



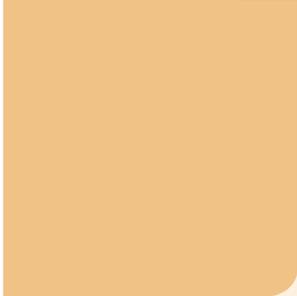
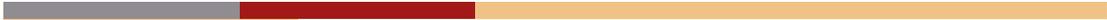
Council of Governors



**REPORT ON
THE AUDIT OF NATIONAL
AND
COUNTY POLICY AND LEGISLATION
IN THE LAND AND PHYSICAL
PLANNING SECTOR**







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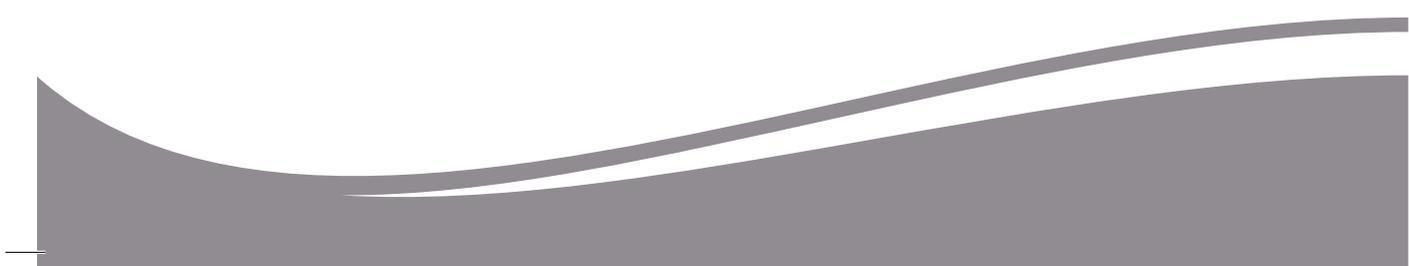
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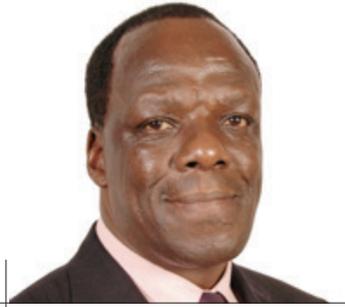
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Foreword by Chairman, Council of Governors



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

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

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

Thank you!

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

Chairman, Council of Governors

Foreword by Chairman, Council of Governors



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

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

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

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

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

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

P. Kihara Kariuki

Attorney-General

Foreword by Chairperson, Kenya Law Reform Commission



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

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

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

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

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

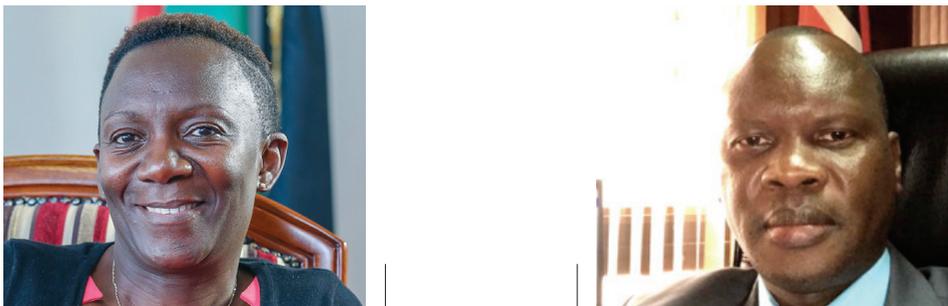
Through this Report, the Commission and CoG will spearhead and undertake the proposed policy and legislative reforms in partnership with the relevant sector Ministries, Departments and Agencies (MDAs). The successful implementation of the Report therefore calls for a coherent and cross-sectoral approach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

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

Thank you very much.

Mbago Ng'ang'a

Chairman KLRC



Acknowledgements

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

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

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

We commend Dr. Conrad Bosire and the team of sector consultants namely: Prof. Kameri Mbote, for the exhaustive research in the policy and legal frameworks. They worked tirelessly with the technical committee to constantly revise, edit and improve the contents of this publication. It is through this effort that we have this comprehensive Report.

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

Thank you!

Ms. Jacqueline Mogeni, MBS
CEO, Council of Governors

Mr. Joash Dache, MBS
CEO/Secretary, KLRC

Council of County Governors

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

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

Kenya Law Reform Commission

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

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

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

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Abbreviations

AHADI	Agile and Harmonized Assistance for Devolved Institutions
CARA	County Allocation of Revenue Act
CoG	Council of Governors
KLRC	Kenya Law Reform Commission
CARA	County Allocation of Revenue Act
SAGA	Semi Autonomous Government Agency
NLP	National Land Policy
EPC	Export Promotion Council
PPA	Physical Planning Act
CIC	Commission for the Implementation of the Constitution
IDLO	International Development Law Organization
IGR	Intergovernmental Relations
IGRA	Intergovernmental Relations Act
IGRTC	Intergovernmental Relations Technical Committee
UNDP	United Nations development Programme
MDA	Ministries Departments Agencies

Land and Physical Planning

1. Introduction

Land is more than a factor of production in Kenya. Politics, economics and social life seem to revolve around land. The terms and conditions under which rights to land are acquired, retained, used, disposed or transmitted are a site of contest.¹ Kenya as a nation state and counties are defined on the basis of territory, which is equivalent to land. Land hosts many renewable and non-renewable resources upon which both the citizenry at the local level and the running of the nation and county depend. Land rights are coterminous with rights to resources at the individual, local, county and national levels.

Land is one area where the functions of the National and County governments inexorably converge. The devolved system of government has been in operation for close to five years. This has been a time of refining institutions and laws to ensure that the intended purposes of devolution are met. Not surprisingly, conflicts have arisen as the process of devolution has unfolded with the national and county governments finding their spaces and seeking to coordinate with and respect the functional and institutional integrity of government at the other level.

Article 60 of the Constitution outlines the national land policy principles. It states that land in Kenya ‘shall be held, used and managed in a manner that is equitable, efficient, productive and sustainable’.² The specific principles outlines are:

- » equitable access to land;
- » security of land rights;
- » sustainable and productive management of land resources;
- » transparent and cost effective administration of land;

1 National Land Policy 2009.

2 Article 60

- » sound conservation and protection of ecologically sensitive areas;
- » elimination of gender discrimination in law, customs and practices related to land and property in land; and
- » encouragement of communities to settle land disputes through recognised local community initiatives consistent with this Constitution.

The CoK land policy principles encapsulate both moral/equity approaches to land and utilitarian/productive use of land.³ They require the concerted efforts of both the National Governments and County Governments to realize. Under Article 60 (2), the principles are to be implemented through a national land policy developed and reviewed regularly by the national government and through legislation. While the National Government is mandated to develop the National Land Policy NLC with advise from the NLC, there is a clear role for CGs to input into the Policy making the provisions on stakeholder engagement and public participation very critical. The National Land Use Policy (NLUP) also upholds the values of economic productivity, environmental sustainability and the conservation of culture while also facilitating the protection and optimal use of land.⁴

The land question in Kenya has been the subject of many taskforces and commissions culminating in the National Land Policy 2009 and the Constitution's chapter five which spells out the principles of land policy, classifies land into public, community and private (specifying the coverage of each), regulation of land use and property and the establishment of the National Land Commission among others.

This audit addresses two critical aspects of land law and policy: Land tenure and Land use. The latter addresses questions of who holds, what interest in what land⁵ while the latter deals with regulation of land use.⁶ The national Land Commission Act which deals with public land affects

3 P Kameri-Mbote, *The Land Question and Voting Patterns in Kenya*, in Kimani Njogu & P. Wafula Wekesa, *Kenya's 2013 General Election: Stakes, Practices and Outcomes*, Twaweza Publications (2015) pp. 34-47

4 Government of Kenya, *National Land Use Policy* (2017) p. 6

5 The tenure issues are dealt with in the following laws: The Constitution; Land Act; Land Registration Act; Land Law Amendments 2016; the Community Land Act.

6 The regulation aspects are dealt with in the Physical Planning Act 1996, revised in 2012; Survey Act Cap 299; and the Valuation for Rating Act Cap 266.

public land in counties and the Environment and Land Court Act which deals with resolution of disputes relating to the use and occupation of, and title to, land is also relevant for this audit.

It is worth noting at the outset that although the Constitution has altered the land governance framework, Kenya's primary land tenure regime is still anchored mainly in the National Government.⁷ The National Government has immense control over land registration, regulation, and definition and enforcement of property rights and contracts. Counties definitely have roles in these functions but they need to define those roles and ensure that the Constitutional imperatives of devolution, sustainable development, stakeholder engagement and public participation, are followed.

Most counties have narrowly defined the land question to involve planning and valuation. While these are important, they leave pertinent land governance issues that counties need to address such as:

- » Governance of unregistered trust land (nature and rules of trusteeship);
- » Governance of public land in the counties (nature and rules of trusteeship);
- » Planning for natural resource governance in counties (required for rangelands, forests, wildlife and fisheries);
- » Role of counties in renewal of land leases in lands in their jurisdiction;
- » Role of counties in land registration and enforcement of property rights;
- » Role of counties in land dispute resolution particularly the development of frameworks for alternative dispute resolution/ traditional dispute resolution as encouraged in Article 67(2)(f) of the Constitution.
- » The role of counties in mediation of rights of diverse claimants in counties with critical resources such as water; oil; gas; coal.

Considering the importance of the land issue, it would have been prudent for each county to define its land question and then proceed to frame legislative and policy interventions to address it. For instance, from the

7 Ellen M. Bassett. "The challenge of reforming land governance in Kenya under the 2010 Constitution", *J. of Modern African Studies*, © Cambridge University Press

data currently available, about 60% of Kenya's land was trustland in 1994.⁸ Indeed public land and private land were estimated at about 20% and below 20% respectively. There is a small number of counties in which the bulk of the land is registered. Most of the counties' land is not registered. This underscores the importance for each county to define its land issues and tailor interventions around the identified problems. Indeed, a process similar to the one followed at national levels where issues are identified; recommendations made should precede law making. Any policy issues identified should feed into the national policy on land and land use planning.

In this work, the various land laws and devolution laws should be scrutinized against the constitutional dispensation. First the land laws are audited to determine their compliance with the constitutional requirements on land and devolution and devolution laws. On the second section devolution laws are placed against the constitutional provisions to determine their level of conformance to the constitutional provisions on land. Notably, more emphasis is placed on the shortcomings of the Acts with regard to the devolution dispensation.

The laws and policies on land and physical planning are analysed with a view to identifying the extent of their conformance or non-conformance with the Constitution. The point made above is worth noting, namely that counties have not exhaustively addressed critical aspects of the land question. Even in areas such as planning and valuation where some attempts have been made, a lot more could be done. We note the slow pace of engaging counties in functions related to land evidenced by the fact that the Physical Planning Act is yet to be revised to give effect to devolution. The draft bill does not give effect to devolution and has remained in draft form for a while. Similarly, although survey is a county government function under the Constitution's Fourth Schedule, the Survey Act is yet to be amended to reflect this.

2. Land and Devolution

All land in Kenya belongs to the people of Kenya collectively, as a nation, as communities, and as individuals. Article 62 defines public land to include unalienated government land, the land occupied, held or used by a county organ except in leasehold, land transferred to the state and land in which

8 Njonjo Commission Report, 2002

the ownership cannot be ascertained. These categories of public land vest in and are held by a county government in trust for the people resident in the county.⁹ The National Land Commission (NLC) administers and manages public land on behalf of the county governments. In this regard, NLC is required to identify and keep a data base for public land and may issue conditions as to the use of the land.¹⁰ Article 63 elaborates what constitutes community land. Importantly any unregistered community land is held in trust by county governments on behalf of the community. Notably, the Community Land Act, 2016 was enacted, and the registration of community land is in the process. The land is, therefore, moving from trusteeship of county governments to communities. It can only be hoped that this will not be dispossession of communities as has happened in the past.

Article 66 of the CoK provides that the state “may regulate the use of any land, or any interest in or right over any land, in the interest of defense, public safety, public order, public morality, public health, or land use planning”. As such, both the county government and national government may limit the use of any category of land for public benefit.

The Fourth Schedule as read together with Article 186 of the COK distributes the functions between the two levels of government. In relation to land use and planning, the national government is mandated to formulate “general principles of land planning” and “the coordination of planning by the counties.” On the other hand, the county governments are responsible for “county planning and development, including statistics, land survey and mapping, boundaries and fencing, housing and electricity and gas reticulation and energy regulation”. Although this is a shared function/ “concurrent jurisdiction” the substantive planning and developmental control is expressly the function of the county governments. County governments should, therefore, have very elaborate planning departments with full capacity.

Article 185 requires county assemblies to “receive and approve plans and policies for the management and exploitation of the county’s resources and the development and management of its infrastructure and institutions.” County assemblies are therefore institutions in planning affairs in the counties.

⁹ Article 62(2)

¹⁰ Article 67

The National Land Commission (NLC) is established under Article 67 and is mandated to “recommend a national land policy to the national government, to monitor and have oversight responsibilities over land use planning throughout the country”. Consequently, with its oversight role, it can only carry out this mandate if the two levels of government cooperate with the Commission.

3. Legislation

The Physical Planning Act, No. 6 of 1996 (the PPA) entered into force in 1998 and applies to all parts of the Country except areas excluded by the Minister (now Cabinet Secretary in charge of Land & Planning).¹¹

As pointed out above, CoK 2010 created two levels of government: NG & CG and distributed specific functions to each of the government.¹² Importantly, each of the governments derives its powers and functions directly from the people. Section 3 of the PPA, establishes the office of the Director of Physical Planning (Director) whose functions include formulating national, regional and local physical development policies, guidelines and strategies; preparation of all regional and local physical development plans and ensuring enforcement by local authorities of physical development control and preservation orders.

The PPA defines a “regional physical development plan” as a plan for the area or part thereof of a county council.¹³ In the post-Constitution of Kenya 2010 dispensation, this definition is obsolete. A regional physical development plan in post-2010 would be a joint agreement between counties located in adjacent areas and having same or similar topographic, development agendas and economic activities. Such an agreement would be at sole discretion of the counties as each of the counties is distinct in its composition, functioning, and enforcement of its laws.¹⁴ It is notable that the PPA does not provide guidelines on the formulation of such regional development plans/agreements to avoid prejudicing national planning principles.

11 Section 2

12 Article 1

13 *ibid*

14 Article 6 and The First Schedule of the Constitution provides for division of the Kenya into forty seven counties.

The Constitution envisages two planning authorities; the national and the county government. Any institution or office created after that indisputably must fall into these two categories and subject to the control of the respective government. The Director of Physical Planning should be an office in the NG responsible for the formulation of principles and coordination of planning by counties. The formulation of regional and local physical development plans and enforcement of such development controls within the counties is the function of CGs.

The PPA does not create a forum for a consultation yet land planning is a shared function. Inadequate consultation and cooperation have led to deteriorating planning and adherence to planning requirements. Cooperation of these two governments is inextricably linked to the proper harmonized formulation of policies, management, development and planning of land.¹⁵ A forum composing of NG and CG representatives and the NLC is required to ensure cooperation and consultation in line with Article 6(2). County planning should be aligned with the national principles developed by the NG. Invariably, the consultation forum should be under the Intergovernmental Relations Act, 2012. Any attempt to establish a statutory body is an emasculation of the county governments.

Section 32 of the PPA requires that a development application before the local authority be forwarded to the Director for consideration and comments. Development approvals are strictly within the purview of the counties and units underneath the counties. To the extent that the NG functions are limited to the formulation of general principles and coordination of planning by counties renders the Director's office redundant in this regard.

One pillar of devolution in Kenyan set up is to ensure increased public participation in the management of the county affairs at every stage of decision making. The PPA mandates the planning authority to develop plans and only invite objections to an already developed plan.¹⁶ In Article 10 and indeed as an object of devolution, the public must be involved in the formulation of such development plans for effective plans to be developed. Participation should be in good faith, substantial as opposed

¹⁵ Council of Governors & 3 others v Senate & 53 others [2015] eKLR

¹⁶ Section 9

to tokenism and their contributions must be considered.¹⁷ Similarly, the procedure for application and approval of development does not envisage public participation.¹⁸

The PPA concentrates powers of planning in the office of the Director, who formulate all policies. Article 184, 6 and 174 aim at having the services and decision making devolved to the lowest manageable level to give the residents power to govern themselves activities in their localities. Towns, municipalities and other smaller units should be given the power to develop their plans subject to approval by the County planning unit. Indeed, the Urban Areas and Cities Act provides for such a set up.¹⁹

The purpose of development control is to ensure economic land use by allocating the resources to maximize their benefits.²⁰ Article 60 requires that land be managed in an equitable, efficient, productive and sustainable manner. Additionally, the use of the land use should ensure sustainable and productive, transparent and cost-effective management of land. Article 10 contains principles such as social justice, equality, inclusiveness, integrity and sustainable development. These are binding principles that should be adhered to in land planning. The PPA does not adopt these provisions and does not contain planning principles.

Section 44 of the PPA, provides that the information obtained by the Director or any official of a local authority be confidential and invokes the provisions of Official Secrets Act.²¹ This provision is untenable and undesired in devolution on two fronts. First, public information requires an informed public, and it is vital in holding the office bearers accountable for their actions. Indeed, Article 10 requires transparency, accountability. Further Articles 35 guarantees right to access to information. Although there should not be gratuitous divulgence of information, limitation of access to planning records should be subject to Access of Information Act.²²

17 Robert N. Gakuru & Others v Governor Kiambu County & 3 others [2014]

18 Section 33

19 Section 20

20 John Mutingá Mativo, The Role of Law in Urban Planning in Kenya: Towards Norms of Good Urban Governance, LL.M thesis, University of Nairobi (2015)

21 Chapter 187, Laws of Kenya

22 No. 31 of 2016.

The PPA does not envisage a county assembly in planning. As the representative arm of a county government, the county assembly role cannot be underestimated. An integrated plan is a road map within which the county government must operate if it is to deliver to the people. The implementation of the plan requires of various stakeholders and such a road map cannot be legitimate without the voice of the people through their representatives.

The Physical Planning Act does not envisage devolution provisions in the CoK 2010; the County Government Act; Urban Areas and Cities Act; Intergovernmental Relations Act, 2012 and the Devolved Functions Legal Notice 116 of 2013 that devolved the county planning.

Physical Planning Bill 2017

The Physical Planning Bill (Bill) is supposed to revise the Physical Planning Act discussed above. It however replicates many provisions of the Act instead of overhauling it to reflect devolution imperatives. Below are some of the ways in which the Bill runs contrary to the CoK provisions and overall spirit of devolution.

National Physical Development Plan

The most critical invention of the devolution was to enable development that is sensitive to the local conditions and needs in a particular county and smaller units. As such, consideration of what each county requires is a crucial principle of devolution that must be put into consideration at all times. In this regard, the Constitution recognizes this fact by limiting the function of the national government to policy and coordination of the planning in the country. The actual development plans are left to the county governments to develop plans that are sensitive to the specific county needs.

Section 17 of the Bill envisages a National Physical Development Plan (NPDP) whose contents are to “define strategic policies for the determination of the general National Physical direction and trends of physical development and sectoral development in Kenya and provide a framework for the use and development of land”. Further, the NPDP should contain “maps and plans showing current and anticipated physical and land use patterns, an implementation framework” In the formulation of county plans and local plans as well as regional plans, county governments are to ensure that the respective plans conform to the NPDP. Measured against the functions of the national government, it is clear that planning should begin at the lower

levels where land is used. This provision therefore offends the Fourth Schedule, Article 186 and Article 6. The NPDP should draw from County Physical Development Plans, which take into account the local planning priorities.

Approving and Implementation of Plans

Related to the issue of NPDP, Section 22 of the Bill requires NPDP to be approved by the Cabinet, which then is to be complied with by all the counties. Section 29 of the Bill further requires that the Cabinet Secretary and the National Director of Physical Planning approve Regional Development Plans. Additionally, implementation of the NPDP is vested in Cabinet Secretary and the NLC. Under the Fourth Schedule approving of any county plan including Regional Development Plan cannot be said to be a function of National Government. The scope of its functions is to prepare general principles and policy and cannot approval and compliance with the NPDP must be linked to approval and compliance with CPDPs. Counties should avail their CPDPs for review.

Enforcement mechanism

The National Government after setting principles and planning policy, there should be a mechanism of ensuring that county government adheres to the dictates of the principles and policies. The National Physical Planning Consultative Forum established under section 5 of the Bill is intended to bring together the national government and county governments. Notably, Article 6 requires consultation and cooperation and the Intergovernmental and Relations Act, 2012 has already set up institutions under Article 189. This forum is a duplication of the roles of the institutions established under intergovernmental relations law. Understandably, the two levels of government may form joint committees, but the composition of this forum just serves the function of re-centralization of planning role to national government. The coordination of planning by national government cannot be the objective of this body looking at its composition and functions.

National Land Commission

Perhaps the most significant blow in the Bill is to the NLC. Under Article 67, NLC is mandated to recommend a national land policy which when interpreted broadly is expected to include land use and planning principles and policies. Although the Chairperson of the NLC is a member of the National Physical Consultative Forum, this is tokenism to NLC. It would be expected that the National Government would substantively engage NLC

and allow it to review and make recommendations as an institution in the development of policies and principles. Clearly the rationale of having a land commission in land policies formulation must be appreciated. The National Government launched the National Land Use Policy in June 2018.

Section 24 of the Bill requires that every national government institution responsible for implementation of NPDP should prepare status report three months to the end of the financial year and submit it to the CS and the NLC. Oversight and monitoring of land use planning is a function of the NLC, and if CS is a planning authority as defined in Section 2 of the Bill, monitoring and oversight roles cannot again vest in CS.

The spirit of the bill and its provisions generally demonstrates the dislike of the Ministry Land on National Land Commission. While NLC has a significant role in policy-making and planning under the Constitution, the Bill tangentially engages NLC reducing it to “any other party” like National Director of Planning while indeed in the Constitution, NLC is intended to be a key partner in planning.

National Director of Physical Planning and the Cabinet Secretary

The retaining of this office in the Bill demonstrates the intention to retain the old order. Among functions of the office, holder is to advise the government on various physical planning issues. We can only assume that the government here means national government. He also formulates national policies and planning policies and coordinates the preparation of regional integration. Although he is responsible to the CS, formulation of principles and policies is also a function of the Cabinet Secretary. It is this lack of clarity and duplication of functions that has led the planning mess that we are in. It is crucial that his functions be subject to the CS for clear-cut command, transparency, and accountability. As stated elsewhere, he is also the chairperson of regional development committee yet counties are distinct and separate. This is a move to recentralize planning. A department under the CS can handle the functions of the Director of Planning. He can be an adviser to a regional development planning policy, but the chairpersonship is suspicious.

Public participation and culture of secrecy

In various forums, for instance, the Regional Physical Development Plan does not provide a representation of residents of various counties in development of the regional plans. Similarly, the Bill does not envisage

disclosure of information related to planning. Information obtained is treated as confidential.

Role of County Assembly

Article 185 requires the county plan to be approved by the county assemblies. Interestingly, Section 37 of Bill does not require such approval. Section 38 provides for modification of County Development Plans by the county executive member in charge of planning again without the approval of the county assembly. Additionally, section 39 adopts the same spirit. Section 47 also ousts county assembly role in local planning.

The Bill also seeks to amend Section 104 and 103 of the County Government whose effect is to oust county assembly role in planning.

The Physical Planning Bill and County Government Act

Section 8 of the County Government Act, 2012 (CGA) echoes Article 185 of the Constitution on the role of county assemblies on planning. Specifically, Section 8 provides that the county assemblies **shall** “approve county development planning”. Similarly, section 30 requires county governor to submit the county plans and policies for approval. Removal of the County Assemblies role by the Bill from plans approval goes against the Act and the Constitutional.

Section 37 of the CGA provides the roles of the county executive committee. The CEC monitors the process of planning, formulation and adoption of the integrated development plan by a city or municipality within the county, assist a city or municipality with the planning, formulation, adoption and review of its integrated development plan, facilitate the coordination and alignment of integrated development plans of different cities or municipalities within the county and with the plans, strategies and programmes of national and county governments, take appropriate steps to resolve any disputes or differences in connection with the planning, formulation, adoption or review of an integrated development plan.

The Bill has wholly omitted the role of CEC in planning and instead leaves the role to Executive county executive member responsible for planning and the county development director.

Although the Bill recognizes that the county has planning functions, it fails to recognize established devolved units such as the Sub-county administrator and Ward administrator who are critical officials in planning at local level. It is a move to create a centralized planning authority at the county level.

Section 103 CGA provides that the county planning unit is responsible for coordinating integrated development planning within the county, ensuring integrated planning within the county; ensuring linkages between county plans and the national planning framework. Further, the designated planning authority in the county should appropriately organize for the effective implementation of the planning function within the county. The Bill establishes the Director of County Planning; it can only be hoped that the Bill establishes the Directorate of County Planning in the county governments, which will be planning unit envisaged in the CGA.

Section 106 of the CGA provides that cooperation in planning shall be undertaken in the context of the law governing inter-governmental relations. The law governing the intergovernmental relations is the Intergovernmental Relations Act (IRA). The national government can, therefore, coordinate the planning under the IRA.

Section 39 of the Bill provides for revision of plans not before eight years. Under the section 109, the CGA provides that the sectoral plans should be reviewed every five years and updated annually. The role of county assembly is ousted despite section 109 providing that the county assembly must approve revision.

Section 114 of the CGA requires the approval of significant projects in the county by county assembly. The Bill in section 63 provides that the Cabinet Secretary shall consider and offer Strategic national policy guidance to any public institution proposing a project's project of strategic national importance. This provision may serve to subject county governments to CS approval without county assemblies.

The Physical Planning Bill and Urban Areas and Cities Act, 2011 (UACA)

The Bill defines a local physical development in section 2 as “plan for the area or part thereof of a city, municipal, town or urban council and includes a plan with reference to any trading or marketing center” The UACA establishes the various urban areas within a county including towns, municipal cities, and cities. The management of these small units within a county is managed by boards appointed under the Act. The boards are agents of the county government and are responsible and accountable to the county governments.

Section 16 of the Urban Areas and Cities Act, 2011 (UACA) provides for the various functions of the respective boards which include to “develop and adopt policies, plans..., control land use, land sub-division, land development

and zoning by public and private sectors for any purpose, including industry, commerce, markets, shopping and other employment centres, residential areas, recreational areas, parks, entertainment, passenger transport, agriculture, and freight and transit stations within the framework of the spatial and master plans for the city or municipality as may be delegated by the county government”. Essentially, the managers of these boards then are to submit their proposed plans to the county executive committee for consideration and then to county assembly for approval.

Section 16 of the Bill provides for the functions of County Director of Physical Planning including “preparation of local physical development plans.” This is apparently in conflict with the UACA, and if adopted as it is, it will only lead to confusion.

Evidently, the primary effect of the Bill on the UACA is centralization of the land use planning function in the office of the County Director of Physical Planning. Although both the Director and the boards work under the county government, the Bill only creates confusion as whom the boards should be answerable to; executive committee or the Director is now not clear. Devolution aimed to devolve power to the lowest unit possible but not to create centralized county capitals.

Physical Planning Bill and Environment and Land Court Act

Section 16 of the Act provides that appeals from subordinate courts or tribunals appeal to the court within thirty days. Section 74 of the Bill, however, states that a determination by County Physical Appeal Physical Planning Liaison Committee should be filed with Environment and Land Court and the court shall record the determination of the committee as a judgment of the court. This denies an aggrieved party the opportunity to access the court. If the determination is recorded as the decision of the court, an appeal can only lie with the Court of Appeal, which is unnecessary. The bill should allow a direct appeal to the Court for a review.

Physical Planning Bill and Intergovernmental Relations Act, 2012

The IRA objects include provide a framework for consultation and cooperation between the national and county governments; provide a framework for consultation and cooperation amongst county governments. The Act establishes institutional structures whose objects include providing a forum for co-ordinating governments’ policies, legislation, and functions. One of the functions of the Summit, for instance,

is to monitoring the implementation of national and county development plans and recommending appropriate action.

On the technical committee, the CS may convene consultative fora on sectoral issues of common interest to the national and county governments. It would be hoped that any coordination in policy implementation and planning would be under this Act, unlike the Bill that forms an organ at the national level whose only function is to revert the planning function to the national level.

The Land Act, 2012

Section 20 of the Land Act provides that the Commission may grant a person a license to use the unalienated public land for a period not exceeding five years subject to planning principles as it may prescribe. Although under Article 67 NLC is responsible for administering and managing public land, the planning rests with county governments. NLC can only prescribe the planning on public land in consultation with the county governments

Section 6 of the Land Act provides that the CS shall be responsible for monitoring and evaluation of land sector performance as well as providing policy direction of the regarding all classes of land in consultation with the Commission. It would be expected, as it is, county governments are vital partners in land matters and county governments would be involved in directions involving land.

Section 146 of the Land Act requires the CS to approve creation for a right of way to the exclusion of a county government yet it would require some land control and planning.

As noted elsewhere, some public lands vest in the CGs and are administered by the NLC on their behalf. The Land Act provides for conversion of different tenure to another. In this regard, public land held by counties may be converted to private land. Section 9 of the Land Act requires that any substantial transaction involving the conversion of public land to private land should be approved by the county assembly.

Land Act and the County Government Act, 2012

Section 6 of the Land Act provides that the coordination of the spatial plan data ought to be in consultation with the county governments or their representatives because it is a shared function.

Section 17 of the Land Act requires a management body to submit development plans to NLC before a reserved public land must require

the CGs to approve plan since the commission in the management of the public land.

Section 20 provides for issuing of licenses of public land by the NLC. Understandably, NLC should consult the CGs whom they manage land for when issuing licenses.

Section 134 of the Land Act provides for the settlement schemes to be administered by the NG for shelter and livelihood. Land settlement should include CG involvement as these are established within counties yet the role of CG is not well articulated. The CG is involved in the identification of beneficiaries should be consulted by the NG. The nature of the consultation is not clear and there are no CG representatives in the Land Settlement Fund Board.

Land Act and Urban Areas and Cities Act, 2011

The Land Act refers to the county governments without recognizing the devolved units in the Urban Areas and Cities Act. Although they act within the county governments, they are recognized in law to promote locally sensitive land administration and planning.

Community Land Act

The Community Land Act was enacted to give effect to Article 63(5) of the Constitution. It provides a mechanism for recognizing, protecting, registering and managing, the land.

The use of the community land is subject to regulation and should conform to the national and county laws and policies. Community land management committees are responsible for the planning of the respective registered community land.²³

In Section 19, a registered community or at the request of the county government should submit a plan for development, management and use of the land registered under the community for approval. The plan should consider the environmental conservation and heritage and should be bound by any physical plan. The county government should consider the plan in line with the development planning laws in place. If the county approves the plan, it should notify the registered community and the community shall develop the land in line with the approved plan.

23 Section 15

The Act clearly recognizes the role of county governments in planning and management of lands within their jurisdiction.

Unregistered community land is held in trust by county governments on behalf of the communities for which it is held.²⁴ Unregistered community land is held by CGs in trust for the communities. Registration of the community land will, therefore bring the trust to an end²⁵ and devolve the management of the unregistered land to the community after adjudication is done to ascertain the members of the community. The nature of this trusteeship is not defined. The problem lies in interim arrangements.²⁶ Section 6-11 of the Community Land Act allow the CS to appoint the Adjudication officer to ascertain claimants of the registration of communities in consultation with the CGs. Whereas the consultation with the CGs is desirable, having held the land subject of registration previously and with the history of the non-recognition of community land rights and wanton illegal allocation of the land, there is need for better definition of CG trusteeship and greater CG engagement in the registration process to avoid dispossession of the land as happened in the Coast in the hands of the NG. The CGs would, for instance, involve its officers in conjunction with the NG adjudication officers to facilitate the registration process. We have pointed out above the role of the CG in registration needs to be articulated. This is particularly the case in community land.

The Community Land Act concentrates many powers in the Cabinet Secretary leaving out the NLC and the CGs despite their being key stakeholders. It is the mistrust in the NG that led to recommendations in the Constitution and the National Land Policy for the removal of community land management from the NG. This recentralization and minimal control by the CGs is not desirable.

Community Land Act and County Government Act

Section 19 of the Community Land Act provides for the submission of a community development plan to the county government for approval.

24 Art. 63 (3)).

25 Community Land Act Section 6 (7)

26 Liz Alden Wily “The Community Land Act in Kenya Opportunities and Challenges for Communities”, Van Vollenhoven Institute, Leiden Law School, Box 9520, 2300 RA Leiden, The Netherlands (19 January 2018).for Communities”, Van Vollenhoven Institute, Leiden Law School, Box 9520, 2300 RA Leiden, The Netherlands (19 January 2018).

However, under the Act it adopts a very generic view of a county government and fails to recognize the various county government devolved units that are involved in the county planning in the County Governments Act.

Section 29 allows a registered community to reserve land for settlement, community conservation areas, farming, and urban development. These reservations have an impact on the land use and planning and they ought to obtain the consent of the county government in their areas as provided under the County Government Act, 2012.

Urban Areas and Cities Act, 2011 and Community Land Act

The Community Land Act completely obscures the role of devolved units in the UACA. The assumption seems to be that community land is outside cities and urban areas. This is a fallacious assumption because of the interaction between community lands and urban areas and cities as more people move to these spaces and land is carved out of community land to accommodate these devolved units of governance.

Land Registration Act

The Land Registration Act governs the registration of all land in Kenya. Land registered is within counties. The Supreme Court Advisory Opinion that delineated the roles of the NLC and the Ministry regarding registration of Land clarified the roles of these two actors but did not address the roles of the CG. These two actors are at the national level. As noted above, there is need for clarity on the roles of the CG in adjudication, registration of land and the enforcement of land contracts.

National Land Commission Act, 2012

The Land Laws Amendment Act 2016 did away with the county land management boards that had seen the county governments have a say at the NLC. Under the current framework, NLC is purely a national government institution without representation from the county governments. It is difficult to see how it will cooperate with the county governments given that it administers public land on behalf of the County governments.

Article 67(2) requires the Commission to “monitor and have oversight responsibilities over land use planning throughout the country”. Further, the National Land Commission requires that the Commission identify, prepare keep a date base all public land while the Section 17 (3) requires the Commission to approve all the developmental plans, management and use of public land vested in a state organ including a county government organ.

The role of the Commission in physical planning, management and land use in the counties requires goodwill and cooperation. Notably, the County Land Development Boards were repealed.²⁷ The Act fails to create a link between the Commission and the county governments.

NLC Act and County Government Act

The Act has blanket consultation requirements. In the management of the land, the Act does not provide anything on county governments and the county devolved units such as sub-counties, wards other than requiring that an office of the NLC be established in each County. It also states that the NLC shall establish offices in the counties and may establish offices in the sub-counties as it may consider necessary.²⁸

NLC and Intergovernmental Relations Act

Dispute resolution in Land Act and Land Registration Act have not provided or envisaged any plan to have the dispute resolution that may arise solved through Intergovernmental Land Relations Act.

Land Adjudication Act

The Amendments introduced to this Act in the post-2010 era are of no significant effect. Secondly, the enactment of the Community Land Act, 2016 dealt a blow to this Act as it gives the Cabinet Secretary the power to appoint adjudication officers in each of the community registration unit. However, in the transition section, the Community Land Act (CLA) saves the Land Adjudication for three years or more time as the Cabinet Secretary may gazette.

Just like the Community Land Act, it leaves out the role of CGs and the NLC is the adjudication process, which includes surveying and mapping which would touch on land use and planning.

Importantly, now that the CLA is in place, it should apply in the adjudication of the rights and should not be applied on requests, should apply on all the land processes as the community land rights are being registered.

This Act has various inconsistencies with the Land Registration Act, 2012 and the Community Land Act.

²⁷ Land Laws Amendment Act, 2016.

²⁸ NLC section 16(5).

Land Control Act

Articles 10 and 60 envisage the sustainable use of resources. Article 60 expressly provides for the principles of land policy including “sustainable and productive management of land resources”. The sustainable and productive use of land could only achieve through police power in control of subdivisions, the partition of land among other transactions.

The county governments through land use and planning are essential institutions in achieving the sustainable and productive management of land. The National Land Commission, having the oversight role in planning is also a key player in ensuring sustainable land use.

The Land Control Act, in section 6 delineates parcels of land that are subject to this application of the Act. By the very role of county governments in land use and planning, formation and constitution of land control boards, delineation of board’s jurisdiction imports the role of county governments. The Cabinet Secretary cannot, therefore, form or purport to constitute land control boards without representatives from the county governments to ensure that the land transaction adheres to land use and planning principles.

Provincial land control board appeals and central control appeal board have no place in the post-2010 era. Further, their constitution does not envisage county governments.

This Act does not envisage devolution and county governments in general. It offends devolution laws by this very fact. The control, which it imposes on agricultural land, is itself a land use and planning issue and as such county governments ought to be involved.

Valuation for Rating Act

Land valuation and taxation is a critical component of land governance. The Valuation for Rating Act provides for the preparation of valuation rolls to facilitate efficient collection of rates and taxes. CGs collect rates while the NG collects Stamp Duty and Capital Gains Tax. Rates and stamp duty are predicated on updated valuations of land. Unfortunately the valuation rolls in Kenya are out of date and most transactions in land are based on estimated values versus real values.²⁹ There is need to link the national

29 P. Kameri-Mbote, Kenya Land Governance Assessment Framework (LGAF) (2018) University of Nairobi School of Law

cadaster to the national land tax and rent database. Both the updating of valuation rolls and updating the land tax and rent database require joint actions of the CGs and NG. Indeed tax and rates are levied on very few properties currently. There is need to update land information capturing all properties. Updated valuation rolls are important parts of the CGs role on.

The role of CGs in valuation is outlined in the NLUP, which provides that “land valuation and taxation shall be based on approved development plans and relevant local area land use and development guidelines”. It is a matter of concern that the task of developing the framework guidelines on valuation of land and land based resources is assigned to NG institutions (Ministries in charge of land and environment) and excludes CGs.

Survey Act

We noted that survey is a function of the CG. However, the Survey Act Cap 299 has not been revised to reflect the reality of devolved governance. Link in Physical Planning, the role of the Director of Survey is very prominent.

4. National policies

A number of policies are worth noting here. The first is the National Land Policy. **The National Land Policy**, Sessional Paper No. 3 of 2009 predates the Constitution and does not therefore capture the institutional architecture of devolution in the 2010 Constitution. The Policy is however a very comprehensive document and captures the spirit of land reforms that informed the Constitution. These include the principles of land policy; the provisions on land tenure and land use. The Policy, like the Constitution provides for three modes of holding land: public; community and private. In coming up with these tenure typologies, it critically analyses the problems with the prior categorizations. Worth noting is the designation of land a government which had resulted in abuse of powers of allocations chronicled in the Ndung’u Report. While the Ndung’u Report addressed the conversion of public land ownership to individual land ownership, the Land Policy also highlighted the conversion of land under group tenure (trust land and group ranches) to individual tenure and the abuse of power by local authorities (the precursors to counties) in dealing with trust land and officials of group ranches in dealing with group ranches. The Policy also highlighted the opaque ways in which compulsory acquisition was carried out and the failure of planning authorities and non-adherence with planning laws. These are pertinent issues for the county governments.



The **National Spatial Plan 2015-2045** is a national spatial vision that charts the path for physical planning in the country. CGs have physical planning functions but in the list of those consulted in the drawing of the Plan they are conspicuously missing. The list includes very many NG institutions, which points to an attempt at recentralizing planning. While both NG and CGs have roles in planning, neither of them can execute the physical planning function on its own.

The National Land Policy pointed to the need for a National Land Use Policy and it is good to note that **the National Land Use Policy** was passed in 2017 and launched in 2018. It is interesting to note that in its guiding principles, devolution is not included. The counties are only listed for purposes of computing demographic data. The need to share information is only couched at the level of Ministries, Departments and Agencies of NG and does not explicitly bring in CGs and institutions under them. On land administration, registration and management of transactions, the Policy does not rope in CG institutions. It recommends the predicating of the national cadaster on national spatial plans and policy guidelines and does not include CGs. Similarly land tax and rates are linked to the national cadastre with no information on how information from counties will be leveraged.

Table 1: Review of Land and Planning Laws in a Tabulated Matrix

Name of Law	Issue	Rationale/Concern	Recommendation
	Make the argument. E.g. separation of powers. Where is the problem or inconsistency?	How do we ameliorate the problem?	Amend the law as so..... Or Repeal the law in its entirety.
<u>Constitution</u>	Designates land as public, private and community but the data on the acreage is dated. Need for inventory of all public land. Need for land information data/statistics from county to feed into national government data.	Take stock of land tenure and land use types in the country to enable counties and national government know what land they are dealing with. This is long overdue. Establish county land information hubs to collect necessary data and statistics.	Designate public, private and community land in Kenya Inventory of public land.
<u>1. Physical Planning Bill 2017 (Seeks to amend the Physical Planning Act</u>	The Bill approaches planning from a national level yet planning under the Fourth Schedule is a County function. Section 37 offends Constitutional provision that requires County Developments plans to be approved by County assemblies.	The County Physical Development Plans should inform the development of the National Physical Development Plan. National Government should only provide general principles of land planning and coordinate planning by the counties.	County Physical Development Plans made and approved by County Assemblies and then amalgamate them into the National Development Plan. Align the Bill to the dictates of devolution and specifically the principles of cooperation and consultation. Integrate the requirement for public participation as outlined in the Constitution.

Table 1: Review of Land and Planning Laws in a Tabulated Matrix (Cont'd)

Name of Law	Issue	Rationale/Concern	Recommendation
	<p>The Bill centralizes local physical development plans for cities, municipal, towns and urban councils and makes them a responsibility of the County Director of Physical Planning yet there are boards established for these entities charged with the same function under the Urban Areas and Cities' Act.</p> <p>S 23(1) appears to impose the National Physical Development Plan on the counties without taking into account the unique circumstances and development priorities of the respective counties.</p>	<p>The principle of subsidiarity favours the making of decisions at the lowest possible level. The County Director of Physical Planning should coordinate overall planning of County taking into consideration the local plans.</p> <p>Some level of autonomy is required if the spirit of devolution is to be respected, though the overall plan adopted at the county level ought to reflect and embody the national plan.</p>	<p>Clarify the role of the County Director of Physical Planning with respect to cities, municipal, towns and urban councils.</p> <p>Align National development plans with county integrated development and spatial plans.</p> <p>Clarify what happens where a county develops its plan in the absence of a national physical plan under S 23(2) of the Bill.</p>
	<p>Bill centralizes planning function and seems to be aided further by membership of the Cabinet secretary on the Technical Committee. The Cabinet Secretary may convene consultative forums on sectoral issues of common interest to the national and county governments.</p>	<p>There is need to shield this function from National Government control by organizing the Intergovernmental Relations Technical Committee to perform it.</p>	<p>Align the Bill to the imperatives of a devolved government by providing for consultation and cooperation in the preparation of plans and respecting the roles of the County Assembly and Executive in the process.</p> <p>The Fourth Schedule has defined the roles of National and County Governments in planning and these</p>

Name of Law	Issue	Rationale/Concern	Recommendation
	Similarly preparation of national, regional and local plans is a function of the Director of Physical Planning under the Bill.		should be respected.
<u>2. The Physical Planning Act</u>	The Bill discussed above seeks to amend this Act. It is framed in the pre-devolution structure of centralized governance.	The Constitutional demarcation of functions between the National and County Governments and the National Land Use Planning Policy should inform the review of this law.	This law should be repealed and replaced with a law aligned to the Constitutional provisions on devolved government. Harmonize the new Physical Planning law with the Urban Areas and Cities Act; the Intergovernmental Relations Act; the County Governments Act and Legal Notice 116 of 2013.
<u>3. Land Act</u>	Defines the roles of the Cabinet Secretary and the National Land Commission with respect to land. The clarification of these roles in the 2015 Supreme Court Advisory Opinion does not address the County role. S. 6 CS is responsible for land sector performance monitoring and evaluation in consultation with the NLC.	Clarify the role of Counties vis a vis MOLPP and NLC. Counties are critical stakeholders in the land sector and should also be included.	Make provision beyond the MOLPP and NLC. Clarify role of counties in land adjudication and registration.
			Make provision for consultation with counties in land sector performance monitoring and evaluation.

Table 1: Review of Land and Planning Laws in a Tabulated Matrix (Cont'd)

Name of Law	Issue	Rationale/Concern	Recommendation
	S. 146 CS approves creation of right of way without express requirement for the involvement of the county government.	Land use planning may be needed in the process of creating rights of way and this is the function of the counties.	Make express provision for the involvement of county governments.
	S. 9 requires that any substantial transaction involving the conversion of public land to private land should be approved by the county assembly.	There is no definition of what constitutes 'a substantial transaction'.	Need to clarify what substantial means so as to be clear on the instances in which the County assembly will be engaged.
	S. 134 on establishment of settlement schemes, the role of County Governments is not very clear	Development and spatial plans in counties need to factor in settlement schemes and this needs to be provided for.	Clarify the role of counties in the establishment of settlement schemes and the place of such schemes in County Integrated Development Plans and County Physical Development Plans.
	Land Act treats county governments as organic entities and does not recognize cities, towns and urban areas as sub-parts of the County.	These sub parts promote local sensitive land administration and planning and should be recognized.	Make provision for cities, towns and urban areas.
4. Community Land Act	Concentrates powers in the Cabinet Secretary.	Involving the Cabinet Secretary too much removes from the intended purpose of granting communities agency over their land. It also does not	Need to relook at the Act to grant communities agency over their land within counties.

Name of Law	Issue	Rationale/Concern	Recommendation
		<p>recognize the role that counties play in community land.</p>	
	<p>S. 6 County to hold unregistered community land in trust for the community.</p>	<p>The local authorities that held trust land in trust for the communities before the enactment of this law abused the trust.</p>	<p>Need for definition of terms of trusteeship to ensure that the integrity of community land is maintained.</p> <p>What are the obligations of the County as trustee?</p> <p>County needs to develop trusteeship rules.</p>
	<p>S. 6 (6) Any transaction in relation to unregistered community land within the county shall be in accordance with the provisions of this Act and any other applicable law.</p>	<p>Article 63: The Constitution directs that community land “shall not be disposed or otherwise used until rights of members of each community individually and collectively”.</p> <p>CLA is the Act; Need to clarify what ‘transaction’ is anticipated here as Constitution bars all dealings with community land.</p>	
	<p>S. 8 Registration of Community land.</p>	<p>Land Registration Act & Regulations (2017) have not spelt out role of counties in the Regulations.</p>	

Table 1: Review of Land and Planning Laws in a Tabulated Matrix (Cont'd)

Name of Law	Issue	Rationale/Concern	Recommendation
<p>5. <u>Land Registration Act No. 3 2012</u></p>	<p>One of the imports of the LRA is to give effect to devolution but it is not clear how this is done in the Act.</p> <p>The County Land Registrar is responsible for administering registries within county and in the implementation of policies, guidelines and strategies in accordance with this Act.</p> <p>The role of the County Land Registrar is however not clearly linked to overall County Administration.</p>	<p>Land registration should respond to county needs and be linked to county planning and development</p>	<p>Though land registration is remit of Ministry, land registered is in counties. Link County Land Registrar to County Executive in charge of land function and overall County Administration.</p> <p>Clarify the role of /relationship with the County Land Registrar in the registration of community land within the county.</p>
<p>6. <u>Land Adjudication Act</u></p>	<p>No recognition of the role of the Intergovernmental Relations Committee in settling land disputes.</p> <p>This law remains effective for three years after the enactment of the community Land Act 2016. It gives the Cabinet Secretary power to appoint adjudication officers for community registration units. It does not provide for the</p>	<p>Boundary land disputes between counties can be addressed by the Intergovernmental Relations Committee.</p> <p>The adjudication process may touch on land use planning which is the remit of county governments.</p>	<p>Provide for the role of the Intergovernmental Relations Committee in dealing with boundary land disputes.</p> <p>Provide for the involvement of county governments in land adjudication.</p>

Name of Law	Issue	Rationale/Concern	Recommendation
	involvement of counties in the adjudication process.		
<u>7. The Land Control Act</u>	<p>The framing of this Act does not take on board devolved units of government.</p> <p>The NG appoints Land Control Boards while issues they are looking into are within counties. CG currently has no role in these boards</p>	<p>The control over agricultural land, which is a land use and planning issue. This is in addition to agriculture being a county government function.</p> <p>Revise the Land Control Act and define CG roles in it.</p>	<p>Rethink the place of this statute within the context of devolution and either repeal the law and make provision for protecting the interests it seeks to protect through other devolution laws or align it to the imperatives of devolution.</p> <p>Provide for role of CG in Land Control Board Processes.</p>
<u>8. Land Law Amendments 2016</u>	<p>Concentrated on defining the relationship between the National Land Commission and the Ministry, which was very frosty. The two actors are at the national level.</p> <p>NLC powers to initiate allocation of public land moved.</p>	<p>The conflicting mandates of the National land Commission, the Ministry and Counties with respect to land management and administration need to be isolated and dealt with</p> <p>Amendment shifts power to initiate the allocation of public land to the national or county government.</p> <p>MOLPP, NLC & Counties have different functions with respect to land but</p>	<p>Look at Land Laws with a devolution lens and facilitate the delineation of functions to enable counties to carry out their land use planning function effectively.</p> <p>Need for counties to define how they exercise this power.</p> <p>Need to define County role in land governance clearly.</p>

Table 1: Review of Land and Planning Laws in a Tabulated Matrix (Cont'd)

Name of Law	Issue	Rationale/Concern	Recommendation
		property rights and contracts in the National Government.	regulation, and enforcement of land rights. Need for robust definition of land question in each county so as to define functions of the County Executive responsible for land.
	S. 8 (4) County Land Registrar shall be responsible for administering registers within the county and in the implementation of policies, guidelines, strategies in accordance with this Act	Note above the identified need to link the County Land Registrar to the County. As is couched, the CLR is an appendage of the NG.	Define CG role in land adjudication and registration and define County policies, guidelines, strategies in this area which should dovetail the National policies, guidelines, strategies.
<u>Valuation for Rating Act Cap 266</u>	Valuation aids both National Government and County Government in collection of stamp duty and rates.	Updating of valuation rolls should be done as a matter of urgency to enable both National Government and County Government to perform their tasks	Review the Act to clarify roles of County Government and National Government.
<u>Survey Act Cap 299</u>	Survey function still anchored in the National Government despite provisions of 4 th Schedule which make land survey and mapping a CG function.	The Survey Act should be aligned with the Constitutional delineation of functions between the NG & the CG. For instance “ surveyor ” in the Act means a Government surveyor or a licensed surveyor. Government is NG and licensing and regulation of surveyors trenches NG function.	Repeal the Survey Act and replace with law that reflects Constitutional provisions on devolution and assignment of roles to NG and CG.

Name of Law	Issue	Rationale/Concern	Recommendation
<p><u>The National Land Policy Sessional Paper No. 3 of 2009</u></p>	<p>The first ever NLP to guide country towards efficient, sustainable and equitable use of land for prosperity and posterity.</p> <p>Constitution requires that NLP be anchor of constitutional principles on land & that Policy should be developed & reviewed regularly by NG.</p>	<p>It predates the 2010 Constitution and while anticipating decentralization, does not include devolution entities as captured in the Constitution.</p> <p>Need for new NLP anchored in Constitution taking onboard devolution.</p>	<p>Revise the NLP. It was to be capture the institutional framework provided for in the Constitution.</p> <p>It was to be reviewed every 10 years and it is in its 9th year so it needs to be reviewed to capture the developments in the land sector and the institutional framework for land governance.</p> <p>Review the National Land Policy.</p>
<p><u>9. National Spatial Plan 2015-2045</u></p>	<p>Constitution provides for settlement of land disputes by establishing the Environment & Land Court & encouraging resolution of land disputes using local community initiatives.</p> <p>Provides for the development of administrative centres most of which will be in counties.</p>	<p>The Environment & Land Court Act has established ELC courts but they do not cover all counties.</p> <p>There is no framework for resolution of land disputes using local community initiatives.</p> <p>Need to harmonize planning imperatives at national and county levels.</p>	<p>Law to require deployment of ELC judges to all counties of for predetermined populations in different counties</p> <p>Counties to work with NG in putting together framework resolution of land disputes using local community initiatives and adhering to the Constitution.</p> <p>Align National spatial plan and county development plans.</p>

Table 1: Review of Land and Planning Laws in a Tabulated Matrix (Cont'd)

Name of Law	Issue	Rationale/Concern	Recommendation
10. <u>National Land Use Plan 2017</u>	Needs to have taken the County physical plans as starting point.	National Plan should be amalgamation of county plans taking on board national planning imperatives.	Ensure National Land Use Plan takes on board County Planning needs.
9. <u>Kisii County Rating Bill 2014</u>	S. 12 –penalty to be charged on interest for late payment at rates to be determined by county assembly S. 11 discount for early payment of rates by county assembly.	There might be a challenge enforcing this unless there is a standard measure so that the waiver or discount of rates will not be abused or subject to whims.	Provide a standard measure and put in place mechanisms to prevent abuse.
10. <u>The Nyeri County Physical Planning Bill, 2015</u>	Too many institutions created under the Bill.	Risk of overlaps thereby hampering proper functioning.	Streamline institutions under the bill.
11. <u>Nairobi City County Regularisation of Developments Act, No 3 of 2015</u>	Section 5(3) provides for extension of regularization period by no more than 6 months for more than once.	This is likely to be abused and may turn out to being extended into perpetuity thus defeating the object of the law.	Need for a cap on how many times the extension may be done. (possibly twice).

5. Conclusion and recommendations

From the foregoing, it is clear that devolution laws enacted immediately after passage of the CoK indeed reflected the spirit of the Constitution on devolution. Unfortunately land laws and related service laws are yet to be totally aligned with the CoK. Indeed the role of CGs is relegated to peripheral functions of rating and partly planning. Roles such as adjudication, survey registration and governance of land transactions remains the remit of the NG. This has implications for other sectors such as agriculture, natural resource management and general access to, control over and management of land related resources in the Counties. The NG, by omission or commission, has been trying to re centralize land functions from the CGs and the NLC. This is more evident in the Land Laws Amendment Act, 2016 and the Physical Planning Bill, 2017.

The CGs should be assisted to define their county specific land questions and define county land policies to address those questions. There are counties outside the ten that were identified for the audit that have addressed their mandates on land in a robust way as suggested here. These include Kajiado, which has a Land policy and Kericho, which has a Survey Act. Makueni has also begun a consultative process to collect views to facilitate the crafting of a land policy and law for the county. These experiences can inform the process of defining and dealing with land in the counties. CGs should also be assisted to prepare county specific land use policies to guide the county physical planning process.

Other recommendations are as below:

- » The Physical Planning Act requires a fundamental review in order to reflect the extensive post-2010 changes.
- » The Physical Planning Bill does not adequately reflect the changes brought by the current Constitution.
- » The Community Land Act does not reflect the roles of the county governments and the National Land Commission, yet these bodies have substantive roles to play in the administration of community lands.
- » Address the inconsistencies and contradictory provisions in the Land Registration Act, Community Land Act and the Land Adjudication Act.





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