gaps and inconsistencies in a sample of the legislation, some of which have been challenged in court on account of unconstitutionality. For this purpose, a normative-functional approach, explained below.

(a) A normative-functional review of sample of legislation

The objects of devolution are both normative and functional. In the discussion of constitutional values and principles, the legislative requirements of the normative objectives were discussed. From the functional perspective, it is a fundamental objective of devolution to promote social and economic development and the provision of proximate, easily accessible services throughout Kenya; to ensure equitable sharing of national and local resources throughout Kenya; to facilitate the decentralisation of State organs, their functions and services, from the capital of Kenya.⁵⁰ In pursuance of these objectives, the Constitution confers functions and powers in the national government and the county governments as set out in the Fourth Schedule.

A key function of devolved government is the provision of services within the framework of the division of powers and functions, either as exclusive powers of the national or county government, or as concurrent functions or powers conferred on more than one level of government or as residual powers or functions, primarily functions or powers not assigned by this Constitution or national legislation to a county, thus being functions or powers of the national government.⁵¹ In reviewing the status of implementation, there is therefore justification in focusing on legislation related to the functional aspects of devolution vis-à-vis its normative foundations. The

⁵⁰Article 174 of the Constitution of Kenya (2010).

⁵¹Article 186 of the Constitution of Kenya (2010).

following part summarizes some gaps identified from literature review and interviews on a sample of three areas: agriculture, roads and health services.

1. Agriculture: The Fourth Schedule (Part 1) vests agricultural policy and capacity building and technical assistance in the national government. The Fourth Schedule (Part 2) of the Constitution provides that the functions and powers of a county government in respect of agriculture include (a) crop and animal husbandry; (b) livestock sale yards; (c) county abattoirs; (d) plant and animal disease control; and (e) fisheries. This means that effectively, county governments are responsible for much of agricultural services. There have been concerns raised among others by the Council of Governors that some of the legislation promulgated such as the Veterinary Professionals and Paraprofessionals Act (No. 48 of 2011), the Agriculture, Fisheries and Food Authority (No. 13 of 2013), the Kenya Plant and Health Inspectorate Act (No. 54 of 2012), and the Kenya Agricultural and Livestock Research Act (No. 17 of 2013), have structural aspects which infringe on county powers and functions. According to a report of the Council of Governors, “where bodies and structures were established with a mandate that may involve both levels of government, there was a consistent pattern of excluding counties from the composition of such bodies.”⁵²For example, in the case of the Agriculture, Fisheries and Food Authority, questions abound how to reconcile its functions and those of county governments, the relationship between county legislation and operations of the Authority and vice versa, and mechanisms for intergovernmental relations and conflict resolution mechanism under its institutional framework. A review of the laws should be undertaken and where necessary, amendments effected.

⁵²Council of Governors, Draft Sectoral Policy and Legislative Analysis (Nairobi: CoG, 2014).

2. County health services: The Fourth Schedule (Part 1) vests health policy, national referral health facilities and capacity building and technical assistance in the national government. The Fourth Schedule (Part 2) of the Constitution provides that the functions and powers of a county government in respect of county health services include (a) county health facilities and pharmacies; (b) ambulance services; (c) promotion of primary health care; (d) licensing and control of undertakings that sell food to the public; (e) veterinary services (excluding regulation of the profession); (f) cemeteries, funeral parlours and crematoria; and (g) refuse removal, refuse dumps and solid waste disposal. It remains to define what constitutes county health services and facilities through legislation, and the High Court has declined to determine the question.⁵³ The Health Bill, 2015 and the Environmental Health and Sanitation, 2015 should be enacted through a participatory process to address the issue.

3. County transport: The Fourth Schedule (Part 1) vests national public works, transport and communications, including, (a) road traffic; (b) the construction and operation of national trunk roads; (c) standards for the construction and maintenance of other roads by counties and capacity building and technical assistance in the national government. The Fourth Schedule (Part 2) of the Constitution provides that the functions and powers of a county government in respect of county transport, include (a) county roads; (b) street lighting; (c) traffic and parking; (d) public road transport; and (e) ferries and harbours, excluding the regulation of international and national shipping and matters related thereto. The Draft Policy on Aligning the Roads Sub-sector with the Constitution attempts to provide a framework for the classification of roads as envisaged under the Fourth Schedule: national trunk roads and county roads. The policy also proposes reforms to align the institutional framework

⁵³See *Okiya Omtatah Okiiti and another v The Attorney General* (2014).

for roads management with the Constitution. It remains to enact the Kenya Roads Bill 2014 to give effect to this constitutional purpose.

(b) Legislation challenged on grounds of inconsistency with devolution

The emerging jurisprudence provides another perspective with which to examine the status of legislation implementing or otherwise impacting devolution. One of the most distinctive elements of the jurisprudence, still in its infancy, is that the courts have been prepared to evaluate legislation based not merely on textual provisions, but also historical context, constitutional structure and constitutional purpose. But the courts have also been reluctant as much to make policy choices, especially where lack of concrete policy choices is a function of evasion or conflicting interests between the national and county governments on constitutional meaning. In lieu of a discussion of the jurisprudence, below is a summary of a sample of two cases and their outcomes.

Table 4: Sample of Cases Declaring Legislation or Parts thereof Unconstitutional

Citation	Legislation Impugned	Key Issue	Allowed/ dismissed
Council of Governors v Senate and Others (Petition No. 381 of 2014)	County Government (Amendment) Act 2014	That within the intendment of Article 6(2), 95, 96, 174 and 175 of the Constitution and resonating the intention of 179(i), 179(4), 183(1), 183(1) and 189(1) of the Constitution, the provisions of section 91A(1) of County Government (amendment) Act 2014 that establishes County Development Boards which shall be comprised in the manner stated in the said Act and undertake the functions outlined in section 91 A (2) of the Act are unconstitutional.	Allowed (10 th July 2015). The High Court found the County Government (Amendment) Act 2014 “patently antithetical to the spirit of devolution, the principles of separation of powers and good governance, as well as the rule of law”. It found and held that section 91A of the County Government (Amendment) Act is unconstitutional.

Citation	Legislation Impugned	Key Issue	Allowed/ dismissed
Institute of Social Accountability & another v National Assembly & 4 others (Petition No 71 of 2013)	Constituencies Development Fund Act (No. 30 of 2013)	That within the constitutional principles of the rule of law, good governance, transparency, accountability, separation of powers and the division of powers between the national and county government, the Constituencies Development Fund Act (No. 30 of 2013) is unconstitutional on account of the substance of the legislation including the nature, administration and management of the CDF.	Allowed (20 th February 2015). The High Court found and held the Constituencies Development Fund Act (No. 30 of 2013) unconstitutional and therefore invalid from the manner it was enacted, its objective, design and implementation. The Court suspended the order of invalidity for 12 months to enable the legislature to correct defect.

3.5 Environmental and Natural Resources Governance

The environment and natural resources constitute the basic foundation of social and economic development, wealth generation and poverty eradication in many of the poorest countries. In Kenya, as elsewhere, much of economic growth is dependent on agriculture, tourism, manufacturing and the energy sector, all of which rely on exploitation of natural resources and the environment: water, minerals, forests and wildlife. At the micro level, communities depend largely on the environment for their wellbeing and access to natural resources for food, fuel, medicine, shelter and livelihoods. As a result of this resource dependence, much of the conflicts in Kenya have been deemed to be natural resource-based. Thus to transform environmental and natural governance is to promote at once sustainable socio-economic development and conflict prevention and resolution.

It is in light of this imperative that environmental and natural resources governance – the rules, practices, policies and institutions that shape how the state and humans

interact with the environment and natural resources – have been at the core of development policy. For example, the first post-independence development blueprint emphasized the need for policies to promote environmental management. The Paper acknowledged that the “heritage of future generations depends on the adoption and implementation of policies designed to conserve natural resources and create the physical environment in which progress can be enjoyed.”⁵⁴In the wake of international developments which brought further understanding of the link between environment and development, the *Kenya National Environment Action Plan* was published in 1994.⁵⁵This Plan recommended the development of national policy and law on the environment, a process which culminated in *Sessional Paper No. 6 of 1999 on Environment and Development* and the Environmental Management and Coordination Act.⁵⁶Under the current national development policy framework, Vision 2030 aims at transforming Kenya into “a newly industrializing, middle income country providing a high quality of life to all its citizens in a clean and secure environment.”⁵⁷

The entrenchment of environmental rights and duties and principles relating to environmental and natural resources in the Constitution of Kenya introduces a new regime of environmental and natural resources governance. This development reflects the imperatives of environmental protection and ownership and control of natural resources by the people. It reflects the demand for a constitutional dispensation that ensures that the incomes and other benefits derived from those resources are used for, and applied to, development programmes in their local areas, but also towards national development and the eradication of poverty.⁵⁸

3.5.1 Status of Constitutional Implementation of Express Requirements

⁵⁴ Republic of Kenya, *African Socialism and its Application to Planning in Kenya*, Sessional Paper No. 10 of 1965 (Government Printers: Nairobi, 1965), para. 110.

⁵⁵ Republic of Kenya, *Kenya National Environment Action Plan* (Ministry of Environment and Natural Resources: Nairobi, 1994).

⁵⁶ Republic of Kenya, *Environment and Development* (Ministry of Environmental Conservation: Nairobi, 1999) and the Environmental Management and Coordination Act (Act No. 8 of 1999).

⁵⁷ Kenya Vision 2030;

⁵⁸ CKRC Final 256/260

The Constitution envisages the enactment of environmental legislation and natural resource legislation to give effect to its requirements. As laws which are regulatory, facilitative or normative, they are intended to define the powers and obligations of the state, the rights and duties of individuals and communities, and other immunities and privileges in relation to the environment and natural resources. Their other function is to provide an institutional framework for environmental and natural resources conservation, management and governance; ensure that environmental standards are maintained at par with international standard; and promote environmental and natural resources education at all levels of instruction.

Environmental and natural resources legislation abound in the statute book. However, the statutes are normatively and institutionally obsolete, thus necessitating the enactment of new legislation. Much of the new legislation required by the Constitution remains to be enacted, while some legislative requirements may be met by the amendment of existing legislation. For example, the requirement for legislation regarding classes of transactions or agreements relating to natural resources requiring ratification by the Parliament under Article 71 invites new legislative enactment, whereas the generic requirement for legislation regarding environment under Article 72 may be met in part by amendment of the existing framework legislation on the environment: the Environmental Management and Coordination Act (No. 8 of 1999). In pursuance of constitutional implementation, the following legislation have been proposed:

- (i) *The Energy Bill, 2014*: Its objective is to provide a framework for development, generation, regulation supply and consumption of energy and to establish an energy authority;
- (ii) *The Water Bill, 2014*: Its objective is to provide for the management of water resources;

- (iii) *The Mining Bill 2014*: Its objective is to make provision for exploration and prospecting of mining. It also sets framework for sharing mineral resources at county and national levels;
- (iv) *The Petroleum (Exploration and Production) Bill, 2015*: Its objective is to provide a framework for the contracting, exploration, development and production of petroleum and to give effect to relevant articles of the Constitution in so far as they apply to upstream petroleum operations;
- (v) *The Sovereign Wealth Fund Bill, 2014*: Its objective is to establish a National Sovereign Wealth Fund to undertake diversified portfolio of medium and long-term local and foreign investment to build a savings base for purposes of national development, stabilization the economy at all times, enhance intergenerational equity in Kenya, to give effect to the provisions of Article 201 of the Constitution of Kenya;
- (vi) *The Natural Resources (Benefit Sharing) Bill, 2014*: Its objective is to establish a system of benefit sharing in resource exploitation between resource exploiters, the national government, county governments and local communities; to establish the Natural Resources Benefits Sharing Authority;
- (vii) *The Climate Change Bill, 2014*: Its objective is to provide a legal and institutional framework for the mitigation and adaption to the effects of climate change and to provide for the guidance and measures to achieve low carbon climate resilient development and for connected purposes;
- (viii) *Environmental Health and Sanitation Bill*: Its objective is to give effect to the right to reasonable standards of sanitation and the right to a healthy environment and to provide for the respective roles of the national and county governments in environmental health and sanitation and for connected purposes;
- (ix) *Environmental Management and Coordination (Amendment) Bill, 2013*: Its objective is to amend the Environmental Management and Coordination Act (No. 8 of 1999) to align it with the Constitution of Kenya;

- (x) *The Wildlife (Conservation and Management) (Amendment) Bill, 2013*: Its object is to make amendments to the Wildlife (Conservation and Management) Act (Cap 376);
- (xi) *The Prevention and Control of Marine Pollution Bill, 2014*: Its object is to give effect to Article 2 Clauses (5) and (6) and Article 69 clause (1) (a),(f),(g) and (h) of the Constitution, international treaties and conventions on marine pollution, provide for the prevention, mitigation and control of pollution of the sea from ship transport operations, preparedness and response for pollution emergencies arising from ship transport operation, liability and compensation for pollution damage arising from shipping transport operations or pollution damage resulting from exploration and exploitation of seabed mineral resources and for connected purposes; and
- (xii) *The Forest Conservation and Management Bill, 2014*: Its object is to provide for the establishment, development and sustainable management, including conservation and rational utilisation of all forest resources for the socio-economic development of the country.

3.5.2 Review of Gaps and Inconsistencies in Legislation

A substantive review of proposed statutes which have not been enacted is not within the scope of this report, because to do so would be an activity in speculation, given the changes which proposed legislation usually undergo before enactment. The one thing that is emergent is the fragmentary nature of the proposed legislation, which will complicate institutional, regulatory and normative consolidation in the sector. In environmental governance, for example, there is, first, the Environmental Management and Coordination (Amendment) Bill, 2013, The Prevention and Control of Marine Pollution Bill, 2014, and The Forest Conservation and Management Bill, 2014. In natural resources management, there have been proposed a number of statutes including The Energy Bill, 2014, The Mining Bill, 2014, The Petroleum (Exploration and Production)

Bill, 2015, The Sovereign Wealth Fund Bill, 2014 and The Natural Resources (Benefit Sharing) Bill, 2014. While there are merits with specialized legislation, there is need to review the impact of such a fragmentary legislative framework.

3.6 Land, Property Rights and Commerce

The land question – the bundle of claims over the ownership, access and use of land – has historically come to occupy a central place in politics and constitutional development in Kenya. Because of the centrality of land as a major economic asset, an instrument of inheritance, and a symbol of social status, questions over land and, therefore, land tenure systems and rights have been the locus of much political contest. The importance of land becomes even the more significant, given that it is a source of livelihood for many households and communities and the basis for the exploitation of much of natural resources not merely for individuals, households or communities but also for the national economy. Hence the Vision 2030 outlines as one of the foundations for socio-economic transformation, land reforms targeting, sustainable land use; information management systems; and the legal framework.⁵⁹

The Constitution of Kenya contemplates a wide range of land reforms to give intent to its purposes, namely, to ensure that land is held, used and managed in a manner that is equitable, efficient, productive and sustainable, in accordance with the principles of equitable access; security of land rights; sustainable and productive management of land resources; transparent and cost effective administration of land; sound conservation and protection of ecologically sensitive areas; non-discrimination in law, customs and practices related to land and property in land; dispute resolution over land through recognised local community initiatives.⁶⁰

3.6.1 Status of Constitutional Implementation of Express Requirements

⁵⁹Vision 2030 p. 12

⁶⁰Article 60(1) of the Constitution of Kenya.

It was one of the purposes of constitution making to secure the place of property and land rights, including public, community and private land in the constitutional framework and to guarantee the fullest enjoyment of land and other property rights. In relation to land, the Constitution requires the principles of land governance to be implemented through two main instruments: a national land policy developed and reviewed regularly by the national government and through legislation.⁶¹Sessional Paper No. 3 of 2009 on National Land Policy constitutes the policy framework, while the following legislation have been enacted:

- (a) *The Land Registration Act (No. 3 of 2012)*: Its object is to revise, consolidate and rationalize the registration of titles to land, to give effect to the principles and objects of devolved government in land registration, and for connected purposes;
- (b) *The National Land Commission Act (No. 5 of 2012)*: Its object is to make further provision as to the functions and powers of the National Land Commission, qualifications and procedures for appointments to the Commission; to give effect to the objects and principles of devolved government in land management and administration, and for connected purposes;
- (c) *The Land Act (No. 6 of 2012)*: Its object is to give effect to Article 68 of the Constitution, to revise, consolidate and rationalize land laws; to provide for the sustainable administration and management of land and land based resources, and for connected purposes; and
- (d) *The Matrimonial Property Act (No. 49 of 2013)*: Its object is to provide for the rights and responsibilities of spouses in relation to matrimonial property and for connected purposes.

The above laws repeal much of the fragmentary legislation that preceded their enactment. The Land Registration Act repeals the Indian Transfer of Property Act 1882, the Government Lands Act (Cap 280), the Registration of Titles Act (Cap 281), the Land

⁶¹Article 60(2) of the Constitution of Kenya.

Titles Act (Chapter 282) and the Registered Land Act (Cap. 300) whereas the Land Act repeals the Wayleaves Act (Cap. 292) and the Land Acquisition Act (Cap. 295). Unrepealed are the Land Control Act (Cap 303), the Landlord and Tenant (Hotels, Shops and Catering Establishments) Act (Cap 301), the Sectional Properties Act (Cap 286A) and the Distress for Rent Act (Cap 293).

3.6.2 Status of Constitutional Implementation of Express Requirements

A review of policy statements and textual provisions of the Constitution reveal that it remains to enact more legislation to give effect to the purposes and requirements of the Constitution. These include

- (i) *The Minimum and Maximum Land Holding Acreages Bill, 2015*: Its object is to give effect to Article 68(c)(i) of the Constitution to provide for minimum and maximum land holding acreages in respect of private land and for connected purposes;
- (ii) *The Community Land Bill, 2014*: Its object is to give effect to Article 63(5) of the Constitution; to provide for the recognition, protection, management and administration of community land; to establish and define the functions and powers of Community Land Boards and management committees; to provide for the powers of county governments in relation to unregistered community land; and for connected purposes;
- (iii) *The Physical Planning Bill, 2014*: Its object is to make provision for the planning, use, regulation and development of land and for connected purposes;
- (iv) *The Investigation and Adjudication of Historical Land Injustices Bill, 2015*: Its object is to make provision for the investigation and adjudication of historical land injustices; and
- (v) Legislation to ensure that investments in property benefit local communities and their economies (Article 66(2) of the Constitution).

3.7 Public Service, Leadership and Integrity

The public service is one of the pillars of government for it constitutes the machinery responsible for undertaking the vital functions of formulation of public policy, public administration and the delivery of public services. Through its function of implementation of government policies and the provision of manpower to deliver public services, the public service has a key function in the operation of the constitutional system. Because of the centrality of the public service, “an efficient, motivated and well-trained public service will be one of the major foundations of the Vision 2030.”⁶² The Vision seeks to nurture “a citizen-focused and results-oriented” public service built upon the principles of transparency and accountability to the citizens of Kenya, performance management including enhanced strategic planning in government, change management and transformative leadership through continuous improvement, greater service delivery orientation and improved stakeholder engagement.

Public service reforms constitute one of the pillars of governance under the new constitutional dispensation. As a departure from its antecedent, the Constitution defines the purposes of government by outlining the principles and values enjoining public service and public administration. These are professionalism, integrity, efficiency, effectiveness, responsiveness, promptness, impartiality, public participation, accountability, transparency, meritocracy, equal opportunities and equitable provision of services.⁶³ These norms complement the national values and principles under Article 10 as well as the guiding principles of leadership and integrity under Article 73 of the Constitution.⁶⁴ These include personal integrity, objectivity, impartiality, honesty, accountability discipline and commitment to public interest and service to the people.

⁶²Vision 2030, p. ix

⁶³Article 232(1) of the Constitution of Kenya.

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3.7.1 Status of Constitutional Implementation of Express Requirements

The Constitution of Kenya requires the enactment of several legislation to effect its provisions on public service, leadership and integrity. Article 79 requires the enactment of legislation to establish an independent Ethics and anti-corruption commission (Article 79); to establish procedures and mechanisms for the effective administration of the Chapter on leadership and integrity (Article 80(a)); to prescribe the penalties that may be imposed for a contravention of the constitutional provisions on leadership and integrity (Article 80(b)); to make any other provision necessary for ensuring the promotion of the principles of leadership and integrity, and the enforcement of the provisions of the chapter on leadership and integrity (Article 80(d)). In addition, legislation is required to give full effect to the values and principles of public service (Article 232).

The above requirements have been largely enacted via the promulgation of new statutes or statutory amendment. The legislation include the Ethics and Anti-Corruption Act (No. 22 of 2011), whose object is to establish the said Commission pursuant to Article 79 of the Constitution, the Leadership and Integrity Act (No. 19 of 2012), to give further effect to, and establish procedures and mechanisms for the effective administration of Chapter Six of the Constitution and to promote ethics, integrity and servant leadership among state officers, the Public Service (Values and Principles) Act (No. 2015) to give effect to the provisions of Article 232 of the Constitution regarding the values and principles of public service and for connected purposes and the Public Service Commission Act (No. 13 of 2012), to make further provisions as to the functions and powers of the Public Service Commission, including the promotion of the values and principles referred to in Articles 10 and 232 of the Constitution throughout the public service. Another approach has been the integration of some of the normative requirements in the general overarching principles of legislation that are not directly related to the subject.

3.7.2 Review of Gaps and Inconsistencies in Legislation

The main legislative and institutional framework for public service at the national level is the Public Service Commission Act (No. 13 of 2012). There are in addition, other service commissions, established under separate legal and institutional frameworks: the Parliamentary Service Act (Cap 185A), Judicial Service Act (Cap 185B), National Police Service Commission (Cap 185C) and the Teachers Service Commission (Cap 212). In addition, county governments have their own public service contingents, the control of which vests in the County Public Service Boards in the case of the executive arm, and County Assembly Service Boards, in the case of the legislative arm of government.

The various legislation on public service have been largely implemented without direct challenge to their constitutionality. Legislation on leadership and integrity, on the other hand, has come under challenge, on the basis that the legislation fails to meet constitutional standards. In one case illustrative of such challenges, the Commission on the Implementation of the Constitution instituted a case questioning the constitutionality of the Leadership and Integrity Act (No. 19 of 2012) on the basis that it falls short of the constitutional threshold required of an integrity and leadership law contemplated under Article 80 of the Constitution. Among other things, the Commission challenged the removal from the draft Bill of proposed procedures providing that persons presenting themselves for election or selection as state officers must possess personal integrity, competence and suitability as contemplated by the Constitution and the deletion of a proposal requiring a declaration by candidates for public office, of assets and liabilities. It sought, *inter alia*, that the legislation be struck down so as to pave way for the genuine and authentic legislation to be enacted, one that provide for mechanisms and procedures for ensuring the effective administration

of Chapter 6 of the Constitution. In its judgment, the High Court dismissed the petition.⁶⁵

The decision by the court certainly brought to an end the legal dispute in question, but it did not foreclose consideration of the substantive matters raised regarding the effectiveness of legislation enacted to implement the provisions of the Constitution on leadership and integrity. The passage of time since the enactment of the legislation therefore provide an opportunity to address the shortcomings of the legislation, more especially the Ethics and Anti-Corruption Act (No. 22 of 2011) and the Leadership and Integrity Act (No. 19 of 2012) with a view to aligning them with the Constitution.⁶⁶

3.8 Judicial and Legal System

The judicial system is the foundation of the rule of law and constitutionalism. As one of the arms of government and the repository of judicial power, the judiciary has an important role in interpreting, safeguarding and protecting the Constitution and its values and thereby contributing towards the consolidation of constitutionalism and of democracy. Further, through its jurisdiction over the enforcement of fundamental rights and freedoms and determination of questions related to constitutional structure, the Judiciary is mandated to do more than simply resolve disputes: Its vocation is to enforce constitutional imperatives and thereby facilitate the socio-economic and political transformation envisaged by the Constitution. The judiciary then, performs the fundamental oversight function of ensuring that public action is based on the purposes of government as envisaged in the preamble: the protection and advancement of human rights, equality, freedom, democracy, social justice and the rule of law.

The one important feature of the Constitution is its attempt to transform the

⁶⁵ Commission on the Implementation of the Constitution v Parliament of Kenya and Others (Petition No. 454 OF 2012).

⁶⁶ The Attorney General has appointed a Task Force to review the Ethics and Anti-Corruption Act (No. 22 of 2011). For proposals by non-state entities, see African Centre for Open Governance, Integrity in Leadership, An Assessment of Kenya's Performance in Enforcing Constitutional Values (Nairobi: AfriCOG, 2015)

entire legal system, broadly conceived as the aggregate of laws and institutions responsible for their interpretation and enforcement. Apart from the express mandate to reform the judicial system, the Constitution requires reform of the other institutional parts of the justice system, including the Office of the Attorney General, the Office of the Director of Public Prosecutions, correctional services, the National Legal Aid Programme, to accord with its values of access to justice, equality, freedom, social justice and the rule of law. It requires a normative reorientation of the laws preceding the Constitution, by a construction “with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with [it].”⁶⁷ Further, it incorporates international treaties ratified by the state, and general rules of international law, to become part of the law of Kenya.⁶⁸

3.8.1 Status of Constitutional Implementation of Express Requirements

The judicial and legal system has been transformed significantly by the Constitution. Its promise of constitutional transformation requires the enactment of several implementing legislation and the amendment of existing legislation to anchor the judicial system: the system of courts (Article 162); on removal from judicial office (Article 168); on the management and administration of the Judiciary Fund (Article 173); vetting of judges and magistrates (Sixth schedule, Section 23). In terms of the legal system, there is a requirement to undertake legal and institutional reforms, which may include the enactment of legislation on the office of the Attorney General (Article 156), the office of the Director of Public Prosecutions (Article 157) and the establishment of legal aid system (Article 50(2)(h)).

In pursuance of these requirements, the following legislation have been enacted to anchor the judicial and legal system: The Judicial Service Act (No. 1 of 2011); the Vetting of Magistrates and Judges Act (No. 2 of 2011); the Supreme Court Act (No. 7 of 2011); the Environment and Land Court Act (No. 19 of 2011); the Industrial Court Act

⁶⁷Section

⁶⁸Articles 2(5) & 2(6) of the Constitution of Kenya (2010).

(No. 20 of 2011); the Judicature (Amendment) Act, 2012; the Office of the Attorney General Act (No. 49 of 2012), and the Office of Director of Public Prosecutions Act (No. 2 of 2013). However, it remains to enact comprehensive legal reforms or legislation on tribunals, alternative dispute resolution media and legal aid and awareness. A survey of key policy statements and literature reveals that the following proposed legislation are or have been under consideration for enactment:

1. The Court of Appeal (Organization and Administration) Bill, 2015
2. The High Court (Organization and Administration) Bill, 2015
3. Code of Conduct for Judges Bill/Code of Conduct for Judicial Officers and Staff Bill
4. The Legal Aid Bill, 2015
5. The Magistrate's Courts Bill, 2013
6. The National Coroners Service Bill, 2013
7. The Bail Information and Supervision Bill
8. Administration of Courts Bill
9. Kenya School of Judicial Education Bill
10. Judges Retirement Benefits Bill
11. Contempt of Courts Bill, 2013
12. The Small Claims Court Bill
13. The Courts of Petty Sessions Bill
14. The Private Prosecutions Bill
15. The Child Justice Bill

3.8.2 Review of Legislation on the Judicial and Legal System

Much of the forerunner statutes on the judicial and legal system are copy-outs of constitutional provisions. For instance, the legislation establishing courts – the Supreme Court Act, the Environment and Land Court Act and the Industrial Court Act – confine the jurisdiction of the courts to the constitutional language. As a result, they

are minimalist, seeking to avoid any gold-plating of constitutional provisions to avoid challenges of constitutionality. But the legislation has also been challenged, and in the case of the Supreme Court, successfully. In one case, the Supreme Court ruled that section 14 of the Supreme Court Act was unconstitutional insofar as it purported to confer “special jurisdiction” upon the Supreme Court, contrary to the express terms of the Constitution.⁶⁹ Similarly, in another case, the High Court held that Sections 14, 16(2) (b) of the Supreme Court Act 2011 were ultra vires the Constitution, to the extent that these purported to add to the jurisdiction of the Supreme Court.⁷⁰

The proposed legislation listed above suggests that much remains to be enacted to give full effect to the total constitution. In the course of interviews, another view was expressed that the challenge in the judicial and legal system is not so much under-legislation as over-legislation. Subjects such as bail, sentencing and so forth, it was considered, should be left to organic evolution, through principle-based practice directions or guidelines, rather than bright line rules in legislation. Certainly there are merits to these views, but so is the counterpoint of legislation as a means of consolidating principles in a firm legal framework.

There were further proposals for the following

- (i) The Office of the County Attorney Bill, 2014;
- (ii) Legislation conferring powers of prosecution on authorities other than the Director of Public Prosecutions, including county government enforcement officers; and
- (iii) Legislation for the implementation of the findings of the Truth, Justice and Reconciliation Commission.

3.9 National Security

⁶⁹Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR App No 2 of 2011.

⁷⁰Commission on Administrative Justice v Attorney General & another [2013] eKLR Petition 284 of 2012

National security, whether narrowly defined as the norms and institutions established to deal with external or internal threats to the security of the state, its territorial integrity and sovereignty, its people, their rights, freedoms, property, peace, stability and prosperity, and other national interests, or in its broader sense that encompasses political, economic, social, juridical, military and intelligence components, constitutes one of the core functions of the modern state. Beyond its traditional functions of enforcing laws, preventing crime and maintaining public order, the national security system is also the foundation for the enjoyment of much of fundamental rights – including rights as core as the right to life, liberty and security of the person; the right to property; freedom of movement among others. Its other function is to ensure the ability of the state as an enabler and purveyor of economic development, political stability, social cohesion and other national interests.

It is one of the features of the Constitution that it seeks to effect not merely structural changes but also a normative transformation of national security as a function of the state. By its approach to defining the purposes of government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law, the Constitution redefines the philosophy of national security. This is reflected in the express subordination of national security organs – the Kenya Defence Forces, the National Intelligence Service and the National Police Service – to civilian authority by among other initiatives, fostering and promoting relationships with the broader society;⁷¹ the requirement that national security be subject to the authority of the Constitution and Parliament;⁷² the requirement that national security shall be pursued in compliance with the law and with the utmost respect for the rule of law, democracy, human rights and fundamental freedoms;⁷³ and the requirement that national security organs promote and practice transparency and accountability and

⁷¹Articles 239(5) and 244(e) of the Constitution of Kenya (2010).

⁷²Article 238(2)(a) of the Constitution of Kenya (2010).

⁷³Article 238(2)(b) of the Constitution of Kenya (2010).

other national values and principles of governance.⁷⁴ In their totality, these amount to a redefinition of national security as not merely focused on the abstraction of the state, but also the security of people.

3.9.1 Status of Constitutional Implementation of Express Requirements

The Constitution mandates the enactment of legal reforms and legislation to provide the legislative framework for security sector reforms and the establishment of a new architecture of national security. As with other implementing legislation, so for legislation on national security, Parliament is bound in their enactment by the national values and principles enunciated under Article 10 of the Constitution. These are mainly legislation on the organization, functions and administration of the national security organs as provided for in Article 239 of the Constitution, namely

- (i) National Police Service Act (No. 11A of 2011)
- (ii) Kenya Defence Forces Act (No. 25 of 2012)
- (iii) National Intelligence Service Act (No. 28 of 2012)

In addition, while the National Police Service Act (No. 11A of 2011) mainly provides for the command of the National Police Service as contemplated by Article 245 of the Constitution, there has also been enacted the National Police Service Commission Act (No. 30 of 2011) and the Independent Policing Oversight Authority Act (No. 25 of 2011), which implements in part the principles of national security, including civilian control, enshrined in Articles 238 and 244 of the Constitution. A further enactment is the Security Laws Amendment Act (No 19 of 2014), which sought several amendments to laws relating to security, including the Public Order Act (Cap 56), the Penal Code (Cap 63), the Extradition (Contagious and Foreign Countries) Act (Cap 76), the Criminal Procedure Code (Cap 75), the Registration of Persons Act (Cap 107), the Evidence Act (Cap 80), the Prisons Act (Cap 90), the Firearms Act (Cap 114), Refugee Act No. 13 of 2006, the National Intelligence Service Act (No. 28 of 2012), the Prevention of Terrorism

⁷⁴Articles 10 and 244(b) of the Constitution of Kenya (2010).

Act (No. 30 of 2012), the Kenya Citizenship and Immigration Act (Cap 172), and the National Police Service Act (Cap 84).

3.9.2 Review of Gaps and Inconsistencies in Legislation

The history of national security discourse abounds with contention over the legality or constitutionality of security legislation. Such contention becomes the more critical in view of the preservation or endurance of much of national security legislation, with its colonial legacy in which security laws were little bound by the normative framework in the Constitution. While this report focuses on legislation enacted following the promulgation of the Constitution, this overhang of such legislation becomes apparent in the following part.

In recent times, the enactment of security related laws has not been without contention. From a human rights and rule of law perspective, the Prevention of Terrorism Act (No. 30 of 2012), for instance, has come under criticism for its vague and broad language that may permit the state to inhibit the freedoms guaranteed under the Bill of Rights including due process protections in its implementation.⁷⁵ Other provisions which pose a threat to due process is the requirement that the High Court hold hearings in chambers relating to orders of refusal of applications for registration and the revocation of registration, of associations linked to terrorist groups.⁷⁶ Most recently, the constitutionality of the Security Laws Amendment Act (No 19 of 2014) was challenged before the High Court.⁷⁷ The Court found that the provisions of

- (i) Section 12 of the Security Laws (Amendment) Act and Section 66A of the Penal Code (Prohibited publications and broadcasts) was unconstitutional for violating the freedom of expression and the media guaranteed under Articles 33 and 34 of the Constitution;

⁷⁵ See for example, *Muslims for Human Rights (Muhuri) & another v Inspector-General of Police & 4 others* [2015] eKLR.

⁷⁶ CIC Audit--

⁷⁷ *Coalition for Reform and Democracy (CORD) & another v Republic of Kenya & another* [2015] eKLR Petition No 628 & 630 of 2014 (Consolidated).

- (ii) Section 16 of the Security Laws (Amendment) Act and Section 42A of Criminal Procedure Code (Disclosure by Prosecution) was unconstitutional as they violate the right of an accused person to be informed in advance of the evidence the prosecution intends to rely on as provided under Article 50(2) (j) of the Constitution;
- (iii) Section 20 of the Security Laws (Amendment) Act which amended Section 364A of the Criminal Procedure Code (Powers of the High Court on revision) was unconstitutional for being in conflict with the right to be released on bond or bail on reasonable conditions as provided for under Article 49(1) (h) of the Constitution; Section 26 of the Security Laws (Amendment) Act which introduced Section 26A into the Evidence Act (Proof of written statement by consent) was unconstitutional for violating the right of an accused person to remain silent during proceedings as guaranteed under Article 50(2) (i) of the Constitution
- (iv) Section 34 of the Security Laws (Amendment) Act was unconstitutional in so far as it includes “telescopes” in Section 2 of the Firearms Act
- (v) Section 48 of the Security Laws (Amendment) Act which introduced Section 18A to the Refugee Act, 2006 (Permitted number of refugees and asylum seekers in Kenya) was unconstitutional for violating the principle of non-refoulment as recognized under the 1951 United Nations Convention on the Status of Refugees which is part of the laws of Kenya by dint of Article 2(5) and (6) of the Constitution.
- (vi) Section 64 of Security Laws (Amendment) Act which introduced Sections 30A and 30F to the Prevention of Terrorism Act (Publication of offending material) was unconstitutional for violating the freedom of expression and the media guaranteed under Articles 33 and 34 of the Constitution.
- (vii) Section 95 of the Security Laws (Amendment) Act which introduced Section 95A to the National Police Service Act (National Police Service Disciplinary

Board) and created the National Police Service Board is hereby declared unconstitutional for violating Article 246(3) of the Constitution.

Apart from these findings of unconstitutionality, there also remain gaps in the enactment of legislation related to national security. Among some of the legislation that have been under consideration include the Private Security Providers Regulation Bill, the National Coroners Service Bill and the Cybercrime and Computer Related Crimes Bill, 2014.⁷⁸ Further, there is need for legislative development to define the contribution of county governments towards national security.

3.10 Public Finance

Public financial management is one of the most essential functions of government. It is by sound public financial management that governments maximize the efficient use of resources, create transparency and accountability in governance and ensure economic success, each of which constitutes a prerequisite for the achievement of public policy objectives. By ensuring that public resources are well managed, good governance of public finance is also of fundamental importance in securing effective service delivery and the provision of socio-economic rights. In addition, a sound public financial management is also an essential part of the development process and poverty reduction as policy objectives of the state, through the use of resources more effectively.

The raising, allocation and control over the use of public resources was foremost among the problems of governance that gave impetus to the quest for a new constitutional dispensation. The constitution making process thus sought to reform the principles and practices underlying the raising, collection and control and audit of expenditure. During the constitution making debates, the public considered that taxation rates were 'too high and, indeed, punitive. Further, the fact that a politically correct elite evades tax with impunity was widely noted.'⁷⁹ Public sentiments were also

⁷⁸ Republic of Kenya, Report of the Police Reforms Implementation Committee (Nairobi: GoK, 2010).

⁷⁹ CKRC 291

critical of government borrowing, in particular, the accumulation of a large internal and external debt; the allocation of public resources on the basis of political calculus, rather than need or equity; the siphoning of resources from places which generate them to those more politically favored; and the plundering of the state by means of corruption and other forms of abuse, partly due to weak control and audit systems.

The Constitution of Kenya enshrines the principles, basic structure and functioning of public financial management. Article 201 sets out the normative principles of public financial management, including openness, accountability, affirmative action, public participation, fairness and equity, prudential control, clear fiscal reporting and intergenerational equity. Further, Articles 202 and 203 set out the requirement for equitable sharing of revenue raised nationally among the national and county governments, according to established criteria. In terms of structure, the Constitution assigns four different aspects of the financial power of the state to different levels of government and institutions; namely: the power to raise and collect revenue, the power to spend revenue, the power to control revenue, and the power to audit revenue. In their totality, these represent a fundamental shift in the philosophy of government and public financial management in particular.

3.10.1 Status of Constitutional Implementation of Express Requirements

The Constitution of Kenya requires the review or enactment of various legislation to effect wide ranging public financial management reforms. The Fifth Schedule of the Constitution specifically requires the enactment of legislation on revenue funds for county governments (Article 207), the establishment and management of a Contingencies Fund (Article 208), loan guarantees by the national government (Article 213), financial control (Article 225), accounts and audit of public entities (Article 226) and procurement of public goods and services (Article 227). In terms of constitutional structure, there is further requirement for the enactment of legislation on the establishment and management of an Equalisation Fund (Article 204),

management of the Consolidated Fund (Article 206), imposition of tax or licensing fee (Article 210), borrowing by the national government (Article 211) and the composition, powers, functions and operations of the Central Bank of Kenya (Article 231).

Table 6: Legislation under Chapter Twelve (Public Finance)

Constitutional Foundation	Legislation Enacted/In Force	Purpose
Article 204: Establishment and management of an Equalisation Fund	Public Finance Management Act (No. 18 of 2012)	Provides for the administration of the Equalisation Fund by the National Treasury (section 18).
Article 206: Management of the Consolidated Fund	Public Finance Management Act (No. 18 of 2012)	Provides for the administration of the Consolidated Fund by the National Treasury (section 17).
Article 207: Revenue funds for county governments	Public Finance Management Act (No. 18 of 2012)	Provides for the administration of the County Revenue Fund (section 109).
Article 208: Establishment and management of a Contingencies Fund	Public Finance Management Act (No. 18 of 2012)	Provides for the administration of the Contingencies Fund by the National Treasury (section 20). Act repeals the Contingencies Fund and County Emergency Funds Act (No. 17 of 2011).
Article 210: Imposition of tax or licensing fee	National Finance Bills County Finance Bills	Provide for imposition of tax or licensing fee.
Article 213: Loan guarantees by the national government	Public Finance Management Act (No. 18 of 2012)	Provides a framework Internal Loans Act (Cap 420), the External Loans Act (Cap 422), National Government Loans Guarantee Act (No. 18 of 2011),
Article 215: Commission on Revenue Allocation	Commission on Revenue Allocation Act (No. 16 of 2011)	Provides for further provision as to the functions and powers of the Commission on Revenue Allocation, the procedure for appointments to the Commission and for connected purposes.
Article 225: Financial control	Public Finance Management Act (No. 18 of 2012)	Provides for the establishment, functions and responsibilities of the national Treasury. It further establishes a framework to ensure both expenditure control and transparency in all governments and mechanisms to

Constitutional Foundation	Legislation Enacted/In Force	Purpose
		ensure their implementation.
Article 226: Accounts and audit of public entities	Public Audit Act (Cap 412B)	The enactment of a substantive law is awaited to repeal the Public Audit Act (Cap 412B).
Article 227: Procurement of public goods and services	Public Procurement and Disposal Act (Cap 412A)	The enactment of a substantive law is awaited to repeal the Public Procurement and Disposal Act (Cap 412A)
Article 230: Salaries and Remuneration Commission	Salaries and Remuneration Commission Act (No. 10 of 2011)	Provides further provision as to the functions and powers of the Salaries and Remuneration Commission, the qualifications and procedures for the appointment of the chairperson and members of the Commission, and for connected purposes.
Article 231: Composition, powers, functions and operations of the Central Bank of Kenya	The enactment of a substantive law is awaited to repeal the Central Bank of Kenya Act (Cap 491)	The enactment of a substantive law is awaited to repeal the Central Bank of Kenya Act (Cap 491)

3.10.2 Review of Gaps

The following legislation await enactment:

- (i) Central Bank of Kenya Bill, 2015
- (ii) Public Audit Bill, 2015
- (iii) Public Procurement and Asset Disposal Bill, 2014
- (iv) The Controller of Budget Bill, 2011
- (v) The Public Fundraising Appeals Bill, 2014
- (vi) The County Retirement Scheme Bill, 2014

(vii) Constituencies Development Fund Bill.⁸⁰

PART 4: CONCLUSIONS AND RECOMMENDATIONS

4.0 Conclusion

Constitutional efficacy and constitutional implementation are closely yoked. To achieve constitutional efficacy is to implement constitutional purposes. It is not merely to accommodate, but rather acculturate constitutional values. This report has revealed the advances in constitutional implementation as well as its challenges. What is emerging is that in the main, much of the legislation prescribed in the transitional provisions of the Constitution of Kenya has been enacted. But it is also emerging that some of the statutory enactments are beset by political workarounds, intended or unintended, whose effect is to blunt constitutional purposes as well as the normative promise of constitutionalism and there imperil the entire constitutional project. Moving forward, an objective of this report has been to identify some of the gaps, inconsistencies and abeyances in post-promulgation legislation, so that law reform can take its course.

It may not be too early draw a preliminary balance sheet. The report finds that while constitutional implementation as envisaged by transitional provisions has been realized to a greater degree, there remains significant challenges to substantial realization of constitutional purposes. The one significant challenge that is notable from the interviews conducted during the study, decisions of the courts of law and literature review of governance reports relate to political blockages to the legislative uptake of proposals arising from public participation and advisories from technical expert bodies. Therefore, the quality of legislation is not so much a function of the technical difficulties inherent in the translation of constitutional intent into legislative outcomes as a result of, to simplify, lack of sustained political goodwill. This must be worrisome, if we

⁸⁰As per the requirements of the Institute of Social Accountability & another v National Assembly & 4 others (Petition No 71 of 2013).

consider that much of the constitution is actually outside the constitution, in the form of legislation which are as much constitutive of our democratic system as the Constitution itself.⁸¹

4.1 Recommendations

4.1.1 Policy Development and Dialogue

The standard process of legislation is well known – legislation follows policy. However, comprehensive policy development has not always preceded legislation, and sometimes legislation does not reflect policy in the sense that it may be retrogressive or progressive. It is the finding of the report that numerous statutes have been enacted since the promulgation of the Constitution before development of comprehensive policy. This has meant enactment of laws without adequate consideration of the policy implications of such legislation. In view of the complexities of policy making, the risk becomes the chasm between legislation and policies when the latter are subsequently developed.

There are no hard and fast rules on the sequencing of policy and legislative development. However, the one clear constitutional directive is the requirement to infuse a rights-based approach to policy development: Article 19 of the Constitution declares that the Bill of Rights is an integral part of Kenya’s democratic state and is the framework for social, economic and cultural policies. This requires, among others, promoting public participation in policy development. It is proposed that the Kenya Law Reform Commission provides a framework to support structured dialogue in policy development.

4.1.2 Capacity Building on Legislative Drafting

⁸¹ See Ernest A. Young, *The Constitution outside the Constitution*, 117 *Yale Law Journal* 408 (Dec., 2007)

The Commission on the Implementation of the Constitution (CIC), the Kenya Law Reform Commission (KLRC) and the Office of the Attorney General and Department of Justice (OAGDJ) have a key responsibility of ensuring that enabling legislation is enacted to implement the Constitution. However, both the KLRC and the Office of the Attorney General are severely handicapped in terms of human and financial resources and capacity to play this crucial role. In particular, the CIC, the KLRC and the AOGDJ require a minimum complement of 70 draftspersons but they currently have less than 30 draftspersons. There is therefore very limited capacity for development of bills in Kenya. Apart from legislative drafting skills, there is also need for subject matters experts in some of the more specialized areas.

There is therefore a need to strengthen the Attorney General's office and Kenya Law Reform Commission to play their roles in the development of legislation and policies through training of draftspersons, technical assistance, research support and comparative visits. Further support should be provided to the Legal Department of Parliament to build its capacity to provide technical assistance to legislators. These interventions should focus on the creation of the enabling policies and laws for constitutional implementation.

4.1.3 Human rights and Other Impact Statements

It is emerging from a review of jurisprudence that human rights constitute the single most important basis for challenging legislation, on substantive and procedural grounds alike. As means of integrating human rights in the substance and process of legislation, one available option is to institutionalize a requirement that the introduction of all legislation to the cabinet or legislature for debate and approval (including proposals amendment of laws or policies) contain a human rights impact statement. Such a statement could provide an assessment of whether a proposed law or policy is consistent with human rights and the reasons or justifications for any inconsistency. It could also note any limitation placed on a human right, as well as the limitation's purpose and justification and whether there is any less restrictive means of achieving the purpose. A framework legislation can be developed for such purpose.

4.1.4 Civic Education on the Constitution

The tendency to outsource constitutional discourse to lawpersons is one of the features of most constitutional orders. Yet it is trite to emphasize that constitutional choices that citizens make and not just the legal interpretations that judges or other lawpersons make are no less important in promoting constitutionality and constitutionalism. The Constitution requires, in fact obligates, every person to respect, uphold and defend the Constitution.⁸² Each citizen therefore has an obligation to enter directly or indirectly into an ongoing and continuing constitutional dialogue. This imperative has been captured in the following observation:

[A] constitution should be generally understood by the people and be acceptable to them. A constitution cannot hope to command the loyalty, respect and confidence of the people otherwise. And to achieve this understanding and acceptance, a constitution needs to be put through a process of popularization, with a view to generating public interest in it and an attitude that everybody has a stake in it, that it is the common property of all. The people must be made to identify themselves with the constitution. Without the sense of identification, or attachment and involvement, a constitution would always remain a remote, artificial object, with no more real existence than the paper on which it is written.⁸³

4.1.5 Knowledge Management on Constitutional Implementation

In essence, constitution making and constitutional implementation in Kenya constitute a laboratory of knowledge production and transmission. In some sense, constitutional implementers are required to be, to borrow the phrase of one jurist, “inevitably teachers in a vital national seminar.”⁸⁴ But they are also learners in the dynamics of constitution building and implementation. In view of this function, the Commission should develop mechanisms for the collection, preservation and dissemination of the knowledge accruing from constitution building and constitutional implementation. This may entail working with universities and other actors that are

⁸²Article 3 of the Constitution of Kenya (2010).

⁸³B.O. Nwabueze, *Constitutionalism in the Emergent States* (London: Hurst Company, 1973), p. 25.

⁸⁴ Alexander Bickel, *The Least Dangerous Branch* (New York: Bobbs-Merill, 1962), p. 26.

repositories of social knowledge, with the aim of drawing ideas and perspectives on various dimensions of constitution building and implementation.

4.1.6 Comprehensive Audit and Reform of the Statute Book

It is one of the features that constitutional transitions are hardly situated on a clean slate. Much of the laws preceding the new constitutional order retain their validity, subject to adaptations through legal reform and legal interpretation. This legal continuity has been justified on the necessities of legal stability and certainty. While these are important functions of law in themselves, legal continuity has the potential to arrest constitutional transformation, absent law reform to align legislation with constitutional purposes. Generally, it was the view of interviewees that much of the legislation in force is ill-adapted to the new operative demands of the new constitutional dispensation. Beyond case-by-case judicial interpretation, conscious attempts must be made by the legislative branch to eradicate inconsistencies and conflicts and to imbue legislation with the ideology and normative orientation of the new Constitution. An urgent audit to facilitate law reform is recommended, one that is thematic, but still holistic in scope.

4.1.7 Comprehensive Audit of County Legislation

This report focuses on national legislation, and within that scope, only the category of laws: Those enacted following the promulgation of the new Constitution in 2010. As with the national government, the capacity of county governments to enact quality legislation is hampered by capacity constraints. The problem becomes the more acute given the levels of legislation entailed under devolution: framework legislation at the national level and detailed legislation at the county. In accordance with its function of advising the national and county governments on the review and reform of legislation, the Kenya Law Reform Commission should undertake an audit of county

legislation to complement the development of model laws for county governments.

4.1.8 Cooperative Government in Legislation

Public participation is one of the requirements of the new Constitution. The principle of participatory democracy is entrenched in the Constitution to ensure that there is a continuous dialogue between the people and the government, to whom they have delegated their sovereignty. Its other function is to ensure the kind of lawmaking that gives concrete meaning to a substantive conception of the public interest. Similarly, the institutional design of devolution of power also places a requirement that the different levels of government work together in various ways. Moreso, in a context similar to our constitutional design,

Where two legislatures have concurrent powers to make laws in respect of the same functional areas, the only reasonable way in which these powers can be implemented is through co-operation. And this applies as much to policy as it does to any other matter.⁸⁵

However, it has become a permanent complaint that the enactment of legislation has not infrequently failed to meet the requirements of public participation generally as well as consultation of county governments. Much of the litigation challenging the constitutionality of legislation is thus as much procedural as it is substantive. In accordance with its Standing Orders, Parliament ought to engage the public and county governments more systematically, in the case of the latter through the institutional framework of intergovernmental relations embedded in the Council of Governors and the Intergovernmental Relations Technical Committee.

⁸⁵In re: National Education Policy Bill No 83 of 1995 (CCT46/95) [1996] ZACC 3; 1996 (4) BCLR 518; 1996 (3) SA 289 (3 April 1996).

Appendix 1: Sample Questionnaire

1. What is the role/responsibility of the Law Society of Kenya in constitutional implementation?
2. Under the thematic area of Rule of Law under your Strategic Plan 2012- 2016, the LSK prescribes its objective as “To Facilitate Implementation of the Constitution.” What specific programmes or interventions does the LSK have to meet that Strategic Objective?
3. What are the challenges that the LSK is facing in constitutional implementation?
4. What is the level of engagement of the LSK in the legislative process? What do you see as the challenge?
5. Beyond process issues, what criteria might we use to evaluate compliance of legislation with the Constitution?
6. Has the idea of Schedule 5, though being well intended, been subverted in our constitutional implementation?
7. What constitutes full implementation of the Constitution? The entire list of laws in Schedule 5 enacted? Transformed society or polity? And what criteria might be applied to determine the success of the same?
8. In light of the passage of five years since the promulgation of the Constitution, what are the most urgent legislation that require reform? Specific legislation?

**Appendix 2: Sample of Cases Challenging Constitutionality of
Legislation/Application of Legislation**

	Citation	Legislation Impugned	Key Issue	Allowed/ dismissed	Bench
1.	Aids Law Project v Attorney General & 3 others [2015] eKLR Petition No 97 of 2010	HIV and AIDS Control and Prevention Act, No. 14 of 2006	Whether section 24 unconstitutional for amongst other things, being vague, overbroad hence failing to adhere to the principle of legality	Allowed Section 24 declared unconstitutional	Lenaola, Mumbi 7 Odunga (JJ)
2.	Anthony NjengaMbuti & 5 others v Attorney General & 3 others [2015] eKLR Petition 45 of 2014	Criminal Procedure Code (Cap 75)	Constitutionality of ss 43 - 61A of the Criminal Procedure Code, (Cap 75) Bond to keep peace	<i>Allowed</i> <i>Sections 43-61A of the Criminal Procedure Code Cap 75 of the Laws of Kenya are unconstitutional for violating the provisions of Articles 27, 28, 29, 49 and 50(2) of the Constitution of Kenya 2010</i>	Mumbi J
3.	Coalition for Reform and Democracy (CORD) & another v Republic of Kenya & another [2015] eKLR Petition No 628 & 630 of 2014 (Consolidated)	Security Laws (Amendment) Act No 19 of 2014	Constitutionality of certain sections of the SLAA	Partly allowed. Ss 12, 16, 20, 26, 34, 48, 64 & 95 of the SLAA unconstitutional	Lenaola, Mumbi, Ong'undi, Chemitei, Onguto (JJ)
4.	Institute of Social Accountability & another v National Assembly & 4 others [2015] eKLR Petition No 71 of 2013	Constituencies Development Fund Act (CDF Act)	Whether CDF unconstitutional in view of devolution	Allowed. CDF Act 2003 declared unconstitutional therefore invalid. Order of invalidity suspended for 12 months to correct defect	Lenaola, Mumbi & Majanja (JJ)
5.	Timothy Njoya v Attorney General & another [2014] eKLR Petition 479 of 2013	Income Tax Act	Whether section 125 of the Income Tax Act (Cap 470) unconstitutional	Dismissed	Lenaola J
6.	Richard Dickson	Traffic Act	Whether <i>Traffic</i>	Dismissed	Majanja J

	Ogendo & 2 others v Attorney General & 5 others [2014] eKLR Petition 70 of 2014		<i>Breathalyser Rules, 2011</i> (“the Rules”) by Legal Notice No. 138 of 2011 unconstitutional		
7.	Kenya Union Of Domestic, Hotels, Education Institutions And Hospital Workers (Kudheha Workers Union) v Kenya Revenue Authority & 3 others [2014] eKLR Petition No 544 of 2013	Value Added Tax Act (No 35 of 2013)	Treatment of service charge under the new VAT law. whether the provisions of the 2013 Act are constitutional and a violation of the petitioner’s members’ fundamental rights and freedoms to the extent that they do not exempt service charge from imposition of VAT	dismissed	Majanja J
8.	Khatija Ramtula Nur Mohamed & another v Minister for Citizenship and Immigration & 2 others [2013] eKLR Petition 38 of 2012	Citizenship and Immigration Act No.12 of 2011	Whether the citizenship and Immigration Act unconstitutional to the extent that it discriminates upon the Petitioners herein from getting automatic residency status by virtue of their marriage	Dismissed. But recommendation made that for the Act to be seen to be promoting the Bill of Rights, it should make clear provision which can enable a non-Kenyan spouse waiting for the lapse of the mandatory three year period to access Interim Residence.	Tuiyott J
9.	Richard M. Kagiri & 2 others v Minister for State for Provincial Administration and Internal Security & 2 others [2014] Eklr Petition 347 of 2012	Alcoholic Drinks Control Act, No 4 of 2010 (ADCA)	Whether Section 7(3)(1) and Section 12(1)(c) of ADCA and the Alcoholic Drinks Control (Licensing) Regulations, 2010 and specifically the First Schedule, Paragraphs 1(2)(a) and (b) thereof unconstitutional	Dismissed.	Lenaola J

10.	Elle Kenya Limited & 9 others v Attorney General & 3 others [2013] eKLR Petition No 320 of 2011(Consolidated)	Alcoholic Drinks Control Act, No 4 of 2010	Challenge on S 31 of ADCA on packaging for distilled alcoholic beverages in PET bottles	Allowed for different reason. That the impugned section 31(2)(a) is inapplicable, invalid by virtue of implied repeal of s 91A of the Customs and Exercise Act	Lenaola J
11.	<i>Zak & another v MA & another</i> [2013]eKLR <i>Petition No 193 of 2011</i> ZAK & another v MA & another [2013] eKLR	Children Act,2001	Parental responsibility- whether sections 24(3) and 25 unconstitutional that vests parental responsibility on the mother in the first instance	Allowed. Ss 23(4), 25 as well as section 90(a) and (e) of the Children Act unconstitutional for breach of Articles 27(1), (2) and (4), and Article 53(1)1(e) of the Constitution	Mumbi J
12.	Crywan Enterprises Enterprises Limited Limited v Kenya Revenue Authority [2013]eKLR Petition 322 of 2011	East Africa Customs Management Act	Constitutionality of ss 210 & 211 of EACCMA. <i>Whether Ss 196, 197, 198 and 200 of the Customs and Excise Act (Cap 272 of the Laws of Kenya) are ultravires Article 40(2) to the extent that they permit seizure and forfeiture</i>	Dismissed.	Majanja J
13.	Samuel KamauMacharia& another v Kenya Commercial Bank Limited & 2 others [2012] eKLR App No 2 of 2011	Supreme Court Act	Jurisdiction of Supreme Court	Allowed. Section 14 of the Supreme Court Act unconstitutional insofar as it purports to confer "special jurisdiction" upon the Supreme Court, contrary to the express terms of the Constitution	Mutunga, Tunoi, Ojwang, Wanjala, Ndung'u (SCJJ)
14.	Commission on Administrative Justice v Attorney General & another [2013] eKLR Petition 284 of 2012	Supreme Court Act	Jurisdiction of Supreme Court	Sections 14, 16(2) (b) of the Supreme Court Act 2011 is declared to be ultra vires the Constitution, 2010 to the extent that it adds to the jurisdiction of the Supreme Court.	Lenaola J

				Rules 17, 41, 42 and 43 of the Supreme Court Rules unconstitutional	
15.	Mwea Foundation & another v Attorney General & 2 others [2013] eKLR Petition No 521 of 2012	Irrigation (National Irrigation Schemes) Regulations Legal Notice No. 68 of 1977	Plight of Mwea Irrigation Scheme farmers/licensees- Whether <i>Irrigation (National Irrigation Schemes) Regulations</i> made pursuant to section 27 of the <i>Irrigation Act (Cap 347)</i> unconstitutional	Partly allowed. Regulations 4 and 8 (a), (g) and (h) of <i>Irrigation (National Irrigation Schemes) Regulations</i> unconstitutional	Majanja J
16.	Commission for the Implementation of the Constitution v Parliament of Kenya & 5 others [2013] eKLR Petition No. 454 of 2012	Leadership and Integrity Act (No. 19 of 2012)	Whether the Leadership and Integrity unconstitutional for watering down constitutional bar on integrity	Disallowed. Leadership and Integrity Act not unconstitutional	Majanja J
17.	Thuita Mwangi & 2 others v Ethics & Anti-Corruption Commission & 3 others [2013] eKLR Petition No 153 & 169 of 2013 (consolidated)	Anti-corruption and Economic Crimes Act	Whether sections 58, 59 & of ACECA violate the right to a fair hearing under Article 50 . Whether section 62 unconstitutional	Disallowed.	Majanja J
18.	Law Society of Kenya v Attorney General & 2 others [2013] eKLR Petition No 318 of 2012	Advocates Act (Cap 16)	Whether provisions of the <i>Statute Law (Miscellaneous Amendments) Act, 2012 (No 12 of 2012)</i> amending the <i>Vetting of Judges and Magistrates Act</i> , the <i>Law Society of Kenya Act</i> and the <i>Advocates Act</i> <i>Constitutional</i>	Disallowed	Majanja J
19.	Overseas Private	Land Act, No 6 of 2012	Whether section 78 of Land Act	Disallowed. Retrospective	Majanja J

	Investment Corporation & 2 others v Attorney General [2013] eKLR Petition No 319 of 2012		unconstitutional for having retrospective effect	operation not per se illegal	
20.	Susan Wambui Kaguru & 7 others v Attorney General & another [2013] eKLR Petition 545 & 553 of 2012	Traffic Act	<i>Constitutionality of Traffic (Amendment) Act, Act No. 37 of 2012 and The Traffic (Amendment) (No. 2) Act, Act No. 38 of 2012. That the penalties introduced punitive</i>	Disallowed	Majanja J
21.	Chirau Ali Mwakwere v Robert M. Maberu & 4 others [2012] eKLR	National Cohesion and Integration Act (Act No. 12 of 2008)	Whether sections 13, 14 and 62 of the NCI Act unconstitutional to the extent they purport to criminalise freedom of expression	Dismissed	Majanja J
22.	Murang'a Bar Operators & another v Minister For State For Provincial Administration and Internal Security & 2 others [2011] eKLR <i>Petition No 3 of 2011</i>	Alcoholic Drinks Control Act, 2010	Constitutionality of provisions and implementation of provisions of ADCA on drinking hours and proximity to educational institutions	Dismissed	Musinga J
23.	Samuel G. Momanyi v Attorney General & another [2012] eKLR Petition No. 341 of 2011	Employment Act	Whether s 45(3) of Employment Act constitutional	Allowed. Section 45(3) of the Employment Act 2007 unconstitutional.	Lenaola J

24.	Beatrice Wanjiku & another v Attorney General & another [2012] eKLR Petition No 190 of 2011	Civil Procedure Act	Imprisonment over contractual debt	Partly allowed. Order 22 rule 7(1) of the Civil Procedure Rules declared Unconstitutional. sections 38 & 40 of the CPA and Order 22 rules 32 and 34 of the Rules consistent with the Bill of Rights	Majanja J
25.	Kenya Bus Service Ltd & another v Minister of Transport & 2 others [2012] eKLR Civil Suit 504 of 2008	Government Proceedings Act (Cap 50) Public Authorities Limitation Act (Cap 39)	Constitutionality of section 13(A) of the Government Proceedings Act (Chapter 50 of the Laws of Kenya) and section 3(1) of the Public Authorities Limitation Act (Cap 39)	Section 13A of the <i>Government Proceedings Act</i> violates the Constitution	Majanja J
26.	Okenyo Omwansa George & another v Attorney General & 2 others [2012] eKLR Petition No 126 of 2011	S 32 Advocates Act rule 2 of the Advocates (Practice) Rules	Whether the provisions barring Advocates from advertising unconstitutional	Partly allowed. Rule 2 of the <i>Advocates (Practice) Rules</i> unconstitutional so far as it constitutes a complete ban of advertising by advocates	Majanja J

Appendix 3: Summary of Issues on Legislation

	Law	Subject Area	Strength/Weakness	Comment/Proposal
1.	Accountants Act- amended in 2012	Professional regulation	<ul style="list-style-type: none"> The Act is the substantive law providing for the Accountants in Kenya. It creates oversight bodies which is good for the profession. 	<ul style="list-style-type: none"> Act may need to be amended to entrench the provisions of Chapter 6 of the Constitution on matters management/ officials of the body.
2.	Advocates Act- amended in 2012	Professional regulation	<ul style="list-style-type: none"> Inconsistent with the Legal Education Act. 	<ul style="list-style-type: none"> Act should be amended especially the section providing for the composition of the Council of Legal Education. Other amendments ought to be done to conform to the Legal Education Act.
3.	Agriculture Act- amended in 2012	Agriculture policy/regulation	<ul style="list-style-type: none"> The Act needs to be reviewed to conform to the various legislations on devolution. 	<ul style="list-style-type: none"> The Act does not conform to the laws on devolution. There is need for an overhaul of the same.
4.	Agriculture, Fisheries and Food Authority Act, 2013.	Agriculture policy/regulation	<ul style="list-style-type: none"> The Act provides for the consolidation of the laws on the regulation and promotion of agriculture generally It conforms to the Constitution in regards to devolution. 	<ul style="list-style-type: none"> Need for fine tuning as agriculture has been devolved to the Counties. Need for further consultations between the National government and the County Governments.

	Law	Subject Area	Strength/Weakness	Comment/Proposal
5.	Alcohol Drinks Control Act-Act No. 10 Of 2013	Alcohol regulation	<ul style="list-style-type: none"> The Act needs to be amended to conform to the new governance dispensation, i.e. conform to the new devolution structures. This is lacking in the Act. 	<ul style="list-style-type: none"> Need for amendments in several sections to provide for structures that conform to the County Government structures.
6.	Animal Diseases Act-amended in 2012	Livestock/agriculture policy/regulation	<ul style="list-style-type: none"> Agriculture has been devolved thus a complete overhaul is needed to make the Act conform to devolution. 	<ul style="list-style-type: none"> A new substantive Act on Livestock needs to be enacted to conform to the Constitution.
7.	Animal Technicians Act-Act. No. 11 of 2010	Livestock/agriculture policy/regulation	<ul style="list-style-type: none"> National Government has the mandate to provide policies (agriculture and livestock). 	<ul style="list-style-type: none"> The Act is in order, need for county government input is desirable.
8.	Anti-corruption and Economic Crimes Act- amended in 2012	Ethics and Integrity	<ul style="list-style-type: none"> The Act still provides for Kenya Anti-Corruption Advisory Board. This needs to be amended to conform to the Constitution to the Ethics and Anti-Corruption Commission Act. Amended Bill is already in Parliament (National Assembly). 	<ul style="list-style-type: none"> Need for amendments to conform to the Constitution and the Ethics and Anti-Corruption Commission Act.
9.	Anti-Counterfeit Act-Act. No. 12 Of 2012	Standards regulation/consumer protection	<ul style="list-style-type: none"> Act amended appropriately. This was after the High Court in Kenya urged Parliament to review 	<ul style="list-style-type: none"> The Act amended was then amended in 2012 to address the ambiguities identified by

	Law	Subject Area	Strength/Weakness	Comment/Proposal
			the 2008 Act as it had ambiguities.	the Court.
10.	Appellate Jurisdiction Act- amended in 2012	Judicial and legal system	<ul style="list-style-type: none"> Outdated and does not conform to the Constitution of Kenya 2010. 	<ul style="list-style-type: none"> Complete overhaul of the Act is desirable.
11.	Assumption of the Office of the President Act, 2012.	Executive structure	<ul style="list-style-type: none"> The Act conforms to the Constitution of Kenya, 2010 as far as the assumption of the Office of the president is concerned. 	<ul style="list-style-type: none"> The Act conforms to the requirements of Article 141 of the Constitution of Kenya, 2010.
12.	Bankruptcy Act- amended in 2012	Commercial law	<ul style="list-style-type: none"> The Insolvency Bill, 2015 once enacted will be the substantive law on Bankruptcy in Kenya. 	<ul style="list-style-type: none"> Insolvency Bill, 2015 in parliament.
13.	Basic Education Act, 2013	Education sector policy/regulation	<ul style="list-style-type: none"> The Basic Education Act has received various critiques from various quotas. One of the shortcomings of the Act is that it does not provide for special schools for the disabled, this can be seen to be a setback in terms of equality as envisaged by the Constitution of Kenya, 2010. 	<ul style="list-style-type: none"> Amendments to the Act are required.
14.	Biosafety Act, 2011	Environmental management	<ul style="list-style-type: none"> Agriculture and health being devolved functions need for this legislation to conform to 	<ul style="list-style-type: none"> Amended or overhaul of the Act to conform to the devolved system of

	Law	Subject Area	Strength/Weakness	Comment/Proposal
			devolution.	governance is desirable.
15.	Breast milk Substitutes (Regulation and Control) Act, 2012	Health regulation	<ul style="list-style-type: none"> The Act provides for the marketing and distribution of breast milk substitutes. Health being a devolved function, there is need to incorporate the devolved units of governance. 	<ul style="list-style-type: none"> The Act needs appropriate amendments so as to conform to the laws on devolution.
16.	Cabinet Secretary to the Treasury (Incorporation)-amended in 2012	Executive structure	<ul style="list-style-type: none"> The Act has been amended so as to conform to the provisions of the Constitution of Kenya, 2010. 	<ul style="list-style-type: none"> The Act has been amended so as to conform to the provisions of the Constitution of Kenya, 2010.
17.	Cancer Prevention and Control Act,2012	Health regulation	<ul style="list-style-type: none"> Amendments to the Act are highly desirable so as to conform to the laws on devolution. 	<ul style="list-style-type: none"> Amendments to the Act are highly desirable so as to conform to the laws on devolution.
18.	Civil Aviation Act,2013	Transport sector regulation	<ul style="list-style-type: none"> The Substantive Act on civil Aviation in Kenya. The Act repealed the former Act and thus adequately provides for civil aviation in Kenya. 	<ul style="list-style-type: none"> This function is a national government function and thus the legislation clearly provides for the same.
19.	Civil Procedure Act-amended in 2012	Judicial and legal process	<ul style="list-style-type: none"> The Act needs to be amended to conform to the court created by 	<ul style="list-style-type: none"> Act needs amendments so as to conform to Chapter 10- of

	Law	Subject Area	Strength/Weakness	Comment/Proposal
			the Constitution of Kenya, 2010 and Chapter 10 of the Constitution of Kenya, 2010.	the Constitution of Kenya, 2010.
20.	Commission for the Implementation of the Constitution Act,2010	Constitutional implementation	<ul style="list-style-type: none"> The Act adequately provides for the functions, powers, qualifications of, and appointment procedure for members of the Commission. The Act conforms to Chapter 15 of the Constitution of Kenya, 2010. 	<ul style="list-style-type: none"> Commission was constituted as required by the Constitution and operational.
21.	Commission on Administrative Justice,2011	Administrative justice	<ul style="list-style-type: none"> Legislation enacted as required by Article 59 of the Constitution of Kenya, 2010. It also conforms to Chapter 15 of the Constitution of Kenya, 2010. 	<ul style="list-style-type: none"> Legislation enacted as required by Article 59 of the Constitution of Kenya, 2010. Should be reviewed to address issues of effectiveness of CAJ.
22.	Commission on Revenue Allocation,2012	Public finance	<ul style="list-style-type: none"> Legislation enacted as required by Article 215 of the Constitution of Kenya, 2010. It also conforms to Chapter 15 of the Constitution of Kenya, 2010. 	<ul style="list-style-type: none"> Legislation enacted as required by Article 215 of the Constitution of Kenya, 2010.
23.	Competition Act,2010	Competition and consumer protection	<ul style="list-style-type: none"> This mandate has been bestowed 	<ul style="list-style-type: none"> Legislation enacted as required by Article 46 of the

	Law	Subject Area	Strength/Weakness	Comment/Proposal
			on the National Government.	Constitution of Kenya, 2010.
24.	Constituency Development Fund Act,2013	Devolved funds	<ul style="list-style-type: none"> Act has been declared unconstitutional by the Court. 	<ul style="list-style-type: none"> Act has been declared Unconstitutional by the Court.
25.	Consumer Protection Act,2012	Commerce and consumer protection	<ul style="list-style-type: none"> Legislation enacted as required by Article 46 of the Constitution of Kenya, 2010. 	<ul style="list-style-type: none"> Legislation enacted as required by Article 46 of the Constitution of Kenya, 2010.
26.	Copyright Act-amended in 2014	Intellectual property regulation	<ul style="list-style-type: none"> The Statute Law (Miscellaneous Amendments) Bill, 2014 amended four sections of the Copyright Act namely sections 22, 28, 33 and 46. 	<ul style="list-style-type: none"> The Act may need amendments/ fine tuning so as to make it conform to the ever changing /growth in technology and the regulations thereon.
27.	Counter-Trafficking in Persons Act,2012	Security and human rights	<ul style="list-style-type: none"> The notable weakness is the commencement date. The commencement is left at the discretion of the Minister; this might be a dangerous practice. 	<ul style="list-style-type: none"> Commencement date need to be ascertained.
28.	County Governments Public Finance Management Transition Act, 2013	Devolution	<ul style="list-style-type: none"> Act was duly enacted to provide for financial transition to devolved governments. As the Transition Authority's 	<ul style="list-style-type: none"> Transition period already elapsed.

	Law	Subject Area	Strength/Weakness	Comment/Proposal
			mandate is nearly coming to an end, the provisions of this Act ought to have been complied with.	
29.	County Governments' Act,2012	Devolution	<ul style="list-style-type: none"> Legislation that was enacted to provide for Chapter 11 of the Constitution of Kenya. 	<ul style="list-style-type: none"> This Act needs regular fine tuning so that the spirit of Chapter 11 of the Constitution and devolved governance generally is achieved.
30.	Crops Act,2013	Agriculture policy/ regulation	<ul style="list-style-type: none"> The commencement date needs to be specific and not at the discretion of the Cabinet Secretary. 	<ul style="list-style-type: none"> This Act should be amended to reflect the constitutional provisions of devolution on agriculture.
31.	East African Development Bank Act-amended in 2013	Foreign and regional development policy	<ul style="list-style-type: none"> Amendments are desirous to conform to the new developments of the EAC and the Constitution of Kenya, 2010 especially Article 2 (5) and 2 (6). 	<ul style="list-style-type: none"> The Act needs an overhaul.
32.	Election Campaign Financing Act,2013	Elections	<ul style="list-style-type: none"> This Act would help eliminate the possibility of money influencing election outcomes. 	<ul style="list-style-type: none"> Strict implementation and fine tuning is desirable as its help in achieving the objective of this legislation.

	Law	Subject Area	Strength/Weakness	Comment/Proposal
33.	Elections Act,2011	Elections	<ul style="list-style-type: none"> • Legislation duly enacted as required by the Constitution to cater for the two levels of government. • The Act was a core guide during the Kenya's post-promulgation general elections. 	<ul style="list-style-type: none"> • Legislation was duly enacted as required by the Constitution of Kenya, 2010 and was the main piece of legislation that guided the 2013 General Elections.
34.	Employment and Labour Relations Act, 2011	Judicial system and labour relations	<ul style="list-style-type: none"> • Court established as required by Article 162 (2) of the Constitution of Kenya, 2010 and operational. 	<ul style="list-style-type: none"> • Court established as required by Article 162 (2) of the Constitution of Kenya, 2010 and operational.
35.	Engineers Act,2011	Professional regulation	<ul style="list-style-type: none"> • Legislation enacted to guide the Engineers as a profession. • It helps in matters discipline among others in the profession. 	<ul style="list-style-type: none"> • Legislation enacted to cater for the engineers thus making them professionally responsible.
36.	Environment and Land Court,2011	Judicial system and land management	<ul style="list-style-type: none"> • Court established and operational. • This Court has helped in reducing case backlogs in the High Court as matters Land and Environment are exclusively dealt with in this Court. 	<ul style="list-style-type: none"> • Legislation enacted to create the Court as required by Article 162 (2) of the Constitution of Kenya, 2010.
37.	Ethics and Anti-Corruption Commission Act,2011	Ethics and integrity	<ul style="list-style-type: none"> • The Act established the Commission as required by 	<ul style="list-style-type: none"> • This Act is currently undergoing amendments in

	Law	Subject Area	Strength/Weakness	Comment/Proposal
			<p>Article 79 of the Constitution of Kenya, 2010.</p> <ul style="list-style-type: none"> This Act is currently undergoing amendments in the National Assembly. 	the National Assembly.
38.	Evidence Act- No. 19 of 2014	Judicial and legal process	<ul style="list-style-type: none"> Act duly amended to conform to the Constitution of Kenya, 2010. 	<ul style="list-style-type: none"> Act has been amended to conform to the Constitution of Kenya, 2010 and other laws.
	Fair Administrative Action Act, 2015	Judicial and legal process	<ul style="list-style-type: none"> Legislation enacted as required by Article 47 of the Constitution of Kenya, 2010. 	<ul style="list-style-type: none"> The legislation is constitutional and properly enacted.
39.	Human Resource Management Professionals Act,2012	Professional regulation	<ul style="list-style-type: none"> Legislation enacted to guide the Human Resource Management as a profession. It helps in matters discipline among others in the profession. 	<ul style="list-style-type: none"> Legislation enacted to cater for the Human Resource managers thus making them professionally responsible.
40.	Independent Electoral and Boundaries Commission Act,2011	Elections	<ul style="list-style-type: none"> The Commission duly constituted as required by Article 88 of the Constitution of Kenya, 2010. 	<ul style="list-style-type: none"> The Commission is properly constituted and in place as required by Article 88 of the Constitution of Kenya, 2010.
41.	Independent Offices (Appointment) Act,2011	Executive structure	<ul style="list-style-type: none"> Legislation enacted to provide for Independent offices as provided 	<ul style="list-style-type: none"> This legislation provides for the appointment of the

	Law	Subject Area	Strength/Weakness	Comment/Proposal
			for under Chapter 15 of the Constitution of Kenya, 2010.	independent offices created by the Constitution; Auditor-General and the Controller of Budget.
42.	Independent Policing Oversight Authority Act,2011	National security and human rights	<ul style="list-style-type: none"> Legislation enacted to provide for civilian oversight of the Police. The Authority is instituted and functional. 	<ul style="list-style-type: none"> Legislation enacted to provide for civilian oversight of the Police. The Authority is duly instituted and functional.
43.	Intergovernmental Relations Act, 2012	Devolution	<ul style="list-style-type: none"> Legislation to provide for cooperation and consultation framework between the National and County Governments has been enacted. The Intergovernmental Relations Technical Committee is already constituted. 	<ul style="list-style-type: none"> Mechanisms have been established to provide for cooperation between the two levels of governments as required by the Constitution of Kenya, 2010.
44.	International Interests in Aircraft Equipment Act,2013	International law	<ul style="list-style-type: none"> Act duly enacted and operational as its commencement was after the general elections in 2013. 	<ul style="list-style-type: none"> Act enacted to give effect to the Convention on International Interests in Mobile Equipment and the protocol on the Convention to International interests in Mobile Equipment and is consistent with Articles 2(5) and 2 (6) of the constitution

	Law	Subject Area	Strength/Weakness	Comment/Proposal
				of Kenya, 2010.
45.	Judicial Service Act,2011	Judicial system	<ul style="list-style-type: none"> Act duly enacted to actualize Chapter 10 of the Constitution of Kenya, 2010. The judiciary is properly constituted and operational. 	<ul style="list-style-type: none"> An independent judicial Service Commission has been established thus a good legislation as envisaged by the Constitution and various reforms geared towards an independent judiciary.
46.	Kenya Agricultural and Livestock Research Act,2013	Agriculture/livestock regulation	<ul style="list-style-type: none"> Legislation duly enacted and conforms to the functions of the National government under the Fourth Schedule of the Constitution of Kenya, 2010. 	<ul style="list-style-type: none"> Legislation to provide for the Kenya Agricultural and Livestock Research Organization whose mandate among others is to advise the National Government on agricultural and livestock policy; this is a National government function as provided for in the Fourth Schedule of the Constitution.
47.	Kenya Citizens and Foreign Nationals Management Service Act,2011	Citizenship	<ul style="list-style-type: none"> Legislation enacted to conform to Chapter 3 of the Constitution of Kenya, 2010. 	<ul style="list-style-type: none"> This legislation is in conformity with the Constitution of Kenya, 2010.

	Law	Subject Area	Strength/Weakness	Comment/Proposal
48.	Kenya Citizenship and Immigration Act,2011	Citizenship	<ul style="list-style-type: none"> Legislation duly enacted to conform to Chapter 3 of the Constitution of Kenya, 2010. 	<ul style="list-style-type: none"> This legislation is in conformity with the Constitution of Kenya, 2010.
49.	Kenya Defence Forces Act,2012	National Security and Defence	<ul style="list-style-type: none"> Legislation duly enacted to conform to Chapter 13 of the Constitution of Kenya, 2010. 	<ul style="list-style-type: none"> Legislation is currently undergoing amendments in the National Assembly.
50.	Kenya Deposit Insurance Act, No. 41 of 2013	Financial regulation	<ul style="list-style-type: none"> Legislation to provide for a deposit insurance system duly enacted and the Corporation established and operational. 	<ul style="list-style-type: none"> Legislation is consistent with the Laws of Kenya.
51.	Kenya Heroes Act, 2014	Heroes	<ul style="list-style-type: none"> The legislation has provided for the criteria of selecting heroes/ heroines and the council. 	<ul style="list-style-type: none"> The legislation is constitutional and properly enacted.
52.	Kenya Institute of Curriculum Development Act,,2013	Education	<ul style="list-style-type: none"> Legislation duly enacted and the Institute duly established. 	<ul style="list-style-type: none"> Legislation to provide for the Kenya Institute of Curriculum Development; this is a National Government function as provided for in the Fourth Schedule of the Constitution of Kenya, 2010.
53.	Kenya Law Reform Commission Act,2013	Law reform	<ul style="list-style-type: none"> The Kenya Law Reform Commission is duly constituted and functional. Act duly enacted. 	<ul style="list-style-type: none"> The legislation has been enacted to provide for the Kenya Law Reform

	Law	Subject Area	Strength/Weakness	Comment/Proposal
				Commission.
54.	Kenya Medical Supplies Authority Act,2013	Health	<ul style="list-style-type: none"> The Legislation conforms to the Constitution of Kenya, 2010 on matters devolution. It has provisions on how to coordinate with the County Governments. 	<ul style="list-style-type: none"> Health is a devolved function thus the County Governments need to be involved; this Act provides for that collaboration..
55.	Kenya National Commission for UNESCO Act,2013	International Law	<ul style="list-style-type: none"> Enacted as envisaged by Articles 2 (5) and 2 (6) of the Constitution of Kenya, 2010. 	<ul style="list-style-type: none"> Enacted as envisaged by Articles 2 (5) and 2 (6) of the Constitution of Kenya, 2010.
56.	Kenya National Commission on Human Rights Act,2012	Human Rights	<ul style="list-style-type: none"> The Act has established the Commission pursuant to Article 59 and Chapter 15 of the Constitution of Kenya, 2010. 	<ul style="list-style-type: none"> The Commission duly constituted and operational.
57.	Kenya National Examinations Council Act, 2012	Education	<ul style="list-style-type: none"> The Council is duly constituted. The Council provides for matters examination and falls under the mandate of the National government. 	<ul style="list-style-type: none"> This function remains that of the National government thus legislation conforms to the Constitution in all aspects.
58.	Kenya National Qualifications Framework Act, 2014	Regulatory	<ul style="list-style-type: none"> The Authority needs to be constituted. 	<ul style="list-style-type: none"> Legislation to provide for the Authority and for connected purposes has been duly enacted and

	Law	Subject Area	Strength/Weakness	Comment/Proposal
				operational.
59.	Kenya Plant Health Inspectorate Service Act, 2011	Agriculture and Bio safety regulation	<ul style="list-style-type: none"> • The inspectorate has been established and operational. • The Act has been duly amended. • The function is duly executed by the National Government as provided for by the Fourth Schedule of the Constitution. 	<ul style="list-style-type: none"> • The Service established by this Act is functional and conforms to the Constitution.
60.	Kenya School of Government Act,2012	Public sector	<ul style="list-style-type: none"> • Capacity development of public servants is key to better service delivery thus this is a good legislation to provide for the Kenya School of Government as a school to <i>inter alia</i> build capacity of public servants. 	<ul style="list-style-type: none"> • The legislation is constitutional and properly enacted.
61.	Kenya School of Law Act, 2012	Education	<ul style="list-style-type: none"> • Legislation that provides for the management of the school that is responsible for training advocates. 	<ul style="list-style-type: none"> • The legislation is constitutional and properly enacted.
62.	Land Act,2012	Land	<ul style="list-style-type: none"> • Legislation duly enacted as required by Chapter 5 of the Constitution of Kenya, 2010. 	<ul style="list-style-type: none"> • Legislation duly enacted as required by Chapter 5 of the Constitution of Kenya, 2010.

	Law	Subject Area	Strength/Weakness	Comment/Proposal
63.	Land Registration Act,2012	Land	<ul style="list-style-type: none"> • Legislation duly enacted as required by Chapter 5 of the Constitution of Kenya, 2010. 	<ul style="list-style-type: none"> • Legislation duly enacted as required by Chapter 5 of the Constitution of Kenya, 2010.
64.	Leadership and Integrity Act, 2012	Leadership and integrity	<ul style="list-style-type: none"> • Legislation duly enacted as required by Chapter 6 of the Constitution of Kenya, 2010. 	<ul style="list-style-type: none"> • Legislation duly enacted as required by Chapter 6 of the Constitution of Kenya, 2010.
65.	Legal Education Act,2012	Legal Education	<ul style="list-style-type: none"> • Regulation of legal education is key for a better profession. 	<ul style="list-style-type: none"> • The legislation is constitutional and properly enacted.
66.	Limited Liability Partnership Act,2011	Business association	<ul style="list-style-type: none"> • The legislation is constitutional and properly enacted. 	<ul style="list-style-type: none"> • The legislation is constitutional and properly enacted.
67.	Marriage Act,2014	Marriage	<ul style="list-style-type: none"> • Legislation duly enacted as required by Article 45 of the Constitution of Kenya, 2010. 	<ul style="list-style-type: none"> • Legislation duly enacted as required by Article 45 of the Constitution of Kenya, 2010.
68.	Matrimonial Property Act, 2013	Marriage	<ul style="list-style-type: none"> • Legislation provides for rights and responsibilities of spouses in relation to matrimonial property. • The legislation is constitutional and properly enacted. 	<ul style="list-style-type: none"> • The legislation is constitutional and properly enacted.
69.	Media Council Act, 2013	media	<ul style="list-style-type: none"> • Legislation that gives effect to Article 34 (5) of the Constitution 	<ul style="list-style-type: none"> • The legislation is constitutional and properly

	Law	Subject Area	Strength/Weakness	Comment/Proposal
			of Kenya, 2010.	enacted.
70.	Micro and Small Enterprises Act,2012	Trade	<ul style="list-style-type: none"> There is need for amendments to the Act to conform to the Fourth Schedule of the Constitution of Kenya, 2010 on the functions of the County government as far as the regulation of trade is concerned. 	<ul style="list-style-type: none"> Necessary amendments should be undertaken so as it conforms to the devolved functions.
71.	Mutual Legal Assistance Act,2011	Legal system	<ul style="list-style-type: none"> It conforms to Article 2 (5) and 2 (6) of the Constitution. 	<ul style="list-style-type: none"> Legislation conforms to Articles 2 (5) and 2 (6) of the Constitution of Kenya, 2010.
72.	Nairobi Centre for International Arbitration Act, 2013	Arbitration	<ul style="list-style-type: none"> Alternative Dispute Resolution Mechanism is quick and at times cheap and less tedious compared to litigation. This help with reducing case back logs in the courts. 	<ul style="list-style-type: none"> The legislation is constitutional and properly enacted.
73.	National Authority for the Campaign Against Alcohol and Drug Abuse Act, 2012	Heath	<ul style="list-style-type: none"> Need for amendments in the Act to provide for clear mechanisms between the National and the County governments as the function for handling drub and substance abuse has been 	<ul style="list-style-type: none"> Legislation needs to be amended as required by the Fourth Schedule; as far as the distribution of functions between the National government and the County

	Law	Subject Area	Strength/Weakness	Comment/Proposal
			devolved.	Governments is concerned.
74.	National Construction Authority Act,2011	Infrastructure	<ul style="list-style-type: none"> • Legislation duly enacted and the Authority established and operational. 	<ul style="list-style-type: none"> • The legislation is constitutional and properly enacted.
75.	National Gender and Equality Commission Act,2011	Gender	<ul style="list-style-type: none"> • Legislation duly enacted as required by Articles 27 and 59 of the Constitution of Kenya, 2010. • The Commission is duly constituted and operational. 	<ul style="list-style-type: none"> • The legislation is constitutional and properly enacted.
76.	National Government Co-ordination Act,2013	Devolution	<ul style="list-style-type: none"> • Legislation enacted as envisaged by Articles 131 (1) (b) and 132 (3) (b) of the Constitution of Kenya, 2010. 	<ul style="list-style-type: none"> • The legislation is constitutional and properly enacted.
77.	National Government Loans Guarantee Act, 2011	Finance	<ul style="list-style-type: none"> • Legislation enacted as envisaged by Article 213 of the Constitution of Kenya, 2010. 	<ul style="list-style-type: none"> • The legislation is constitutional and properly enacted.
78.	National Honours Act,2013	National Heroes/ heroines	<ul style="list-style-type: none"> • Legislation that helps in identifying heroes and heroines to remove biasness. 	<ul style="list-style-type: none"> • The legislation is constitutional and properly enacted.
79.	National Intelligence Service Act,2012	Security	<ul style="list-style-type: none"> • Legislation duly enacted to conform to Chapter 13 of the 	<ul style="list-style-type: none"> • The legislation is constitutional and properly

	Law	Subject Area	Strength/Weakness	Comment/Proposal
			Constitution of Kenya, 2010.	enacted..
80.	National Land Commission Act,2012	Land	<ul style="list-style-type: none"> • Legislation duly enacted as required by Chapter 5 of the Constitution of Kenya, 2010. 	<ul style="list-style-type: none"> • Legislation duly enacted as required by Chapter 5 of the Constitution of Kenya, 2010.
81.	National Payment System, 20100	Finance	<ul style="list-style-type: none"> • The legislation is constitutional and properly enacted. 	<ul style="list-style-type: none"> • The legislation is constitutional and properly enacted.
82.	National Police Service Act,2011	National Security	<ul style="list-style-type: none"> • Legislation duly enacted to conform to Chapter 13 of the Constitution of Kenya, 2010. 	<ul style="list-style-type: none"> • The legislation is constitutional and properly enacted.
83.	National Police Service Commission Act,2011	National Security	<ul style="list-style-type: none"> • Legislation duly enacted to conform to Chapter 13 of the Constitution of Kenya, 2010. 	<ul style="list-style-type: none"> • The legislation is constitutional and properly enacted.
84.	National Security Council Act,2012	National Security	<ul style="list-style-type: none"> • Legislation duly enacted to conform to Chapter 13 of the Constitution of Kenya, 2010. 	<ul style="list-style-type: none"> • The legislation is constitutional and properly enacted.
85.	National Social Security Fund Act, 2013	Social security	<ul style="list-style-type: none"> • Legislation that provides for social security: social assistance to the retired members of the society. 	<ul style="list-style-type: none"> • The legislation is constitutional and properly enacted.
86.	National Transport and Safety Authority Act, 2012	Transport	<ul style="list-style-type: none"> • Legislation duly provides for the authority and is constitutional. 	<ul style="list-style-type: none"> • The legislation is constitutional and properly enacted.

	Law	Subject Area	Strength/Weakness	Comment/Proposal
87.	Office of the Attorney-General Act,2012	Executive /Legal system	<ul style="list-style-type: none"> • Legislation that gives effect to Article 156 of the Constitution of Kenya, 2010 	<ul style="list-style-type: none"> • The legislation is constitutional and properly enacted.
88.	Office of the Director of Public Prosecutions Act,2013	Executive/Legal system	<ul style="list-style-type: none"> • Legislation that gives effect to Articles 157 and 158 of the Constitution of Kenya, 2010. 	<ul style="list-style-type: none"> • The legislation is constitutional and properly enacted.
89.	Partnerships Act,2012	Business Association	<ul style="list-style-type: none"> • The notable weakness is the commencement date. The commencement is left at the discretion of the Minister; this might be a dangerous practice. 	<ul style="list-style-type: none"> • Commencement date need to be ascertained.
90.	Petitions to Parliament (Procedure) Act,2012	Petitions	<ul style="list-style-type: none"> • Legislation to give effect to Article 37 or 119 of the Constitution of Kenya, 2010. 	<ul style="list-style-type: none"> • The legislation is constitutional and properly enacted.
92.	Persons Deprived of Liberty Act, 2014	Security/liberty	<ul style="list-style-type: none"> • Legislation enacted as required by Articles 29 (f) and 51 of the Constitution of Kenya, 2010. 	<ul style="list-style-type: none"> • The legislation is constitutional and properly enacted.
93.	Physiotherapists Act,2014	Heath	<ul style="list-style-type: none"> • Legislation provides for the regulation and conduct of the physiotherapists as a profession. 	<ul style="list-style-type: none"> • The legislation is constitutional and properly enacted.
94.	Political Parties Act,2011	Politics	<ul style="list-style-type: none"> • Legislation as required by Chapter 7 of the Constitution of Kenya has been duly enacted. 	<ul style="list-style-type: none"> • The legislation is constitutional and properly enacted.

	Law	Subject Area	Strength/Weakness	Comment/Proposal
95.	Power of Mercy Act,2011	Law	<ul style="list-style-type: none"> • Legislation to operationalise Article 133 of the Constitution of Kenya, 2010. • The power of Mercy Advisory Committee already in Place and operational. 	<ul style="list-style-type: none"> • The legislation is constitutional and properly enacted.
96.	Prevention of Terrorism Act,2012	Security	<ul style="list-style-type: none"> • An Act of Parliament to provide measures for the detection and prevention of terrorist activities and amend the following legislations: <ul style="list-style-type: none"> 1. Extradition (Commonwealth Countries)Act 2. Extradition (Contiguous and Foreign Countries) Act. 	<ul style="list-style-type: none"> • The legislation is constitutional and properly enacted.
97.	Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act,2012	Equality	<ul style="list-style-type: none"> • It conforms to Article 2 (5) and 2 (6) of the Constitution of Kenya, 2010. 	<ul style="list-style-type: none"> • The legislation is constitutional and properly enacted.
98.	Price Control (Essential Goods) Act,2011	Trade	<ul style="list-style-type: none"> • Article 43 and 46 of the Constitution of Kenya is well covered by this Act. 	<ul style="list-style-type: none"> • Legislation conforms to Article 43 and 46 of the Constitution of Kenya.

	Law	Subject Area	Strength/Weakness	Comment/Proposal
100.	Prohibition of Female Genital Mutilation Act,2011	Culture	<ul style="list-style-type: none"> Article 2 (4) of the Constitution of Kenya, 2010 prohibits culture that is inconsistent with it. 	<ul style="list-style-type: none"> The legislation is constitutional and properly enacted.
101.	Protection Against Domestic Violence Act, 2015	Equality/ law	<ul style="list-style-type: none"> Legislation that provides for the protection and relief for victims of domestic violence. The legislation is constitutional and properly enacted. 	<ul style="list-style-type: none"> The legislation is constitutional and properly enacted.
102.	Public Appointments (Parliamentary Approval) Act,2011	Public service	<ul style="list-style-type: none"> Legislation to provide for how Parliament executes its oversight role as far as public appointments is concerned. 	<ul style="list-style-type: none"> The legislation is constitutional and properly enacted.
103.	Public Benefits Organizations Act,2013	Public benefit	<ul style="list-style-type: none"> The enactment of this legislation has elicited public debate especially by the Non-Governmental Organizations whose name the Act has changed to Public Benefits Organization. This only means that public participation was never exhaustive during the enactment of this legislation as envisaged by the Constitution of Kenya, 2010. 	<ul style="list-style-type: none"> Need for amendment to factor in public participation as provided for by the Constitution of Kenya, 2010.

	Law	Subject Area	Strength/Weakness	Comment/Proposal
104.	Public Finance Management Act,2012	Public financial management	<ul style="list-style-type: none"> • Legislation duly enacted as required by Chapter 12 of the Constitution of Kenya, 2010. 	<ul style="list-style-type: none"> • Legislation duly enacted as required by Chapter 12 of the Constitution of Kenya, 2010.
105.	Public Health Officers (Training, Registration and Licensing) Act,2013	Professional regulation	<ul style="list-style-type: none"> • Regulation of the profession by National legislation brings about uniformity and good practice. 	<ul style="list-style-type: none"> • The legislation is constitutional and properly enacted.
106.	Public Private Partnerships Act,2013	Public private partnerships	<ul style="list-style-type: none"> • Necessary for economic growth of a country such as Kenya, if left unregulated, may lead to chaos in the public sector and numerous court battles. • This legislation is good for development. 	<ul style="list-style-type: none"> • The legislation is constitutional and properly enacted.
107.	Public Service(Values and Principles) Act,2015	Values and principles	<ul style="list-style-type: none"> • Legislation enacted as required by Article 232 of the Constitution of Kenya, 2010. 	<ul style="list-style-type: none"> • The legislation is constitutional and properly enacted.
108.	Public Service Commission Act,2012	Public service	<ul style="list-style-type: none"> • Legislation duly enacted as required by Chapter 13 of the Constitution of Kenya, 2010. 	<ul style="list-style-type: none"> • Legislation duly enacted as required by Chapter 13 of the Constitution of Kenya, 2010.
109.	Public Service Superannuation Scheme Act, 2012	Public service	<ul style="list-style-type: none"> • Seeks to secure a better future of the retired workers thus a dignified life in future after 	<ul style="list-style-type: none"> • The legislation is constitutional and properly

	Law	Subject Area	Strength/Weakness	Comment/Proposal
			rendering public service.	enacted.
110.	Publication of Electoral Opinion Polls Act,2012	Elections	<ul style="list-style-type: none"> Legislation has helped in doing away with unrealistic opinion polls that may trigger the county into post-election violence. 	<ul style="list-style-type: none"> The legislation is constitutional and properly enacted.
111.	Pyrethrum Act, 2013	Agriculture	<ul style="list-style-type: none"> THE Act should be amended accordingly to factor in the functions of the National and County Government as far as Agriculture is concerned. 	<ul style="list-style-type: none"> Amendments to the Act should be done accordingly.
112.	Retirement Benefits (Deputy President and Designated State Officers) Act, 2015	Retirement Benefits	<ul style="list-style-type: none"> The legislation is constitutional and properly enacted. 	<ul style="list-style-type: none"> The legislation is constitutional and properly enacted.
113.	Salaries and Remuneration Commission Act,2011	Salaries	<ul style="list-style-type: none"> Legislation duly enacted as required by Chapter 15 of the Constitution of Kenya, 2010. 	<ul style="list-style-type: none"> Legislation duly enacted as required by Chapter 15 of the Constitution of Kenya, 2010.
114.	Science, Technology and Innovation Act, 2013	Science and technology	<ul style="list-style-type: none"> Legislation in promotion of science and technology in the County and providing for the Commission. Commencement date need to be 	<ul style="list-style-type: none"> Commencement date need to be ascertained.

	Law	Subject Area	Strength/Weakness	Comment/Proposal
			ascertained.	
115.	Scrap Metal Act,2015	Trade	<ul style="list-style-type: none"> The Act should be amended accordingly to factor in the functions of the National and County Government as far as environment and licensing are concerned. 	<ul style="list-style-type: none"> Amendments to the Act should be done accordingly.
116.	Social Assistance Act,2013	Equality	<ul style="list-style-type: none"> Legislation as envisaged by Articles 27 and 43 of the Constitution of Kenya, 2010 duly enacted. 	<ul style="list-style-type: none"> The legislation is constitutional and properly enacted.
117.	Sports Act, 2013	Sports	<ul style="list-style-type: none"> Sports remain both a National Government and County Governments function, need for harmonization in the Act to cater for the same. 	<ul style="list-style-type: none"> A necessary amendment to the Act is desirable.
119.	Statutory Instruments Act,2013	Law	<ul style="list-style-type: none"> Legislation duly enacted. This is a key legislation as it ensures adherence to the rule of law and the Constitution; breach of which will be a great disaster. 	<ul style="list-style-type: none"> The legislation is constitutional and properly enacted.
120.	Supreme Court Act	Judicial system	<ul style="list-style-type: none"> Court duly established and 	<ul style="list-style-type: none"> The legislation is constitutional and properly

	Law	Subject Area	Strength/Weakness	Comment/Proposal
			operational.	enacted.
121.	Tax Appeals Tribunal Act, 2013	Judicial and legal process	<ul style="list-style-type: none"> Legislation establishing the Tribunal. This helps in professional, speedy disposal of disputes related to tax thus a solution to case backlog in the Courts. 	<ul style="list-style-type: none"> The legislation is constitutional and properly enacted.
122.	Teachers Service Commission Act,2012	Education	<ul style="list-style-type: none"> Legislation duly enacted as required by Chapter 15 of the Constitution of Kenya, 2010. 	<ul style="list-style-type: none"> Legislation duly enacted as required by Chapter 15 of the Constitution of Kenya, 2010.
123.	Technical and Vocational Education and Training Act,2013	Education	<ul style="list-style-type: none"> Tertiary Institutions remain both a National Government and County Governments function, need for harmonization in the Act to cater for the same. 	<ul style="list-style-type: none"> A necessary amendment to the Act is desirable.
124.	Tourism Act,2011	Tourism	<ul style="list-style-type: none"> Legislation duly enacted. Legislation is key in promotion of tourism and making it better. It is a core revenue earner and thus this legislation is warranted. 	<ul style="list-style-type: none"> The legislation is constitutional and properly enacted.
125.	Transition County Allocation of Revenue Act,2013	Devolution	<ul style="list-style-type: none"> Legislation outdated as the period provided for its operation is long 	<ul style="list-style-type: none"> Legislation outdated as the period provided for its

	Law	Subject Area	Strength/Weakness	Comment/Proposal
			overdue.	operation is long overdue.
126.	Transition to Devolved Government Act,2012	Devolution	<ul style="list-style-type: none"> • The Mandate of the Transition Authority is soon coming to an end. • This legislation may soon be time barred. 	<ul style="list-style-type: none"> • Legislation may soon be time barred thus repealing may be necessary at some point.
127.	Treaty Making and Ratification Act,2012	International Law	<ul style="list-style-type: none"> • Legislation enacted pursuant to Article 2 (6) of the Constitution of Kenya, 2010. 	<ul style="list-style-type: none"> • The legislation is constitutional and properly enacted.
128.	Unclaimed Financial Assets Act,2011	Finance	<ul style="list-style-type: none"> • This act is aimed at establishing a dedicated mechanism and resources to help locate property owners and/or beneficiaries to facilitate claims 	<ul style="list-style-type: none"> • The Authority has been established.
129.	Universities Act,2012	Education	<ul style="list-style-type: none"> • It has consolidated the various Acts that used to govern individual universities, this makes regulating these universities an easier task. 	<ul style="list-style-type: none"> • The legislation is constitutional and properly enacted.
130.	Urban Areas and Cities Act,2011	Devolution	<ul style="list-style-type: none"> • Legislation duly enacted as required by Chapter 11 of the Constitution of Kenya, 2010. 	<ul style="list-style-type: none"> • Legislation duly enacted as required by Chapter 11 of the Constitution of Kenya,

	Law	Subject Area	Strength/Weakness	Comment/Proposal
				2010.
131.	Value Added Tax, 2013	Taxation	<ul style="list-style-type: none"> • Legislation to review law on Value added Tax and imposition of tax for the proper taxation. 	<ul style="list-style-type: none"> • The legislation is constitutional and properly enacted.
132.	Veterinary Surgeons and Veterinary Para-professionals Act,2011	Professional regulation	<ul style="list-style-type: none"> • Veterinary/ livestock regulations remain both a National Government and County Governments function, need for harmonization in the Act to cater for the same. 	<ul style="list-style-type: none"> • A necessary amendment to the Act is desirable.
133.	Vetting of Judges and Magistrates Act,2011	Judicial system	<ul style="list-style-type: none"> • Legislation was duly enacted to provide for the establishment of the Board for a specific duration. 	<ul style="list-style-type: none"> • The legislation is constitutional and properly enacted.
134.	Victim Protection Act,2014	Judicial and legal process	<ul style="list-style-type: none"> • Legislation duly enacted as envisaged by Article 50 (9) of the Constitution of Kenya, 2010. 	<ul style="list-style-type: none"> • The legislation is constitutional and properly enacted.
135.	Wildlife Conservation and Management Act, 2013	Wildlife	<ul style="list-style-type: none"> • Legislation duly provides for the protection and management of wildlife in Kenya. • County Governments have been incorporated. 	<ul style="list-style-type: none"> • The legislation is constitutional and properly enacted.

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