

# THE LAW REFORM

**QUARTERLY NEWSLETTER**  
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FROM THE  
**EDITOR'S**  
DESK

# Message

## From the Editor In Chief

The Kenya Law Reform Commission (KLRC) is glad to publish the 2nd issue of the Quarterly Law Reform Newsletter (LRN). The issue comes at a time when the country has celebrated ten (10) years since the promulgation of the Constitution of Kenya. Subsequently, the country has undergone through a number of legal, policy, institutional and administrative reforms. KLRC has been integral in the realization of these reforms as well as in the ongoing implementation of the 2010 Constitution. The Law Reform Newsletter thus highlights the key legislative initiatives, policy development and administrative reforms brought about by the Constitution. It also captures KLRC's contributions to the reforms, experiences and lessons. Part of this issue has also been dedicated to the recent work done by KLRC in close collaboration with our stakeholders and partners.

It is worth noting that the Law Reform Newsletter is one of the flagship projects that KLRC has instituted

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so as to enhance public awareness and access to information on law reform in Kenya as well as across the borders. The articles are carefully selected from a plethora of contributions to suit the theme and the unique readership needs of our stakeholders. The Law Reform editorial team did subject the articles to further review before final publication. We therefore anticipate having quality and increased engagement, information sharing and participation of as many stakeholders as possible.

The Law Reform Newsletter targets the policy makers at the two levels of government (National and County Governments), legislators, Civil Society, Development Partners, Academia and the general public who are the ultimate beneficiaries of our work. We have confidence that our experts and the contributors to the newsletter have been alive to the issues reflected in the body public and have penned inspiring experiences and possible policy solutions where applicable for the betterment of society.

We have equally made deliberate efforts to guarantee that the language and design is user friendly for a great reading and compatibility with user's needs. The editorial team will continue to work on your feedback in the upcoming Law Reform Newsletter issues.

**Josephine Sinyo, EBS**  
Editor in Chief...Law Reform Newsletter



# Appointment of Hon. Josephine Sinyo as Acting CEO/Secretary

**H**on. Josephine Sinyo was appointed acting CEO of Kenya Law Reform Commission (KLRC) in October, 2019. Before her appointment, she had been serving as the Director Legislative Services at KLRC.

## Achievements and experience

Hon. Sinyo is an Advocate of the High Court of Kenya and holds a Master's Degree in Law (United Kingdom); Bachelor of Laws Degree from University of Nairobi, University School of Law; a Post graduate Diploma in Law (Kenya School of Law) and a diploma in legislative drafting (UK). She brings on board vast experience in legal research, legislative drafting, policy development, legal aid assistance, and community engagement.

## Goals and Vision

Hon Sinyo is passionate about people and organization development. Her vision is to continue promoting the vision of KLRC into becoming a vibrant agency for responsive law reform. The Ag. Secretary/CEO is also keen on continued partnership with all institutions in enhancing KLRC's mission of facilitating law reform conducive to social, economic and political development

through keeping all the law of Kenya under review, ensuring its systematic development and reform in conformity with the Constitution of Kenya, 2010.

***“Hon. Sinyo is passionate about people and organization development. Her vision is to continue promoting the vision of KLRC into becoming a vibrant agency for responsive law reform.”***



## Online Protection Of Children During and Post The Covid-19 Pandemic

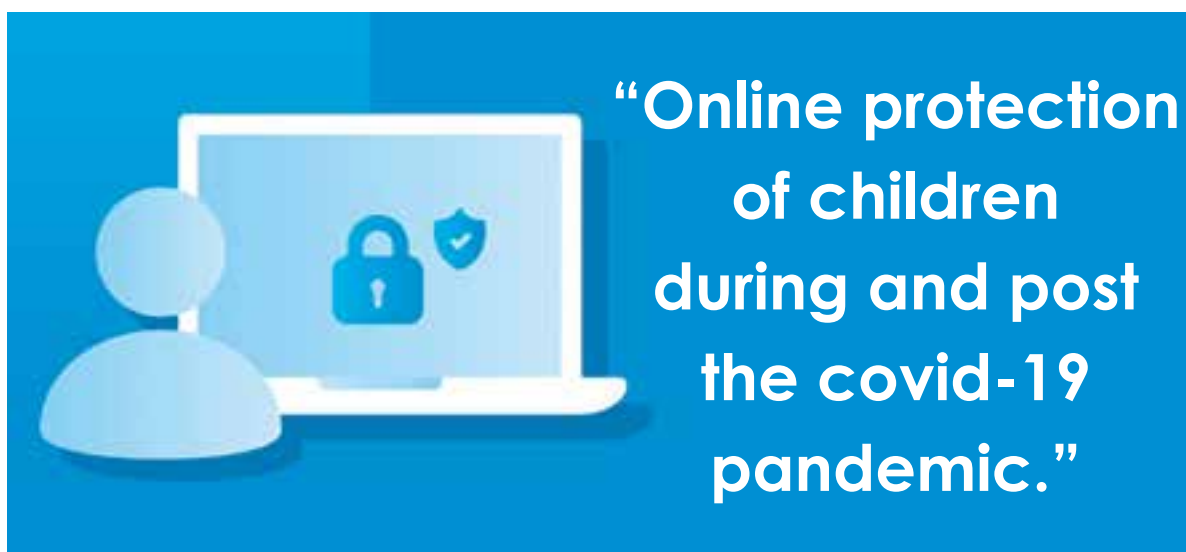
Globally, Information Communication Technologies (ICTs) have become powerful tools to propel knowledge dissemination and economic growth. In Kenya, eighty five point five percent (85.5%) of the population use mobile phones, which translates to a whopping thirty four point eight (34.8) million subscribers. Further, it is estimated that about twenty-nine point one million (29,100,000) persons (which translates to 71.7% of the Kenyan population) have access to the internet. This estimate is inclusive of both adults and children. Indeed, the United Nations Children's Fund (UNICEF), projects that a third (1/3) of the internet users are children and further that the usage would increase by half (50%) following the stay-at-home and closure of schools orders, adopted by most states to aid in combating the spread of COVID-19.

Whilst access to content and interaction over the internet is progressive, it is yet to be fully regulated to protect children. On May 30th 2020, the Anti-Human Trafficking and Child Protection Unit (AHTCPU) raised alarm over the sudden increase in the online human trafficking, recruitment and exploitation of children in Kenya. This came with concerns that this trend would continue and even get worse, for as long as the children were staying

at home, exploring the internet without restrictions and unaided. There were further fears that owing to the dusk- to-dawn curfew and the cessation of movement (as directed by His Excellency the President), human traffickers were capitalizing on the internet realm to groom, recruit and exploit children and even lure adults into illegal business.

**“Whilst access to content and interaction over the internet is progressive, it is yet to be fully regulated to protect children”**

Both international and local organizations have attributed the risky increase of online exploitation of children, as a result of the measures taken to prevent the spread of COVID 19. For instance, the interruption of physical but adoption of online learning exposes the children to all manner of content and 'persons' as their parents/guardians are often away from them or unable to control. According to Rachel Harvey, the Regional Advisor for UNICEF, before the COVID-19 Pandemic there were about seven hundred and fifty thousand (750,000) people globally, looking to connect online with children for sexual purposes at any given time! Whilst the increase in the usage of the internet is and will be on the rise, this risk is more imminent in our private spaces and homes now than ever.



Premised on the foregoing, interested stakeholders in Kenya have come up with the Child Online Protection campaign commonly known as (COP). The COP campaign seeks to provide children and the youth, with the information and skills to practice safe internet use and minimize exposure to risks and vulnerabilities. The COP campaign was developed in partnership with Childline Kenya, the Department of Children Services, Google, Kenya Association of Professional Counsellors, Kenya Film Classification Board, Plan International, Terres des Hommes, the Cradle, the GSMA, UNICEF and Safaricom among others. In the quest to sensitize parents, guardians and care-givers on safe use of the internet for the children, there has been training for COP in partnership for with the Communication Authority of Kenya, African Advanced Level Telecommunications Institute (AFRALTI) and the Kenya Law Reform Commission.

It has been said that child online protection is more of a social issue that a legal issue. It borders on right of access to information, freedom of expression and right to privacy. In the quest to balance all these interests, it is imperative for the parents, guardians and care-givers to take charge of the gargets and sites the children access, in order to protect them from accessing harmful sites that may lead them to being exploited. This way, we will all be online protectors of children.

**Written by:**

**Kogi Evelyne Wanjiku,**

**Kenya Law Reform Commission.**

# The Referendum Debate



Kenya is at the verge of holding its third referendum. The first of such a plebiscite was in the year 2005 when Kenyans voted against the Bomas Constitution by 58% of the vote. The second of such an initiative was in 2010 where Kenyans overwhelmingly voted for the current constitution (67% vote). There is an ongoing debate about the need to amend the constitution especially after ten years of implementation. As this is the case, there are legal and public interest issues which need to be coalesced, demystified and illuminated. The major one emanates from the democratic principle where a referendum does require citizen participation and vote. That is why it is called an approval by majority (popular vote) on a specific issue, matter or constitutional amendment such as ours.

At the onset, it is crucial to underscore the fact that referendums have been used to mediate and make decisions on significant issues such as: constitutional issues, sovereignty of nations, morality concerns such as abortion, environmental questions, education and other matters. They have also been used in securing support for leaders, political parties or their policies. Further, they have

become effective tools for popular control and feedback on critical issues. This has indeed been the experience globally. Major examples include: the Brazilian preference for a republic against a monarchical system (1993), Chile's 1998 experience where a dictatorial regime of Augusto Pinochet was brought to an end, the Secession of South Sudan from the North and the European Union Brexit debate. It is evident that referenda have posed various benefits to any legal system, including enhancing more robust democratic governance. This leads us to our situation.

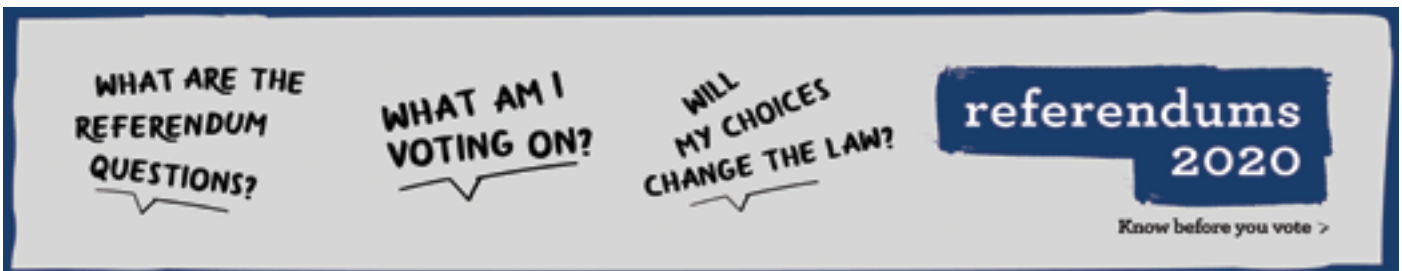
It is noteworthy to mention that Kenya which was a British colony, became a Republic in 1963. The 2010 Constitution of Kenya, currently in force, replaced the 1969 constitution, which itself had replaced the 1963 independence constitution. Since independence and the enactment of the Constitution of 2010, the 1969 national Constitution was amended numerous times on matters such as: multi-party politics, security of tenure of some offices and presidential term limits. These constitutional amendments provide hind/foresight into the dynamic social political changes and ultimately the current system of governance in Kenya.

“There is an ongoing debate about the need to amend the constitution especially after ten years of implementation.”

As already reiterated, constitutional referendums do need approval by a popular vote. It will be recalled that the defeat of the 2005 referendum was not necessarily issue based but political. The YES in the 2005 referendum was assigned the symbol of a banana, while the NO was assigned the orange as their means of representation. It is intimated that some could have rejected the banana owing to its "over-ripeness", misinformation about majimboism and other political undertones.

Fast forward to August, 2010; the Constitution was supported and approved amid concerns that there were some aspects that were not palatable. However, owing to the ugly incidents of the 2007/2008 Post Election Violence (PEV) and subsequent National Accord which brought together the antagonists in the election (ODM and Narc Kenya); we gave ourselves the current

amendment bill). However, if the bill touches on a matter that is mentioned in Article 255 (1) such as the territory of Kenya, the president shall before assenting to the Bill request the Independent electoral and boundaries commission to conduct within ninety days a national referendum for approval of the Bill. Article 257 provides for popular initiative which is supported by at least one million registered voters. Promoters of such an initiative are to prepare and submit their draft bill to the IEBC for verification of signatures and onward transmission to county assemblies. Majority of county assemblies are required to pass this bill which is to be submitted to the president for assent. One may also check the legislation that deal with referendum among them, the Constitution of Kenya review Act, 2009 and the constitution of Kenya review (referendum) regulations, 2010.



katiba. As can be noted, meteoric circumstances prevailed the defeat and the support of the past two referenda. As demonstrated, referendums can be divisive, used as political tools or be progressive. I may say that indeed this is the beauty and price of democracy.

The issues which presently need to be ironed are: does Kenya have a well thought out and all-inclusive referendum legislation and not a reactive one? Do we need simple or super majority to amend the law? Can the sovereignty and will of the people be amended by the legislative arms of government without public input?

An attempt to respond to the above issues may need one to seek shelter and domicile themselves under articles 255, 256 and 257 of the Constitution. These provisions provide for the amendment of the Constitution. Article 256 (5) (a) provides for amendments by parliamentary initiative (an

Kenya has witnessed attempts to amend the constitution under the Okoa Kenya and Punguzo Mzigo popular initiatives. The initiatives were defeated at the signature verification (for Okoa Kenya) and at the county assemblies (Punguzo mzigo). The current Building Bridges Initiative will have many lessons to pick from the previous attempts as they drum support for constitutional amendment. There is also the cardinal principle on the right to make political choices, in a free fair and regular elections based on universal suffrage and the free expression of the will of the electors and right without unreasonable restrictions to vote in any election or referendum among other rights (Article 38 of the Constitution). The critical point is that the popular majority must resonate with the issues (as needs) being advanced by the promoters.

**Written by:**  
**Mathew Kimanzi**  
**Head of Public Education, KLRC**



# Big Four, Legislation and the National Economy



The Government of Kenya through His Excellency the President, declared in 2017 that it would focus its time and resources on a targeted transformative agenda, based on four socio-economic pillars namely; Manufacturing, Food and Nutrition Security, affordable Housing and Universal Health Coverage. This was intended to address the pressing concerns facing Kenyans and create the best environment for achieving accelerated socio-economic transformation. The year 2017 also marked the year that brought MTP II to its conclusion, paving way for MTP III. Based on the average economic growth of the country from 2013 to 2017 at 5.66 %, it was projected that realization of the big four agenda would propel the country's annual economic growth to the highs of 8.4 % annual growth experienced in 2010.

The beauty of the Big Four vision was the resonance with issues that seemed to directly affect the common man such as cost of living, jobs, shelter and health care. While the "hardware" needed to drive growth is crucial; the roads, SGR, the ICT capabilities,

Ports, Service Delivery within Government; of equal importance was the "software" required to drive the Big Four pillars. The "software" here refers to the policy and legal interventions needed to accelerate national social and economic transformation.

Fortunately, the right policies are there. Similarly, many of the laws needed to translate policies into actionable programmes are also in place. What was needed is implementing the actionable policies and laws, reviewing those that needed revisiting, redrafting others, giving legal opinions when the need arises. As one state council rightly put it, law reform is akin to the sausage making process, it is allegedly messy, and yucky and all that stuff that we leave for horror movies, or presidential election results in Kenya. Nonetheless, it is a role gladly filled by KLRC, with gusto and vibrancy, a professional workforce spearheading legal and institutional reform. This involved plugging gaps in policy and legislation under each of the four pillars, and a detailed report on this is available on <https://www.klrc.go.ke/index.php/klrc-blog/637-legislative-initiatives-to-support-the-big-four>.

**“Similarly, many of the laws needed to translate policies into actionable programmes are also in place.”**

**“The year 2019, marked a decline in the economic performance, with data registering an annual GDP growth rate of 5.4 %.”**

Taking a glimpse of the economic background, surrounding Big Four, if we follow the numbers, the Kenya's annual Economic growth rate jumped from 4.9 % in 2017, to 6.3 % in the preceding two years. It can be argued that the Big Four Agenda had a major impact in the increased economic output. That is a case for another day however. The year 2019, marked a decline in the economic performance, with data registering an annual GDP growth rate of 5.4 %. Not complicating matters so much with figures, what comes out is how the economy was performing parallel to the lifetime of the Big Four Agenda. At about midway through the journey, the world had to deal with the emerging issue that is Covid-19 pandemic, the resultant global impact and economic haemorrhage. Kenya was not immune, and the hit to the economy will be comprehensively documented come the end of the year. The hit definitely slowed down the country's economic momentum, and so, it remains to be seen whether, the Government's Economic recovery stimulus plan will provide the economic resilience to bounce back from the impact of the pandemic.

More however needs be done in terms of creating the right policy and legal environment for the private sector to partner with government in driving the Big Four agenda. In this field of legal, policy and institutional reforms, Kenya Law Reform Commission will gladly play its role.

**Written by:**  
**Kelvin Mwenda**  
**Head of Planning, KLRC**



## Key considerations for relocation of the seat of a County Government/ Headquarters

With the advent of devolution and county governments, the location of county headquarters has emerged both as a legal and political issue. Section 6A (1) of the County Government Act, provides that each of the county governments shall be located in the respective physical location set out in the third Schedule of the Act. It goes further to provide in section 6A (2) that a County Assembly may by a resolution supported by at least two-thirds of the members of the County Assembly and with the approval of Parliament, transfer the headquarters of the county government from the physical location specified in the Third Schedule to such other physical location as it may consider appropriate. In addition County Assemblies are obligated, by dint of section 6A (3) to facilitate public participation before passing a resolution to transfer the headquarters.

### Case Studies

#### (i) Transfer of Laikipia County Headquarters from Nanyuki to Rumuruti

In the proceedings of the County Assembly of Laikipia dated 12th February, 2014, the members of the County Assembly moved, debated and passed a motion to the effect that the seat of the executive Government of Laikipia County Government and the County Assembly would be relocated to Rumuruti with satellite offices at Doldol, Nanyuki and Nyahuru. A section of the residents of Laikipia

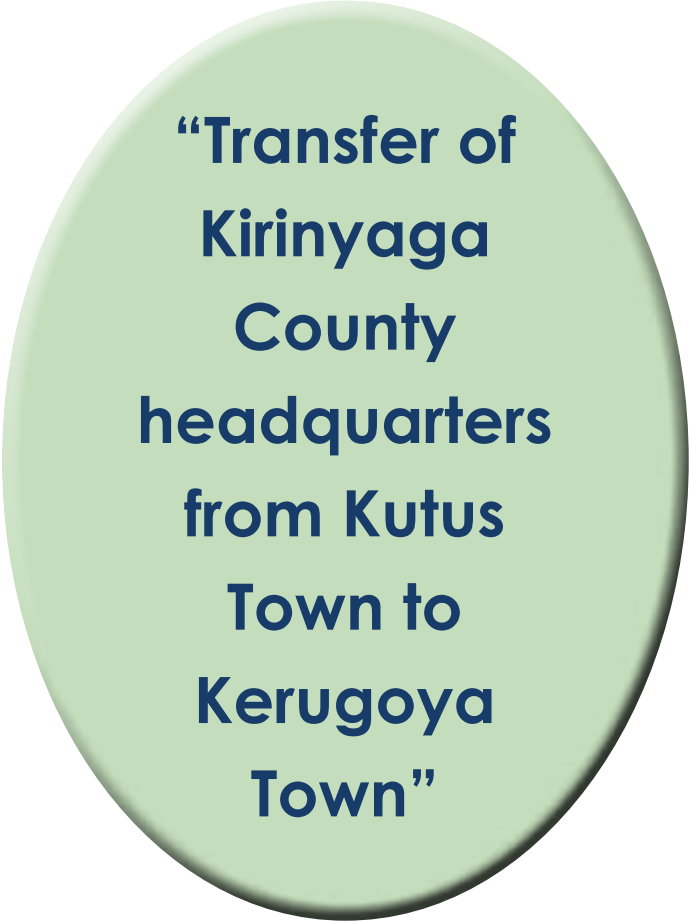
County, aggrieved by this decision, petitioned the High Court, in *Sammy Ndung'u & 5 others v Governor Laikipia County & 2 other* seeking a declaration that the resolution of the County Assembly was a nullity for failing to involve the members of the public before the decision was made.

The Court found that that the resolution to relocate the seats of the Executive and County Assembly of the County Government of Laikipia to Rumuruti with the satellite offices was in violation of articles 1(2), 10(2) (a), and 196 (1) (b) of the Constitution. This was because members of the public did not participate in the decision making it null. The court held further that, in coming to this decision, the Assembly also breached sections 87, 91 and 115 of the County Government Act.

**“Transfer of Laikipia County Headquarters from Nanyuki to Rumuruti”**

**(ii) Transfer of Kirinyaga County headquarters from Kutus Town to Kerugoya Town**

Similarly, there was a petition by residents of Kirinyaga County questioning the legality of a gazette notice naming Kutus Town as the headquarters of Kirinyaga County. The residents had insisted that they had not been consulted by the leaders when the gazette notice was drafted. They had thus technically rejected the notice that declared that the headquarters be transferred to Kerugoya Town. The High Court in Kerugoya ruled, in April of 2016 that Kerugoya Town is the official county headquarters as opposed to Kutus Town. This was so despite that the county government had already begun construction of county headquarters at Kutus Town, a project that was nearing completion.



**“Transfer of  
Kirinyaga  
County  
headquarters  
from Kutus  
Town to  
Kerugoya  
Town”**

**Conclusion**

Section 6A(2) of the County Governments Act, 2012 authorizes a County Government to transfer its headquarters from the physical location specified in the Third Schedule to another physical location, subject to public participation. The Act, however, does not establish a criteria for consideration before a county headquarter is relocated from one physical location to another. Additionally, the procedure to be undertaken by the County Government before a resolution for the transfer is passed, is not outlined. It is recommended that regulations be developed to guide the procedure of transfer of county government's headquarters.

**The Regulations may provide for—**

- (a) The obligation for the conduct of a feasibility study on the practicality of the relocation , taking into account the economic, technical and other factors including the reasons for the proposed move, the benefits of the move and the challenges thereof;
- (b) Preparation of a proposal indicating the reason for the proposed move, the new proposed location, the impact benefits and challenges that will be brought about by the transfer;
- (c) Consultation with the residents of the County in respect of the proposal to transfer the headquarters of the County;
- (d) Presentation of proposal to the County Assembly for approval; and
- (e) Transmission of the resolution of the County Assembly to Parliament for adoption.

**Written by:****Damaris Mukala****Senior Legal Officer, KLRC**

# KLRC MOMENTS



KLRC Receives a delegation from the Nigeria Law Reform Commission



Former KLRC chairman Mr. Mbage Ng`ang`a and staff pose for a photo at a public outreach forum



Former KLRC chair makes his remarks during a constitutional and independent offices chairperson's forum in Meru



KLRC's Assistant Director, Legislative services hands over a report to Hon. Joshua Kiptoo (the speaker of Nandi County Assembly)



# Municipalities should spark countrywide development

**K**enya currently has over fifty nine (59) municipalities that are supposed to foster urbanization and development across the country. Under the objects of devolution in article 174 of the Constitution, decentralization of services to the lowest possible levels is a cardinal principle. In this regard, article 184 of the Constitution provides for the enactment of national legislation to provide for the governance of urban areas and cities. Consequently, parliament enacted the Urban Areas and Cities Act (UACA), 2011 (which has since been amended in 2019) to provide for the classification criteria, principles of governance and management and for the participation of residents in the governance of urban areas and cities in Kenya.

On the classification criterion, the 2019 amendment provides that cities, municipalities, towns and markets have a minimum population of two hundred and fifty thousand (250,000), fifty thousand (50,000), ten thousand (10,000) and two thousand (2,000) respectively. This is a departure from the previous provisions of UACA 2011 which had a higher population threshold. The act also provides that all county headquarters be designated as municipalities except the headquarters which had already attained the city status such as Nairobi. The focus thus shifts to how municipalities are discharging their assigned functions.

Of import is that municipalities have a number of complimentary functions to county governments as provided for in Part II of the Fourth Schedule to the Constitution and Section 20 of the UACA, 2011. Some of the specific development issues they are to address include: control of land, land sub-division, land development and zoning by public and private sectors for any purpose; industry, commerce, markets, shopping and other employment centers; residential areas, recreational areas; parks, entertainment, passenger transport; agriculture; freight and transit stations among others. Municipalities also supposed to work within the framework of the spatial and master plans in fostering urban development and service delivery.

**“Under the objects of devolution in article 174 of the Constitution, decentralization of services to the lowest possible levels is a cardinal principle.”**



“Such legislation includes the PFM Act, 2011 which requires proper accounting and reporting.”

In order to achieve their mandates, municipalities are expected to have and manage their own resources. The sources of funds for a board consist of monies allocated by the respective county assemblies. The UACA also allows county governments to provide conditional and unconditional transfers. It also allows municipalities to receive grants from organizations within and outside Kenya. To safeguard these resources, the municipalities are also required to implement all applicable national and county legislation. Such legislation includes the PFM Act, 2011 which requires proper accounting and reporting.

The governance of municipalities is dedicated to respective municipal boards whose composition and functioning is expected to be as inclusive as possible. For instance, membership is to be drawn from diverse organizations and sectors including: professional associations, the private sector, registered associations of the informal sector and a cluster representing registered neighborhood associations. The boards are also to be guided by the principles of governance. For instance there should be the recognition and respect for

the constitutional status of county governments. In this sense, there is a principal agency relationship between the boards and their respective county governments. The boards are equally expected to work with municipal managers and other staff in the implementation of their policies and programmes.

Further, while discharging their functions, the boards may exercise their powers which include formation of committees and the making of by-laws so as to realize development in their respective areas. They are also supposed to promote accountability not only to the county government<sup>2s</sup> but also the residents of the municipality. Significantly, the municipalities need to institutionalize active public participation by its residents in governance affairs. Globally, municipalities have been the engines and the centers of development; much more is expected from our very own.

**Written by:**

**Dr. Jacob Otachi**

**Head of Corporate Affairs/Communications  
Information Access Officer, KLRC**



# Devolution: Administrative and legislative framework for performance, delegation and transfer of functions

The Constitution of Kenya provides, in the Fourth Schedule, an elaborate list of the functions of each level of government. This list was conceptualised as the key guide and foundational law on the distinct functions that each level of government is responsible for. In the implementation of these assigned functions, disputes have occasionally arisen on the substantive role of each level of government in their performance of the functions. Notable in this respect are the court cases that have been instituted by either level of government challenging the role or action of the other level of government in relation to implementation of functions as assigned in the Fourth Schedule. These disputes have invariably led to loss of public resources, provision of a poor quality of services to the public and ultimately caused rifts in the relation between the two levels of government.

## Case law

In *Kenya Ferry Services v Mombasa County Government & 2 others 2016 (eKLR)*, a dispute arose on which level of government was mandated to run ferry services in Kenya. The County government of Mombasa relying on Part II of the Fourth Schedule of the Constitution of Kenya 2010 that in paragraph 5(e) conferred to the County government, the

function of County Transport including operating ferries and harbours. The Petitioners contention was that the Transition Authority together with other stakeholders unbundled the functions of the Petitioner for the purposes of determining whether any were devolved functions to be marked for handing over to the County government of Mombasa. It was decided that functions relating to the Kenya Ferry Services, being transport on international waters, was assigned to the national government, even though certain elements that would allow for effective performance of the function would require involvement of the county government. Thus it was held that the two levels of government needed to consult and cooperate on the delivery of services that revolved around the ferry transport infrastructure.

**“Notable in this respect are the court cases that have been instituted by either level of government challenging the role or action of the other level of government ...”**



There was a similar holding in Republic v Transition Authority & another Ex parte Kenya Medical Practitioners, Pharmacists & Dentists Union (KMPDU) & 2 others [2013] eKLR. These cases clearly demonstrated the need for much closer collaborative efforts in delivery of services where it becomes impossible for one level of government to deliver an exclusive function without the active involvement of the other level of government.

### **Transfer of functions**

As is evident, the courts and other stakeholders have also had the opportunity to restate the procedure for the transfer of functions. The defunct Transitional Authority was required to, before undertaking a transfer of functions between the two levels of government and in accordance with Article 175 of the Constitution and sections 7 and 24 of the County Governments Act, 2012, among other things—

- (a) determine the resource requirements for the transferred/devolved function;
- (b) prepare and validate an inventory of all the assets and liabilities of the County Governments, public entities and other local authorities;
- (c) provide mechanisms for the transfer of assets including vetting the transfer of assets during the transitional period;
- (d) develop criteria pursuant to Section 15 (2)(b) of the Sixth Schedule of the Constitution to guide the phased or asymmetric transfer of functions to the Counties;
- (e) develop criteria to determine the transfer of previously shared assets, liabilities and staff;
- (f) carry out an audit of existing human resource of the Government and local authorities and advise on the effective and efficient rationalization and human resource deployment to either arm of Government; and
- (g) assess the capacity needs of National and County Governments and recommend necessary measures to ensure that the two levels of Governments had adequate capacity during the transition period to enable them undertake the assigned functions.

It should also be noted that while the Fourth Schedule allocates functions to the national and county governments, there is the existence of concurrent functions that have to be delivered by the two levels of governments, and residual functions that were retained by the national government having not been expressly assigned by the constitution to either the national or the county governments during the unbundling process. Such concurrent jurisdiction exists in functions such as health, agriculture and transport, where the aspects of policy and standard setting of these functions are allocated to national government, whilst the county governments implement the functions. The residual functions, having not been clearly dealt with present a challenge in that for the allocation to either level of government to be done, a further unbundling process is required.



Article 191 of the Constitution provides that in the event of any conflict between national law and county law with respect to matters falling within the concurrent jurisdiction of both levels of government, the national legislation shall prevail if it is aimed at preventing unreasonable action by a county; if it provides for a matter that cannot be regulated effectively by legislation enacted by the individual counties; and where it provides for a matter that requires uniformity throughout Kenya.



On transfer of functions from one level of government to another, Article 187 provides that a function or power of government of one level of government may be transferred to another level of government by agreement between the two levels of government. However, even then, the constitutional responsibility for the performance of the function or exercise of the power remains with the level of government to which the function is assigned by the constitution in general, and the Fourth Schedule in particular.

The Intergovernmental Relations Act, 2012 in Part III makes provision for the transfer and delegation of powers, functions and competencies. The provisions in the Act relate to the principles to be applied in such transfer and delegation and further provides for an agreement for the same. The criteria and the need for public participation process to be applied during the process of transfer or delegation is also provided for in detail.

This synopsis of the nature and character of division of functions between the two levels of government and the challenges that have arisen due to such division present an opportunity for the Ministry of

Devolution to delve deeper into these challenges and present lasting solutions for a more cohesive environment intergovernmental relation sector.

It is notable that whilst the Intergovernmental Relations Act, 2012 provides the legislative framework for the maintaining of sound relations between the national and county governments, a broader policy, legislative and regulatory lacuna exists with respect to the foundational matters touching on the performance of the functions as assigned to each level of government. Performance of functions sits at the core of service delivery and therefore relations between the two levels of government. Therefore, given that performance of functions has in the past resulted in court battles and ostensibly, lack of a cooperative and collaborative environment between the two levels of government, it is necessary to strategize and operationalise policy, legislative and regulatory interventions to once and for all provide the much-needed guidance.

**By Anthony Otieno,  
Senior Legal Officer, KLRC**

## Feature Article

# The role of the Nairobi centre for international arbitration

It is an acknowledged fact that to resolve all disputes through litigation is untenable, for an economy and that particularly places an unnecessary burden on the state's ability to enhance access to justice. What is more, a faster dispensation of disputes can serve to improve sustainable development and stimulate economic growth by building confidence both for domestic and foreign investment.

The last decade has witnessed a growing interest and legislative developments in ADR. One such change is the establishment of The Nairobi Centre for International Arbitration by Act No. 26 of 2013 as a Centre for promotion of international commercial arbitration and other forms of dispute resolution. The NCIA has in the period since its inception entrenched specialized administered case management to offer professional ADR services. These coupled with the emerging role in statutory appointment will shape the growth of ADR into a complementary system for resolution of disputes. The Centre has handled disputes worth more than Kenya Shillings 12 Billion since 2016 when it launched the Arbitration and Mediation Rules.

Prior to the underpinning of Alternative Dispute Resolution in the Constitution, the sector operated

in the shadow of the formal justice system. This meant that there was little or no coordinated effort to build a harmonized approach to ADR. As a result, the sector remained segmented into small practice areas concentrating on a particular mode of dispute resolution and accessible to a limited

**“The Centre has handled disputes worth more than Kenya Shillings 12 Billion since 2016 when it launched...”**

portion of the society. Legislative initiatives also took a similar pattern with fragmentation being a common feature. To address this situation the NCIA embarked on a process towards development of a National ADR Policy that has so far been subjected to a participatory process for validation of its proposals.

The Centre has also gained continental recognition in the 2020 Arbitration in Africa Survey dated 30th June 2020, conducted by the School of Oriental and African Studies (SOAS), University of London ranking NCIA amongst the Top Five Arbitration Centres in Africa. According to the SOAS 2020 Arbitration in Africa Survey:

1. The top five arbitral centres in Africa as chosen by the Survey respondents were AFSA, CRCICA, Kigali International Arbitration Centre (KIAC), Lagos Court of Arbitration (LCA), and Nairobi Centre for International Arbitration (NCIA).
2. The top five arbitral centres with the best support facilities as chosen by the respondents are: AFSA, CRCICA, LCA, NCIA, and CCJA.

The COVID 19 has however been a game changer in the industry and its impact is far reaching. The social and economic effect will likely continue

to have legal and access-to-justice implications for some time, giving rise to new disputes and delaying the progress of existing disputes before the courts. The depth of this crisis creates a need for parties and their legal representatives to consider focus on rebuilding their business relationship, re-negotiating the contract, or finding alternative paths to resolve their conflicts, rather than insisting on strict enforcement of contractual terms. This may lead to more demand for arbitration, mediation, conciliation and other amicable methods of dispute resolution, as well as the combination of different dispute resolution processes. The Centre has as a result adopted a virtual hearing protocol and enhanced the capacity of the case management system to offer a secure platform for virtual hearings. Additionally, at NCIA we seek to build capacity for present and future utility through our training opportunities open to practitioners and the general public and talent development through our Moot programs.





## Issuance of advisories

**A**dvisories are tools used to respond on various legal, policy, administrative and institutional issues. They seek to inform, point out to the gaps and share feedback with the public and stakeholders on emerging issues. They are usually in form of researched opinions, statements, briefs, declarations and communiqués. Advisories by their very nature and approach are persuasive (and not binding) instruments. They have thus become very appealing and are issued to Ministries, Departments and Agencies at the national government and to county governments.

Beyond the day to day law reform work, KLRC is also called upon to provide advisories on key administrative and policy issues around the countries. KLRC has also on certain occasions moved on its own motion (suo moto) to issue statements especially where such matters are of great public interest.

## THE REPORT CARD

Draft legislation and policies that KLRC worked on in the FY 2019-2020

	A. BILLS DEVELOPED OR REVIEWED	STATUS
1.	Kenya Food and Drug Authority Bill, 2020	Completed
2.	NHIF (Amendment) Bill, 2020	Completed
3.	Slum Upgrading and Prevention Bill, 2020	Completed
4.	Conflict of Interest Bill, 2020	Completed
5.	Bail and Bond Bill, 2020	Completed
6.	Huduma Bill, 2020	Completed
7.	Intellectual Property Office Bill, 2020	Completed
8.	Business Laws (Amendment) Bill, 2020	Completed
9.	Legal Sector Laws (Amendment) Bill, 2020	Completed
10.	Political Parties Primaries Bill, 2020	Completed
11.	Referendum Bill, 2020	Completed
12.	Statute Law Miscellaneous Bill, 2020	Completed
13.	Review of the Capital Markets Financial Law	Completed
14.	County Public Service Board Bill, 2019	Completed
15.	Supreme Court (Amendment) Bill, 2019	Completed
16.	Employment (Amendment) Bill, 2019	Completed
17.	Internal Auditors Bill, 2019	Completed
18.	Labour Institutions (Amendment) Bill, 2020	Completed
19.	Sacco Societies (Amendment) Bill, 2020	Completed
20.	Lifestyle Audit Bill, 2019	Completed
21.	Anti-Doping (Amendment) Bill, 2020	Ongoing
22.	National Film Bill, 2020	Ongoing
23.	Livestock Bill, 2020	Ongoing
24.	Insurance Law (Amendment) Bill, 2020	Ongoing
25.	Privatisation (Amendment) Bill, 2020	Ongoing
26.	Review of the Power of Mercy Advisory Committee Act	Ongoing
27.	Review of the Persons Deprived of Liberty Act	Ongoing
28.	Review of the Power of Mercy Advisory Committee Act	Ongoing
29.	Review of Nuclear Energy Act	Ongoing
	B. SUBSIDIARY LEGISLATION DEVELOPED OR REVIEWED	STATUS
30.	Intergovernmental Relations Regulations, 2020	Completed
31.	Data Protection (Civil Registration) Regulations, 2020	Completed
32.	Registration of Persons (National Integrated Identity Management Systems) Regulations, 2020	Completed
33.	Breast Milk Substitute Regulations, 2020	Completed

34.	Public Finance Management (COVID-19 Emergency Response Fund) Regulations, 2020	Completed
35.	Public Health (Prevention, Control and Suppression of Covid-19) Rules, 2020	Completed
36.	County Governments Regulations, 2020	Completed
37.	Access to Information Regulations, 2020	Completed
38.	Huduma Namba Regulations, 2020	Completed
39.	Data Protection (Civil Registration) Regulations, 2020	Completed
40.	Education Appeals Tribunal Rules, 2020	Completed
41.	National Gender and Equality Commission (Complaints Handling and Procedure) Rules, 2020	Completed
42.	HIV and AIDS Tribunal (Procedure) Rules, 2020	Completed
43.	Land Registration (Electronic Transactions) Regulations, 2020	Completed
44.	Livestock Regulations, 2020	Ongoing
45.	Anti-Doping Rules, 2020	Ongoing
46.	Supreme Court Rules, 2019	Completed
47.	Supreme Court (Presidential Election Petition) (Amendment) Rules, 2019	Completed
48.	Biosafety Appeal Rules, 2019	Completed
49.	Insolvency (Amendment) Bill, 2019	Completed
50.	Capital Markets (Commodities Exchange) Regulations 2019	Completed
51.	Legal Education Appeals Tribunal (Procedure) Rules, 2019	Completed
52.	Persons with Disabilities (Amendment) Regulations, 2019	Completed
53.	Communications and Multimedia Appeals Tribunal Rules, 2019	Completed
54.	National Youth Service Regulations, 2019	Completed
	<b>C. COUNTY BILLS DEVELOPED OR REVIEWED</b>	<b>STATUS</b>
55.	Turkana County Monitoring and Evaluation Bill, 2020	Completed
56.	Nyandarua Trade Bill, 2020	Completed
57.	Nyandarua County Revenue Administration Bill, 2020	Completed
58.	Nyandarua County Social Protection and Assistance Bill, 2020	Completed
59.	Nyandarua Water and Sanitation Services Bill, 2020	Completed
60.	Nyandarua County Agriculture and Livestock Revolving Fund Bill, 2019	Completed
61.	Busia County Public Participation Bill, 2020	Completed
62.	Isiolo County Disaster Risk Management Bill, 2020	Ongoing
63.	Kajiado Land Use and Planning Bill, 2020	Ongoing
64.	Lamu County Public Participation Bill, 2020	Ongoing
65.	Nairobi County Trade and Markets Bill, 2020	Ongoing
66.	Review of the Nairobi County Alcoholic Drink Control Act	Ongoing
67.	Nairobi City County Betting Lotteries and Gaming Bill, 2019	Completed
68.	Nairobi County Revenue Administration Bill, 2019	Completed
	<b>D. COUNTY SUBSIDIARY LEGISLATION DEVELOPED OR REVIEWED</b>	<b>STATUS</b>
69.	Nairobi City County Betting, Lotteries and Gaming (Licensing) Regulations, 2019	Completed

<b>E. LEGAL AUDITS</b>		<b>STATUS</b>
70.	Legal and Compliance Audit of the Kenya School of Government	Completed
<b>F. POLICIES REVIEWED (NATIONAL)</b>		<b>STATUS</b>
71.	National Building Code, 2020	Completed
72.	National Correctional Services Policy, 2020	Ongoing
73.	National Film Policy, 2020	Ongoing
74.	National Devolution Policy, 2020	Ongoing
75.	Political Parties Primaries Policy, 2019	Completed
76.	Social Health Insurance Policy, 2019	Completed
<b>G. GUIDELINES DEVELOPED OR REVIEWED</b>		<b>STATUS</b>
77.	County Legislation Protocol	Completed
78.	Implementation Framework on the Audit of the National and County Legislation	Completed
<b>H. POLICIES REVIEWED (COUNTY)</b>		<b>STATUS</b>
79.	County Solid Waste Management Model Policy	Ongoing
80.	Isiolo County Disaster Management Policy	Ongoing
81.	Samburu County Anti-Beading Policy	Ongoing
82.	Samburu County Gender Policy	Ongoing
83.	Lamu County Public Participation Policy	Ongoing
84.	Nairobi City County Trade Policy	Ongoing
<b>I. RESEARCH</b>		<b>STATUS</b>
85.	Research on the Legal and Institutional Framework of County Partnerships in Kenya	Completed
86.	Review of the Protocol on Publication of County Legislation	Completed
87.	Development of the World Bank Ease of Doing Business Report	Completed
88.	Research on Access to Justice in Magistrates' Courts	Ongoing
89.	Research on the necessary policy, institutional and legal framework necessary for the adoption of a penalty and fee units system in Kenya	Ongoing
90.	Research on innovative financing for Kenyan cities	Ongoing

**\*'Completed' refers to draft legislation or policy finalized by KLRC and submitted either to the Attorney-General, an instructing MDA or a county government.**



Disclaimer:

The Law Reform is a newsletter produced by KLRC's Corporate Affairs and Communications Department.

NB: The views and opinions expressed in this issue do not necessarily represent the position of KLRC. The editorial team welcomes contributions, suggestions and feedback from readers and stakeholders.

The quote:

*Social reforms are  
never carried out by the  
weakness of the strong;  
but always by the strength  
of the weak.*

*Karl Marx*

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