

Pathways to **Devolution**

The Scope for Decentralising State Agencies

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About Us

The Africa Centre for Open Governance (AfriCOG) is an independent, non-profit organisation that provides cutting edge research and monitoring on governance and public ethics issues in both the public and private sectors so as to address the structural causes of the crisis of governance in this country. The overall objectives of our programme activities are: to promote the implementation of the Constitution of Kenya 2010; strengthen anti-corruption and good governance in Kenya with objective, high-quality research and advocacy and to build Kenyans' capacity to be permanently vigilant and monitor progress on governance issues in the public and private sectors in Kenya. We also work with others at regional and international levels to promote collective efforts towards anti-corruption, accountability, transparency and openness in governance. Our reports, policy briefs and overall work add value to anti-corruption and governance reform processes in Kenya and the region by stimulating policy discussion and supporting evidence-based advocacy and the mobilisation work of our partners.

Article 6 (3) of the Constitution provides that:

“A national State organ shall 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.”

Consequently, Section 16 (2) of the Transition to Devolved Government Act states that:

“The Cabinet Secretary of a State department or, in the case of a public entity, an authorized officer shall submit to the (Transition) Authority and the Commission for the Implementation of the Constitution a transition plan within a period specified by the Commission for the Implementation of the Constitution.”

Additionally, Article 35(1) guarantees “the right of access to–

- (a) information held by the State; and
 - (b) information held by another person and required for the exercise or protection of any right or fundamental freedom.
- (3) The State shall publish and publicise any important information affecting the nation.”

Contents

Acronyms/Abbreviations	vii
1 Introduction	1
2 The Devolution Imperative	3
3 Analysing the Context of Commission Mandates	5
3.1 Summarising the Findings	6
Cross-cutting Remarks	6
Summary of findings specific to constitutional commissions/independent office	8
3.2 Constitutional commissions/independent offices and the Devolution Gap: the way forward	14
4 Constitutional Commissions and Independent Offices: a status review	16
4.1 Transition Authority	16
4.2 Independent Electoral and Boundaries Commission	21
4.3 Public Service Commission	23
4.4 Salaries and Remuneration Commission	27
4.5 Commission on Revenue Allocation	29
4.6 Office of the Controller of the Budget	34
4.7 Public Procurement and Oversight Authority	37
4.8 National Police Service Commission	39
4.9 National Land Commission	41
4.10 Commission on Administrative Justice	48
4.11 Ethics and Anti-Corruption Commission	50
4.12 Kenya National Commission on Human Rights	54
4.13 National Gender and Equality Commission	57
4.14 Auditor General	61
5 Appendices	62

Abbreviations and Acronyms

ADR	Alternative Dispute Resolution
AG	Auditor General
CAJ	Commission on Administrative Justice
CBC	County Budget Co-ordinator
CC/IO	Constitutional Commission/Independent Office
CEC	County Executive Committee
CG	County Government
CGA	County Government Act
CIDP	County Integrated Development Plan
CoG	Council of Governors
CPSB	County Public Service Board
CRA	Commission on Revenue Allocation
CRF	County Revenue Fund
CS	Cabinet Secretary
EACC	Ethics and Anti-Corruption Commission
HDI	Human Development Index
IEBC	Independent Electoral and Boundaries Commission
IFMIS	Integrated Financial Information Management System
KNCHR	Kenya National Commission on Human Rights
KRA	Key Results Area
LAIFOMS	Local Authority Financial and Operating Management System
MDA	Ministries Departments and Agencies
MTEF	Medium Term Expenditure Framework
MTP	Medium Term Plan
NCIC	National Cohesion and Integration Commission
NG	National Government
NGCA	National Government Coordination Act
NGEC	National Gender and Equality Commission
NLC	National Land Commission
NPSC	National Police Service Commission

OCOB	Office of the Controller of the Budget
PFMA	Public Finance Management Act
PPDA	Public Procurement and Disposal Act
PPOA	Public Procurement Oversight Authority
PSC	Public Service Commission
PSCK	Public Service Commission of Kenya
PWD	People with Disabilities
S.	Section
SIG	Special Interest Groups
SO	Strategic Objective
SRC	Salaries and Remuneration Commission
TDGA	Transition to Devolved Government Act
TFDG	Task Force on Devolved Government
TRD	Traditional Dispute Resolution

1 Introduction

Article 6 of the Constitution provides for the devolution of services to 47 counties, and further provides that *all State organs must, as far as is possible, ensure the accessibility of their services across the country*. After the 2010 promulgation of the new constitution, the Ministry for Local Government established the Task Force of Devolved Government (TFDG), which researched the theory of devolution and international best practices around the framework, and consulted nationwide in the spirit of the Constitution, to produce a comprehensive report on a model devolution framework for Kenya.¹ The Constitution's Fifth Schedule provides timelines by which enabling legislation should be in place for its full implementation, the basic legislation for devolution being in place by 2012.² However, TFDG's mandate did not extend to the other important imperative covered by Article 6 (3): *that state organs must also contemplate devolving or reforming their service delivery, to conform to the distinction of the National Government (NG) from the county level of government*. The significance of that clause is that whereas in the old dispensation, State organs reached the grassroots through the central government ministries in Nairobi, which gave directives to the sub-national levels – the provinces, districts and local authorities – the new dispensation requires such organs to consider how to interact directly with county governments (CGs). Significantly, county governments do not take orders from the national level. In other words, State organs – for this report, specifically constitutional commissions and independent offices (CC/IO) of the Constitution's Chapter 15 – must, for efficiency, review their service delivery portfolios to relate to the new structure of government, distinguishing interventions directed at national government from those directed at county governments.

The Constitution's Fourth Schedule divides service delivery roles between national government and County governments.³ The County governments' roles specified in the Schedule's Part 2 were previously performed either by the sector ministries of the central government, or decentralised to their subordinates in the field (the provincial, district and sub-district levels), or delegated to local authorities or State agencies. As elaborated in Section 2 of this report, County governments are required to produce County Integrated Development Plans (CIDP), which Section (S.) 104 (1) of the County Governments Act (CGA) declares to be such that "no public funds shall be appropriated outside (CIDP) approved by the county assembly." *In effect, therefore, if State organ interventions require county government participation, then it is imperative that such State organs plan early to facilitate county government integration of their intentions into CIDP: otherwise, as declared by S. 104(1), no county government money is set aside for such activities.*

Additionally, Kenya is a country of wide socio-economic variations: 42 basic ethnic groups are scattered across seven broad agro-ecological zones which have implications for livelihood opportunities, the efficiency of service delivery, and consequent welfare attainments, amongst other factors. The failure of successive independence governments to ameliorate these socio-economic inequalities has been among the drivers of the demands for devolution: a single nationwide strategy has not adequately addressed the needs of diverse peoples and regions. Consequently, the new constitutional dispensation requires that constitutional commissions/independent offices consider reviewing their mandates and strategies for compatibility with the diverse circumstances at the grassroots where they direct their services. Socio-economic differences among county governments mean

1 Republic of Kenya (2011), Final Report of the Taskforce on Devolved Government. Volume I: A Report on the Implementation of Devolved Government in Kenya.

2 These include: Devolved Government Act – later County Governments Act; Intergovernmental Relations Act; Transition to Devolved Government Act; Public Finance Management Act; and Urban Areas and Cities Act. The actual implementation of devolution has seen amendments to some of the original legislation, while additional legislation has been enacted, such as over the transfer of monies to CGs.

3 See appendix Table A-1.1.

that some will need more or less constitutional commissions/independent office attention than others. Such a review should shape the approach settled on by such constitutional commissions/independent offices, whether a national office with missions to the counties suffices for the delivery of their services, or whether a more permanent county presence is necessary. It also offers an opportunity for constitutional commissions/independent offices to consider the scope for collaboration as a cost-minimising measure, such as by sharing basic county level resources.

Methodology and structure

The methodology of this report is purely functional. The original design of the study set out, using a questionnaire, to examine the extent to which a sample of constitutional commissions/independent offices (listed in Section 3) has prepared for devolution, viewed against international best practices. The response to the questionnaire was however poor, with many questions unanswered, especially over budgetary issues. An alternative approach was decided on: a review would be undertaken of the strategic plans of respective constitutional commissions/independent offices against the backdrop of the functions of county governments spelt out in Part 2 of the Fourth Schedule, which are mapped against strategic plan objectives and activities. This approach is intended to provide an advocacy tool through which State organs can be encouraged to rethink their approaches to implementing their objectives in the context of devolution. The approach also provides county governments with a baseline against which to instigate dialogue with constitutional commissions/independent offices on appropriately targeted service delivery.

The second section of this report provides the constitutional and legislated framework for devolution. The emphasis on these frameworks is timely since the weak adherence to them – especially by national government and the umbrella Council of Governors (CoG)⁴ – is a major explanation for the poor current status of devolution implementation.

Section 3 lists the State organs – constitutional commissions/independent offices – under consideration. It also provides the broad findings of the study on the organs' focus on the imperatives of the Constitution as they relate to devolution's distinction between national government and the interdependent county governments. The section consequently makes some initial recommendations on the way forward with respect to the restructuring necessary for State organs to meet the needs of devolution. The above conclusions grow out of analysing the respective mandates of the listed constitutional commissions/independent offices, and reviewing their respective strategies for county government-focused service delivery.

Section 4 presents the above-mentioned analysis of mandates and review of strategic plans.

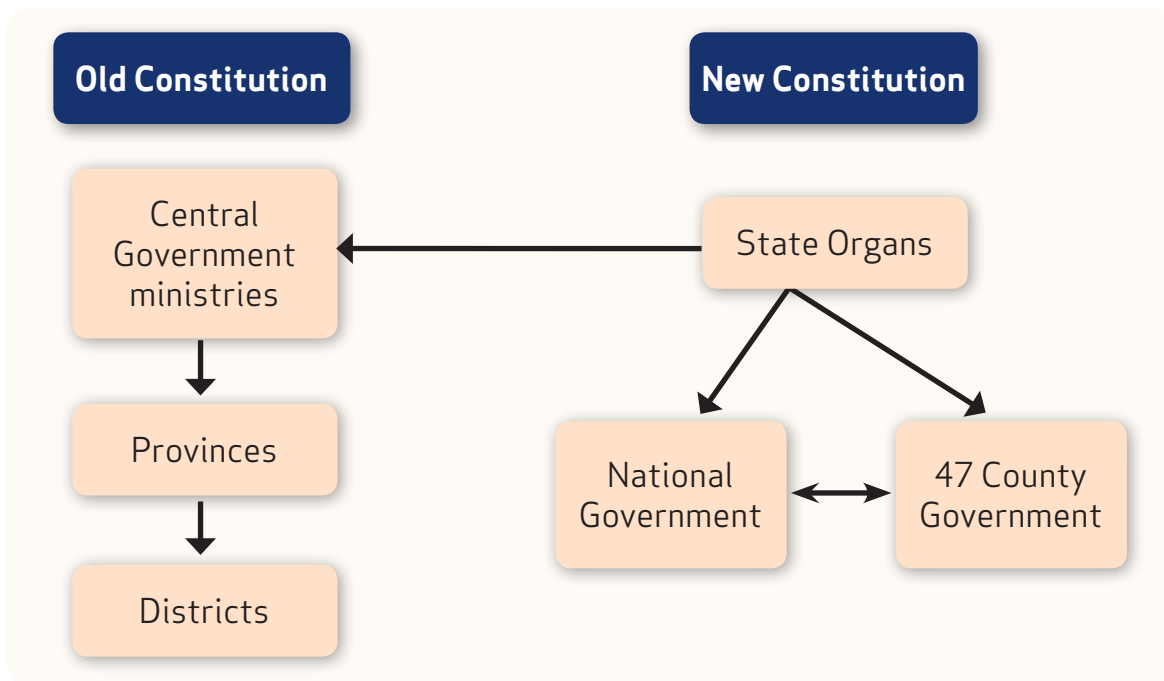
⁴ See Section 19 of the Intergovernmental Relations Act. NG succumbed to CoG demands for the one-off transfer of all services to CGs, violating the asymmetrical transfer intended by the Constitution and related legislation.

2 The Devolution Imperative

This section summarises the constitutional and legal frameworks whose full implementation should enable the full operationalisation of devolution. Besides the devolving provisions of Article 6 (cited above), the Constitution also champions ‘consulted development’ through democratic participation. Thus if the frameworks are not fully implemented and operationalised, then Kenya will have less than the devolution envisaged in the Constitution and related legislation. The frameworks focused on in this section relate directly to the opportunities provided for constitutional commissions/independent offices to meet their obligations to deliver services in a new constitutional era in which they should interact with a single national government and 47 county governments.

Having provided that the national government and county governments are distinct even if inter-dependent (Article 6 (2)), the fundamental constitutional provision is that all State organs must ensure reasonable access *in all parts of the Republic* (Article 6 (3)). Figure 2.1 illustrates the shift from the old dispensation to the new constitutional one. Note that the old subordination of the sub-national levels – the provinces and districts – to the central government ministries gives way to a new arrangement of parity between national government and the county governments. However, the Constitution mandates that county governments decentralise service delivery to a rational number of sub-county levels.

Figure 2.1: Government – the Old and New Orders



Chapter Four of the Constitution presents an extensive Bill of Rights whose provisions “belong to each individual and are not granted by the State (Article 19 (3)(a)).” The Bill of Rights “applies to all law and binds all State organs and all persons... (and must be enjoyed) to the greatest extent consistent with the nature of

the right or fundamental freedom (Article 20).” Indeed, Article 21 makes it “a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights.” Additionally, the courts are encouraged to “develop the law to the extent that it does not

(presently) give effect to a right or fundamental freedom (and to) adopt the interpretation (of laws) that most favours (such rights and freedoms) (Article 20 (3))."

Article 187 allows the transfer of functions and roles – and related resources – between the two levels of government. The operational details for county governments are provided in the County Government Act whose S. 6 (5)(b) empowers the County Executive Committee (CEC) to "contract any person, company, firm or other body for the delivery of a particular service or carrying on a particular function." CEC may decentralise county governments operations below the ward level to the extent necessary for cost-effective service delivery (S. 48). In so doing, it should observe the principles of equity, efficiency, accessibility, non-discrimination, transparency, accountability, sharing of data and information, and subsidiarity (S. 116), and the related standards and norms (S. 117).

Part XI of the Act (S. 102-115) deals with county planning: S. 103's objectives of county planning emphasise harmonising interventions – such as between national government, individual county governments and other State and non-State actors; and S. 104's obligations emphasise participation – especially by *wananchi* (citizens). The design and process of participation are highlighted in Part VIII (S. 87-92), while the civic education which is a precondition to effective – i.e. informed – participation is the subject of Part X (S. 98-101).

These provisions underscore the need for State organs to consult widely on, and declare their strategies for delivering the rights that might fall under their respective dockets. For the Bill of Rights further states at Article 35 that "(e)very citizen has the right of access to... information held by the State (and) another person and required for the exercise or protection of any right or fundamental freedom." Besides economic and social rights (Article 43), the Bill of Rights also distinguishes various characteristics and groupings

that should dictate variability in service delivery, including consumer rights (Article 46), children's rights (Article 53), persons with disabilities (Article 54), youth (Article 55), minorities and marginalised groups (Article 56) and older members of society (Article 57).

Part IV of the Public Finance Management Act (PFMA) (S. 102-186) is devoted to the management of county governments finances by the County Treasury (S. 103), which must adhere to principles of public finance (S. 102) in managing county financial resources (S. 104 and 105). The County Treasury is responsible for the development of the county development plan – CIDP – reflecting the strategic priorities of the medium term, including implementation strategies (S. 126) and related cash flows (S. 127). These undertakings fall under the wing of the County Budget and Economic Forum whose membership includes "a number of representatives, not being county public officers, equal to the number of executive committee members appointed by the Governor from persons nominated by organisations representing professionals, business, labour issues, women, persons with disabilities, the elderly and faith based groups at the county level (S. 137 (2)(c))." Consequently, the County Treasury also fulfils its other obligation of preparing the budget which must be approved by the County Assembly (S. 125), which then enables the Controller of the Budget to write approving withdrawals from the County Revenue Fund (S. 109 (6)).

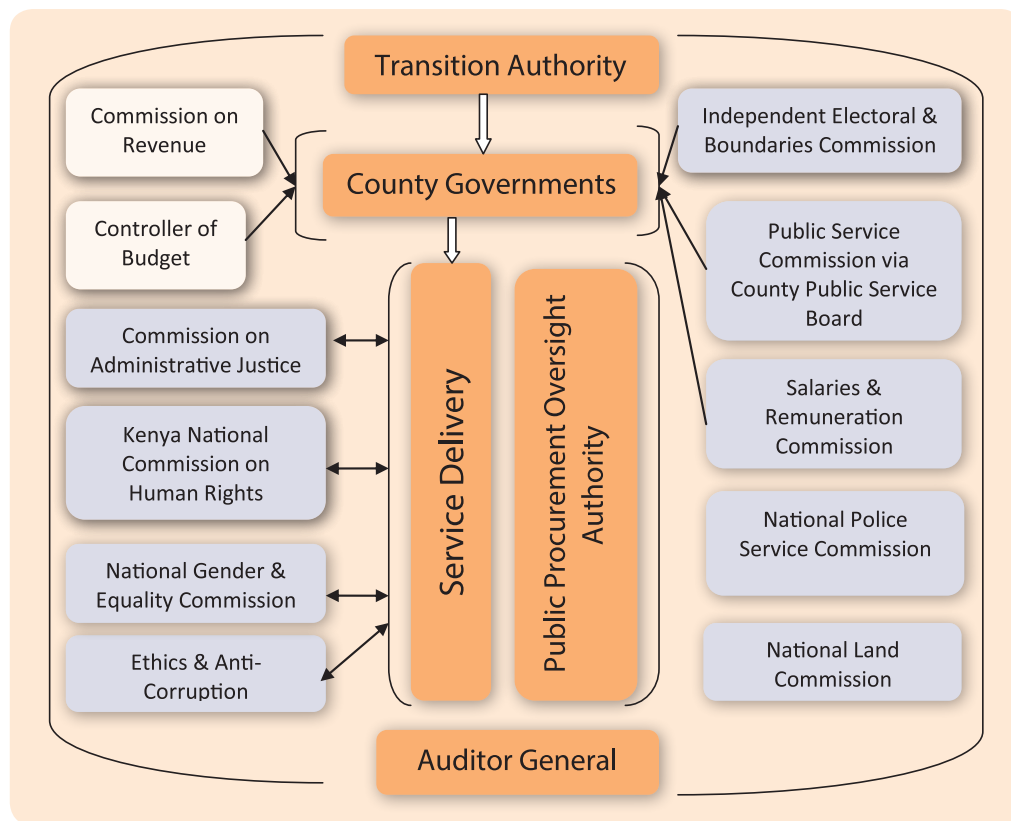
In summary, the foregoing is the context within which State organs must contemplate the most suitable entry point for delivering their services to the counties. The design of such services must involve the participation of intended beneficiaries; and county governments should reflect such proposed interventions in their County Integrated Development Plans, which validates their inclusion in budgets, and thus ensures that resources are available for implementing such plans.

3 Analysing the Context of Commission Mandates

This section presents the broad findings on the preparedness of Constitutional Commissions and Independent Organs (CC/IOs) for the imperatives of devolution. The constitutional commissions/independent offices are listed in an order that attempts to reflect their role in devolution, as conceptualised in Figure 3.1. Thus, the devolution enabling constitutional commissions/independent offices include the Transition Authority, Independent Electoral and Boundaries Commission, Public Service Commission, Salaries and Remuneration Commission, Commission on Revenue Allocation, Office of the Controller of the Budget, Public Procurement Oversight

Authority and Auditor General. The service delivering constitutional commissions/independent offices include National Land Commission, National Police Service Commission, Commission on Administrative Justice, Kenya National Human Rights Commission, National Gender and Equality Commission, and Ethics and Anti-Corruption Commission. Section 4 contains a detailed analysis of the preparedness of each of the constitutional commissions/independent offices for devolution. However, the rest of this section provides the broad findings across the constitutional commissions/independent offices.

Figure 3.1: Relating constitutional commissions and independent offices to devolution



Source: Nyanjom, O.

3.1 Summarising the Findings

The first part of this sub-section provides cross-cutting comments on constitutional commissions/independent office preparedness for interaction with county governments while the latter part summarises the situation with respect to individual State organs. On this last aspect, the distinction is made between constitutional commissions/independent offices that serve county governments specifically from those that serve *wananchi* in the counties.

Cross-cutting remarks

The conduct of the research reported here highlights the extent to which public officers in general, and those in the constitutional commissions/independent offices covered by the study in particular, violate Article 35 of the Constitution on freedom of access to public information. Across the study constitutional commissions/independent offices' public officers continue to consider access to the information to be a privilege they should rarely grant to members of the public. An understandable reason for this is that there are various statutes that threaten public servants over disclosure of information, such as the Official Secrets Act whose S. 3 threatens officers over 'acts prejudicial to the Republic', and S. 267 of the Penal Code which provides that 'information is capable of being stolen'. The Access to Information Bill 2013 is the latest

rendition of an intention that has been in the pipeline since 2005. However, its enactment might do little to free public servants over releasing information: S. 6 of the Bill's list of 'exempt information' is so broad it leaves little that can be released to the public.

The Kenya Open Data Initiative was launched in 2011,⁵ the same year that the country's e-government initiative was launched.⁶ The Initiative provides datasets to the public, giving access to information, for example, on public expenditure, parliamentary proceedings and the locations of public services. All the constitutional commissions/independent offices covered have a website with basic information, as shown in Table 3.1, covering establishing and operational frameworks, strategic plans, and periodic review reports. However, even where a strategic plan existed at the 2013 commencement of the research reported here, in many instances it was not available online. None of the websites offer work-plan and budget information; yet this is the type of information that would be useful for integration of their intentions with the work of county governments. Strategic plans have implementation matrices with projected annual activities and budgets. But, such projections are the ideal; and what county governments would require is actual activities and budgets.

5 See <https://opendata.go.ke/vision> Accessed 05/05/2014.

6 See <http://www.e-government.go.ke/> Accessed 05/05/2014.

Table 3.1: Summary of status of basic constitutional commissions/independent office information

	Establishing framework	Operational framework	Strategic plan	Annual work plan/budget	Periodic reviews
Transition Authority http://www.transauthority.go.ke/	Yes	Yes	Yes: 2013-16	No	Yes
Independent Electoral and Boundaries Commission http://iebc.or.ke/	Yes	Yes	Yes: 2011-17	No	Yes
Public Service Commission http://www.publicservice.go.ke/	Yes	Yes	Yes: Date unknown	No	Yes
Commission on Revenue Allocation http://www.crakenya.org/	Yes	Yes	Yes: 2013-15	No	Yes
Office of the Controller of the Budget http://www.cob.go.ke/	Yes	Yes	Yes: 2012-16	No	Yes
Salaries and Remuneration Commission http://src.co.ke/	Yes	Yes	Yes: Date unknown	No	Yes
Public Procurement Oversight Authority http://www.ppoa.go.ke/	Yes	Yes	Yes: 2010-14	No	Yes
Commission on Administrative Justice http://ombudsman.go.ke/	Yes	Yes	Yes: 2013-16	No	Yes
National Land Commission http://www.nlc.or.ke/	Yes	Yes	Yes: 2013-18	No	Yes
Kenya National Commission on Human Rights http://www.knchr.org/Home.aspx	Yes	Yes	Yes: 2009-13	No	Yes
National Gender and Equality Commission http://www.ngeckkenya.org/	Yes	Yes	Yes: 2013-15	No	Yes
National Police Service Commission http://npssc.go.ke/	Yes	Yes	No	No	Yes
Ethics and Anti-Corruption Commission http://www.eacc.go.ke/	Yes	Yes	Yes: 2013-18	No	Yes
Attorney General http://kenao.go.ke/	Yes	Yes	Yes: 2012-15	No	Yes

Such annual work plan and budget data require that constitutional commissions/independent offices are willing to generate clear and adequately differentiated details of proposed interventions and their related costs. Such interventions and costs should respond to Kenya’s differentiated needs across groups of people (e.g. gender and disability), regions (e.g. arid and semi arid lands vs. the highlands), etc. In turn, this requires that constitutional commissions/independent offices

consult with respective county governments to ensure there is a joint understanding of their mutual agenda of interventions, to enable county governments to integrate the same in their respective work plans and budgets. The means by which to do this is to take strategic planning not just below the national level, but also below the county and sub-county levels, as illustrated in Figure 3.2.

Figure 3.2: Incorporating county governments, regions and people groups in strategic planning

Strategy	Activities	Beneficiary Counties, Regions and/or People Groups	Budgets/Timelines
Strategic Area 1: XXXXXX			
Strategic Objective 1.1: XXXXXXX			
	Activities	Components	
	1. XXXXXXXX	• XXXXX • XXXXX	• XXXX • •
	2. XXXXXXXX	•	•
Strategic Objective 1.2: XXXXXXX			
		•	•

An impediment to streamlined planning and budgeting that is evident from Table 3.1 is the misalignment of strategic plan years. Given the evident technical capacity constraints in (some) constitutional commissions/independent offices and county governments, the misalignment of plan years compounds the already difficult task of planning and budgeting. The country’s long term planning is based on Kenya Vision 2030, which is being implemented through succeeding five-year ‘development plans’ – called Medium Term Plans (MTP).⁷ The MTPs are themselves based on the national and sectoral Medium Term Expenditure Frameworks (MTEF), which are budget systems to which the constitutional commissions/independent offices subscribe. Counties also undertake MTEF budgeting. Given such an integrated budgeting system, it is inappropriate that constitutional commissions/independent offices should have strategic plans that are in discord with national and county level planning and budgeting. The planning discord among them also makes it difficult for any cooperation capable of producing synergies.

3.1.2 Summary of findings specific to constitutional commissions/independent offices

As noted above, this sub-section makes a rough distinction between constitutional commissions/independent offices that serve county governments from those that serve *wananchi* in the counties. The

first group includes the Transition Authority (TA), Independent Electoral and Boundaries Commission (IEBC), Commission on Revenue Allocation (CRA), Office of the Controller of the Budget (OCOB), Public Service Commission (PSC), Salaries and Remuneration Commission (SRC), Public Procurement and Oversight Authority (PPOA) and the Auditor General (AG). The second group of constitutional commissions/independent offices which serve *wananchi* directly includes the Commission on Administrative Justice (CAJ), Kenya National Commission on Human Rights (KNCHR), National Gender and Equality Commission (NGEC), National Land Commission (NLC), National Police Service Commission (NPSC), and Ethics and Anti-Corruption Commission (EACC).

County Government-focused Commissions and Offices

The Transitional Authority’s mandate was critical to preparations for devolution. During Phase 1 of the transition to the March 2013 general elections that would create county governments, TA generated interim county government development plans and budgets, alongside other evaluative work on county government capacities for performing the functions set out in the Fourth Schedule of the Constitution. TA has also been critical to the establishment of the new government structure, such as through its important advisory role to county governments. However, TA’s work is incomplete, which it blames on constraints of time, due to the delay in its establishment, and finances,

⁷ The first MTP was 2008-12, followed by the current one running from 2013-17.

in a context in which political intrigues have sometimes threatened its very existence.⁸ A fundamental aspect of Kenya's devolution is that the group of 47 county governments gets an equitable vertical share of national revenues in relation to national government, and a similarly equitable horizontal share in relation to each other. Legislatively, the work of ensuring that equitable share fell to TA, which should have costed national government and county government functions ahead of the March 2013 accession to devolution, as a basis for making the interim county government budgets to June 2013. However, TA missed the deadline and has, in collaboration with the Commission for Revenue Allocation, only in 2014 engaged a consultant to undertake the assignment.⁹

The **Independent Electoral and Boundaries Commission** (IEBC) oversaw the March 2013 general elections that brought in the key officers of county governments, including the Governor and Deputy Governor, County Assembly representatives and the Senators. While IEBC had more than abundant resources, the management of the 2013 general elections was arguably below expectations, triggering challenges in the Supreme Court. The Supreme Court upheld the outcome of the presidential election even if many people questioned the court's decision.¹⁰ However, IEBC's former chief executive officer is in court on suspicion of corrupt conduct over procurement ahead of the 2013 elections. Further, IEBC's systems failed spectacularly, such as the failure of the electronic voter identification system; and evidence in a British court has also pointed to corrupt conduct by the IEBC secretariat over the printing of ballot papers.¹¹ While IEBC has regional election offices, much remains to be done at the national and sub-national levels to ensure the proper conduct of elections.

To complete the establishment of county governments, the **Public Service Commission** (PSC) was instrumental in the setting up of County Public Service Boards (CPSB), which recruited for county governments, including the county executive and assemblies, using remuneration structures advised on by the **Salaries and Remuneration Commission**. PSC also produced capacity building material for CPSBs. However, much more capacity building is necessary on human resource issues. Despite PSC and TA advisories over the deployment of employees of the defunct local authorities, these have not been accepted by some county governments, which assumed that devolution gave them exclusive right to choose whom to employ. Thus, county governments have employed without necessarily resolving capacity constraints, leading to unsustainable wage bills. The consequent recurrent spending burdens undermine attention to development spending - capital or investment - which is required to open up opportunities to reduce poverty and inequality.

Additional confusion has been created by the national government's attempt to reoccupy the counties through the National Government Coordinating Act (NGCA), resulting in a major stand-off over the proper role under devolution of the former Provincial Administration. While S. 17 of the Sixth Schedule of the Constitution provides for the restructuring of the Provincial Administration "to accord with and respect the system of devolved government", NGCA has merely tried to repackage it, as is evident in regulations 11 to 15 of the Act's Regulations.¹²

Consequent to the TA's delays mentioned above, the **Commission on Revenue Allocation** proceeded to share national revenues vertically between national government and the county government pool, and

8 See John Ngirachu, MPs to decide fate of transition agency. Daily Nation, June 2, 2014.

9 See TA and CRA (2014), Concept Paper on Costing of Functions. May 2014. TA explains its failure to undertake the costing study and other preparations for devolution on financial and time constraints, as well as working in a politically charged environment in which its very existence has occasionally been threatened. See John Ngirachu, MPs to decide fate of transition agency. Daily Nation, June 2, 2014.

10 See Bernard Sanga, Jurists fault Supreme Court ruling on presidential petition. Standard Digital. September 6th 2013. Read more at: <http://www.standardmedia.co.ke/?articleID=2000092900>

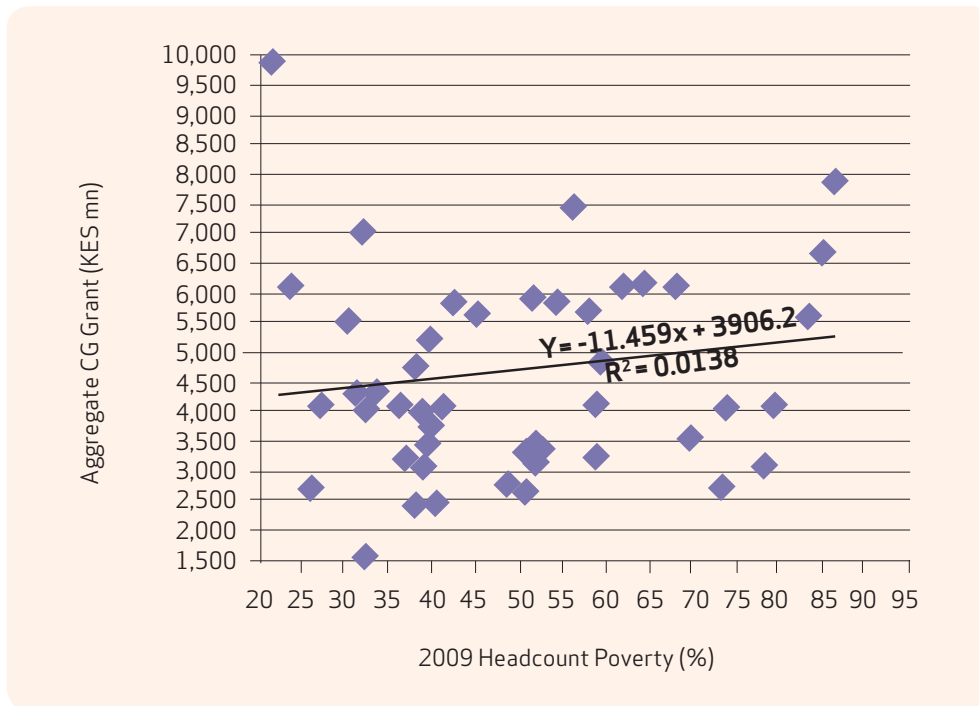
11 See David Herbling, How UK sleuths unearthed Kenya 'Chickengate' scandal. Business Daily, Friday 8th 2015.

12 See National Government Coordination (General) Regulations, available at <http://www.cickenya.org/index.php/policies-regulations/item/404-the-national-government-co-ordination-general-regulations-2014#.VU5b05OT3IU> Accessed 08/05/2015.

horizontally among the 47 county governments, without basing these initiatives on any actual costs of service delivery.¹³ Consequently, it is unclear if the respective shares of the national and county levels are equitable, given the functions assigned to them in the Fourth Schedule. Further, the formula for horizontal sharing across the 47 county governments can be criticised for allocating 45% of the resources based on population size, and only 20% based on poverty rates. A characteristic of the more populous counties is that they have higher levels of development. However, population redistribution could be achieved by investing disproportionately more in the higher poverty counties.

The fairness of CRA allocations to counties can be assessed using two welfare status measures as seen in Figure 3.3. The left-hand graph compares aggregate 2014/15 grants to county governments against the latter's 2009 poverty headcount shares, and shows that allocations marginally favoured less poor county governments – as reflected in the upward slope of the trend line.¹⁴ The right-hand graph compares the same allocations against the county governments' 2013 Human Development Index (HDI) scores, which very marginally favour the poorer counties, reflected in the downward slope of the trend line.¹⁵

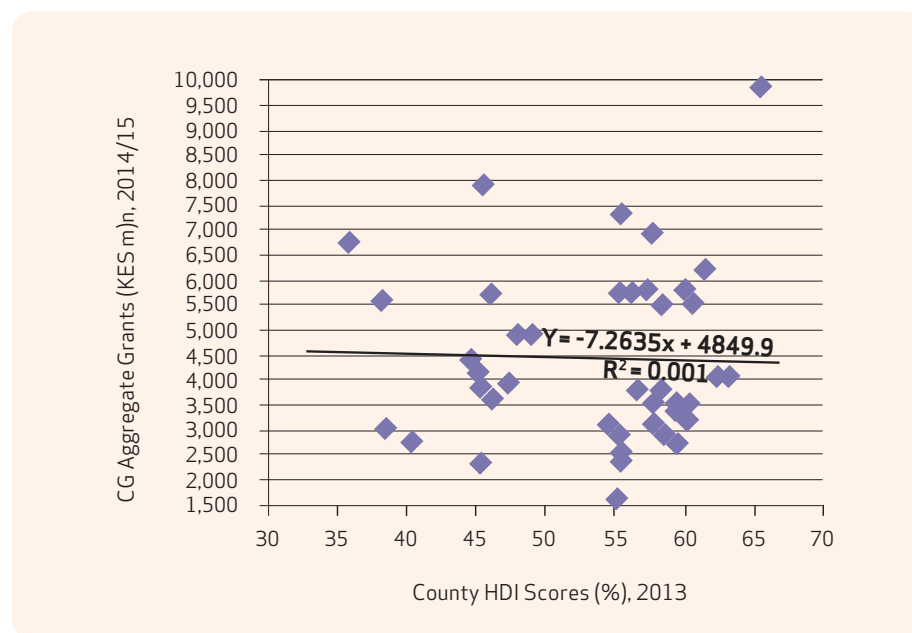
Figure 3.3: CRA allocations vs. poverty status and the Human Development Index



13 The CRA formula and some indicative allocations are available at <http://www.scribd.com/doc/120501602/Presentation-on-Functions-of-CRA-National-and-County-Governments> Accessed 05/06/2014.

14 The 'poverty headcount' is simply the share of the population with an expenditure level which is deemed insufficient to keep them out of poverty, meaning that share lives below the 'poverty line'.

15 HDI is a composite measure of incomes (poverty measure), education enrolment and life expectancy (health). That CRA allocations are 'fairer' under HDI than against the poverty status alone is unsurprising: for example, free primary education means that poorer households also have children in school who would not be enrolled if they had to pay fees.



Source: generated from CRA data and UNDP's HDI report

CRA's equitable allocations to county governments enter their respective County Revenue Fund (CRF) accounts from which money may only be withdrawn on the basis of an appropriation legislation passed by a county assembly, and the written approval of the Office of Controller of Budget (OCOB). OCOB has been quite instrumental in getting county governments to move from generating spending 'wish lists' to realistic budgets given the aggregate equitable shared pool of county government funds. As it turns out, a large share of county government spending is taken up by personnel emoluments (salaries and allowances): while the Salaries and Remuneration Commission (SRC) has advised on levels of remuneration, the driver of county government wage bills is the aggregate numbers in employment¹⁶.

Procurement

However, much county government spending has also gone into procurement to set up structures and equip the new operations. Among the greatest threats to successful devolution are the risk of corruption and the mismanagement of public funds in procurement.

The Constitution and the Transition to Devolved Government Act provided for an asymmetric transfer of functions to county governments over a three-year transition period. After a first slate of limited functions transferred on 22nd April 2013, each county government would need to convince TA that it had the capacity to deliver a particular service before TA transfers the function. This meant that some county governments would start delivering some services ahead of others. However, this retention of some Fourth Schedule county government functions at the national level meant that county governments would not get their full equitable revenue shares as allocated by the Commission on Revenue Allocation. Since some county government functions would continue to be delivered by the national government, the latter would consequently claim proportionate dues from the CRF. Faced with this reality, the umbrella Council of Governors brought political pressure to bear on the President who consequently ordered TA to irregularly transfer all the remaining functions at once, disregarding whether county governments had established an adequate capacity to deliver such services.¹⁷

¹⁶ Cf. AfriCOG, (2014), Delivering on Devolution?

¹⁷ See John Ngirachu, op cit.

The earliest reports on county government expenditure management coming from OCOB and AG suggest gross irregularities, in many instances over procurement.¹⁸ These realities arise despite the Public Procurement Oversight Authority (PPOA) establishing the Public Procurement and Disposal (County Governments) Regulations, 2013, which operationalises the national Public Procurement and Disposal Act for county governments. Despite its capacity building initiatives and field visits, PPOA seems inadequately resourced to oversee the proliferation of procurement entities which the law provides for, including county governments and their sub-entities like the county assemblies and city and urban authorities. Thus, PPOA needs an expanded capacity to ascertain adherence to procurement regulations; and both the Controller of Budget and Auditor General would do well to also focus on the legitimacy of spending, such as under AG's mandate of value for money audits. For example, certain county governments have procured vehicles for security: apart from that being a national government function, the security patrolling constraint has often been one of fuelling and maintaining available vehicles, rather than of buying them.¹⁹

People-focused constitutional commissions/independent offices

The National Police Service Commission (NPSC) has the mandate, given through the preliminary part of the Kenya Police Service Act, to vet all the officers of the former Kenya Police Force and Administration Police Force. Officers found unsuitable for the new Kenya Police Service, or any officers refusing to undergo vetting, stand removed from the Service. NPSC launched its vetting activities focusing on the

most senior police officers who initially provided some resistance. It has recently moved to officers in the regions; but the task is great given NPSC's small establishment – and therefore vetting outlays – compared to the numbers of officers to be reviewed. While the vetting process also anticipates submissions from the public – which is potentially a great source of character reference on police officers - there is little evidence that NPSC has adequately sensitised the public on this role. Thus, it will be quite some time before a substantive Kenya Police Service of verified integrity is in place, especially as preliminary findings suggest a deeply corrupt force.²⁰ This scepticism over the on-going reforms is supported by the recent High Court cancellation of a 2014 police recruitment exercise over claims of extensive corruption.²¹ NPSC has undertaken a new, hopefully more credible recruitment exercise starting 20 April 2015.²²

Land

The history of political turmoil in Kenya is a history of struggle over land – which is why a whole chapter of the Constitution – Chapter Five – is dedicated to its conceptualisation and to the policy, legal and institutional frameworks for its management. The majority of the conflict-generating grievances have been over private land (Article 64) and community land (Article 63), as opposed to public land (Article 62). However, the growth of corruption and impunity in Kenya has increasingly brought the mismanagement of public land to the fore, notably its irregular appropriation.²³ This is why the first function of the National Land Commission is the “manage(ment of) public land on behalf of the national and county governments” (Article 67 (2)(a)). But precisely because land issues have been so sensitive, vested interests

18 See OCOB's consolidated and stand alone county spending reviews at <http://www.cob.go.ke/index.php/downloads> Accessed 04/06/2014.

19 Such procurement issues are the focus of the forthcoming AfriCOG publication entitled 'Public Procurement Challenges: a case study of three counties.'

20 See Cyrus Ombati, Vetted police officers admit corruption is deep-rooted. The Standard Digital, Updated Wednesday, January 8th 2014. Read more at: <http://www.standardmedia.co.ke/article/2000101785/vetted-police-officers-admit-corruption-is-deep-rooted>. Accessed 08/05/2015.

21 See Gerald Andae, High Court orders NPSC to conduct fresh countrywide police recruitment. Business Daily, Friday October 31st 2014. At: <http://www.businessdailyafrica.com/Court-nullifies-countrywide-police-recruitment-NPSC/-/539546/2506514/-/whwd1gz/-/index.html> Accessed 11/05/2015.

22 See Cyrus Ombati, D-Day for 2015 police recruitment exercise. Standard Digital, Monday April 20th 2015.

23 See for example, AFRICOG (2009), Mission Impossible? Implementing the Ndung'u Report. Available at http://www.africog.org/reports/mission_impossible_ndungu_report.pdf Accessed 05/05/2014.

have resisted attempts to reform its management frameworks, such as by undermining efforts to rationalise legislation in order to remove multiple antiquated statutes.

A National Land Policy had been validated by stakeholders by 2009;²⁴ but politics has hampered its implementation. Thus, NLC's mandate as the custodian of the National Land Policy has been severely circumscribed, as has its general capacity to deliver on its functions. A critical obstacle to NLC operations is its umbilical ties to the parent Lands ministry which retains budgetary leverage through S. 28 of the NLC Act. NLC lacks an independent budget line, such as is given to various constitutional commissions/independent offices; and it also lacks a statutory undertaking that its operations shall be free from presidential, ministerial or other interference. Indeed, events at the Lands ministry building in May 2014 have illustrated NLC's operational vulnerability: the Lands minister unilaterally shut down the whole building, also locking out NLC officers.²⁵ Consequently, even though NLC has finally appointed representatives to the County Land Management Boards, a 27-county April/May 2014 study by the Land Development and Governance Institute found that 68% of Kenyans interviewed did not even know what NLC's mandate was.²⁶

Ombudsman

The arrival of the constitutional Commission for Administrative Justice (CAJ) – the Ombudsman – has done much to improve the scope for redressing grievances against public servants. CAJ's predecessor, the Public Complaints Standing Committee, encountered operational difficulties, primarily because it had no grounding in either the Constitution or statutes, having been established by a mere gazette notice. CAJ is sharing resources in the counties with the National Gender and Equality Council. NGECC's mandate covering gender and special interest groups

(SIG) warrants an extensive grassroots coverage as its clients include women, men, persons with disabilities, the youth, children, the elderly, minorities and marginalised communities. In a highly unequal society such as Kenya's, there is much discrimination needing attention at the national and sub-national levels, and in both the private and public sectors. NGECC's strategies include public education, gender mainstreaming and monitoring and evaluation (M&E). Given NGECC's proposed presence in the counties, it would do well to focus on children, adolescents and the youth as groups that are particularly impressionable and therefore form a good area in which to invest resources in transforming attitudes to gender and other sources of inequalities and marginalisation.

Ethics and Anti-Corruption Commission (EACC)

Through its successive manifestations since 1999, the Ethics and Anti-Corruption Commission (EACC) is probably the most well established among the constitutional commissions/independent offices examined in this report. It is likely also among the better resourced among them, which is a reflection of the importance placed on the fight against corruption – even if commitment often seems tepid. Over the decades, the Commission has been weak in delivering its mandate in that while there have been numerous high-level corruption scandals, no single such case has been prosecuted to its logical conclusion. Most such scandals have revolved around public procurement, with cases being handled centrally at the Nairobi head office. The Constitution, 2010 has greatly expanded the size of the public sector through its creation of constitutional commissions/independent offices and the additional 47 county governments under devolution. This suggests that EACC must increase its capacity at both the national and sub-national levels if its efficiency is to deter corruption, and indeed resolve existing cases.

24 See Bruce, John (2009), Kenya Land Policy: Analysis and Recommendations. Available at http://pdf.usaid.gov/pdf_docs/PNADP494.pdf Accessed 05/05/2014.

25 See Cyrus Ombati, Charity Ngilu order paralyzes Lands ministry. Standard Digital, Tuesday May 6th 2014. Read more at: <http://www.standardmedia.co.ke/?articleID=2000111088>. See also 'National Land Commission accuses ministry of taking over its role'. Standard Digital, June 2nd 2014.

26 See 'Kenyans yet to feel NLC impact, says report'. The Standard, 5th June 2014. Available at http://www.standardmedia.co.ke/mobile/?articleID=2000123609&story_title=kenyans-yet-to-feel-nlc-impact-says-report. Accessed 10/03/2015

EACC's strategic plan does not suggest any measures that specifically respond to the changes brought about by devolution. Additionally, when EACC has recently seemed to move against grand corruption,²⁷

its Commissioners have found themselves suspended awaiting a judicial investigation.²⁸ While the EACC secretariat says their work continues apace, observers feel the agency has been severely compromised.²⁹

3.2 Constitutional commissions/independent offices and the devolution gap: the way forward

The above summary of the findings of this study is inconclusive due to extensive data limitations. However, it points to various remedial measures that can be employed to ensure that constitutional commissions/independent offices make the contribution anticipated of them by Article 6 (2) and (3) of the Constitution, and by various pieces of legislation establishing the devolution framework. The broad finding is that constitutional commissions/independent offices appear not to have given adequate thought to the significance of the new governance structure involving a national government which is distinct from, even if interdependent with, 47 county governments. As noted in Figure 2.1, whereas in the old constitutional dispensation, State organs like the constitutional commissions/independent offices interacted with the sub-national level primarily through central government ministries, in the new dispensation, such organs must recognise each county government individually and identify appropriate channels of communication with them.

constitutional commissions/independent offices are obviously interacting with county governments, but they have not accorded them the recognition mandated by the Constitution and various legislation. These latter frameworks dictate absolute participation of beneficiaries in the identification of their needs, and in the design of appropriate interventions with which to address those needs. Given the capacity constraints inherent in the newly established counties, it is incumbent upon constitutional commissions/independent

offices to take the initiative to facilitate interaction with county governments, many of whose functionaries may not even know the *raison d'être* of certain constitutional commissions/independent offices. While constitutional commissions/independent offices produce strategic plans, it is clear that very few outsiders read these documents. Consequently, constitutional commissions/independent offices must reach out and introduce themselves to their constituencies.

A major constraint to effective interaction between constitutional commissions/independent offices and county governments is the failure of the former to fully espouse the letter and the spirit of the Constitution, which most of them are products of. constitutional commissions/independent offices need to fully espouse the provisions of the Constitution and would do well to follow that document's advice to the courts to be active with respect to the need for legislation securing the Bill of Rights, and to always adopt an interpretation of existing legislation that most favours the achievement of such rights (Article 20 (3)).

One area in which this is especially important is with regard to access to information, which is guaranteed by Article 35 of the Constitution. As noted above, the Access to Information Bill still remains in abeyance after more than eight years since the idea took form. Additionally, the 'exempt information' listed under Section 6 takes much away that the legislation is intended to give the public. Meanwhile, various other statutes intimidate public officers from providing

27 For example, see BDAfrica.com Reporter, Senate reveals the secrets of EACC 'List of Shame' report. Business Daily, Tuesday March 31st 2015.

28 See Kamau Muthoni, Suspension of two commissioners will not ground EACC operations, says Waqo. Standard Digital, Saturday April 25th 2015.

29 All three EACC commissioners have apparently chosen to resign rather than face the judicial investigation. See Jane Goin, Total wipe out as Matemu resigns from EACC. Capital News, May 12th 2015.

information. It is therefore necessary that the letter and spirit of the Constitution be honoured, and that the Access to Information Bill be reviewed with respect to 'exempt information', after which the law should be enacted. Additionally, all other legislation that presently intimidates public officers over publishing information be repealed, such as the Official Secrets Act.

Capacity constraints in many county governments and indeed, in some constitutional commissions/independent offices mean that all can benefit from an improved alignment of planning and budgeting frameworks. **Firstly, since all State organs subscribe to Kenya Vision 2030, constitutional commissions/independent office strategic planning should be aligned to national and county government planning and budgeting frameworks based on the MTEF and the five year MTP cycles.** This will enable county governments to more effectively integrate constitutional commissions/independent office interventions into their respective activities.

However, for such realignments to be meaningful, **constitutional commissions/independent office strategic planning must be restructured to recognise the distinctiveness of county governments from national government, as well as the varied socio-economic status across county governments, and individuals, groups and regions within and/or among them.** constitutional commissions/independent office strategic planning must reflect awareness that one size does not fit all. **Consequently, there is need to harness the multiple ideas on effective public participation.**

In order for such restructured strategic planning to be useful, **the service delivery costing exercise underway by TA and CRA should be completed so that it informs the equitable vertical sharing of resources**

between national and county governments, and the subsequent horizontal sharing of resources among counties. This should feed into CRA's finalisation of its second generation resource sharing formulae.

Capacity remains a severe constraint in county governments, despite recruiting large numbers which drive their wage bills to dominate their recurrent spending, which in turn crowds out the investment spending that is required for poverty and inequality reduction. **PSC and CPSBs should liaise with SRC and other pertinent government departments to rationalise human resource needs in county governments. Such rationalisation of staffing needs should go alongside continuous capacity building for improved productivity.**

Transparent public financial management remains a serious problem, as documented jointly and separately by the oversight bodies AG, EACC, OCOB and PPOA. **These constitutional commissions/independent offices should deepen their interactions with county governments to improve the management of public resources, addressing issues of legality as well as legitimacy.**

As noted above, wages eat into potential investment resources, and efforts should be made to also contain them within constitutional commissions/independent offices. **Thus while constitutional commissions/independent offices must recognise the distinctiveness of county governments, they must also guard against wasteful duplication of services and structures for their delivery. As some constitutional commissions/independent offices already show, there is scope for joint service delivery, such as among a public financial management cluster (TA, CRA, OCOB, PPOA and AG), or a rights cluster (IEBC, CAJ, NGEC, KNCHR, and NLC).**

4 Constitutional Commissions and Independent Offices: a status review

This concluding section of the report serves as an appendix summarising the constitutional and/or legislative roles of each of the constitutional commissions/independent offices reviewed. It reviews respective strategic plans and extracts aspects considered pertinent specifically to county governments. The thrust of Section 3 of this report was that strategic planning has hitherto stopped at a level that cannot enable constitutional commissions/independent offices and county governments to engage fully. The section argued that constitutional commissions/independent offices must take the proposed activities identified under this section a step further by producing county government-focused logical frameworks of activities, complete with the identities of intended beneficiaries, timelines of the interventions and related budgets. That would enable individual counties to integrate constitutional commissions/independent office intentions into their own CIDPs and annual work plans and budgets.

4.1 Transition Authority

The origins of the Transition Authority (TA) are in the Constitution's Article 200 (1) which requires Parliament to enact legislation giving effect to Chapter 11 on devolution, with clause (2)(b) making specific reference to legislation for the transfer of functions and powers between the two levels of government.

Additionally, S. 15 (1) of the Sixth Schedule provides for a legislated, phased transfer of functions within three years of the first election under the Constitution, with the national government facilitating the county governments' capacity to deliver their services. Consequently, the Task Force on Devolved Government recommended the establishment of a transitional authority to undertake multiple preparatory tasks ahead of the establishment of county governments, and to chaperone the asymmetric, or appropriately staggered, transfer of functions to them while also ensuring sustained service delivery.³⁰ In turn, the Constitution's Fifth Schedule had provided that legislation with which to effect Chapter 11 (Article 200 and S. 15 of the Sixth Schedule) would be in place within 18 months of the August promulgation.

Among others, the Transition to Devolved Government Act (TDGA) establishes the TA whose basic function is to "facilitate and co-ordinate the transition to the devolved system of government..." TA's detailed functions listed in S. 7 (2) are presented in Box 4.1, and include analysis for the phased transfer of functions, establishment of resource requirements and inaugural county budgets, co-ordination with relevant State organs, establishing and validating asset and liability inventories, establishing human resources status and capacity building needs, and reporting periodically on these activities to the Commission on Implementation of the Constitution.

³⁰ A service would only be devolved to a CG that provided TA with evidence it had an adequate capacity to manage the particular service. Prior to such an affirmation, such a service would continue to be delivered by the National Government.

Box 4.1: Functions of the Transition Authority

7. (2) Despite the generality of subsection (1), the Authority shall—
- (a) facilitate the analysis and the phased transfer of the functions provided under the Fourth Schedule to the Constitution to the national and county governments;
 - (b) determine the resource requirements for each of the functions;
 - (c) develop a framework for the comprehensive and effective transfer of functions as provided for under section 15 of the Sixth Schedule to the Constitution;
 - (d) co-ordinate with the relevant State organ or public entity in order to—
 - (i) facilitate the development of the budget for county governments during Phase One of the transition period ;
 - (ii) establish the status of ongoing reform processes, development programmes and projects and make recommendations on the management, reallocation or transfer to either level of government during the transition period; and
 - (iii) ensure the successful transition to the devolved system of government;
 - (e) prepare and validate an inventory of all the existing assets and liabilities of government, other public entities and local authorities;
 - (f) make recommendations for the effective management of assets of the national and county governments;
 - (g) provide mechanisms for the transfer of assets which may include vetting the transfer of assets during the transitional period;
 - (h) pursuant to section 15 (2) (b) of the Sixth Schedule to the Constitution, develop the criteria as may be necessary to determine the transfer of functions from the national to county governments, including —
 - (i) such criteria as may be necessary to guide the transfer of functions to county governments; and
 - (ii) the criteria to determine the transfer of previously shared assets, liabilities and staff of the government and local authorities;
 - (i) carry out an audit of the existing human resource of the Government and local authorities;
 - (j) assess the capacity needs of national and county governments;
 - (k) recommend the necessary measures required to ensure that the national and county governments have adequate capacity during the transition period to enable them undertake their assigned functions;
 - (l) co-ordinate and facilitate the provision of support and assistance to national and county governments in building their capacity to govern and provide services effectively;
 - (m) advise on the effective and efficient rationalisation and deployment of the human resource to either level of government
 - (n) submit monthly reports to the Commission for the Implementation of the Constitution and the Commission on Revenue Allocation on the progress in the implementation of the transition to the devolved system of government; and
 - (o) perform any other function as may be assigned by national legislation.

Section 8 of the Act lists TA's powers, including gathering – and if necessary, compelling the production of – relevant information from all sources (individuals, groups and institutions) to enable it to recommend and facilitate asset distribution between the national and county levels of government. Besides being accountable to the Kenyan people, TA is required to be fair, non-partisan and non-political in its conduct, which should reflect technical and administrative competence. TA's work involves two transitional phases, the first being from the enactment of its enabling legislation – Transition to Devolved Government Act – to the first elections under the Constitution (March 2013); while the second runs for three years after the elections and establishment of county governments. S. 16 of the Act requires that TA issues guidelines to all State agencies for their development of transition plans which they must subsequently submit to CIC.

TA developed an 8-point road map to the devolved government system incorporating the following elements:

- Optimal operationalisation of TA
- Mapping the whole of government transition activities
- Capacity assessment and development
- Functional analysis, competency assignment and costing
- Resource mobilisation
- Strategic communication and engagement
- Performance management framework
- Inauguration and operationalisation of county governments.

S. 23 of the enabling legislation provided that TA should identify the initial functions to be transferred at least 30 days before the first election of March 2013, i.e. the First Transition Period. After the elections and consequent launch of devolved governments, individual county governments would apply for further functional transfers in accordance with S.15 of the Constitution's Sixth Schedule. TA's decision criteria are based on

S. 24 of the Act, assessing established legislative, administrative and service delivery frameworks and infrastructure, functional and financial capacity, and any other factor agreed on with the county government and CIC.

Since its establishment, TA has been striving to fulfill its statutory functions despite extensive resource constraints, drawing financial resources from modest budgetary allocations and a development partner basket fund resident at UNDP. TA also lamented the constrained time-frame in which it was to deliver devolution, the high expectations of people, the political pressure to violate the law on the staggered transfer of functions, and sustained threats to the independence – and at times, existence – of TA. While S. 25 of the Transition to Devolved Government Act requires TA to publish progress reports every three months, which it should Gazette and publish in "other accessible manner as it may determine", this has not happened regularly. TA's most recent publications along those lines do not go beyond late 2013, according to its website. Indeed, one eagerly anticipates a TA evaluation of one year of devolution as at March 2014. However, TA had apparently done much work, according to its August 2013 updated report. To wit, it developed legislative frameworks and guidelines for various transitional issues, prepared the transitional budgets, took part in the MTEF 2013-2017 deliberations and civic education, and undertook a human resource audit for the counties, amongst many other tasks.³¹

TA's work is based on its assessment of the pre-conditions for the successful transition to devolution given the constitutional and legislated imperatives. Table 4.1 summarises TA's scorecard on the state of county preparedness for devolution as at August 2013. Thus, for example, county governments had no own legislation; and all but Kericho did not have a CIDP upon which to base annual work plans and budgets.

31 See Transition Authority (2013), Analysis of Counties Preparedness as at 12th August 2013: an updated report. Available at: http://www.transauthority.go.ke/index.php?option=com_jdownloads&Itemid=62&view=finish&cid=29&catid=3 Accessed 30/05/2014

Table 4.1: County preparedness for devolved government – TA indicators for 2013

	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15
Mombasa	X	✓	X	✓	✓	✓	X	✓	38	✓	X	✓	✓	✓	X
Kwale	X	✓	X	✓	✓	✓	X	✓	28	✓	X	X	✓	X	X
Kilifi	X	✓	X	✓	✓	✓	X	✓	24	✓	X	✓	X	✓	X
Tana River	X	✓	X	✓	X	x	X	✓	12	✓	X	X	✓	✓	X
Lamu	X	✓	X	✓	X	✓	X	✓	0	✓	X	X	X	X	X
T-Taveta	X	✓	X	✓	✓	✓	X	✓	11	✓	X	✓	✓	✓	X
Garissa	X	✓	X	✓	✓	✓	X	✓	3	x	X	X	✓	✓	X
Wajir	X	✓	X	-	-	-	X	x	17	✓	X	X	-	-	X
Mandera	X	✓	X	✓	✓	✓	X	✓	2	✓	X	X	✓	✓	X
Marsabit	X	✓	X	✓	✓	✓	X	✓	5	✓	X	✓	✓	✓	X
Isiolo	X	✓	X	✓	✓	✓	X	✓	15	✓	X	✓	X	✓	X
Meru	X	✓	X	✓	✓	✓	✓	✓	8	✓	✓	✓	✓	✓	X
T-Nithi	X	✓	X	✓	✓	✓	X	✓	10	✓	X	✓	X	✓	X
Embu	X	✓	X	✓	✓	✓	X	✓	16	✓	X	X	✓	✓	X
Kitui	X	✓	X	✓	✓	✓	X	✓	12	✓	✓	✓	✓	✓	X
Machakos	X	✓	X	✓	x	✓	✓	X	30	✓	X	✓	✓	✓	X
Makueni	X	✓	X	✓	✓	X	X	X	7	X	X	X	X	X	X
Nyandarua	X	✓	X	✓	✓	✓	✓	X	5	X	X	X	✓	✓	X
Nyeri	X	✓	X	✓	✓	X	X	X	16	✓	X	X	✓	✓	X
Kirinyaga	X	✓	X	✓	✓	X	X	X	18	✓	X	X	X	X	X
Murang'a	X	✓	X	✓	X	X	X	X	35	✓	X	X	✓	✓	X
Kiambu	X	✓	X	✓	✓	✓	X	✓	18	✓	X	✓	✓	✓	X
Turkana	X	✓	X	✓	✓	✓	X	✓	11	X	X	X	✓	✓	X
West Pokot	X	✓	X	✓	✓	X	X	X	6	✓	X	X	✓	✓	X
Samburu	X	✓	X	✓	✓	✓	X	✓	21	✓	X	✓	✓	X	X
Transzoia	X	✓	X	✓	✓	✓	X	✓	12	✓	X	X	✓	✓	X
Uasin Gishu	X	✓	X	-	-	-	-	-	-	✓	X	✓	✓	✓	X
E-Marakwet	X	✓	X	✓	✓	✓	X	✓	20	✓	X	X	✓	✓	X
Nandi	X	✓	X	✓	✓	✓	X	X	0	X	X	X	✓	✓	X
Baringo	X	✓	X	✓	✓	X	X	X	20	✓	X	X	✓	✓	X
Laikipia	X	✓	X	✓	✓	✓	X	X	15	✓	X	X	X	X	X
Nakuru	X	✓	X	X	✓	✓	X	✓	26	✓	✓	✓	✓	✓	X
Narok	X	✓	X	✓	X	X	X	X	16	✓	X	X	✓	✓	X
Kajiado	X	✓	X	✓	X	✓	X	✓	20	✓	X	✓	✓	✓	X
Kericho	X	✓	X	✓	✓	✓	X	✓	9	✓	X	✓	✓	X	✓
Bomet	X	✓	X	✓	✓	✓	✓	✓	25	X	X	✓	✓	X	X
Kakamega	X	✓	X	✓	✓	✓	X	X	10	X	X	X	✓	✓	X
Vihiga	X	✓	X	✓	✓	✓	X	X	9	✓	X	X	✓	x	X
Bungoma	X	✓	X	✓	✓	✓	X	✓	13	✓	X	X	✓	✓	X
Busia	X	✓	X	✓	✓	X	X	X	6	✓	X	X	✓	✓	X
Siaya	X	✓	X	✓	✓	✓	X	✓	31	✓	X	✓	✓	✓	X
Kisumu	X	✓	X	✓	✓	X	X	✓	9	✓	X	✓	✓	✓	X
Homa Bay	X	✓	X	✓	✓	✓	X	X	5	✓	X	-	✓	✓	X
Migori	X	✓	X	✓	✓	✓	X	✓	13	✓	X	✓	✓	✓	X
Kisii	X	✓	X	✓	✓	✓	X	✓	15	✓	X	✓	✓	✓	X
Nyamira	X	✓	X	✓	✓	✓	X	✓	16	✓	X	X	✓	✓	X
Nairobi	X	✓	✓	✓	✓	✓	X	✓	22	✓	X	✓	✓	✓	X

Source: Transition Authority (2013)

Note: 1–Legislation; 2–Service Delivery; 3–Capacity Assessment; 4–County Executives Committees; 5–County Assembly Service Board; 6–County Public Service Board; 7–County Chief Officers; 8–Sub-county Administrators; 9–IFMIS trained staff; 10–Integrated Personnel & Payroll D-base; 11–LAIFOMS; 12–G-Pay; 13–Procurement framework; 14–Internal Audit; and 15–County Integrated Development Plan.

However, TA is presently collaborating with the Commission on Revenue Allocation on a critical undertaking for the success of devolution: in consultation with a large number of stakeholders, the two agencies are costing service delivery at the national and county levels.³² That information will be an invaluable source of data for the equitable vertical sharing of national revenues between the two levels of government, as well as the equitable horizontal sharing of revenues among the 47 county governments. Additionally, that data will provide the county governments with a useful basis for equitable internal resource allocation.

Meanwhile, TA has developed its Strategic Plan 2013-2016 whose overriding goal is ‘Making Devolution Work’. Table 4.2 highlights key areas of the strategic plan some of which have already been implemented. S. 37 (1) of the TA’s enabling legislation provides for a three-year time frame to its dissolution. Consequently, it is unsurprising that TA only sees a staffing shortfall of 32 above its current level of 113. Additionally, the head office focus of the bulk of its staff underscores TA’s perception of itself as an advisor to county governments on transition issues, rather than an agency to be involved in the day-to-day operations of county governments.

Table 4.1: A selection of TA’s strategic areas, strategic objectives and strategies

Strategy	Activities
SA 1: Counties and national institutions performing assigned functions effectively and efficiently	
SO 1.1 Develop framework for effective transfer of functions	
	Develop framework for smooth transfer of functions for effective service delivery <ul style="list-style-type: none"> • Unbundle and cost functions • Develop function transfer framework • Review classification framework for UACA 2011 and assess classification of urban areas and cities
	Enhance management and utilisation of resources <ul style="list-style-type: none"> • Develop county planning and budgeting guidelines • Establish County Budget and Economic Forums
SO 1.3 Strengthen legislative framework	
	Enhance legislative capacity <ul style="list-style-type: none"> • Undertake gap analysis of devolution laws and regulations • Support Intergovernmental Relations frameworks
SA 2: Enhance Kenyans’ embrace of devolution	
SO 2.1 Enhance civic education on and awareness of devolution	
	Communication strategy <ul style="list-style-type: none"> • Develop civic education materials • Enhance and maintain resource centre
	Sensitise counties in their role in transition and devolution <ul style="list-style-type: none"> • Facilitate the development of a public participation framework • Co-ordinate development and dissemination of civic education curriculum • Oversee establishment of public participation platforms countrywide • Conduct civic education on transition and devolution • Undertake stakeholder mapping

32 See Transition Authority and Commission on Revenue Allocation Cap A (2014), Concept Paper on Costing of Functions. May 2014

Strategy	Activities
SA 3: Public Assets secured and liabilities established	
SO 3.1 To secure public assets and liabilities	
	<p>Develop and validate an inventory of public assets and liabilities</p> <ul style="list-style-type: none"> • Establish and audit an inventory of public assets and liabilities • Develop a framework for the transfer of assets and liabilities and validate it • Establish an information system on assets and liabilities
SA 4: Strengthen individual and institutional capacity and capability	
SO 4.1 Build the capacities of the national and county governments for effective service delivery	
	<p>Collaborate with other agencies for the development of a capacity building framework</p> <ul style="list-style-type: none"> • Develop a capacity building and training framework, including a coordination mechanism • Develop and M&E framework
	<p>Facilitate the development of a capacity assessment and rationalisation plan</p> <ul style="list-style-type: none"> • Develop a capacity assessment and rationalisation plan • Develop guidelines on the transfer and deployment of staff and their records • Develop the framework for a county pension scheme • Sensitise on and build capacity for planning and budgeting • Sensitise on and build capacity for legislative drafting

4.2 Independent Electoral and Boundaries Commission

The Independent Electoral and Boundaries Commission (IEBC) is established by Article 88 of the Constitution and operationalised by the IEBC Act (No. 12 of 2012). The Constitution lists the responsibilities of IEBC to include:

- (a) the continuous registration of citizens as voters;
- (b) the regular revision of the voters' roll;
- (c) the delimitation of constituencies and wards;
- (d) the regulation of the process by which parties nominate candidates for elections;
- (e) the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results;
- (f) the registration of candidates for election;
- (g) voter education;
- (h) the facilitation of the observation, monitoring and evaluation of elections;
- (i) the regulation of the amount of money that may be spent by or on behalf of a candidate or party in respect of any election;
- (j) the development of a code of conduct for candidates and parties contesting elections; and
- (k) the monitoring of compliance with the legislation required by Article 82 (1) (b) relating to nomination of candidates by parties.

The act added the following functions:

- (l) the investigation and prosecution of electoral offences by candidates, political parties or their agents pursuant to Article 157(12) of the Constitution;
- (m) the use of appropriate technology and approaches in the performance of its functions; and
- (n) such other functions as are provided for by the Constitution or any other written law.

The vision of IEBC is to be a credible, independent electoral management body whose conduct promotes democracy in Kenya, with a mission to conduct free and fair elections that institutionalise sustainable electoral processes. Besides the general elections and by-elections, the Commission also conducts or supervises referenda and elections for any elective constitutional body or office, or any other elections prescribed by legislation. Of specific interest to devolution, IEBC espouses teamwork and innovativeness among its seven core values. It presently has 17 regional offices distributed as follows: Nairobi; Thika; Nyeri; Central Eastern; Upper Eastern; Lower Eastern; Garissa; Wajir/Mandera; Kakamega; Bungoma; Nyanza Central; Nyanza South; South Rift; Central Rift; North Rift; South West Coast; and North Coast. The distribution of these regional offices rightfully maps the regional distribution of the national population.

IEBC's Strategic Plan lists 12 objectives very closely mapping the Commission's statutory functions. These include:

1. Strengthening IEBC's legal framework for the effective management of electoral processes
2. Increasing registration of eligible voters and maintaining a complete, accurate and current Voters' Roll
3. Enhancing the efficiency and effectiveness of the Commission in handling elections
4. Providing adequate voter education for effective participation in electoral processes
5. Promoting strategic partnerships, collaboration and networking in the electoral process

6. Integrating ICT in the management of the Commission's operations and electoral processes
7. Institutionalising risk management systems in the Commission's operations
8. Providing an enabling environment for the regulation of the activities of political parties and candidates
9. Enhancing and maintaining a positive corporate image of the Commission
10. Strengthening institutional structures and capacity of the Commission for improved service delivery
11. Promoting equity in representation and participation in the electoral process
12. Enhancing corporate governance in the Commission.

IEBC's Strategic Plan aspires to strengthen the national and sub-national political electoral process by rationalising the varied legislative frameworks currently governing it, which are presently quite perplexing to many prospective and actual candidates and voters. The Plan proposes to register 90% of eligible voters in its duration. It further proposes to develop and implement a comprehensive voter curriculum for voter education through which it intends to enlighten 90% of registered voters. In collaboration with strategic stakeholders, these undertakings are expected to develop and maintain an accurate National Voters Register with which to improve participation in electoral processes. It is therefore opportune that the Plan distinguishes special groups to target in the registration outreach, such as the nomadic pastoralists. The Plan had anticipated that its interventions would raise voter turn-out from the 72% of the 2010 referendum on the Constitution to 80% in the 2013 general elections. In the event, the turn-out stood at 85.9% suggesting, if the figures are to be relied on,³³ that IEBC's work in that respect had been more successful than in the area of integrating ICT in the voting process.

Hitherto, the voter registration process has been through brief campaigns on the eve of an election.

33 Cf. AfriCOG, Voter Registration for the 2013 general elections in Kenya, 2014. The report analyses the many problems and open questions affecting voter registration http://africog.org/reports/voter_registration_for_the_%202013_general_elections_in_Kenya

The intention has been that voter registration should be undertaken alongside the issuance of national identification cards, an exercise that involves grassroots verification of the citizenship status of applicants, in a country that hosts a large population of refugees; which underscores the importance of its proposal to enhance stakeholder involvement. The legislative restructuring is also designed to improve IEBC's management of political party affairs, enabling an improved monitoring and evaluation of political party activities. That 53 of the 59 official parties have registered offices in Nairobi is a plus for IEBC supervision; but IEBC needs grassroots activity to monitor the dynamism of these parties, which is one of the criteria for their funding. This is especially important for auditing the presidential electoral criterion of 25% votes in 50% of the counties.

IEBC also proposes an enhanced engagement in the non-electoral aspects of community life – corporate social responsibility – presumably as a means of enhancing its profile at the grassroots and indirectly marketing its core functions. While the Strategic Plan is concerned to achieve a “proportionate reduction in the average unit cost of registering a voter”, the Krieglger Report highlighted an equally important concern: that the average cost per registered voter in 2007 was US\$ 20.4 compared to US\$3.7 for Uganda and US\$0.7 for Ghana.³⁴ A significant contributor to cost-containment will be IEBC's ability to address equity in representation at the national and sub-national level by rationalising existing constituency and ward boundaries.

As reported above, IEBC already has 17 regional offices, but recognises the need for a deeper penetration into the populations of prospective voters. Thus, while it has regional offices for Upper Eastern, Lower Eastern, Garissa, Wajir/Mandera and North Rift which will target pastoralists as a specific under-registered group, the vastness of these areas and nomadic

livelihoods of their peoples point to the need for more local offices which would also support the objective of deepening voter education. A review of voter registration and balloting conduct points to regional peculiarities in electoral conduct. This suggests the need to for a nuanced understanding of the incentives for, and impediments to, participation in democracy, as a means of developing appropriately focused voter education material and setting pertinent registration strategies and targets. A greater grassroots presence will also enable IEBC to develop and test its intentions regarding the employment of ICT in its work.

On delimiting electoral boundaries, IEBC is mandated to “consult all interested parties (and) progressively work towards ensuring that the number of inhabitants in each constituency and ward is, as nearly as possible, equal to the population quota”. This delicate task over boundaries will benefit greatly from IEBC's greater grassroots penetration, which facilitates an improved engagement with local stakeholders. To this end, a glaring oversight is the Strategic Plan's failure to identify county governments individually or collectively through the Council of Governors, in its Stakeholder Analysis. The Governors' support will be critical for any delimitation of boundaries.

4.3 Public Service Commission

The Public Service Commission (PSC) is established by Article 233 of the Constitution, and is operationalised by the Public Service Commission Act No. 13 of 2012. Article 235 of the Constitution envisages the establishment of a public service management agency at the county level. PSC's vision is to be “a benchmark for a high performing, dynamic and ethical public service (which is) professional, efficient and effective for the realisation of national development goals.”

34 See the report's page 43-5. Available at http://www.mapambano.com/The_Krieglger_Report.pdf Accessed 10/03/2014.

Box 4.2: PSC's Constitutional Mandates

Article 234 of the Constitution mandates PSC to:

- a) Establish and abolish office in the public service;
- b) Appoint persons to hold or act in public offices, and to confirm appointments;
- c) Exercise disciplinary control over and remove persons holding or acting in those offices;
- d) Promote the values and principles (of) Articles 10 and 232 throughout the public service;
- e) Investigate, monitor and evaluate the organisation, administration and personnel practices of the public service;
- f) Ensure that the public service is efficient and effective;
- g) Develop human resources in the public service;
- h) Review and make recommendations to the national government in respect of conditions of service, code of conduct and qualifications of officers in the public service;
- i) Evaluate and report to the President and Parliament on the extent to which the values and principles(of) Articles 10 and 232 are complied with in the public service;
- j) Hear and determine appeals in respect of county governments' public service; and
- k) Perform any other functions and exercise any other powers conferred by national legislation.

Additionally, PSC:

- a) Nominates persons to the Judicial Service Commission and Salaries Remuneration Commission;
- b) Recommends persons to be appointed as Principal Secretaries; and
- c) Receives petitions for the removal of the Director of Public Prosecutions and recommends the appointment of a tribunal to investigate the complaints.

PSC's core functions are to establish and abolish offices in the public service, subject to the Constitution and legislation which might create structures that for example, make some elements of the public service independent of PSC (as illustrated by Article 234 (3) which distinguishes various independent service commissions).³⁵ PSC appoints individuals to hold or act in the offices it creates, and duly confirms their appointments. In exercising disciplinary authority over such officers, it also promotes the values and principles of leadership in Articles 10 and 232, and consequently investigates, monitors and evaluates personnel practices to ensure effectiveness and efficiency. PSC also has a human capacity development function for the public service and

reviews and makes recommendations to the national government on the terms and conditions of service, including qualifications for all positions, and on the code of conduct for officers. Besides reporting to the President and Parliament of performance in relation to Articles 10 and 232, and performing any other functions that emerging legislation might prescribe, PSC also hears and determines appeals in relation to the work of the County Public Service Boards (CPSB).

In effect, therefore, PSC has no direct interaction with county public servants. Instead, Article 235 of the Constitution provides that legislation provide for the latter workers' management. Consequently, S. 57 of CGA establishes CPSB to undertake the public

³⁵ During the early decades of independence, PSC was responsible for employment in the entire public service which included the civil service (incorporating the central government and some officers of the local governments), disciplined forces, and employees of the Judiciary and Parliament. Over the years however, PSC functions have been transferred to stand-alone service commissions in an ad hoc manner. The public servants no longer under PSC include State offices, and those serving in the diplomatic service, Parliamentary Service Commission, Judicial Service Commission, Teachers Service Commission and National Police Service Commission

service functions which Article 235 bestows upon county governments, which include establishing and abolishing county offices, appointing persons to act or hold those offices, and confirming their appointments, and managing disciplinary issues arising. Article 236 provides the principles surrounding victimisation and dismissal from service. S. 59 clarifies these issues in listing CPSB's functions which closely map those already listed above for PSC with respect to promotions, evaluation in relation to Articles 10 and 232, the development of a sustainable human resource framework, and reporting to the Salaries and Remuneration Commission on viable county terms and conditions of service, including pay, pensions and gratuities. S. 60 and 61 respectively provide clear criteria for the establishment and abolition of county offices, with S. 62 mandating the involvement of the county chief officer of the concerned department ahead of seeking County Assembly approval. S. 63 authorises appointments to an office at the instigation of the relevant county chief officer, clerk to the County Assembly, or at CPSB's own behest "on account of the best interest of the county public service..." The Act also addresses the procedures for appointments, confirmation of qualifications, redesignations, promotions, secondments, contracts, resignations, retirements and punishments. Finally, S. 77 provides that anyone dissatisfied with a CPSB decision with respect to any of the latter's functions, may appeal in writing to PSC within 90 days of the decision.

A major threat to CPSB work is the driving desire to hire "our own". In this respect, PSC has set the benchmark in its monitoring of equity in recruitment,³⁶ even if the National Cohesion and Integration Commission (NCIC) found that government ministries, departments and agencies (MDAs) are able to subvert the same with impunity.³⁷ PSC's 2011/12 annual report provides a template for the transparent management of human resources issues – recruitment, discipline, postings, etc – that is sensitive to the various frameworks that have arisen since the 2002 departure of the 40-year

old KANU regime, such as the Public Officers Ethics Act (2003). Thus, the report provides entry level appointments by county, shows why it rejected the LA appointments in Kisumu, Mbeere, Nakuru, Machakos and Narok, analyses the distribution of employees by gender and disability; and so on.

Soon after the August 2010 promulgation of the Constitution, PSC joined other government MDAs in attempting to rationalise their respective roles in the transition to, and into, the new dispensation. PSC's strategy declared a limited direct county government role given the anticipated establishment of CPSBs which were the product of PSC's membership of the devolution Task Force.³⁸ The PSC role analysis identified four broad areas of interaction with county governments, including:

- Ensuring norms and standards in respect to management of the Public Service in general as envisaged under Article 235 (1);
- Facilitating capacity building and technical assistance (Fourth Schedule, item 22);
- Hearing and determining appeals in respect of county governments' Public Service as contemplated under Article 234 (i); and
- Protection of Public Officers as stipulated under Article 236.

PSC particularly envisaged a role of protecting county government officers stated in Article 236 through multiple channels in the Constitution, including the following:

- Instillation of the values and principles of public service in Article 232;
- The management of urban areas and cities, including the capital city (Articles 184 (2) and 200(1));
- Support for county governments (Article 190 (1));
- (Potential) conflict of Laws between the national and county levels (Article 191(2)) and (4));
- On powers and privileges and immunities of county assemblies (Article 196(3));

36 See PSC (2012), Report of Activities and Financial Statements for the Financial Year 2011/2012. Nairobi: PSC.

37 See NCIC (2011), Towards National Cohesion And Unity In Kenya Ethnic Diversity And Audit Of The Civil Service: Volume 1, Abridged Version. Nairobi: NCIC.

38 See PSC (2011), A Proposal on Modalities for Implementation of the Commission's Mandate under the Constitution, December 2010/March 2011.

- Concern with communities and their cultural diversity (Article 197 (2));
- Establishment and abolition of offices and appointment to those offices (Article 234 (2)); and
- Instillation of norms and standards (Article 235 (1)).

PSC identified a key function in relation to CPSBs to be the interpretation of Kenya's commitments to various international conventions regarding employment and labour, in accordance with Article 2 (5)'s declaration that "(t)he general rules of international law shall form part of the law of Kenya." Additionally, sub-article (6) provides that "(a)ny treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution." Besides Article 181 (1)(b)'s provision that a governor may be impeached for breach of international law, PSC's attention to international law is also important because this is mentioned in various other areas of the Constitution, such as articles 21 (4), 51 (3)(b), 132 (1)(c)(iii) and (5). Among the international laws or conventions that PSC highlights are the following:

- Universal Declaration of Human Rights 1948 – the basis of the Constitution's Chapter Four
- United Nations Convention against Corruption – signed by Kenya in December 2013
- Convention on the Rights of Persons with Disabilities
- Convention on Elimination of All Forms of Discrimination against Women
- Industrial Relations Charter Discrimination (Employment and Occupation) Convention 1958
- Maternity Protection Convention – which entitles to 14 weeks of maternity leave; and
- Declaration on Fundamental Rights and Freedoms at Work, 1998.

Consequently, PSC published guidelines for the management of public officers seconded from the national to the county level.³⁹ In this regard, PSC distinguished four categories of personnel under

such secondment, and spelt out both their continuing employment status as well as their reporting lines given the potential duality of their allegiances in working under a county government but retaining their contractual obligations with national government. The first group of such personnel was that of the Interim County Transition Teams established by TA, including the Interim County Executive Team (backed by an Interim County Secretary) Interim County Treasury Team and Interim County Assembly Team reporting to the Speaker through the Interim Clerk.⁴⁰ These interim officers would continue in service until the CPSB is duly constituted and makes its own substantive appointments to those positions.

The second group PSC advises on is that of the employees of the former local authority (LA), which ceased to exist immediately after the first election of county governors and their deputies ushered county governments into existence.⁴¹ Guided by S. 138 of CGA and S. 57 of the Urban Areas and Cities Act, such officers were seconded to county governments until these absorbed them, or returned them to national government. The third category PSC advised on were the Civil Servants performing devolved functions which have yet to be transferred to the counties. Essentially, these were officers of the various sectors/ ministries who had, prior to the accession of county governments, been serving at the sub-national level, in the provinces, districts and below.⁴² These were also seconded by virtue of S. 138 of CGA, and would report to their respective head offices with copies of their reports given to the governors. Given the intended progressive transfer of Fourth Schedule roles, this arrangement would obtain until specific officers functions were transferred to county governments, after which they would be fully integrated in county governments.

The final group was that of National Government Administrative Officers working in the counties (under the National Government Coordination

39 See PSC (2013a), Guidelines On Management Of Public Officers Seconded To County Governments. March 2013.

40 See PSC (2013a: 2-5).

41 See PSC (2013a: 5-8).

42 See PSC (2013a: 9-11).

Act (2013) (NGCA).⁴³ The latter legislation was the product of S. 17 of the Sixth Schedule's provision that "the national government shall restructure the system of administration commonly known as the provincial administration to accord with and respect the system of devolved government..." Thus NGCA provided for County Commissioners, Deputy County Commissioners, Assistant County Commissioners, Chiefs and Assistant Chiefs who would report to national government, but consult and co-operate with their respective county governments.

Specific to PSC's own area of extensive specialisation, it produced a manual on human resource management for the incoming CPSBs.⁴⁴ Additionally, PSC produced: (i) PSCK Guidelines on Mainstreaming the Rights of Persons with Disabilities, (ii) Guidelines for the Public Officers Ethics Act (2009), and (iii) Guidelines on Declaration of Income, Assets and Liabilities.

From the foregoing, it is evident that if PSC enables CPSBs to develop adequate capacity, then there should be little or no need for sustained PSC interaction at the county level.

4.4 Salaries and Remuneration Commission

The Salaries and Remuneration Commission (SRC) is created by Article 230 of the Constitution, its powers and functions being spelled out in sub-article (4). Prior to the creation of SRC, public service terms and conditions of employment were determined through multiple processes, including administrative reviews, collective bargaining for unionised workers, and institutional processes. The Ministries of Finance and

Labour, and the Pensions Department were involved, as were various other institutions as they came into existence, including the Parliamentary Service Commission, Judicial Service Commission, Teachers Service Remuneration Committee, Kenya National Audit Commission, State Corporations Advisory Committee, and Armed Forces Remuneration Review Board. Additionally, remuneration was set on an *ad hoc* basis, such as over the recruitment of single sourced officers seconded from international bodies,⁴⁵ for instance. These multiple approaches led to an unsustainable context in which terms and conditions of employment did not depend on qualifications or performance, but rather on what public sector agency one worked for and/or what patronage one had access to when negotiating remuneration⁴⁶.

Thus, SRC was established to:

- (a) set and regularly review the remuneration and benefits of all State officers;⁴⁷ and
- (b) advise the national and county governments on the remuneration and benefits of all other public officers.

In undertaking the foregoing functions, the SRC Act also mandates the Commission to:

- inquire into and advise on the salaries and remuneration to be paid out of public funds;
- keep under review all matters relating to the salaries and remuneration of public officers;
- advise the national and county governments on the harmonisation, equity and fairness of remuneration for the attraction and retention of requisite skills in the public sector;
- conduct comparative surveys on the labour markets and trends in remuneration to determine the monetary worth of the jobs of public offices;

43 See PSC (2013a: 12).

44 See PSC (2013b), County Public Service Human Resource Manual. May 2013.

45 Such recruitment is often referred to as 'head-hunting', whereby an officer is purposively selected for local assignment.

46 See AFRICOG, (2015) "Golden Handshakes: Retirement Benefits of Senior State Officials"

47 Article 260 declares that 'State officers' means the collectivity of offices, organs and other entities comprising the government of the Republic under the Constitution. They include: President; Deputy President; Cabinet Secretary; Member of Parliament; Judges and Magistrates; member of a commission to which Chapter Fifteen applies; holder of an independent office to which Chapter Fifteen applies; member of a county assembly, governor or deputy governor of a county, or other member of the executive committee of a county government; Attorney-General; Director of Public Prosecutions; Secretary to the Cabinet; Principal Secretary; Chief of the Kenya Defence Forces; commander of a service of the Kenya Defence Forces; Director-General of the National Intelligence Service; Inspector-General, and the Deputy Inspectors-General, of the National Police Service; or an office established and designated as a State office by national legislation.

- determine the cycle of salaries and remuneration review upon which Parliament may allocate adequate funds for implementation;
- make recommendations on matters relating to the salary and remuneration of a particular State or public officer;
- make recommendations on the review of pensions payable to holders of public offices; and
- perform such other functions as may be provided for by the Constitution or any other written law.

Article 230 (5) specifies the principles SRC should consider in undertaking its task, which evidently underscore the need for a sustainable and just remuneration framework. The principles include the need to:

- ensure that the total public compensation bill is fiscally sustainable;
- ensure that the public services are able to attract and retain the skills required to execute their functions;
- recognise productivity and performance; and
- (champion) transparency and fairness.

Section 12 of the Act also revisits the operational SRC principles emphasising equal remuneration to persons for work of equal value, against the backdrop of work done along these lines by previous commissions. Additionally, the legislation specifies the powers under which the Commission conducts its work, including powers to:

- gather, by any means appropriate, any information it considers relevant, including requisition of reports, records, documents or any information from any source, including governmental authorities;
- interview any individual, group or members of organisations or institutions and, at the Commission's discretion, conduct such interviews;
- hold inquiries for the purposes of performing its functions under this Act; and
- take any measures it considers necessary to ensure that in the harmonisation of salaries and remuneration, equity and fairness is achieved in the public sector.

During its three years of existence, SRC has undertaken work in fulfilment of its mandate, sometimes with a lot of resistance from entities that were antagonistic to the idea of rationalising remuneration in the entire public service. In this context, it has produced the following reports which have been the basis of its recommendations on State remuneration as well as its advice to other public agencies:

- In-depth Analysis on Private Public Sector Wage Differentials: this enabled a realisation that constitutional offices have raised the average public sector earnings above the private sector, especially because of allowances.
- Job Evaluation Exercise - between the public sector and the private sector but also within the public sector.
- International Remuneration Comparative Analysis: for Kenyan competitiveness, a study on international practices in remuneration determination for State officers, over remuneration practices, levels and structures; internal and external relativities and comparison of benchmark positions relative to per capita GDP of respective countries.
- Setting and Harmonization of Remuneration.
- State officers: the Commission used the result from the Job Evaluation Exercise and the analysis from the International Remuneration Survey, to set remuneration and benefits levels for State officers.
- Impact of the Set Remuneration and Benefits for State Officers: reduced compression ratio and capped allowances.
- Advice on Remuneration for Other Public Officers to national and county governments.
- Harmonising and Restoring Equity in Remuneration Cycle: move from 2 to 5 year cycle to 4 year cycle.
- Development of Database for Analysis and Review/Determination of Remuneration Levels: open to public.

SRC's Strategic Plan 2013/2018 underscores the need to develop a framework for ensuring compliance with its recommendations, which should require a greater

presence – whether permanent or *ad hoc* – at all offices dealing with wages, and at the sub-national level, as well as self-reporting by such offices, and a greater personal obligation for compliance by accounting officers.

4.5 Commission on Revenue Allocation

The Commission on Revenue Allocation (CRA) is a constitutional office established by Article 215 of the Constitution, whose primary function is to make recommendations concerning the basis for the equitable sharing of revenues raised by the national government (Article 209 (1)) between the national and county governments, and consequently among county governments (Article 203). CRA is also expected to make recommendations on matters concerning the financing of county governments and their financial management performance (based on the Constitution and related legislation), paying attention to the initial inequalities in endowments and welfare attainments. CRA is also mandated to develop and regularly review a policy on, and criteria for, identifying marginalised areas and sharing the 0.5% of national revenue that Article 204 sets aside for such areas. CRA recommendations are forwarded to Parliament (Senate and the National Assembly), the national executive (National Government – notably the National Treasury), county assemblies and county executives. CRA is also mandated to look for new ways of enhancing revenues at both levels of government while also encouraging fiscal responsibility.

CRA's vision is to create "(a) prosperous Kenya through equitable public resource sharing" while the mission is "(t)o make expert recommendations on equitable sharing of revenue, financing of, and financial management for both national and county governments". CRA has a County Fiscal Affairs division whose function is "to position the counties for the effective roll out of devolved government, building a knowledge base on counties, (to) clarify and cost functions at the two levels of government, support the development of devolution structures, systems

and role clarification, and define and enhance revenue sources."

In its strategic plan 2013-2015, CRA presents a SWOT analysis that appreciates the teething challenges of a new organisation trying to develop capacity for its constitutional obligations amidst a heritage of bad governance, which poses a threat to institutional credibility. The lack of quality county data complicates analysis in a highly politicised context in which operational diversions are a reality. However, CRA draws strength from its exclusive and independent constitutional role, specifically on revenue sharing, and anticipates that its adequate and timely resourcing will enable it to acquire the necessary capacities in good time to augment the existing commissioners' experience. While devolution is a novelty in Kenya, CRA can draw on global experiences and can count on much goodwill from the public and development partners even if government support waxes and wanes.

Of the environment in which it operates, CRA says it "will endeavour to maximise on positive factors as it mitigates the effects of negative environmental factors." Its core equitable budgeting function will be heavily politicised due to historical resource-sharing injustices inevitably leading to counties that 'gain' versus those that 'lose', which itself complicates enhancement of fiscal discipline amidst low usage of enablers like ICT. In turn, such 'politics' might undermine the constitutional and legislative frameworks, which have hitherto been well received. A significant concern in mitigating adversity for most Kenyans is the persisting dominance of nature in how they earn their livelihoods.

The strategic plan's four key result areas (KRAs) and among the 14 strategic objectives that directly relate to county level activities are summarised in Table 4.3. The four KRAs are inextricably intertwined, and have a bearing on the strategy for CRA's interaction with the counties. Resource constraints are likely to make CRA prefer periodic – possibly regional – interactions with county governments, rather than having a permanent presence in each of the 47 counties.

Table 4.3: Selected strategic objectives in CRA strategic plan (1)

KRA 1: Devolved Fiscal Systems And Transfers		
SO 1. To develop and review principles, criteria and policies for fiscal decentralisation		
	SO 1.1 Develop framework for effective transfer of functions	
	Promote better understanding of the principles, criteria and the policies for fiscal decentralisation framework	<ul style="list-style-type: none"> Conduct semi-annual expert and stakeholder forums Articulate principles, criteria and policies of fiscal decentralisation Conduct peer to peer learning
SO 2. To develop and review policies and principles for equitable revenue sharing		
	Develop vertical and horizontal-sharing formula	<ul style="list-style-type: none"> Collect, collate and analyse as required Engage the public on proposed weights and allocations
	Advise on the equitable sharing of benefits accruing from natural resources	<ul style="list-style-type: none"> Make recommendations on laws and policies touching on the sharing of benefits from natural resources Make specific recommendations on the sharing of specific natural resources
SO 3. To develop principles and policies for sharing the Equalisation Fund		
	Development of policy on marginalisation	Conduct research for identifying marginalised areas
	Set out criteria for identifying marginalised areas	Public participation - test acceptability of criteria identified
SO 4. To develop a legislative and institutional framework		
	Review and champion the legislation on fiscal decentralisation	Enhance public awareness on legislation touching on fiscal decentralisation
SO 5. To develop knowledge, systems and structures to support counties for the effective roll out of devolved governments		
	Structured engagement with county governments	<ul style="list-style-type: none"> County visits Enhance public knowledge on counties and devolved government Build institutional capacity on devolved government Cost the functions at two levels of government Semiannual forum with the Senate
	Develop an integrated, reliable and consistent database at both national and county government levels	<ul style="list-style-type: none"> Build a statistical database Develop and implement standard memorandum documents that inform working relationships on data sharing with key stakeholders such as KNBS Encourage/promote usage of information systems and structures by counties

KRA 1 is the **development of devolved fiscal systems and transfers**, arguably CRA's most important objective viewed against its constitutional mandate. Among KRA 1's strategic objectives (SO), the first – SO1 – is largely a desk review of international best practices, such as on vertical and horizontal revenue sharing (SO2), and fiscal decentralization (SO4), that enables the development of educational and sensitisation material for all stakeholders, including the National Treasury, legislators (including the County Assemblies), county governments and non-government stakeholders, including *wananchi*. There will be multiple modes of dissemination, such as the print and electronic media, workshops, seminars, and public meetings. It will be especially important that the National Treasury and legislators buy into good fiscal decentralisation recommendations if the transfers of resources are to be efficient for county level service delivery. Indeed, some of CRA's strategic objectives seem to stray into the Transition Authority's statutory functions listed in S. 7 of TDGA, which amongst other things, mandates TA to oversee "the whole transition process as provided by section 15 of the Sixth Schedule of the Constitution." Thus, CRA need only look out for TA outputs, with section 7 (2)(n) of TDGA mandating it to "submit monthly reports to the Commission for the Implementation of the Constitution and the Commission on Revenue Allocation on the progress in the implementation of the transition to the devolved system of government." A most important TA report with respect to CRA's SO 2, 3 and 5 is that of its costing of the relative services of the national and county governments and the related capacity needs (S. 7 (2) (b) and (j)). Thus for KRA 1, there seems to be no need for a permanent CRA presence in the counties, even if there is a need for sustained interaction for peer-to-peer learning experiences.

One task that is exclusively CRA's – accorded by Article 204 (4) of the Constitution, is the management of the Equalisation Fund. It consequently developed a fund management framework that defines marginalisation

based on a County Development Index, historical injustices and information from a CRA survey across counties.⁴⁸ Article 204 (2) ring-fenced the Fund for "marginalised areas" which CRA chose to interpret in terms of counties, instead of areas within counties. This means, for example, that Taita Taveta County is included among 'marginalised areas', but Kajiado County which shares the semi-arid Tsavo is excluded. An obvious assignment for CRA is to improve its framework for identifying 'marginalised areas' which the Constitution identifies to need "basic services including water, roads, health facilities and electricity."

With respect to KRA 2 on **public financial management** (Table 4.4), again it seems that CRA is over-stepping its bounds, this time into the domain of the multiple managers of the Public Financial Management Act (PFMA). Various operational bottlenecks have impeded TA work, especially low budgetary resources, meaning it probably has not adequately delivered on its mandate specified in S. 7(2). While financial management frameworks also had some birthing problems – such as the politically contentious 2012 finance management bills of Treasury and the Local Government ministry,⁴⁹ implementation of PFMA mandates has been less contentious. Thus for example, other than making the arguments for the 'correct' vertical and horizontal sharing of national revenues and the Equalisation Fund, it is unlikely that CRA could add value to the financial management frameworks provided by PFMA, whose parts cover: II – Parliamentary Oversight; III – National Government obligations; IV – County Government obligations; V – Intergovernmental public finance relations; VI – Public sector financial accounting; and VII – Enforcement of regulations. PFMA is the integration of previous government public financial management frameworks and devolution ideas generated by the 2011 Task Force of Devolved Government. Under SO 1, for example, CRA proposes activities to oversee disbursement of county funds, which is the docket of the Controller of the Budget, as noted elsewhere in this report.

48 The sharing out of the Equalisation Fund is available at <http://www.crakenya.org/wp-content/uploads/2013/02/CRA-POLICY-ON-THE-CRITERIA-FOR-IDENTIFYING-MARGINALISED-AREAS.pdf> Accessed 12/02/2014. The beneficiary counties in order of 'merit' include Turkana, Mandera, Wajir, Marsabit, Samburu, West Pokot, Tana River, Narok, Kwale, Garissa, Kilifi, Taita taveta, Isiolo and Lamu

49 While devolution was a docket under the Local Government ministry, the Finance ministry insisted on its developing the framework for managing devolved public funds, hence the conflicting bills.

Table 4.4: Selected strategic objectives in CRA strategic plan (2)

KRA 2: Public Financial Management	
SO 1: To develop and implement an oversight framework for prudent financial management at both levels of government	
Promote understanding of the public financial management framework	Develop and disseminate Frequently Asked Questions (FAQs) List on PFM institutions and their roles
Develop CRA structures for handling PFM report submissions by both levels of government	Establish follow up and feedback mechanism for delinquent reports
Develop criteria for determining fiscal responsibility of counties	Develop and disseminate criteria for measuring fiscal responsibility
Establish performance standards and incentives	Develop manuals and reference materials for criteria application Develop an incentive scheme on fiscal responsibility Reward counties on fiscal responsibility
Promote awareness and the use of the fiscal responsibility monitoring framework	Monitor county fiscal responsibility Ranking counties on fiscal responsibility Publish county ranking report of fiscal responsibility Disseminate county ranking report of fiscal responsibility
Oversight on county funds' disbursements	Develop monitoring framework for county funds disbursement Implement monitoring framework for county fund disbursement Encourage/support timely funds disbursement
Support the formulation of integrated development plans (IDPs) for both national and county governments	Actively participate in the formulation of IDPs Identify, analyse and review PFM processes that require public participation
SO 2: To support intergovernmental relations in financial management	
Facilitate planning, prioritisation of activities and budgeting for both levels of government	Participate in the development of the Budget Review and Outlook Paper Participate in the Budget and Economic Council Participate in the development of County Integrated Development Plans Participate in the budget policy statement for national government and County Fiscal Strategy Paper
Promote harmonisation of financial management reporting and inter-county learning	Review and standardise reporting formats Establish financial management reporting help lines Identify financial management reporting centres of excellence Establish intra-county PFM forum
Interrogate and make recommendations on the debt management strategy for both national and county debt management	Review legal provisions to ensure equitable guarantees to county government Monitor debt levels at all levels of government Make recommendations on debt sustainability

However, CRA can join the various other bodies with a civic education mandate, including NT, county governments and TA, in sharing that onerous burden of promoting an understanding of the new financial system. Given the initial contestations of the frameworks eventually included in PFMA, and the strife between the Council of Governors and TA over the latter's mandated oversight of the staggered transfer of services to the counties, CRA could usefully monitor these issues to ensure the letter and spirit of devolution law is observed.

Revenue enhancement is an imperative if devolution is to take root and succeed since national revenue is unlikely to cope, especially given growing national fiscal responsibilities (see (KRA 3/SO1 in Table 4.5).

However, here again, it is not clear why CRA should have a comparative advantage in identifying new sources of revenue, or indeed, in facilitating counties setting up policy and legislative frameworks for own revenues, as indicated in KRA 3. Nor is it clear why CRA should be involved in "mapping and exploitation of natural resources", which sounds like a highly technical activity which Kenya typically out-sources to international enterprises. Already, county financial legislation has demonstrated a weak conceptualisation of own county revenues, often copying and pasting prospective revenues from domains which are quite dissimilar.⁵⁰ Thus, an area CRA should invest in is capacity building for rational county revenue proposals, involving short courses for the county finance offices and legislators.

Table 4.5: Selected strategic objectives in CRA strategic plan

KRA 3: Revenue Enhancement	
SO 1: To develop innovative approaches for revenue enhancement	
Map out sources of revenue for both levels of government	<ul style="list-style-type: none"> Conduct a baseline survey on existing sources of revenue Compile and publicise existing sources of revenue Perform county and national resource potential surveys Document and publicise county and national potential source of revenue reports Identify and review existing laws and make recommendations
Facilitate county governments to set up policy and legislative frameworks on their revenue-raising measures	<ul style="list-style-type: none"> Develop a framework based on international best practices on sub-national revenue raising measures Dissemination of the framework and training of county government staff Identify pilot counties and oversee implementation of the framework Review the framework based on the lessons learnt and replicate Review legal enforcement structures Promote knowledge and use of enforcement options Promote tax morale through taxpayer education
Support the mapping and exploitation of natural resources	<ul style="list-style-type: none"> Perform stakeholder mapping Facilitate national natural resources mapping Obtain and evaluate existing agreements and concessions on natural resources Make recommendations on policies and laws on natural resources in consultation with the public

50 In developing the finance bills, many CGs have simply adopted the fees and rates from Nairobi City Council, for example

SO 2: To develop structures for increased efficiency and operational effectiveness

Promote PPPs and inter-county coordination in project planning	Review and make recommendations on the legal framework Benchmark against international best practices
Develop structured engagement with the stakeholders on revenue enhancement	Develop a framework for stakeholder engagement Revamp stakeholder involvement

Under KRA 3's SO 2, it is not clear what 'increased efficiency and effectiveness' is referred to, especially when one sub-strategy refers to public-private partnerships while the other refers to stakeholder engagement frameworks.

KRA 4 is inward looking, about how to improve CRA, rather than those that its work targets. It should therefore have come first, because it is CRA's internal institutional capacity that determines what it can do with the national and county governments and other stakeholders. An alternative reading of the situation is that CRA sees its interactions with others defining its capacity needs – which could explain the 'wish list' of activities in its KRAs 1 to 3. However, such an approach is untenable since CRA's functions are specified in a statute.

In discharging its functions, CRA aims to consult widely, carry out research, review information, solicit expert opinions, adhere to legislative requirements and lobby for recommendations to be adopted and implemented.

4.6 Office of the Controller of the Budget

The Office of the Controller of the Budget (OCOB) is established by Article 228 of the Constitution as an independent office to "oversee the implementation of the budgets of the national and county governments by authorising withdrawals from public funds under Articles 204, 206 and 207." The Constitution mandates OCOB to only authorise withdrawals which are lawful, and to report to both houses of Parliament on a

quarterly basis on the implementation of budgets at the national and county levels. Thus OCOB authorises the withdrawal of financial resources from the Consolidated Fund (as provided by S. 17 (5) of PFMA), Equalisation Fund (PFMA, S. 18 (4)), and the County Revenue Fund (PFMA, S. 109 (6)), thereby triggering implementation of national government and county government development plans, including service delivery. OCOB draws heavily on the public finance principles enumerated in the Constitution's Article 201, notably accountability, prudent and responsible public resource use and clear fiscal reporting. There is no specific OCOB legislation, its functions being operationalised through PFMA's presentation of the public finance management cycle, as well as the Constitution's Article 252 (1) which provides the general functions and powers of commissions.

OCOB has a Budget Implementation Directorate which develops the policies and procedures for budget implementation and reporting, which it oversees, with withdrawals being based on accurate documentation, the preparation of the quarterly, and annual and occasional or special reports. Additionally, the directorate ensures timely and accurate gazettelement of monthly exchequer releases, and develops monitoring and evaluation policies with which it monitors the legality of budget implementation on which it reports to OCOB. In response to the National Treasury stopping the flow of funds to a particular State organ or public entity, OCOB is obliged to investigate the circumstances, and advise on how to resolve the impasse, on which it must report to Parliament. Only OCOB's advice can reverse the stoppage of such funding flows. OCOB also has the authority to instigate investigations on financial management, or

undertake them in response to complaints from the public. Finally, OCOB may employ alternative dispute resolution mechanisms to reconcile, mediate or

arbitrate in financial management disputes between the national and county governments and among county governments.

Box 4.3: Type of OCOB Reports

- Quarterly Reports on Budget Implementation to the Executive and Parliament Article 228 (6)
- Annual Reports on Budget Implementation to the President and Parliament Article 254 (1)
- Special Reports to the President and Parliament Article 254 (2), investigation reports (Article 254 (2)) and reports on stoppage of funds for governments units as per Article 225 of the Constitution
- Arbitration/Mediation Reports to Parliament on matters relating to Budget Implementation Article 225 (7a) Article 252 (1a&1b).
- Performance reports for the activities of Office of Controller of Budget
- And any other report on Budget implementation that may be required

Source: <http://www.cob.go.ke/index.php/what-we-do> accessed 30/05/2014

With respect to the devolution of services to the counties, soon after the March 2013 launch of the county governments, OCOB posted a dedicated County Budget Co-ordinator (CBC) to each of the 47 county governments. Accomplished accountants with a background in Economics, the CBCs oversee budgeting activities in their counties, performing OCOB's advisory, controlling, reporting and arbitration functions at that level. Where necessary, CBCs get assistance from the national office, such as with capacity building and public awareness campaigns. Since their establishment, CBCs have been responsible for the production of the consolidated and individual quarterly county budget implementation review reports which provide a county socio-economic profile, revenue status, and recurrent and development spending performance.⁵¹ The reports highlight the challenges faced by the counties and offer solutions.

OCOB launched its inaugural Strategic Plan 2013-2017 early in 2014. The Plan notes the need to recruit necessary staff, build capacity and provide a conducive work environment. This suggests that OCOB will expand its presence in the counties beyond the current one-staffer office. Indeed, as the county governments settle, the extents of budget advisory needs will become clearer, pointing the direction

for OCOB expansion. Just as the Transition Authority was mandated to undertake a staggered transfer of functions to the counties, so too might OCOB realise a need for a similar engagement in the counties. The Plan focuses on six strategic issues, including:

- Enhanced proper use of public funds by approval of withdrawals of funds within the law;
- Efficient budget implementation by offering the requisite oversight and monitoring;
- Provision of information on budget implementation to Kenyans through enhanced statutory reporting;
- Improved financial, planning and budgeting processes;
- Developing institutional capacity and enhancing the work environment; and
- Improving information sharing by leveraging on communication.

The foregoing issues led to the following six strategic objectives (SO) whose details considered relevant to the county governments are expanded on in Table 4.6. In delivering these SOs, OCOB head office will focus on the production of material and maintenance of standards, as well as the vertical links to the Executive and Legislature while CBCs will focus on dissemination.

⁵¹ See <http://www.cob.go.ke/index.php/downloads> Accessed 30/05/2014.

Table 4.6: County-focused issues from OCOB's strategic plan 2013-2017

SO 1: To ensure timely approval of withdrawals from the Consolidated Fund, County Revenue Fund and Equalization Fund	
Develop and review policies, systems and procedure manuals for withdrawals from public funds	Disseminate procedure manuals to stakeholders and train on their use
Ensure timely approval of MDA Exchequer requests	Update Exchequer records; ensure requisition documents are accurate and comply with the law
SO 2: To oversee and regularly monitor the utilization of public funds released to spending units	
Promote PPPs and inter-county coordination in project planning	Review and make recommendations on the legal framework Benchmark against international best practices
Develop structured engagement with the stakeholders on revenue enhancement	Develop a framework for stakeholder engagement Revamp stakeholder involvement
SO 2: To oversee and regularly monitor the utilisation of public funds released to spending units	
Ensure balanced Exchequer account	Ensure national and county governments comply with Parliament-approved budget
Develop M&E for budget implementation tracking	Train OCOB staff on framework's use and deploy to national and county governments
Track/monitor budget implementation	<ul style="list-style-type: none"> • Develop a partnership/collaboration and networking policy • Establish stakeholder forums for M&E • Conduct regional participation forums on budget implementation
Develop and operationalise complaints handling mechanisms	<ul style="list-style-type: none"> • Develop relevant complaints policy and manual • Create awareness of complaints management system • Manage complaints
Enhance investigations	As necessary
Develop strong dispute resolution mechanisms	<ul style="list-style-type: none"> • Develop dispute resolution policy and manual • Operationalise dispute resolution panels
SO 3: To enhance openness, accountability and public participation in prudent financial management	
Ensure timely production of statutory reports	Develop reporting formats, guidelines and tools, and ensure the production of quality reports for publication and submission to the Executive, National Assembly and County Assemblies
Publish statutory reports	<ul style="list-style-type: none"> • Familiarise stakeholders with report formats and seek their feedback • Publish reports on-line, in county libraries and documentation centres
Ensure proper records' management	Establish comprehensive records management system

SO 4: To participate and provide advice on financial, planning and budgeting issues	
Strengthen OCOB capability for advising Parliament	Focus especially on the suspension of funds transfers to State and public entities
Enhance the planning and budgeting process	Review and advise national and county governments as appropriate on the Budget Review and Outlook Papers, Budget Policy Statements
Strengthen MDAs budget implementation capacities	As necessary
SO 5: To build capacity of the office to deliver on its mandate	
Enhance human resource capacity	Recruit and retain, well trained and motivated staff in a dynamic organisational structure
Ensure sufficient financing	Prepare realistic budgets
Enhance OCOB financial management, office space and equipment, including IT materials for modern Management Information System – all in the context of an adequate legal and regulatory framework	
Formulate and implement research policy systems and frameworks	
SO 6: To ensure the public has access to comprehensive, understandable, credible and timely information	
Manage PR issues, including corporate identity	

4.7 Public Procurement and Oversight Authority

Article 227 of the Constitution states that: “When a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.” It further prescribes the legislation of an enabling framework, which is provided by the Public Procurement and Disposal Act (PPDA) whose objectives are to maximise economy and efficiency, promote fair competition, integrity, transparency and accountability, thereby enhancing public confidence in procurement in order to promote local industry and economic development (S. 2). PPDA applies with respect to procurement by public entities, contract management, supply chain management (including investment and distribution), and disposal

of unserviceable, obsolete and surplus stores and equipment (S.4 (1)). The Act clarifies that renting premises, acquiring real property and engaging individuals at a fee amount to procurement; but cross government transactions and limited term employments are not. S. 8 of PPDA creates the Public Procurement Oversight Authority (PPOA) whose mandate is to ensure compliance with statutory procurement procedures, enabling monitoring and reporting on the system’s effectiveness (S. 9). PPOA is also mandated to build capacity through the preparation and distribution of manuals and to provide technical back-up and training for professional conduct of the framework.

Box 4.4: PPOA Functions mandated by PPDA

S. 9 The Authority shall have the following functions—

- (a) to ensure that the procurement procedures established under this Act are complied with;
- (b) to monitor the public procurement system and report on the overall functioning of it in accordance with section 20(3)(b) and present to the Minister such other reports and recommendations for improvements as the Director-General considers advisable;
- (c) to assist in the implementation and operation of the public procurement system and in doing so—
 - (i) to prepare and distribute manuals and standard documents to be used in connection with procurement by public entities;
 - (ii) to provide advice and assistance to procuring entities;
 - (iii) to develop, promote and support the training and professional development of persons involved in procurement;
 - (iv) to issue written directions to public entities with respect to procurement including the conduct of procurement proceedings and the dissemination of information on procurements;
 - (v) to issue written directions to public entities with respect to procurement including the conduct of procurement proceedings and the dissemination of information on procurements;
 - (vi) to ensure that procuring entities engage procurement professionals in their procurement units;
- (d) to initiate public procurement policy and propose amendments to this Act or to the regulations; and
- (e) to perform such other functions and duties as are provided for under this Act.

PPOA's available strategic plan ended in year 2014; so the development of the succeeding plan must be at an advanced stage. The most recent annual report on PPOA's website is for the financial year 2009/10, which predates Kenya's accession to devolution. Yet, if the Transition Authority was the most critical agency for the smooth accession into devolution, PPOA must be the most crucial agency for the success of devolution whose bedrock is both participatory planning and the prudent management of devolved public funds. Effective procurement management is critical for avoiding a primary risk faced by the Kenyan devolution initiative, the transfer of corrupt practices to the 47 counties. This risk would greatly be reduced if procurement is managed in the manner prescribed by PPDA, i.e. through a system "that is fair, equitable, transparent, competitive and cost-effective."

PPDA's Part III covers the internal organisation for public procurement, S. 26's 'threshold matrix' and

segregation of responsibilities requiring procurement decisions to be made in a systematic and structured way, within an approved budget and annual plan, and to be handled by procurement professionals in different offices in terms of initiation, processing and receipt of goods, works and services (to avoid conflict of interest). While the ultimate procurement responsibilities lie with the accounting officer of a public entity, compliance with PPDA provisions lies with all individuals concerned including contractors (S. 27) or pre-qualified procuring agents registered with PPOA (S. 28).

Part IV of the Act covers the general procurement rules, including choice of procurement procedure (S. 29), criteria for eligibility for contracts (S. 31), pre-qualification procedures (S. 32), and limit to employee contracting (S. 33). Part IV also addresses participation in procurement (S. 39), corruption (S. 40), fraudulent practice (S. 41), collusion (S. 42), conflicts of interest (S.

43) and confidentiality (S. 44). All procurement awards must be published (S. 46), and records maintained for six years after the contracted was entered into, or even terminated (S. 45). As there are varied modes of tendering, Part V of the Act addresses open tenders, covering invitation to tender (S. 51) and its mandatory advertisement (S. 54), tender documents (S. 52), their submission and receipt (S. 58) and security (S. 57). It also addresses their opening (S. 60), evaluation (S. 66), award notification (S. 67), creation of contract (S. 68), and international tendering (S. 71).

Besides open tendering, Part VI covers other forms of tendering including restricted tendering (S. 73), direct procurement (S. 74-75), request for proposals (S. 76-87), request for quotations (S. 88-89), low value procurements (S. 90-91) and specially permitted procurement procedures (S. 92). Under Part VII on administrative review of procurements, disgruntled candidates may request a review of the process (S. 93), with the Review Board empowered to annul proceedings, amongst other things (S. 98).

In order for PPOA to ensure compliance with PPDA, it has the right of access to information (S. 101), investigation (102-103) and request for review (S. 106). Part IX of the Act provides for the grounds for debarment from procurement proceedings (S. 115-125), while Part X addresses the disposal of stores and equipment.

To link this legislation with the county government system, PPOA has produced The Public Procurement and Disposal (County Governments) Regulations, 2013. S. 5 defines 'county public entity' to include (a) county government, or entity of the county government; (b) county assembly; (c) city; (d) urban area; or (e) county service delivery co-ordinating unit. S. 6 and S.7 of the Regulations declare the independence of such entities, which are consequently fully responsible for ensuring all procurement and asset disposal measures are conducted in a systematic, corporate and structured manner – effectively invoking Part III of PPDA, which is offered as the First Schedule of the Public Procurement and Disposal Regulations (2006). Thus, for example, each county entity will have standing committees (for tendering and disposal committees) and ad hoc committees (for tender opening, tender evaluation,

negotiations and inspection and acceptance) whose membership must be forwarded to PPOA (S. 8). While S. 9 and S. 10 underscore the County Accounting Officer's obligation to ensure compliance with all regulations, S. 11 allows "preference and reservations" for small and micro enterprises. County service delivery coordinating units inherit all pre-existing procurement contracts (S. 12) and staff (s. 14).

4.8 National Police Service Commission

In reforming the internal security system, Article 246 creates the National Police Service Commission (NPSC) as a distinct but interrelated body to the National Police Service and the Independent Policing Oversight Authority (IPOA). Its constitutional functions include recruiting and appointing persons to the service, confirming appointments, determining promotions and transfers, and resolving disciplinary issues, according to clause 3. Additionally, S. 10 of the Act mandates the Commission to address matters of standards, qualifications and training, and remuneration and benefits in the Service – see Box 4.5. The Commission also reviews police involvement in trade and other businesses, sets the terms and conditions of engaging civilians in the Service, and monitors the general performance of the Service, including processing public complaints for onward transmission to IPOA, KNCHR, EACC and Director of Public Prosecutions. NPSC reviews complaints from Service members, and reports to both the President and National Assembly on the status of the Service, such reports being guided by S. 26 (1) to (4). S. 10 (2) and (5) provide that NPSC may conditionally and in writing delegate some functions to the Inspector-General, including the recruitment, appointment and promotion of police officers under the rank of sergeant, heeding the need for ethnic, gender and county balancing. But S. 10 (3) bars the delegation of the making of regulations, rules, code of conduct or subsidiary legislation under the Act, and the Commission may also not delegate the making and submission of reports to the President and National Assembly.

Box 4.5: Functions of NPSC

- Keep under review all matters relation to standards or qualifications required of members of the service;
- With the advice of the Salaries and Remuneration Commission, determine the appropriate remuneration and benefits of the service and staff of the Commission;
- Approve application for engagement by police officers in trade and other business, in accordance with the law relating to matters of leadership and integrity under Article 80 of the Constitution;
- Co-operate with other State agencies, departments or commissions on any matter that the Commission considers necessary;
- Provide for the terms and conditions of service and the procedure for recruitment and disciplinary measures for civilian members of the Service;
- Develop fair and clear disciplinary procedures in accordance with Article 47 of the Constitution;
- Investigate and summon witnesses to assist for the purposes of its investigations;
- Exercise disciplinary control over persons holding or acting in office in the Service;
- Promote the values and principles referred to in Articles 10 and 232 of the Constitution throughout the Service;
- Ensure that the Service is efficient and effective;
- Hear and determine appeals from members of the Service;
- Develop policies and provide oversight over training in the Service;
- Approve training curricula and oversee their implementation;
- Investigate, monitor and evaluate the organisation, administration and personnel practices of the Service;
- Receive and refer civilian complaints to the Independent Policing Oversight Authority, the Kenya National Commission on Human Rights, the Director of Public Prosecutions or the Ethics and Anti-Corruption Commission, as the case may be, where necessary;
- Review and make recommendations to the national government in respect of conditions of service, code of conduct and qualifications of officers in the Service;
- Evaluate and report to the President and the National Assembly on the extent to which the values and principles referred to in Articles 10 and 232 are complied with in the Service;
- Monitor and evaluate the performance of the Service;
- Receive complaints and recommendations from police associations registered in accordance with the applicable law;
- Perform such other functions as are provided for by the Constitution, this Act or any written law.

NPSC is empowered under S. 11 of the Act to use any legal means to gather published or interview information and to conduct investigations as necessary for the conduct of its obligations. It can hold disciplinary hearings, meaning it can summon witnesses, mete out disciplinary action, and also demand updates from the Inspector General on the status of police reforms. Additionally, since the Commission can make recommendations to the government concerning the status of the Service, it

can conduct public hearings and summon evidence towards such recommendations.

S. 26 of the operationalising legislation requires NPSC to produce an annual report based on its financial year, which must be presented to the President and National Assembly within three months of the close of the year, and be published and publicised. The report should inform on the status of the Commission's finances, its activities and the impacts they might

have had. It should contain a review of the status of the National Police Service and the welfare of its members, including attention to gender and regional balancing, and make recommendations to the Inspector-General on the service's administration.

Among NPSC's earliest initiatives was the assessment of the suitability and competence of all the officers in the Service who S. 7 (1) of the National Police Service Act had automatically transferred from the disbanded Kenya Police Force and the Administration Police Force. According to clause 3 of the National Police Service (Vetting) Regulations, 2013, the objective and purpose of the vetting is to "build confidence and trust in the Service (and) ensure (it) complies with Chapter Six of the Constitution and the principles of the public service set out in Article 232... and the Public Officer Ethics Act." In principle, Regulation (Reg.) 4 provides that all officers must be vetted through a consistent transparent process that heeds the values and principles set out in Articles 10, 27, 47, 50 and 232 of the Constitution, the dictates of national security (Article 238), and the principles of impartiality, natural justice and international best practices.

While Regulation 5 provides that the processes should be public, officers may apply for closed hearings; and panelists must disclose conflict of interest situations (Reg. 6). Officers may retire from the Service voluntarily (Reg. 8); but failure to attend vetting amounts to a decision to leave the Service (Reg. 19, 20 and 32). The vetting process requires officers to submit a completed self-assessment and income, assets and liabilities forms, national ID, certificate of appointment, academic certificates, bank statements for preceding two years, tax compliance certificate and any other documents requested by the Commission. The issues under consideration during the vetting include an officer's: (i) compliance with constitutional and legislated standards; (ii) record of conduct, discipline and diligence; (iii) integrity and financial probity; and (iv) human rights record. Besides an officer's own submissions, the vetting panel will also rely on public submissions, and information from the public and civil society organisations, Parliament and the full slate of constitutional commissions and independent

offices (Reg. 15). The decision of the Commission shall be by consensus or a majority vote (Reg. 25); and a dissatisfied officer may appeal within 7 days based on new evidence, or a perceived error during the vetting, as decided by the Commission.

NPSC decided against vetting the Inspector General and the two deputies who were only hired in December 2012 after a fairly rigorous recruitment process. Regulation 11 allows the Commission to establish its vetting sequence: it started from the top echelons of the Service and is only now going to the regions. NPSC functions are wide-ranging; but it will only be possible to get a sense of its interpretation of S. 10 of the Act when its strategic plan currently under development is completed.

4.9 National Land Commission

"Our Land, Our Wealth, Our Heritage": "Ardhi Yetu, Mali Yetu, Urithi Wetu"

Kenya's is a history of struggles over land, and of betrayal in the same realm. Struggles in pre-colonial society revolved around ethnically driven claims over territory, leading to extensive migration and re-migration. However, colonial land expropriation (from indigenous Kenyans without any payment) – notably for European settlement since the early 1930s, eventually triggered the short-lived Mau Mau uprising which coincided with emerging demands for African participation in government. That colonial land expropriation shaped the country's future is an enduring fact: instead of the independence government returning expropriated land to its pre-colonial communal owners, it argued that a land market had emerged in which anyone could trade in land in disregard of the historical realities. This enabled the emergence of a landed class of indigenous Africans with a vested interest in covering up the transitional injustices over land ownership. Among the ways in which this was done was to retain much of the convoluted colonial legal framework for land management,⁵² while centring authority over land transactions on the President and (his) hand-picked

52 As at the promulgation of Constitution (2010), land in Kenya was managed by a framework comprising 27 laws.

Commissioner of Lands.⁵³ Consequently, Kenyans' land concerns decades after independence, have revolved around:

- (i) the unresolved injustices by the colonial government over communal land that were exacerbated by the intransigence of the independence government;
- (ii) the unequal regional modernisation of land management which has allowed new rounds of activities that amount to new expropriation ;
- (iii) the theft of government – public – land since independence by privileged individuals – well documented in the Ndungu Report,⁵⁴ amongst other documents;
- (iv) the convoluted legal frameworks for land management; and
- (v) the manner in which the foregoing issues have made land management a perennial flashpoint in Kenyan politics, such as its being an underlying issue in the 2007 post-election violence.⁵⁵

Demand for constitutional change

Thus, land reforms became a major mid-1990s driver of the demand for a comprehensive review of what remained of the much revised independence constitution.⁵⁶ While the comprehensive review of the independence constitution had been completed by 2002, resulting in the 'Bomas Draft Constitution', its watering down by the NARC government meant that its proposed format was rejected by a 2005 referendum. However, 2007 saw the launch of the National Land Policy to provide a framework for the efficient, sustainable and productive use of land for the current and future generations. The Policy seems to have drawn extensively from the Bomas draft, items 229 to 241 emphasising devolution of, and stakeholder participation in, land management.⁵⁷ The

Policy recognises three categories of land – public, private, and community – and provides for three levels in the institutional framework, with the National Land Commission (NLC) at the national level, and elected District Land Boards and Community Land Boards.

In the event, the whole of Chapter Five of the Constitution (2010) is devoted to the management of land affairs. Article 60 provides the principles for good governance in land management, including equitable access, secure rights including those for women, transparent land management, environmentally sustainable land use, and dispute settlement approaches embedded in local community contexts (to avert expensive litigation). Article 61 also distinguishes three categories of land, viz. public (government) land, community land, and private land. Article 63 provides community land is vested in and held by communities identified by ethnicity, culture, or other similar community interest. It includes land held legally by or transferred legally to specified groups, or any other land so declared by legislation. It also includes land held by communities as forests, for grazing and spiritual purposes, ancestral lands, including those of hunter-gatherers, and trust land held by county governments. Parliament is required to enact legislation governing the disposal of community land, taking into account community as well as individual interests.

Article 64 defines private land as that held by an individual under freehold or leasehold tenure, or any other land so declared by legislation. Meanwhile, against a backdrop of a devolution expectation that all "our county resources belong to us", Article 62 significantly defines public land to include much of the natural phenomena on, above and under the land surface, and in water bodies, and includes all land that is neither privately-owned nor community-owned: see Box 4.6.

53 Needless to say, successive Kenyan presidents and lands commissioners acquired extensive land holdings which have been the subject of many audit queries: for example, see the Ndung'u Report – officially, ROK (2004), Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land: Volumes I and II. Nairobi:

54 For an analysis of the Ndung'u report, see AfriCOG (2011), Mission Impossible: Implementing the Ndung'u Report. Nairobi. Available at http://www.africog.org/reports/mission_impossible_ndungu_report.pdf

55 See the Waki Report – officially 'The Report of the Commission of Inquiry into the Post-election Violence.

56 At the August 2010 promulgation of the new constitution, the independence constitution had been revised 30 times, most of the revisions being about enhancing presidential powers.

57 See Ministry of Lands (2007), National Land Policy. Nairobi: National Land Policy Secretariat (May)

Box 4.6: Article 62's Definition of Public Land

- (1) Public land is—
- (a) land which at the effective date was unalienated government land as defined by an Act of Parliament in force at the effective date;
 - (b) land lawfully held, used or occupied by any State organ, except any such land that is occupied by the State organ as lessee under a private lease;
 - (c) land transferred to the State by way of sale, reversion or surrender;
 - (d) land in respect of which no individual or community ownership can be established by any legal process;
 - (e) land in respect of which no heir can be identified by any legal process;
 - (f) all minerals and mineral oils as defined by law;
 - (g) government forests other than forests to which Article 63 (2) (d) (i) applies, government game reserves, water catchment areas, national parks, government animal sanctuaries, and specially protected areas;
 - (h) all roads and thoroughfares provided for by an Act of Parliament;
 - (i) all rivers, lakes and other water bodies as defined by an Act of Parliament;
 - (j) the territorial sea, the exclusive economic zone and the sea bed;
 - (k) the continental shelf;
 - (l) all land between the high and low water marks;
 - (m) any land not classified as private or community land under this Constitution; and
 - (n) any other land declared to be public land by an Act of Parliament—
 - (i) in force at the effective date; or
 - (ii) enacted after the effective date.
- (2) Public land shall vest in and be held by a county government in trust for the people resident in the county, and shall be administered on their behalf by the National Land Commission, if it is classified under—
- (a) clause (1) (a), (c), (d) or (e); and
 - (b) clause (1) (b), other than land held, used or occupied by a national State organ.
- (3) Public land classified under clause (1) (f) to (m) shall vest in and be held by the national government in trust for the people of Kenya and shall be administered on their behalf by the National Land Commission.

NLCs functions

Article 67 establishes NLC whose constitutional functions include (i) managing public land on behalf of the national and county governments; (ii) recommend a national land policy...; (iii) advising... on a comprehensive countrywide land title registration programme; (iv) researching and advising appropriate authorities on land and natural resource use; (v) initiating investigations into, and making recommendations on, present or historical land injustices; (vi) encouraging alternative and/or traditional dispute resolution (ADR/TDR) mechanisms in land conflicts; (vii) assess land taxes and premiums on immovable property in any lawfully designated area; (viii) monitoring and overseeing land use planning throughout the country; and (ix) perform any other functions prescribed by national legislation.

In effect, NLC assumes all the powers previously vested in the President and the Commissioner of Lands, its constitutional activities being operationalised through the National Land Commission Act (2011), as well as Land Act (2012) and Land Registration Act (2012). A primary constitutional function of NLC is the "(management of) public land on behalf of the national and county governments..." NLC is statutorily empowered to gather any documented or oral information or evidence on land and related issues from any source it deems pertinent, and to take any measures necessary to ensure compliance with the principles of land policy.

Article 67 (2)(ix) provides the link to the three land legislations, which each specify their respective NLC functions. The National Land Commission Act lists 12 functions among which are the: (i) management of public land for the national and county governments which will be consulted over the establishment of County Land Management Boards (CLMB) and its sub-county offices, (ii) registration of rights and interests based on an effective land information management system at national and county levels, (iii) management of unregistered trust and community lands, (iv) development of scope for Alternative Dispute Resolution (ADR) and Traditional Dispute Resolution (TDR) mechanisms, (v) registration of all land within 10 years, (vi) review within five years, the propriety and legality of all grants, and (vii) recommendation

to Parliament within two years of legislation for the management of historical land injustices.

The thirty-five functions under the Land Act (2012) collapse into the following broad activities:

1. Development of the public land register and database which is shared with pertinent public agencies under NLC guidelines;
2. Recommendations on land management policies for implementation by the Cabinet Secretary, including legislation on land conversion;
3. Identification and management of ecologically and environmentally sensitive land based on rules and regulations promoting sustainability;
4. Management of land allocation (including to foreign governments under the Vienna Convention on Diplomatic Relations), grant and extension of leases (and the related fees and royalties, and compulsory public interest acquisition (and related compensation matters);
5. Allocation and/or acquisition of land for, and management of settlement programmes under the Land Settlement Fund;
6. Management of public access (right of way), paying attention to unlawful occupation and obstruction.

The six functions under the Land Registration Act (2012) translate into the following obligations:

1. Consultation with national and county governments over the constitution of registrations units and determine their respective forms of register
2. Establishment of a maps depository into which survey authorities will deposit cadastral maps
3. Prescription of the modes (regulations/guidelines) for rectification of registers and other documents hitherto obtained fraudulently;
4. Provision of advice to the Cabinet Secretary on rules and regulations for parliamentary action.

NLC groups the foregoing functions into four areas:

1. The administration and management of land;
2. Ensuring that all unregistered land is registered;
3. Attending to historical land injustices and
4. Reviewing all grants or dispositions (titles, leases, deeds, transfers) of public land to ensure their propriety or legality.

NLC's powers

NLC's powers are listed in S. 6 of its operationalising legislation. It is empowered to gather by appropriate means documented and oral evidence from any source including the State, and take all necessary measures to ensure compliance with the principles of land policy in Article 60 (1) of the Constitution. S. 14 of the NLC Act provides a 5-year timeframe within which to review the propriety and legality of all grants and dispositions of public land, acting against any unlawfully or irregularly acquired lands, heeding the principles of fair administrative action (Art. 47). NLC's annual report shall address progress over land registration, recommendations made to both levels of government, and any impediments to the performance of its functions (S. 33). The Act provides for a fine not exceeding Ksh 3 million and/or imprisonment for up to five years for unlawfully obstructing, misleading or misrepresenting information to an NLC officer (S. 34).

The County Land Management Board

With respect to devolution, the key NLC agency is the County Land Management Board (CLMB) established by S. 18 of the NLC Act. On CLMB functions, S. 18 (9) provides that it shall be subject to the physical planning and survey requirements, process applications for allocation of land, change and extension of user, subdivision of public land and renewal of leases; and (b) perform any other functions assigned by the Commission or by any other written law. NLC's report of the first year of operation lists the creation of CLMBs among its achievements, the interviews being undertaken since March 2014.⁵⁸ CLMBs will basically undertake NLC functions in their respective counties, which is why NLC functions have been outlined extensively above.

58 See NLC (2014: 22; 42), The Progress Report, March 2013 – January 2014. Nairobi: NLC.

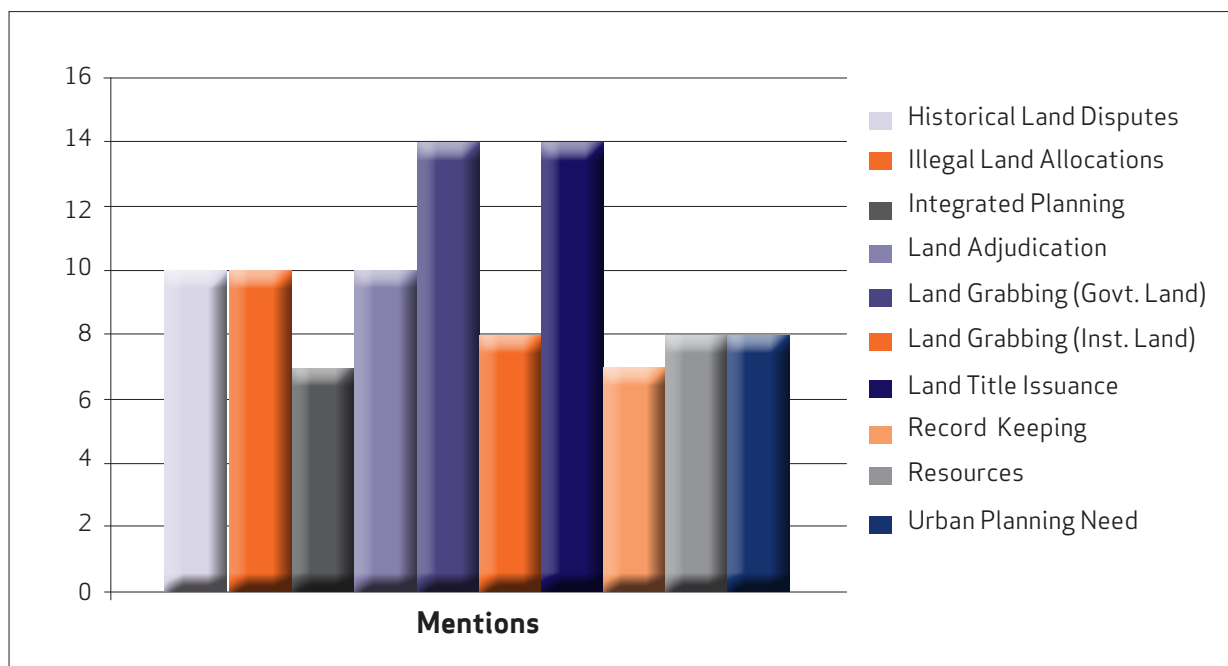
Box 4.7: CLMB functions

1. Processing transactions for NLC approval; allocation of public land, change of user, extension of user, subdivision of public land, renewal of leases, extension of leases;
2. Inspecting all public land allotments for adherence to planning requirements;
3. Encouraging use of ADR and TDR mechanisms in land disputes;
4. Performing other functions assigned by NLC or any written law, including:
 - i. Processing applications for land;
 - ii. Issuance of allotment letters;
 - iii. Documentation of claims on public land at national and county levels;
 - iv. Processing of new grants/leases;
 - v. Processing and approval of applications for development of land;
 - vi. Processing of applications for extension of leases, extensions to and change of user;
 - vii. Renewal of leases;
 - viii. Processing and approval of subdivisions and resultant leases and grants;
 - ix. Updating of land rent records;
 - x. Collection of land rent;
 - xi. Updating and custody of land records;
 - xii. Dispute resolutions;
 - xiii. Site inspections; and
 - xiv. Inter ministerial/departmental meetings

On its inception, NLC launched multiple reform initiatives, including the development of a strategic plan which is nearing completion. It also undertook public hearings on land issues, with the findings reported in Figure 4.2 illustrating the central place of the mismanagement of public land. NLC's analysis of its first year in operation lists the following achievements:

- (i) Institutional strengthening;
- (ii) Devolution – creation of the CLMB's;
- (iii) Establishment of the Historical Injustices (Retribution) Task Force;
- (iv) Land Inventory index - Public Institutions;
- (iv) County governments public land audits;
- (v) Encouragement of the use of TDRs and ADRs in land conflicts; and
- (vi) Establishing linkages and partnerships with other land related organisations.

Figure 4.2: Feedback from NLC’s public hearings on land management issues



Source: NLC (2014:20)

NLC’s Deputy Chairperson and seven Commissioners serve as County Focal Points in a strategy designed to sustain regular consultations with the National Government, county governments and stakeholders with a view to fulfilling the statutory objective of registering all unregistered land within 10 years. While striving to establish the CLMBs, NLC is also finalising the rules and regulations for the operationalisation of the legislative framework for land management. The experiences of its inaugural year point NLC to 21 key issues requiring attention for effective sector streamlining, which are collapsible into the following:

1. Institutional and infrastructure challenges, including weak staffing numbers and discipline, alongside poor provisioning of facilities and equipment;
2. Inadequate funding alongside weak revenue management;
3. Weak awareness by public and county governments of land legislation and regulations;
4. Great public expectations given Kenya’s history of land mismanagement; and

5. Extensive backlogs of cases and documentation.

The weak funding issue illustrates the gravity of the situation facing NLC and the incoming CLMBs. For its inaugural financial year (FY) 2013/14, NLC budgeted for Kshs 3.3 billion (bn) but received Kshs 206 million (mn), that is a yield of 6.2%.⁵⁹ A supplementary budget of the same FY added a further Kshs 400 mn, raising the yield to 18.4%. NLC belongs to the Agriculture Rural and Urban Development sector working group for budget purposes. While the group has been allocated Kshs 55 bn for FY 2014/14, the group’s allocation to NLC is a mere Kshs 493 mn, the outlook being that it will not receive much more than a 7% share for the entire FY 2013/14 to 2016/17 budget period.

The foregoing provides evidence of a substantive devolution framework for NLC which should be well represented in the counties through the CLMBs and its subsidiary bodies. However, there are at least three fundamental concerns, the first being the weak awareness at the national, county and stakeholder levels of the constitutional, legal and institutional

⁵⁹ See NLC (2014: 43). Also see Ramah, Rajab, 'Under-funding Kenyan land commission could set back reforms' Sabahi, May 30, 2013. At http://sabahionline.com/en_GB/articles/hoa/articles/features/2013/05/30/feature-01

frameworks for land management. Such weak awareness requires extensive civic education, which in turn requires extensive resources. As illustrated above, however, NLC is severely under-resourced, meaning it will likely set aside inadequate resources for civic education, not to mention the other activities. It is opportune that NLC has set out to court support from county governments, which should have a great interest in NLC's success, unlike powerful people in the National Government who have a vested interest in not resolving past land injustices. Legal land ownership documents are important for county governments because they will enable their *wananchi* to access capital with which to invest and generate taxable revenues.

4.10 Commission on Administrative Justice

The Commission on Administrative Justice (CAJ) – the Ombudsman – is established by the Commission on Administrative Justice Act (2011), the result of a restructuring of the Kenya National Human Rights and Equality Commission into three organs as provided by Article 59 (4) of the Constitution. Section 3 (20) of the Act declares it to be the successor of the Public Complaints Standing Committee while Section 4 declares it to have the status and powers provided by Chapter 15 of the Constitution. CAJ aspires “(t)o be an effective overseer of responsiveness and servant-hood in public offices at national and county levels... (able to) enforce administrative justice and promote constitutional values by addressing maladministration through effective complaints handling and dispute resolution.” CAJ sees its wide mandate to arise from a “pressing need to address the rampant rise in maladministration and promote good governance and efficient public service delivery by enforcing the right to fair administrative action which is a fundamental right under Article 47 of the Constitution.”

CAJ grew out of a long-standing intention to create an Ombudsman office in Kenya, dating back to the recommendation of the 1971 Commission of Inquiry (Public Service Structure and Remuneration Commission), the ‘Ndegwa Commission’. The rot

in the public service over the years had been such that the Kenya Anti-Corruption Commission found close to 85% of the complaints it received to be on administrative malfeasance, which was outside its mandate. Consequently, 2007 saw the establishment of the Public Complaints Standing Committee (PCSC) whose operations were however, hampered by its lack of a statutory grounding. Thus, CAJ was part of the Agenda Four initiatives agreed on in resolving the 2007/08 post-election violence. Its mandate is summarised as follows:

- Quasi-judicial mandate to deal with maladministration.
- Ensuring compliance with leadership, integrity and ethics requirements
- Litigation and Amicus Briefs.
- Reporting Obligation.
- Training of Government Ministries Departments and agencies.
- Resolution of inter-governmental conflicts.
- Provision of advisory opinions and recommendations
- Promotion of constitutionalism and human rights advocacy
- Performance contracting
- Protecting the rights of the minorities and marginalised
- Jurisdiction over prisons and prisoners
- Oversight on implementation of recommendations of task forces, commissions of inquiry and other specialised agencies on matters of improvement in public administration

Consequently, as required by Article 59(2)(h) of the Constitution, CAJ investigates any conduct, actions or omissions in state affairs and public administration that is alleged or suspected to be prejudicial or improper, or to result in any impropriety or prejudice. This may involve direct investigation by CAJ, or delegate investigation to appropriate public agencies, with powers to summon and enforce attendance of any officer or production of records. CAJ partners related agencies, such as KNCHR, promotes public awareness of public administration justice policies and procedures; provides advisory opinions on related issues, awards compensation and recommends remedies, and provides periodic

reports on the status of administrative justice in the country. Critically for devolution to autonomous – if interdependent – county governments, CAJ facilitates capacity building for handling complaints, including for alternative dispute resolution.

In summary, CAJ's work involves monitoring public offices for maladministration, including unreasonable service delivery delays, discourtesy, misconduct, incompetence, ineptitude and violations of the constitutional values and principles of national leadership. Consequently, CAJ is the primary custodian of the right to expeditious, efficient, lawful, reasonable and procedurally fair administrative action (Article 47), and in collaboration with sister commissions and organs, will enforce the ethics and integrity requirements of Chapters 6 and 13. Indeed, CAJ generally oversees adherence to the Public Officers Ethics Act, 2003, which requires officers to be dignified and sensitive to issues of gender, minorities and the marginalised. The Act requires full declaration of wealth by officers who must surrender gifts received in the course of their duty to the government, and must neither hold dual citizenship or foreign bank accounts, nor be in multiple employments, nor hold political party positions. Additionally, the Act requires monitoring against re-employment of offending officers, vetting of judicial officers, and voter participation.

CAJ's work is organised around three directorates. The Compliance and Risk Directorate ensures the legality and legitimacy of CAJ operations including its outreach to national government departments and to county governments, while monitoring performance contracting, undertaking capacity building and awarding performance. The Legal and Advisory Services Directorate formulates and implements policies and strategies, prepares advisories, handles complaints and co-ordinates county functions. Finally, the Advocacy and Communications Directorate champions outreach to public servants and the public, believing that individual and community desires for transformative leadership, integrity and citizen-focused service delivery are critical for change management in public affairs.

CAJ only has one regional office, the Western Regional Office in Kisumu, covering the former Nyanza, Western

and parts of Rift Valley provinces; but planning for a Mombasa office is at an advanced stage. Meanwhile, its services are accessible through the following partner organisations' regional offices: KNCHR in Kitale, Wajir and Mombasa; National Anti-Corruption Campaign Steering Committee in West Pokot; EACC in Kakamega and Nyeri; and Transparency International in Mombasa.

Prospects for decentralising to the counties

CAJ's agenda is as much a national government and state corporations' agenda as it is a county governments' agenda. Indeed, given the Fourth Schedule's division of roles between the national and county governments, the greater share of public servants are likely to be in the county governments. Consequently, CAJ's very apparent awareness of its need to 'go to the counties' is commendable. The reportedly participatory manner in which it developed its 2013-2016 strategic plan suggests an early marketing of its agenda in the counties. In terms of taking CAJ to the counties, it has augmented its regional offices with an advocacy outreach that has so far focused on the regional agriculture shows, covering Garissa, Nyeri, Kakamega, Eldoret, Kisii, Kisumu, Nakuru, Machakos, Mombasa, Kilifi and Turkana. However, CAJ has also actively engaged the Commission on Implementation of the Constitution, meaning that it has added its voice and intentions to the new legislation designed to facilitate the implementation of the Constitution (2010).

That the government contributed nearly 95% of CAJ's financial year 2012/13 budget suggests commitment on the latter's part, the balance coming from development partners. However, CAJ laments its resource constraint that has hampered the speed with which it can make preparations for, and open up new offices in the counties, in fulfilment of its aspiration that all complaints should be registered and managed to the extent possible at the county level. Besides its lack of a statutory founding, CAJ's predecessor, PCSC's operations had been constrained by poor actual resources. However, PCSC's operations were also constrained by the lack of political goodwill: government departments ignored its inquiries with impunity.

CAJ complains of slow public sector reforms to align with the integrity requirements of the Constitution.

In a 11th July 2013 letter to the Nairobi County Governor, CAJ elaborates on its status and mandate, and mentions its desire to be in every county, which is currently “severely hampered by non-allocation of resources by the Treasury.”⁶⁰ As part of its plans for the counties, which it hopes will augment its initiatives by establishing and staffing a ‘County Ombudsman Office’, CAJ proposes to engage the Kenya Law Reform Commission to develop a model legislation on administrative justice for county domestication. In the meantime, CAJ informs the Nairobi governor of the following areas of possible engagement with the counties:

- Training county staff on service delivery standards;
- Capacity building on county level complaints handling;
- Provision of Advisory Opinions on public administration matters, including review of legislation and codes of conduct;
- Mediation, conciliation or negotiation in resolving inter-governmental conflicts; and
- Compliance with the constitutional thresholds for leadership and integrity.

4.11 Ethics and Anti-Corruption Commission

The Ethics and Anti-Corruption Commission (EACC) is legislated for in response to the obligation established by Article 79 of the Constitution, which also declares that it shall have the status and powers of a commission as defined in Chapter 15 of the Constitution (discussed above). S. 3 (2) (b) of the Ethics and Anti-Corruption Act empowers the Commission to do or perform all actions that enable its realisation of its constitutional role and other functions that might arise through other legislation. Specifically, S. 11 of the Act requires EACC to support other state and public offices in developing and promoting standards and best practices in integrity and anti-corruption and in also developing a code of ethics whose enforcement it will oversee. EACC

will receive and investigate complaints for onward transmission to the Director of Public Prosecutions as appropriate, or recommend appropriate alternative action against allegedly offending public officers. Further, EACC will raise public awareness on ethics to enable the garnering of public support in the anti-corruption crusade. It will also monitor public bodies with a view to ensuring their systems encourage ethical conduct. Finally, EACC may institute court proceedings in order to either recover corruptly acquired assets or to protect public property against losses to corruption. Consequently, it is empowered to freeze and confiscate such assets as might be suspected to have been corruptly acquired. In order to achieve these objectives, S. 5 of the Act allows EACC to request professional assistance of any individual or organisation deemed fit.

EACC sees its role to fit squarely under the Political Pillar of Kenya Vision 2030, whose Leadership, Ethics and Integrity Programme is among the flagship projects of the Vision’s Medium Term Plan 2013-18 – MTP II. The Vision programme seeks to develop a national ethics and integrity policy, and to strengthen the capacities of ethics and anti-corruption agencies to promote leadership, ethics and integrity through improved policy, legislative and institutional frameworks. It seeks to improve EACC’s capacities for investigation, prevention, and asset tracing and recovery, and to also grant it prosecutorial powers. Enhanced awareness of standards and best practices through education and sensitisation will improve accountability mechanisms while mainstreaming preventive measures, including instituting an effective whistleblower framework. Additionally, the programme proposes to develop a framework for punishing corrupt Kenya companies and individuals by having the courts freeze their assets.

EACC’s strategic plan 2013-18 proposes to undertake the actions envisaged by MTP II’s programme, but also intends to augment the activities with some targeted integrated research, promotion of results-based management and performance contracting, greater partnerships, and the implementation of an up-dated National Anti-Corruption Plan.⁶¹ In turn, EACC’s strategic

60 See http://www.ombudsman.go.ke/index.php?option=com_content&view=article&id=170&catid=78&Itemid=496 Accessed 5/1/2014.

61 See EACC (2014), Strategic Plan (2013-2018). Nairobi: EACC. Available at <http://www.eacc.go.ke/docs/EAAC-strategic-plan-2013-2018.pdf> Accessed 30/05/2014.

plan responds to Article 6 of the Constitution requiring devolution of services to the counties, by proposing to undertake more or less the same activities listed above for MTP II's programme and EACC's perceived role in it. However, the strategic plan departs from – or indeed, amplifies the former intentions in two respects: firstly it notes the need to “monitor implementation of and adherence to the principles of governance related to transparency and accountability, leadership and integrity, and public service as set out in Articles 10, 73 and 232...” Secondly, it proposes to “undertake corruption and ethical risk mapping in the counties; and (finally to) undertake clearance and social audit of public officers.”

During the life of the previous strategic plan (2009/10 to 2012/13), EACC completed 533 investigations with some 4,353 cases remaining under investigation while some 292 complaints were referred to other appropriate government agencies. Out of the 293 files recommended for prosecution, 250 (85%) were

accepted. During that period, EACC traced assets worth Kshs 19.6 billion with recoveries amounting to Kshs 2.3 bn, and disrupted impending corruption or averted losses amounting to Kshs 60.1 million.

In terms of awareness creation, EACC has taken itself ‘to the people’ by rotating the venue of the commemoration of the International Anti-Corruption Day in December of every year, as follows: Nairobi (2009), Mombasa (2010), Kisumu (2011) and Nyeri (2012). It has also invested in outreaches through the print and electronic media and in corporate branding, reaching an estimated 15 million Kenyans. It undertook 18 county-based outreaches as shown in Table 4.7. Arguably, these activities have concentrated on counties along the railway line: while that might reflect the current distribution of the burden of corrupt and unethical practices, EACC would do well to move to the rest of the country in order to focus on prevention, especially in light of the financial resources that are being devolved to county governments.

Table 4.7: Distribution of EACC county outreaches, 2009 to 2013

Year	Counties		
2009	Trans-Nzoia; Uasin-Gishu; Kisumu		
2010	Kitui; Machakos; Mombasa; Kisii; Migori; Kakamega; Nairobi; Kisumu		
2012	Embu; Nakuru		
2013	Uasin-Gishu; Kericho; Makeni; Marsabit; Isiolo		
<table border="0" style="width: 100%;"> <tr> <td style="width: 50%; vertical-align: top;"> <p>10 most corrupt counties</p> <ol style="list-style-type: none"> 1. Uasin Gishu [6.5%] 2. Samburu [3.3%] 3. Embu [3.0%] 4. Meru [2.8%] 5. Nyamira [2.7%] 6. Nairobi [2.6%] 7. Nakok [2.5%] 8. Tharaka Nithi [2.5%] 9. Mombasa [2.4%] 10. Migori [2.3%] </td> <td style="width: 50%; vertical-align: top;"> <p>10 least corrupt counties</p> <ol style="list-style-type: none"> 1. Baringo [1.0%] 2. Turkana [1.0%] 3. Marsabit [1.0%] 4. Busia [1.1%] 5. Taita Taveta [1.2%] 6. Siaya [1.2%] 7. Isiolo [1.3%] 8. Vihiga [1.4%] 9. Kwale [1.4%] 10. West Pokot [1.5%] </td> </tr> </table>		<p>10 most corrupt counties</p> <ol style="list-style-type: none"> 1. Uasin Gishu [6.5%] 2. Samburu [3.3%] 3. Embu [3.0%] 4. Meru [2.8%] 5. Nyamira [2.7%] 6. Nairobi [2.6%] 7. Nakok [2.5%] 8. Tharaka Nithi [2.5%] 9. Mombasa [2.4%] 10. Migori [2.3%] 	<p>10 least corrupt counties</p> <ol style="list-style-type: none"> 1. Baringo [1.0%] 2. Turkana [1.0%] 3. Marsabit [1.0%] 4. Busia [1.1%] 5. Taita Taveta [1.2%] 6. Siaya [1.2%] 7. Isiolo [1.3%] 8. Vihiga [1.4%] 9. Kwale [1.4%] 10. West Pokot [1.5%]
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Source: EACC (2014: 56) for the outreach data; and EACC (2013: 15) for the county corruption data.⁶²

62 See EACC (2013), National Corruption and Ethics Survey, 2013 Report. Nairobi: EACC. Available at <http://www.eacc.go.ke/docs/National-Survey-Corruption-Ethics-2012.pdf> Accessed 30/05/2014.

EACC aspires to establish a greater presence nationwide, as reflected in various measures contained in its strategic plan 2013-18. A job evaluation report commissioned in September 2013 found the Commission to have a staff establishment of 384, with officers in-post amounting to 238, meaning there was a current staffing shortfall of 38%. While EACC has 5 regional offices, most of its staff are located at the Nairobi head offices. However, EACC's medium to long term outlook proposes to raise head office staff to 742,

while the regional and county offices will have 348 and 1,504 members of staff respectively, raising the agency's total staffing to 2,633. That 57% of the future staff will be in the counties reflects EACC's focus on the grassroots as the arena for the efficient and effective fight against corruption and unethical practices. This county level focus is also reflected in the details of the strategies and activities of the 2013-18 strategic plan, partially summarised in Table 4.8.

Table 4.8: EACC's strategic objectives, strategies and activities, 2013-18

SO 1: To reduce prevalence of corruption and unethical conduct	
	Strengthen policies, systems, procedures and practices of work in institutions in order to seal corruption loopholes
	Provide advisory services regarding investigations, legal opinions, corruption prevention and risk management. Also analyse anti-corruption reports and provide feedbacks.
	Develop and promote standards in ethics and integrity, giving guidelines for effective application
	Monitor systems, policies, procedures and practices in identified institutions in MDAs and the counties. Build capacity for implementations and monitor compliance.
	Mainstream corruption prevention activities in public and private institutions, including anti-corruption policies, best practices and standards in MDAs and counties
	Intensify education, training and awareness on anti-corruption and ethics
	Mainstream anti-corruption and ethics content into learning and training institutions, including undertaking school-based programmes, training county education managers, sponsoring an anti-corruption categories in the national music and drama festivals, and training university student leaders and integrity club movement leaders
	Develop and disseminate anti-corruption, ethics and integrity IEC materials
	Establish and operationalise leadership and integrity academy/institute for training State and public officers. Also develop leadership integrity and training manual to be used with professional bodies, e.g. LSK.
	Enhance intelligence gathering mechanism
	Expand networks for detection and disruption of corruption, economic crimes and unethical conduct by engaging stakeholders
	Acquire and integrate technology in intelligence gathering and investigation
	Detect and disrupt corruption, economic crimes and unethical conduct
	Conduct integrity tests

Intensify investigations into corruption and unethical conduct	
	Receive, analyse and process complaints
	Enhance corruption reporting through an established central system
	Undertake preliminary investigations
	Undertake forensic investigations and sting operations
	Reduce the case backlog
Support anti-corruption interventions through targeted research on corruption, ethics and governance related issues	
	Conduct corruption, ethics and governance-related studies
Enhance M&E of anti-corruption and ethics interventions	
	Develop and roll out M&E framework
Enhance tracing and recovery of unexplained and corruptly acquired assets nationally and internationally	
	Trace corruptly acquired assets
	Preserve and recover unexplained and corruptly acquired assets
SO 2: To establish, maintain and strengthen partnerships and networks against corruption and unethical practices	
Enhance stakeholder participation in fighting corruption and unethical practices	
	Develop and implement the Kenya Integrity Plan (KIP)
	Enlist public support against corruption through training community-based anti-corruption monitors (C-BAM), conducting regional outreach programmes, including participation in trade fairs and exhibitions, and training faith-based organisations. Sensitise on wealth declaration among county executive committee members
Strengthen partnerships and coalitions against corruption and unethical practices	
	Create and maintain an effective collaboration with media
	Strengthen partnership networks through workshops and seminars with criminal justice system
Forge strategic alliances to optimise investigative and preventive outcomes	
	Establish and maintain inter-agency collaboration and information-sharing through county leadership forums, while also highlighting profile by marking international bench-marks on anti-corruption and unethical conduct
SO 3: Promote ethics and good governance	
Enhance institutional governance ethics	
	Develop and disseminate
	Develop and disseminate regulations for the Leadership and Integrity Act and the code of ethics for public officers, and evaluate adherence to it by monitoring the management of gifts, conflicts of interest and holding of foreign bank accounts. Enforce forfeiture of improper benefits for, and compensation to, State and public officers

Strengthen mechanisms for verifying suitability of candidates for State and public offices
Develop clearance and vetting mechanisms
Promote ethics and good governance in private sector institutions
Support private sector development and implementation of a code of conduct and vetting framework
SO 4: Mobilise resources for effective and efficient service delivery
Enhance human resource capacity
Expand staff numbers, and install internship programme
Train staff
Provide competitive terms and conditions of employment
Enhance infrastructure, ICT networks and financial and supply chain management
So 5: Strengthen the policy and legal framework
Support the development of a policy, legal and regulatory framework for EACC and its activities

Source: EACC (2014: 64-92).

4.12 Kenya National Commission on Human Rights

Created by Article 59 of the Constitution, the Kenya National Commission on Human Rights (KNCHR) is mandated to further the promotion and protection of human rights in Kenya. Launched in 2003, its operations are guided by the UN-approved Paris Principles on the establishment and functioning of independent national human rights institutions. The Commission is a watch-dog over the government on human rights issues, and provides key leadership in moving the country towards a human rights state. KNCHR's vision is to develop a society that upholds human rights for all its people by protecting, promoting and monitoring laws, policies and practices surrounding human rights. It investigates human rights violations and provides redress, researches and monitors compliance with human rights norms and standards, conducts human rights education and training, and campaigns and advocates for human rights, either individually or with other stakeholders. KNCHR's goal is to increase the enjoyment of fundamental rights and freedoms by all in Kenya, through 4 strategic objectives:

1. To promote the respect and observance of human rights standards in public institutions.
2. To increase the application of human rights principles and standards in mechanisms of justice.
3. To enhance the realisation of economic and social rights in Kenya.
4. To enhance the efficiency and effectiveness of the Commission.

KNCHR's North Rift regional office is based in Kitale and covers Uasin Gishu, Trans Nzoia, Elgeyo Marakwet, Baringo, Turkana, Pokot, parts of Bungoma (around Mt. Elgon) and South Rift. The Northern Kenya regional office is located in Wajir and covers Mandera, Wajir, Marsabit, Moyale, Isiolo, Ijara and Garissa. The Coastal regional office covers Mombasa, Kwale, Kilifi, Taita Taveta, Lamu and Tana River counties. A new regional office has recently been opened in Kisumu. However, KNCHR's new strategic plan running from 2013 to 2018 underscores the importance of KNCHR's restructuring for greater grassroots focus than the 4 regional offices can provide. The list of proposed activities discussed below underscores the need for closer and more sustained interactions between KNCHR officers and county stakeholders.

KNCHR notes the need for reforms to its management recommended by the Directorate of Personnel Management in the “Report on the reorganisation and staffing of the Kenya National Commission on Human Rights (KNCHR), November 2012.” After recording the various roles KNCHR played in developing the new constitution and the reforms emanating from its implementation, the strategic plan notes the need to avoid duplication of functions with the new constitutional bodies, including CAJ and NGE. However, or consequently, it also notes the need for rebranding to enhance its grassroots profile.

In a review of complaints received, KNCHR concludes that the Constitution’s provisions for basic rights have yet to be internalised three years since its promulgation, since economic and social rights issues accounted for 51.5% of all complaints received, compared to 24% each for civil and group rights. The focus of complaints included land and judicial rights, and threats to security by individuals in the community and state agents. Thus, the strategic plan identifies these rights as a key area of activity, for which it will liaise with TA in instilling a rights-based approach to policy and planning among

the county executive committees. Along these lines, the focus will be on frameworks for people participation as provided by the Constitution, as a means of addressing inequalities through the effective management of access to water, education, health care and housing. Additionally, the management of Equalisation Fund resources is important to ensure they reach needy children, women, persons with disabilities and persons living with HIV- Aids, among others.

The strategic plan recognises the efficacy of the traditional justice system as a means of ensuring accessible justice for the poorest and most vulnerable in society. Consequently, it will champion the system as one among readily available alternative dispute resolution mechanisms. It also notes the importance of transitional justice, and undertakes to ensure the implementation of the Truth Justice and Reconciliation Commission’s report in order to lay historical injustices to rest.

Table 4.9 selects a few strategic objectives and strategies through which KNCHR intends to deliver on its focus on economic and social rights, including transitional justice.

Table 4.9: Selected KNCHR strategies involving county-level interventions

Expected outcome	Strategy	Target groups	Outputs
Strategic objective 1: To promote the respect and observance of human rights in public institutions.			
1.1) Public Institutions operating in accordance with human rights principles	ii. Establish relevant partnership and collaborations	CSOs/FBOs/State agencies	52 partners per annum
1.2) Enacted laws and policies that promote respect of human rights by public institutions.	Provide technical support to state and non state agencies, inc CSOs	Parliament, county assemblies, executive and directorates, line ministries	
1.4) Empowered communities that are able to claim their human rights.	i. Build capacity of the public to claim their human rights	Public	500 members of the public annually
	ii. Strengthen partnership and collaboration on human rights with communities	CSOs/FBOs/DPOs/NGOs	150 organisations per year

Expected outcome	Strategy	Target groups	Outputs
1.5 Enhanced compliance with international and regional human rights standards and obligations	i. Facilitate state compliance with regional and international obligations through capacity building of both state and non-state actors.	Cabinet, Parliament, County Assemblies, CSOs, media the general public	15 agencies annually
	ii. Advocate for implementation of obligations undertaken by the state at regional and international level		
	iii. Engage with international and regional human rights mechanisms		
Strategic objective 3: To enhance the realisation of economic and social rights in Kenya			
3.1) Laws and policies enacted to promote economic and social rights (Article 43 rights)	Provide technical support to state and non state agencies on implementation of ECOSOC rights	KLRC, Parliament, County Assemblies, line ministries.	82 agencies over 5 years
	ii. Advocate and lobby for ratification and implementation of ECOSOC rights obligations	CSOs, Parliament, media, Line ministries	4 agencies annually
	iii. Strengthen collaborative research on the observance of ECOSOC rights	CSOs, line ministries, Committee on Budgets, members of public	1 collaboration per annum
	iv. Review policy and legislation relating to ECOSOC rights	Parliamentary committees, county assemblies, CSOs, public institutions, line ministries	2 policies or legislation per year
	v. Build strategic partnerships with state and non-state actors	Colleges of higher learning, tertiary colleges, CSOs, FBOs, DPOs	8 partnerships per year
	i. Engage in budget analysis and policy review	Line ministries, KIPRA, IPAR, IEA, and Parliamentary Committee on Budgets. CRA, CSOs, CBOs, FBOs	3 agencies per annum
	ii. Sensitise the public to engage in budget making processes	CBOs, FBOs, community opinion leaders	100 people per year

3.3) Enhanced delivery of economic and social rights to Kenyans by the state in a manner consistent to defined standards	i. Enhance collaboration with NGEC and MDAs in development/review of Minimum Core Standards	CBOs, NGEC, FBOs, CSO	13 rights themes standards formulated
	i. Build capacity of County Assemblies and Executive Committees, Directorates and, Parliamentary Committees Members of Senate on Minimum Core Standards	Line ministries, CSOs, County governments,	100 individuals trained per year
	iii. Monitor compliance with Minimum Core Standards (Pilot Counties)	Pilot counties	
	iv. Build capacity of communities and CSOs to monitor compliance with Minimum Core Standards	CSOs and NGEC	100 communities and CSOs per annum

4.13 National Gender and Equality Commission

The National Gender and Equality Commission (NGEC) was created by the National Gender and Equality Commission Act of 2011, as a successor to the Kenya National Human Rights and Equality Commission which had been created by Article 59 of the Constitution (2010). Consequently, NGEC has the status accorded under Chapter 15 of the Constitution and powers accorded by Article 253. The over-

arching goal for NGEC is to contribute to an improved understanding of 'gender' – as distinct from 'sex' – as part of efforts leading to the reduction of gender inequalities. In the process, NGEC is also mandated to address discrimination against all special interest groups (SIG) including women, men, persons with disabilities, the youth, children, the elderly, minorities and marginalised communities.

Box 4.8: Functions of the National Gender and Equality Commission

S. 8 of the Act lists the functions to be to —

- (a) promote gender equality and freedom from discrimination in accordance with Article 27 of the Constitution;
- (b) monitor, facilitate and advise on the integration of the principles of equality and freedom from discrimination in all national and county policies, laws, and administrative regulations in all public and private institutions;
- (c) act as the principal organ of the State in ensuring compliance with all treaties and conventions ratified by Kenya relating to issues of equality and freedom from discrimination and relating to special interest groups (SIG) including minorities and marginalised persons, women, persons with disabilities, and children;
- (d) co-ordinate and facilitate mainstreaming of SIG issues in national development and to advise the Government on all aspects thereof;
- (e) monitor, facilitate and advise on the development of affirmative action implementation policies as contemplated in the Constitution;
- (f) investigate on its own initiative or on the basis of complaints, any matter in respect of any violations of the principle of equality and freedom from discrimination and make recommendations for the improvement of the functioning of the institutions concerned;
- (g) work with other relevant institutions in the development of standards for the implementation of policies for the progressive realisation of the economic and social rights specified in Article 43 of the Constitution and other written laws;
- (h) co-ordinate and advise on public education programmes for the creation of a culture of respect for the principles of equality and freedom from discrimination;
- (i) conduct and co-ordinate research activities on matters relating to equality and freedom from discrimination as contemplated under Article 27 of the Constitution;
- (j) receive and evaluate annual reports on progress made by public institutions and other sectors on compliance with constitutional and statutory requirements on the implementation of the principles of equality and freedom from discrimination;
- (k) work with the (Kenya) National Commission on Human Rights, the Commission on Administrative Justice and other related institutions to ensure efficiency, effectiveness and complementarity in their activities and to establish mechanisms for referrals and collaboration in the protection and promotion of rights related to the principle of equality and freedom from discrimination;
- (l) prepare and submit annual reports to Parliament on the status of implementation of its obligations under this Act;
- (m) conduct audits on the status of SIGs;
- (n) establish, consistent with data protection legislation, databases on issues relating to equality and freedom from discrimination for different affected interest groups and produce periodic reports for national, regional and international reporting on progress in the realisation of equality and freedom from discrimination for these interest groups;
- (o) perform such other functions as the Commission may consider necessary for the promotion of the principle of equality and freedom from discrimination; and
- (p) perform such other functions as may be prescribed by the Constitution and any other written law.

Section 8 of the establishing legislation elaborates on the functions of NGECE in relation to gender equality and inclusion of SIGs. The law provides NGECE with wide ranging responsibilities over gender and discrimination at the national and county levels, and in the public and private sector. Consequently, in addition to the powers conferred to NGECE by Article 252 of the Constitution, S. 26 of the Act empowers the Commission to issue summons and take statements under oath or affirmation, adjudicate on matters under its jurisdiction, and lawfully obtain any information, or compel the production of such information as is necessary for its performance of its mandate.

NGECE has the powers to commission investigations through Government agencies and to summon individuals and enforce the production of documents (subject to related legislation) (S. 28) in response to complaints in person or through a representative (S. 32) made orally or in writing (S. 33).

The Strategic Objectives (SO) of NGECE's Strategic Plan (2013-15) are:

- To create an enabling legal environment to achieve equality in compliance with the Constitution and other written laws, treaties and regulations;

- To provide comprehensive and adequate response to Sexual and Gender-Based Violence (SGBV);
- To mainstream needs and issues of SIGs in development at national and county governance systems and private institutions;
- To advocate for financing of substantive equality at all levels;
- To build an effective, efficient and sustainable institution visible at all levels.

The strategies with which to strive for the objectives include: (i) public education, advocacy, research and advisory; (ii) monitoring compliance of laws, policies and international treaties; (iii) mainstreaming co-ordination and collaboration; and (iv) institutional development and resource mobilisation. The interventions arising which are proximate to devolution are summarised in Table 4.10, SO 5 being omitted entirely because its focus is exclusively on improving NGECE's internal workings. While the Strategic Plan repeatedly refers to the GEFSD principles, it does not at any point define them, meaning one cannot judge the adequacy of the proposed interventions until one has reviewed the literature on the principles.

Table 4.10: The strategic objectives and their related interventions

SO 1: To create an enabling legal environment to achieve equality in compliance with the Constitution and other written laws, treaties and regulations
<ul style="list-style-type: none"> • Review existing and proposed national and county level frameworks against principles of equality and non-discrimination • Review and provide advisories on compliance • Produce county-level databases on and monitor numbers of frameworks in compliance
<ul style="list-style-type: none"> • Undertake public education and sensitisation on the principles and practice of gender equality and non-discrimination • Convene multi-stakeholder working groups at national and county levels to sensitise on those principles
<ul style="list-style-type: none"> • Support devolution governance structures for sensitivity to inclusiveness and equality • Develop county level frameworks for gender equality and inclusiveness • Establish county NGECE offices • Monitor resulting effect of legal and institutional frameworks
<ul style="list-style-type: none"> • Conduct investigations, public hearings at all levels on adherence to constitutional and other gender equality and inclusion frameworks • Institute public interest legislation at all levels to underscore the values.

SO 2: To provide comprehensive and adequate response to sexual and gender-based violence (SGBV)

- Coordinate delivery of public education and information, including through a multi-media campaign, on the added value and benefits of reduced SGBV prevalence on the economic, social and political development agenda
- Monitor compliance with SGBV principles by public and private national and county level institutions, including through annual reviews
- Investigate SGBV incidents across all institutions and recommend redress
- Hold public hearings
- Develop frameworks for collaboration over this sub-objective
- Monitor national and county budgets for sensitivity to SGBV concerns
- Commission county level studies reviewing responsiveness to equity and inclusiveness.

SO 3: To mainstream needs and issues of SIGs in development in national and county governance systems and private institutions

- Coordinate the design of an advocacy programme on economic value of investment in gender empowerment and inclusiveness of SIGs in development agenda at all levels
- Pilot an Equality and Inclusion advocacy programme
- Set standards and indicators for mainstreaming SIG issues in development
- Conduct orientation sessions at all levels
- Develop reporting templates on SIG issues
- Monitor performance of all levels in mainstreaming SIG issues, including participation in decision-making organs
- Review existing blueprints for sensitivity and compliance
- Incorporate a SIG performance monitoring module in all development planning materials
- Conduct annual compliance audits and reviews for all national and international commitments on Equality and Inclusion
- Provide continuing advisories on SIG issues.

SO 4: Advocate for financing of substantive equality at all levels

- Commission baseline studies on equity in political representation, wage employment and access to maximum defined services
- Monitor inclusiveness in the budget-making process
- Develop guidelines for inclusiveness, disseminate and monitor their use.

Among the threats to implementation, the SWOT analysis identifies politics; yet this is not as serious as the other two listed threats, viz. competition and overlapping mandates. SO 2 addresses the need to develop collaboration frameworks, which is pertinent because NGEC's originating legislation recognises the fact that it shares a common constitutional root with the KNCHR and CAJ. Thus, while Article 59 (4) empowers Parliament to enact legislation restructuring the Kenya National Human Rights and Equality Commission into two or more commissions, S. 55 of the

latter institutions' founding legislation anticipates their dissolution within five years.

One way in which NGEC's mandate is superior to that certainly of CAJ, is that it focuses on the national and county levels, as well as the public and private sectors. In effect therefore, the Ombudsman's mandate – directed exclusively at the public sector – can be subsumed in NGEC. But from the devolution perspective, NGEC's specific mandate to work with county governments in ensuring their laws and institutions comply with

gender and equality principles underscores the need for NGECC to create a substantive county level presence. Additionally, NGECC's Strategic Plan also recognises the need for monitoring and evaluation, which requires embedded instruments, including personnel. Consequently, it is right that NGECC SO 1 declares an intention to establish county level offices. Such offices will enable NGECC to more efficiently address two weaknesses identified under its SWOT analysis, limited sub-national visibility and the poor general understanding of its mandate.

A major concern with NGECC's Strategic Plan is that it shows little awareness of social differentiation in societies across the country. Its undertaking to interact with stakeholders and working groups would be well served by a distinction of the difficult to reach groups, such as pastoralists and people with disabilities. Additionally, NGECC would do well to have an agenda that focuses specifically on children, adolescents and the youth as groups that are particularly impressionable and therefore a good area in which to invest resources in transforming attitudes to gender and other sources of inequalities and marginalisation. All these groups are based at the grassroots and are best approached from local county offices which can domesticate the agenda.

4.14 Auditor General

The Auditor General (AG) is the chief executive of the Kenya National Audit Office (KENAO). The AG's constitutional function is to undertake an annual audit of publicly-funded entities within six months of the end of each financial year, and report on the financial accounts of the same, indicating whether public money has been applied lawfully and in an effective way. Among the organisations to be so audited are:

- (i) national and county governments;
- (ii) all funds and authorities of the national and county governments;
- (iii) all courts;
- (iv) all state corporations;
- (v) every constitutional commission and independent office;
- (vi) the National Assembly, the Senate and the county assemblies;

- (vii) publicly-funded political parties;
- (viii) the public debt;
- (ix) and any other entity mandated by legislation for public audit.

The AG submits an audit report to Parliament or the county assembly as applicable. In Parliament, the reports are reviewed by the Public Accounts Committee in respect of the National Government and related entities, and the Public Investment Committee in respect of state corporations. Parliament and the county assemblies must review and decide within three months what action – if any – to take on the AG reports.

The legislation establishing the AG office, the Public Audit Act, has yet to be updated to conform to the Constitution (2010); so it still combines the budget control and public audit functions, and devotes its Part IV to the audit of local authorities. However, S. 3 of the Act provides for the preparation each financial year of accounts showing the financial position of the government with respect to receipts into and issues from the exchequer account, and a statement of the outstanding accounts. Respective accounting officers, receivers of revenue and special fund administrators must also prepare similar accounts (S. 4, 5 and 6 respectively). Part III of the legislation is devoted to the audit of state corporations.

With respect to the audit of county governments, there is no substantive document outlining processes. It is therefore tempting to assume this will be managed in the same way the audit of local authorities was done. However, there is a fundamental difference between the local authorities and county government financial systems, which is why the Public Finance Management Act has distinct parts dedicated to the management and control of public finance for the national as opposed to county governments. Indeed, AG reports that county government audits are at an advanced stage of completion. This lack of specific attention to devolution is curious: the AG's current strategic plan covers 2012 to 2015, meaning it was launched two years into the era of the 2010 constitution, and should have anticipated devolution. Additionally, the agency's website continues to list 'Local Authorities' among its five departments.

Appendices

The Roles of the National and County Governments

Part 1—National Government functions

1. **Foreign affairs, foreign policy and international trade.**
2. **The use of international waters and water resources.**
3. **Immigration and citizenship.**
4. **The relationship between religion and state.**
5. **Language policy** and the promotion of official and local languages.
6. **National defence** and the use of the national defence services.
7. **Police services**, including— (a) the setting of standards of recruitment, training of police and use of police services; (b) criminal law; and (c) correctional services.
8. **Courts.**
9. **National economic policy and planning.**
10. **Monetary policy**, currency, banking (including central banking), the incorporation and regulation of banking, insurance and financial corporations.
11. **National statistics** and data on population, the economy and society generally.
12. **Intellectual property rights.**
13. **Labour standards.**
14. **Consumer protection**, including standards for social security and professional pension plans.
15. **Education policy**, standards, curricula, examinations and the granting of university charters.
16. **Universities**, tertiary educational institutions and other institutions of research and higher learning and primary schools, special education, secondary schools and special education institutions.
17. **Promotion of sports** and sports education.
18. **Transport and communications**, including, in particular— (a) road traffic; (b) the construction and operation of national trunk roads; (c) standards for the construction and maintenance of other roads by counties; (d) railways; (e) pipelines; (f) marine navigation; (g) civil aviation; (h) space travel; (i) postal services; (j) telecommunications; and (k) radio and television broadcasting.
19. **National public works.**
20. **Housing policy.**
21. **General principles of land planning** and the co-ordination of planning by the counties.
22. **Protection of the environment and natural resources** with a view to establishing a durable and sustainable system of development, including, in particular— (a) fishing, hunting and gathering; (b) protection of animals and wildlife; (c) water protection, securing sufficient residual water, hydraulic engineering and the safety of dams; and (d) energy policy.
23. **National referral health facilities.**
24. **Disaster management.**
25. **Ancient and historical monuments** of national importance.
26. **National elections.**
28. **Health policy.**
29. **Agricultural policy.**
30. **Veterinary policy.**
31. **Energy policy** including electricity and gas reticulation and energy regulation.
32. **Capacity building and technical assistance to the counties.**
33. **Public investment.**
34. **National betting**, casinos and other forms of gambling.
35. **Tourism policy** and development.

Part 2—County Government functions

1. **Agriculture**, including— (a) crop and animal husbandry; (b) livestock sale yards; (c) county abattoirs; (d) plant and animal disease control; and (e) fisheries.
2. **County health services**, including, in particular— (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.
3. **Control of air pollution**, noise pollution, other public nuisances and outdoor advertising.
4. **Cultural activities**, public entertainment and public amenities, including— (a) betting, casinos and other forms of gambling; (b) racing; (c) liquor licensing; (d) cinemas; (e) video shows and hiring; (f) libraries; (g) museums; (h) sports and cultural activities and facilities; and (i) county parks, beaches and recreation facilities.
5. **County transport**, including— (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.
6. **Animal control and welfare**, including— (a) licensing of dogs; and (b) facilities for the accommodation, care and burial of animals.
7. **Trade development and regulation**, including— (a) markets; (b) trade licences (excluding regulation of professions); (c) fair trading practices; (d) local tourism; and (e) cooperative societies.
8. **County planning and development**, including— (a) statistics; (b) land survey and mapping; (c) boundaries and fencing; (d) housing; and (e) electricity and gas reticulation and energy regulation.
9. **Pre-primary education**, village polytechnics, homecraft centres and childcare facilities.
10. **Implementation of specific national government policies on natural resources and environmental conservation**, including— (a) soil and water conservation; and (b) forestry.
11. **County public works and services**, including— (a) storm water management systems in built-up areas; and (b) water and sanitation services.
12. **Fire fighting services** and disaster management.
13. **Control of drugs and pornography**.
14. **Ensuring and coordinating the participation of communities and locations in governance** at the local level and assisting communities and locations to develop the administrative capacity for the effective exercise of the functions and powers and participation in governance at the local level.

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