



Council of Governors



**REPORT ON
THE AUDIT OF NATIONAL
AND
COUNTY POLICY AND LEGISLATION IN
THE TRADE AND INVESTMENT SECTOR**





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A publication by:

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Foreword by Chairman, Council of Governors



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

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

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 Some of the key recommendations highlighted in the report are that some National laws need to be repealed while others require amendments in order to ensure conformity with the Constitution.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

Thank you!

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

Chairman, Council of Governors

Foreword by Chairman, Council of Governors



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

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

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

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

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

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

P. Kihara Kariuki

Attorney-General

Foreword by Chairperson, Kenya Law Reform Commission



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

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

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

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

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

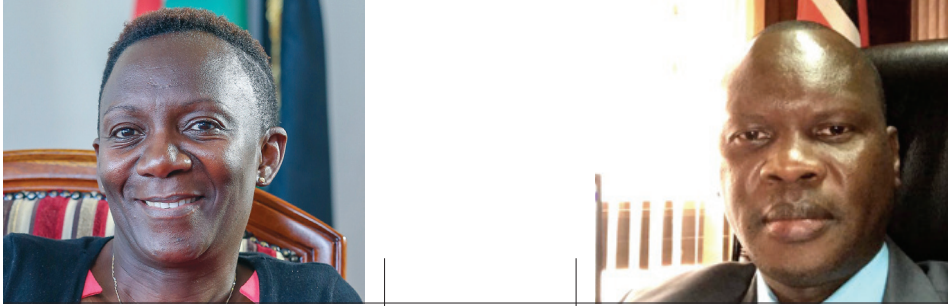
Through this Report, the Commission and CoG will spearhead and undertake the proposed policy and legislative reforms in partnership with the relevant sector Ministries, Departments and Agencies (MDAs). The successful implementation of the Report therefore calls for a coherent and cross-sectoral approach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

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

Thank you very much.

Mbago Ng'ang'a

Chairman KLRC



Acknowledgements

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

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

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

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

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

Thank you!

Ms. Jacqueline Mogeni, MBS
CEO, Council of Governors

Mr. Joash Dache, MBS
CEO/Secretary, KLRC

Council of County Governors

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

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

Kenya Law Reform Commission

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

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

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

Contents

FOREWORD BY CHAIRMAN, COUNCIL OF GOVERNORS	iii
FOREWORD BY THE ATTORNEY GENERAL	iv
FOREWORD BY CHAIRPERSON, KENYA LAW REFORM COMMISSION	vi
ACKNOWLEDGEMENTS	viii
LIST OF TABLES	xi
ABBREVIATIONS	xii
1. Introduction	1
2. National Legislation	2
3. National Policies	15
4. County Legislation	16
5. Conclusions and Recommendations	20

LIST OF TABLES

Table 1: Review of national and county legislation for trade and investment sector in a tabulated matrix	8
Table 2: Review of national policies in the trade and investment sector in a tabulated matrix	19
Table 3: Review of county legislation for trade and investment in a tabulated matrix	20

Abbreviations

AHADI	Agile and Harmonized Assistance for Devolved Institutions
CARA	County Allocation of Revenue Act
CoG	Council of Governors
KLRC	Kenya Law Reform Commission
CARA	County Allocation of Revenue Act
SAGA	Semi Autonomous Government Agency
WDF	Ward Development Fund
EPC	Export Promotion Council
PPA	Physical Planning Act
CIC	Commission for the Implementation of the Constitution
KENAS	Kenya Accreditation Service
CFSP	County Fiscal Strategy Paper
CS	Cabinet Secretary
FMCA	Forest Management and Conservation Act
IDLO	International Development Law Organization
IGR	Intergovernmental Relations
IGRA	Intergovernmental Relations Act
IGRTC	Intergovernmental Relations Technical Committee
KLRC	Kenya Law Reform Commission
MTP	Medium Term Plan
UNDP	United Nations development Programme
MDA	Ministries Departments Agencies

Trade and Investment

1. Introduction

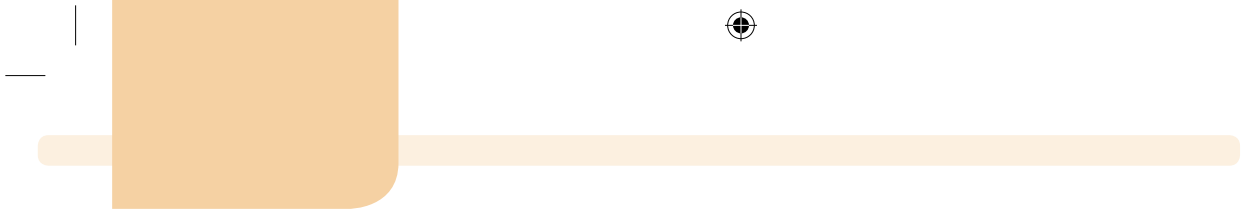
The trade and investment sector cuts across areas of economic and business activity such as industry and investment, cooperatives, trade, EAC integration, and tourism.¹ Sectors such as industry and investment contribute about an annual average of 10 percent of the country's GDP.² Most of these areas are shared, in varying degrees, with the county governments. The county governments are in charge of areas such as regulation of markets for local trade, trade licencing, fair trading practices, local tourism, and cooperative societies. It is expected that laws and policies would be aligned to ensure respect to and adherence to the functional boundaries that have been established between the two levels of government.

The audit of the trade and investments sector entailed a review of 32 pieces of national legislature in order to ascertain the extent of alignment with the constitutional framework. The previous legal and policy audit of legislation in 2015 entailed a review of Value Added Tax, Consumer Protection Act, Scrap Metal Bill, County Industrial Bill and Policy Framework for Regulation of Corporative Societies. In the report, recommendations were made for the alignment of the laws with national legislation.

Despite this, there still exists laws and policies that essentially recentralize this function back to the National Government. This phenomenon manifests itself through regional development authorities, state corporations and other national institutions, which continue to perform functions that belong to county governments. The effect of this has been that devolved functions are under-funded, there is wastage of resources

1 Republic of Kenya, National Treasury 'Report for the General Economic and Commercial Affairs' (GECA) Sector (September 2016) P. 141.

2 As above.



and overlaps/duplication of roles. To cure this, comprehensive legal and policy reforms are required including the Trade and Investment sector to achieve alignment with the devolved system of governance.

2. National legislation

A total of 32 National Acts. In general it was found that the majority of the legislation for the Trade and Investment Sector do not cater for county government representation in their Board and Committee structures and key decision making positions yet the legislation cover important trade and investment issues affecting counties. This was particularly so with regard to the Special Economic Zones Act, 2015; Export Processing Zones Act, Cap. 517; Micro and Small Enterprise Act No. 55 of 2012; and the Public Private Partnership Act, Cap. No. 5 of 2013). The National Legislation touching on the County functions does not also allow for consultation with the respective county. Only the Micro and Small Enterprise Act No. 55 of 2012 is currently under review to address county government functions. It was found that some key institutions are established only under legal notices and required legislative review.

Table 1: Review of National and County Legislation for Trade and Investment Sector in a Tabulated Matrix

Name of Act	Issue	Rational for proposal for Amendment	Proposal for Amendment
<p>1. The Investment Promotion Act, No. 6 of 2004</p>	<p>The Act generally: considers the national Government and functions of the Kenya Investment Authority established under this ACT.</p> <p>Sec. 30 Gives the Cabinet Secretary powers to make regulations generally for this ACT including amending the Second Schedule.</p>	<p>There is need to provide for a uniform formulation of this legislation to guide both levels of Government.</p> <p>The review of this Act to ensure the mandatory public participation of stakeholders at the national and county levels.</p>	<p>Section 30(1): The Minister in consultation with the Board may make regulations generally for the better carrying out of the provisions of this Act.</p>
<p>2. Export Processing Zones Act, No. 16 of 2015</p>	<p>Section 3: Establishment and membership of the Export Processing Zones Authority (EPZA).</p> <p>Section 10: Power of the Authority to make rules.</p> <p>Section 15: Declaration of export processing zone (1) Provides for the Minister to declare any area of Kenya be an EPZ on recommendation of the Authority and in consultation with the Minister for finance.</p> <p>Section 18: Power of Minister to make rules.</p> <p>Section 34: The Minister may make regulations in respect of any matter required by this Act to be prescribed or in respect of which regulations are authorized.</p>	<p>The EPZA Act requires a review to conform to the realities of the devolved system of governance. For instance, the Constitution 2010 Fourth Schedule, Part 2 (7) provides for County Governments to be responsible for Trade regulation and Development.</p> <p>The Counties should propose areas to be declared export processing zones.</p> <p>Mandatory public participation in making rules and regulations.</p>	<p>Section 3: Membership of the EPZA Board should ensure County Government representation.</p> <p>Section 10: Power of the Authority to make rules with public participation.</p> <p>Section 15(1): The Minister may, on recommendation of the, County Government, the Authority and in consultation with the Minister for the time being responsible for finance with the object of attracting, promoting or increasing the manufacture of goods, or provision of services, for export, by gazette, declare any area of Kenya to be an export processing zone.</p> <p>Section 18: Power of the Minister to make rules (in consultation with the Board and the County Government).</p>

Name of Act	Issue	Rational for proposal for Amendment	Proposal for Amendment
			Section 34: The Minister in consultation with the Board may make regulations in respect of any matter required by this Act to be prescribed or in respect of which regulations are authorized.
3. Foreign Investment Protection Act, Cap. 518	Section 9: Regulations and directions by the Minister	Public participation mandatory including the relevant County Government.	Section 9: The Minister in consultation with the relevant County Government may make regulations or give directions generally for the better carrying out of this Act and prescribing the manner in which applications shall be made for certificates under this Act, and the information which shall accompany those applications.
4. The Micro and Small Enterprises Act No. 55 of 2012	The Micro and Small Enterprise Authority to be seen to advise at both levels of Governments.	The main object of the Bill is to amend the definition of the term 'micro and small enterprises' to include informal sector, introduce a new subsection under section 31 and amend section 47 to provide that the Authority shall advise and facilitate relevant National Government Ministries and County Government Departments.	Micro and Small Enterprises (Amendment) Bill, (Senate Bill No. 12 of 2015) <ul style="list-style-type: none"> ●Amendment of section 2 of No. 55 of 2012. ●Amendment of section 31 of no. 55 of 2012. ●Amendment of section 47 of No. 55 of 2012.
5. Scrap Metal Act No. 1 of 2015	Has not been implemented despite the fact it was enacted in 2015.	The Scrap Metal Council to be established in 2018 by Ministry of Industry and Trade	Representation of County government is recommended
6. County Industrial Development Bill, 2014	Was to be introduced to the Senate in 2014	Requires follow up with the Ministry of Industry, Trade and Cooperatives	The Act expected to reflect the central role of counties in driving industrialization.

Name of Act	Issue	Rational for proposal for Amendment	Proposal for Amendment
7. Investment Disputes Convention Act, Cap. 522	Representation of the County Governments at the Administrative Council and Secretariat of the International Centre for Settlement of Investment Disputes,	Chapter 1, Section 2 – The Administrative Council: The country representative to consult the County governments during making of administrative and financial regulations of the International Centre for Settlement of Investment disputes.	The Administrative Council to have representation from the National and County governments.
8. Nairobi Centre for International Arbitration Act, No. 26 of 2013	The constitution of the Board of Directors of the Nairobi Centre for International Arbitration is not inclusive.	County Government representation required.	Section 6. Board of Directors should include representation for the Council of Governors. Section 25: Should provide for the Board making rules in consultation with the Minister.
9. The Companies Act, 2015	No none-compliance noted. The Act was reviewed recently with good public participation.	None	None
10. Special Economic Zones Act, No. 16 of 2015	Section 4: Declaration of Special Economic Zones by the Cabinet Secretary.	Proposal for the establishment of Special Economic Zones should be from the Counties to the Cabinet Secretary for approval. The County Government should be involved in the management of the Special Economic Zones.	Section 4: Declaration of special economic zones should provide for participation of the Counties. Section 12: Board of Directors of the Authority should be inclusive of both levels of governance. Section 16(1): There shall be a chief Executive Officer of the Authority who shall be appointed competitively by the Board in consultation with the Minister.

Name of Act	Issue	Rational for proposal for Amendment	Proposal for Amendment
<p>11. Value Added Tax Act, Cap. 476</p>	<p>Section 7 (1): The Minister may amend schedules</p> <p>Section 58: The Minister may make regulations for the better carrying out or giving effect to the purposes and provisions of this Act,</p> <p>Section 59(2): Without prejudice to any provision under this Act, the Minister may make regulations prescribing conditions for any person authorized to act as an agent under this section.</p>	<p>Public participation to ensure harmony in implementation at the County level and National level.</p> <p>The tax structure was pointed out by stakeholders to be friendly to the national government as opposed to the county governments.</p>	<p>Section 7 (1): The Minister in consultation with the Board may by order published in the Gazette- (a) amend the First Schedule by increasing any of the rates of tax by an amount not exceeding twenty-five per cent of the rate set out therein; (b) amend, vary or replace the Sixth and Seventh Schedules.</p> <p>Section 58: The Minister in consultation with the Board may make regulations for the better carrying out or giving effect to the purposes and provisions of this Act,</p> <p>Section 59(2): Without prejudice to any provision under this Act, the Minister in consultation with the Board may make regulations prescribing conditions for any person authorized to act as an agent under this section.</p>
<p>12. Income Tax Act, Cap. 470</p>	<p>Section 6A(2): The Minister may, by notice in the Gazette , prescribe regulations for the better carrying out the provisions of this section.</p> <p>Section 12C(2): The Minister may, by notice in the Gazette , prescribe rules for the better carrying out of the provisions of this section.</p> <p>Section 82(7): The Minister may make rules-</p>	<p>Public participation and in particular at the county level.</p> <p>Stakeholders to be involved in the process of making rules and regulations</p>	<p>Section 6A(2): The Minister in consultation with the Commissioner may, by notice in the Kenya Gazette , prescribe regulations for the better carrying out the provisions of this section.</p> <p>Section 12C(2): The Minister in consultation with the Commissioner may, by notice in the Gazette , prescribe rules for the better carrying out of the provisions of this section.</p>

Name of Act	Issue	Rational for proposal for Amendment	Proposal for Amendment
	<p>Section 83(7): The Minister may make rules-</p> <p>Section 130: The Minister may make rules prescribing anything which is to be prescribed under, and generally for carrying out the provisions of, this Act.</p>		<p>Section 82(7): The Minister in consultation with the Commissioner may make rules-</p> <p>Section 83(7): The Minister in consultation with the Commissioner may make rules-</p> <p>Section 130: The Minister in consultation with the Commissioner may make rules prescribing anything which is to be prescribed under, and generally for carrying out the provisions of, this Act.</p>
<p>13. Prevention of Fraud (Investments) Act, No. 1 of 1977</p>	<p>Section 4: Establishment of New Issues Committee</p> <p>Section 9(1): Subject to the following provisions of this Part, the Minister upon application in that behalf made by any person in the prescribed manner, and on payment of the prescribed fee, shall grant to that person a principal's license.</p> <p>Section 12: Refusal and revocation of licenses</p> <p>Section 25: Making of rules by the Director of Public Prosecutions.</p> <p>Section 28: The Minister may make regulations for prescribing anything which by this Act, other than Part VI, is required or authorized to be prescribed.</p>	<p>A review of Section 4 will provide for appropriate consideration of the issues at the County level.</p>	<p>Section 4: Establishment of the new Issues Committee by the Minister should provide for a representative from the County Government.</p> <p>Section 9 (1): Application for, and grant and extend of, licenses should provide for the Minister to consult with the County Government before grant of a principal's license.</p> <p>Section 12: Refusal and revocation of licenses should be with the recommendation of the New Issues Committee.</p> <p>Section 25: Making of rules by the Director of Public Prosecutions should provide for consultations with stakeholders.</p> <p>Section 28: The Minister may make regulations for prescribing anything which by this Act, other</p>

Name of Act	Issue	Rational for proposal for Amendment	Proposal for Amendment
			than Part VI, is required or authorized to be prescribed with public participation.
14. Public Private Partnerships Act, No. 15 of 2013	<p>Stakeholders from both the public and private sectors have raised concern over the poor implementation of this Act and have requested for a review.</p> <p>County Governments are requesting for meetings with the Public Private Partnership Unit.</p>	<p>Section 4: Establishment of the PPP Committee and Section 12: Composition of the Unit require review to include County government representation.</p>	<p>Section 15: The Cabinet Secretary in consultation with the unit shall make rules for the better administrative and financial framework of the unit, the relationship of the unit with other State departments and organizations and the conduct of the affairs of the unit.</p>
	<p>Section 15: The Cabinet Secretary shall make rules for the better administrative and financial framework of the unit, the relationship of the unit with other State departments and organizations and the conduct of the affairs of the unit.</p> <p>Section 39(4): The Cabinet Secretary shall make rules to regulate the pre-qualification process by the pre-qualification committee under this part.</p> <p>Section 44(3): The Cabinet Secretary shall make rules for the submission and opening of the tender documents under this part.</p> <p>Section 67(6): The Cabinet Secretary may by regulations, provide for the procedure for determining a petition under subsection (1).</p>	<p>A review of the Act has also been suggested by stakeholders to make less it bureaucratic.</p> <p>Data required for a Public Private Partnership proposal is found to be difficult to collect especially by the county governments.</p> <p>All stakeholder participation required for making rules and regulations.</p>	<p>Section 39(4): The Cabinet Secretary in consultation with the Committee shall make rules to regulate the pre-qualification process by the pre-qualification committee under this part.</p> <p>Section 44(3): The Cabinet Secretary in consultation with the unit shall make rules for the submission and opening of the tender documents under this part.</p> <p>Section 67(6): The Cabinet Secretary in consultation with the Committee may by regulations, provide for the procedure for determining a petition under subsection (1).</p> <p>Section 71(1): The Cabinet Secretary in consultation with the Committee, may make regulations generally for the better</p>

Name of Act	Issue	Rational for proposal for Amendment	Proposal for Amendment
	<p>Section 71(1): The Cabinet Secretary, may make regulations generally for the better carrying out of the functions under this Act and in particular-</p>		<p>carrying out of the functions under this Act and in particular-</p>
<p>15. Intergovernmental Relations Act, 2012</p>	<p>Section 38(1): The Cabinet Secretary may, in consultation with the summit, make regulations for the better carrying out of the provisions of this Act.</p>	<p>In the spirit of cooperation between the national and county governments the Cabinet Secretary should make regulations in consultation with the Summit for effective county government participation.</p>	<p>Section 38(1): The Cabinet Secretary may, in consultation with the Chairman of the COG, make regulations for the better carrying out of the provisions of this Act.</p>
<p>16. Treaty Making and Ratification of Treaties Act, No. 45 of 2012</p>	<p>Section 5(1): Subject to the provisions of this section, the relevant national executive or the relevant State department shall initiate the treaty making process in such manner as may be prescribed by the Cabinet Secretary.</p>	<p>Treaty making and ratification requires advice from the Attorney General's office.</p>	<p>Section 5(1): Subject to the provisions of this section, the relevant national executive or the relevant State department shall initiate the treaty making process in such manner as may be prescribed by the Cabinet Secretary in consultation with the Attorney General.</p>
<p>17. The Competition Act, 2010</p>	<p>Section 10: Members of the Competition Authority.</p> <p>Section 60 (2) : Product information standards: The Authority may, by regulations in respect of goods of a particular kind, prescribe a consumer product information standard consisting of such requirements as to-</p> <p>Section 71(5): The members of the Tribunal shall be entitled to receive such fees and allowances as the Minister may determine.</p>	<p>Appointment of the members of the Authority to include members from the County Government.</p> <p>Stakeholder participation in making standards and regulations for the standards.</p>	<p>Section 10 (1f): five other members to be appointed by the Minister in consultation with the County Government from among persons experienced in completion and consumer welfare matters, one of whom shall be experienced in consumer welfare matters.</p> <p>Section 60(2): The Authority may, by regulations in consultation with consumer stakeholders in respect of goods of a particular kind, prescribe a consumer product</p>

Name of Act	Issue	Rational for proposal for Amendment	Proposal for Amendment
			information standard consisting of such requirements as to- Section 71(5): The members of the Tribunal shall be entitled to receive such fees and allowances as the Minister may in consultation with SCAC determine.
18. East African Community Customs Management Act, 2004	Section 12(1): The Commissioner may by notice in the Gazette, appoint – (Appointment of Customs areas)	Depending on the location, the counties could make recommendations on areas to be appointed as Customs areas.	Section 12(1): The Commissioner may in consultation with stakeholders by notice in the Gazette, appoint – (Appointment of Customs areas)
19. Employment Act, Cap. 226	Labour Advisory Board Section 3(2): The members of the Board shall be appointed by the Minister, and the Minister shall appoint a member to be chairman thereof and shall appoint an officer of the Labour Department to be secretary thereof.	The County Governments should be represented on the Labour Advisory Board.	Section 3(2): The members of the Board shall be appointed by the Minister in consultation with the County Government and the Minister shall appoint a member to be chairman thereof and shall appoint an officer of the Labour Department to be secretary thereof.
20. Sacco Societies Act, 2008 (Cap. 490)	Section 10: Remuneration of the Board members: The Authority, in consultation with the Minister, shall pay members of the Board. Section 57(1): The Board of Trustees shall pay its members such remuneration or allowances for expenses out of the Deposit Guarantee Fund as it may determine after consultation with the Minister.	Need to harmonize salaries and allowances in the public service as per the SCAC guidelines. Need to harmonize salaries and allowances in the public service as per the SCAC guidelines.	Section 10: The Authority, in consultation with the Minister and the State Corporation Advisory Committee (SCAC) , shall pay members of the Board such remuneration or allowances for their services and expenses as it may determine. Section 57(1): The Board of Trustees shall pay its members such remuneration or allowances for expenses out of the Deposit

Name of Act	Issue	Rational for proposal for Amendment	Proposal for Amendment
			Guarantee Fund as it may determine after consultation with the Minister, State Corporation Advisory Committee and the Salaries Commission.
21. Insurance Act, 2015 (Cap. 487)	Section 3D: The Authority, in consultation with the Minister, shall pay the members of the Board such allowances for expenses as it may determine. Section 169(6): The Minister may make rules-	Need to harmonize salaries and allowances in the public service as per the SCAC guidelines. Making rules for the purpose of hearing appeals by the Tribunal with public participation.	Section 3D: The Authority, in consultation with the Minister, State Corporations Advisory Committee and the Salaries Commission shall pay the members of the Board such allowances for expenses as it may determine. Section 169(6): The Minister in consultation with the Board may make rules-
22. Public Procurement and Asset Disposal Act, No. 33 of 2015	Section 28 (2): The Review Board shall have powers to develop rules and procedures to be gazette by the Cabinet Secretary.	The Review Board to consult appropriately.	Section 28 (2): The Review Board shall have powers to develop rules and procedures in consultation with stakeholders and be gazette by the Cabinet Secretary.
23. Industrial property Act, 2001	Section 117: The Minister may make rules regulating the practice and procedure of the Tribunal. Section 119: The Minister may make regulations prescribing anything which under this Act may be prescribed and generally for the better carrying out of the objects and purposes of this Act.	Stakeholder participation in the development of rules and procedures. Stakeholder participation in the development of rules and procedures.	Section 117: The Minister may make rules regulating the practice and procedure of the Tribunal in consultation with the Board of Directors of the Kenya Industrial Property Institute (KIPI) Section 119: The Minister may make regulations prescribing anything which under this Act may be prescribed and generally for the better carrying out of the

Name of Act	Issue	Rational for proposal for Amendment	Proposal for Amendment
			objects and purposes of this Act in consultation with the Board of Directors of KIPI.
24. Trade Marks Act, Cap. 506	Section 39 (1): The Minister may from time to time make such rules, prepare such forms and generally do such things as he thinks expedient, for empowering the Registrar to amend the register, whether by making or expunging or varying entries therein, so far as may be requisite for the purpose of adapting the designation therein of the goods or classes of goods or services or classes of services in respect of which trademarks are registered to any amended or substituted classification that may be prescribed.	Stakeholder participation	Section 39 (1): The Minister may from time to time in consultation with the Board make such rules, prepare such forms and generally do such things as he thinks expedient, for empowering the Registrar to amend the register, whether by making or expunging or varying entries therein, so far as may be requisite for the purpose of adapting the designation therein of the goods or classes of goods or services or classes of services in respect of which trademarks are registered to any amendment or substituted classification that may be prescribed.
	Section 36A (2): The Minister may make rules for the surrender of a registered trade mark and for protecting persons with rights in the registered trade mark.	Stakeholder participation	Section 36A (2): The Minister in consultation with the Board may make rules for the surrender of a registered trade mark and for protecting persons with rights in the registered trade mark.
	Section 40C(1): The Minister may, in rules, make appropriate provisions to give effect, in Kenya, to the provisions of the Banjul Protocol and the Madrid Agreement and the Madrid Protocol.	Stakeholder participation	Section 40C(1): The Minister in consultation with the Board may, in rules, make appropriate provisions to give effect, in Kenya, to the provisions of the Banjul Protocol and the Madrid Agreement and the Madrid Protocol.
	Section 41: Power to make rules; The Minister may make such rules, prescribe such forms and generally do such things as he thinks		

Name of Act	Issue	Rational for proposal for Amendment	Proposal for Amendment
	expedient-	Stakeholder participation	Section 41: The Minister in consultation with the Board may make such rules, prescribe such forms and generally do such things as he thinks expedient-
25. The Standards Act, Cap. 496	Section 16B: The Minister shall pay the members of the Tribunal such remuneration and allowances as the Minister determines. Section 16H (1): The Minister may make rules for regulating the practice and procedure of the Tribunal.	Harmonize salaries and allowances in the public service. Stakeholder participation	Section 16B: The Minister shall pay the members of the Tribunal such remuneration and allowances as per the laid out national guidelines. Section 16H (1): The Minister may make rules in consultation with the Council for regulating the practice and procedure of the Tribunal.
26. States Corporations Act Cap 446: Legal Notice No. 55 of May 2009 (KENAS as the sole National Accreditation Body)	Kenya Accreditation Service (KENAS) is the sole national accreditation body mandated to offer accreditation services in Kenya.	A legal Notice is not appropriate for establishment of such an important institution.	KENAS should be a State Corporation established by an Act of parliament.
27. Science, Technology and Innovation Act No. 28 of 2013 (Kenya Industrial Research and development Institute as the National Industrial, Technology and Innovation Institute)	Section 45 (1): The Cabinet Secretary may make Regulations for the better carrying out of the provisions of this Act.	Stakeholder participation	Section 45 (1): The Cabinet Secretary in consultation with the Commission may make Regulations for the better carrying out of the provisions of this Act.

Name of Act	Issue	Rational for proposal for Amendment	Proposal for Amendment
28. Privatization Act No. 2 of 2005	<p>Section 42(2): The Minister may make regulations governing the records required under subsection (1).</p> <p>Section 46(1): The members of the Tribunal shall be paid such allowances and expenses as are determined by the Minister.</p> <p>Section 51: The Minister may make regulations generally for the better carrying out of the provisions of this Act.</p>	<p>Stakeholder participation</p> <p>Need to harmonize salaries and allowances in the public service consistent with the SCAC guidelines</p> <p>The Constitutional requirement for stakeholder consultation.</p>	<p>Section 42(2): The Minister in consultation with the Commission may make regulations governing the records required under subsection (1).</p> <p>Section 46(2): The members of the Tribunal shall be paid such allowances and expenses as are determined by the Minister in consultation with the Commission.</p> <p>Section 51: The Minister in consultation with the Commission may make regulations generally for the better carrying out of the provisions of this Act.</p>
29. Legal Notice No. 4342 of 19 th August, 1992: The Export Promotion Council (EPC)	EPC Established through Legal Notice.	Export Promotion Council urgently requires its own Act of Parliament for more effective service provision.	EPC needs to be established under an Act of Parliament.
30. Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Cap. 301	<p>Section 11(2): Persons other than public officers appointed under the provisions of subsection (1) of this section shall be paid such emoluments or allowances as the Minister shall determine.</p> <p>Section 16(1): The Minister may make regulations for the better carrying out of the provisions of this Act and without prejudice to the generality of the foregoing such regulations may prescribe-</p>	<p>Need to harmonize allowances across government institutions.</p> <p>Stakeholder participation</p>	<p>Section 11(2): Persons other than public officers appointed under the provisions of subsection (1) of this section shall be paid such emoluments or allowances as the Minister shall determine in consultation with SCAC.</p> <p>Section 16(1): The Minister in consultation with the Tribunal may make regulations for the better carrying out of the provisions of this Act and without prejudice to the generality of the foregoing such</p>

Name of Act	Issue	Rational for proposal for Amendment	Proposal for Amendment
			regulations may prescribe-
31. The Anti-Counterfeit Act, 2008	<p>Section 37(1): The Minister may make regulations generally for the better carrying into effect the provisions of this Act.</p> <p>Section 37(2): Without prejudice to the generality of the fore going, the Minister may in such regulations prescribe-</p>	Stakeholder participation	<p>Section 37: The Minister may in consultation with the Board make regulations generally for the better carrying into effect the provisions of this Act.</p> <p>Section 37(2): Without prejudice to the generality of the fore going, the Minister in consultation with the Board may in such regulations prescribe-</p>
32. The Tourism Act (No. 28 of 2011) Tourism Fund Regulations, 2015	Local tourism is governed by counties and yet at the moment under the Fourth Schedule of the Constitution it is a function of the national government?	Stakeholder participants raised this concern pointing to the need of an Inter-governmental technical committees to assist in streamlining agreements at the two levels of governments.	Creation of Intergovernmental technical committees.

3. National Policies

Two National policies were audited for conformity to the Constitution 2010. These are: the Draft National Co-operative Development Policy, 2017 and the National Trade Policy, 2016 (Transforming Kenya into a Competitive Export-led and Efficient Domestic Economy). The Trade Policy was found to conform to the Constitution 2010 and was consistent to the expected to Trade as a County function. However, the National Co-operative Development Policy was still in draft form and yet to have stakeholder input. One missing element from the latter policy is the need for measures aimed at capacity building at the county level and technical assistance to align the county policies to the national policy.

Table 2: Review of National Policies in the Trade and Investment Sector in a Tabulated Matrix

Name of Policy	Issue	Rational for proposal for Amendment	Proposal for Amendment
1. National Trade Policy, 2016 (Transforming Kenya into a Competitive Export-led and Efficient Domestic Economy)	Lack of a coherent framework for coordination of the formulation and implementation of trade policy	The New Trade Policy has adequately addressed the previous state of Trade policies scattered in diverse governments and regulations with lack of harmonization and coordination mechanisms.	No amendment required to the new National Trade Policy, 2016.
2. National Co-operative Development Policy, 2017 (Draft)	Policy recognizes critical role played by the County governments as key centres of development by which economic growth can be relied through creation of synergies with the National Government and other agencies.	Counties need technical assistance to align their policies to the national policy. More stakeholder consultation has been requested.	The policy to address the Capacity building need at the counties.

4. County legislation

A total of 13 pieces of county legislation were reviewed. Not many counties have passed laws dealing with trade and investment. This informed the recommendation that the national government needs to develop a capacity development strategy for county governments in the development of national laws and policies for county governments. The table below captures the analysis from the county legislation examined.

Table 3: Review of County Legislation for Trade and Investment in a Tabulated Matrix

<p>1. The Nyeri Tax waivers Administration Act, 2014</p>	<p>Section 5(1): The Executive Committee Member responsible for Finance may, where he or she deems it appropriate, waive or vary, the payment of any tax, fees, or other payment due to the County Government.</p> <p>Section 10(1): The Executive Committee Member may make Regulations for the better carrying out of the provisions of this Act.</p>	<p>There should be a provision for the Executive Committee member to waive or vary payment of any tax in consultation with the Executive Committee to be in line with Article 10 (2c) for transparency, integrity and good governance.</p> <p>Stakeholder participation in making rules.</p>	<p>Section 5(1): The Executive Committee Member responsible for Finance in consultation with the Executive Committee may, where he or she deems it appropriate, waive or vary, the payment of any tax, fees, or other payment due to the County Government.</p> <p>Section 10(1): The Executive Committee Member in consultation with the Executive Committee may make Regulations for the better carrying out of the provisions of this Act.</p>
<p>2 .The Nyeri County Enterprise Development Fund Act, 2017</p>	<p>Section 40 (1): The County Executive Member may make regulations generally for the better carrying out of the provisions and purposes of this Act.</p> <p>Section 40 (3): Notwithstanding the provisions of subsection (1) and (2), the County Executive Committee member for the time being responsible for trade may make regulations in relation to enterprise development and any administrative guidelines for the better carrying out of the provisions and purposes of this Act.</p>	<p>The Constitutional requirement for stakeholder consultation.</p>	<p>Section 40: The County Executive Member in consultation with the Board may make regulations generally for the better carrying out of the provisions and purposes of this Act.</p> <p>Section 40 (3): Notwithstanding the provisions of subsection (1) and (2), the County Executive Committee member for the time being responsible for trade in consultation with the Board may make regulations in relation to enterprise development and any administrative guidelines for the better carrying out of the provisions and purposes of this Act.</p>
<p>3. The Nyeri County Investment Development Corporation Act, 2016</p>	<p>Section 9: The remuneration of the members of the Board shall be as determined by the County Treasury in consultation with the County Public service Board and must attract</p>	<p>There in need to harmonize salaries and allowances in the public service.</p>	<p>Section 9: The remuneration of the members of the Board shall be as determined by the County Treasury in consultation with the County Public service Board and SCAC and must</p>

Table 3: Review of County Legislation for Trade and Investment in a Tabulated Matrix

	the right calibre of personnel.		attract the right calibre of personnel.
4. The Nyeri County Enterprise Fund Act, 2017	Section 14(3): The Executive Member may make regulations for the realization of the powers granted in Section 14(1)	Need for the Executive Member to consult with the Board while making regulations.	Section 14(3): The Executive Member in consultation with the Board may make regulations for the realization of the powers granted in Section 14(1)
5. The Kisumu County Trade Fund Act, 2015	Section 22: The Executive Committee member may make regulations generally for the better carrying out of the provisions of this Act and without prejudice to the foregoing, the Executive Committee Member may make regulations in respect of the following – 22 (a), (b), (c), (d) and (e).	The Constitutional requirement for stakeholder consultation.	Section 22: The Executive Committee member in consultation with the Board may make regulations generally for the better carrying out of the provisions of this Act and without prejudice to the foregoing, the Executive Committee Member may in consultation with the Board make regulations in respect of the following - 22 (a), (b), (c), (d) and (e).
6. Kisumu County Co-operative Act, 2015 No. 5 of 2015	Section 78(1): The Member of the Executive Committee may make regulations for the better carrying out of the provisions of this Act,	There is need to provide for consultation.	Section 78(1): The Member of the Executive Committee in consultation with the Commissioner may make regulations for the better carrying out of the provisions of this Act,
7. Kisii County Business Licensing Act, 2015	Section 22(1): The County Executive Member may, make regulations for the proper and efficient administration of this Act.	Stakeholder participation	Section 22(1): The County Executive Member in consultation with the County Secretary may, make regulations for the proper and efficient administration of the Act.
8. Kisii County Outdoor Advertising Act, 2014	Section 17. The County Executive Member, may make regulations-	Stakeholder participation	Section 17. The County Executive Member in liaison with the Committee on Public participation may make regulations-
9. Kisii County Rating Act, 2015	Section 19(1): The County executive member responsible for finance, may make regulations or rules generally for the better carrying out of the	Stakeholder participation	Section 19(1): The County executive member responsible for finance in consultation with the County Assembly , may make regulations or rules

Table 3: Review of County Legislation for Trade and Investment in a Tabulated Matrix

	provisions and purposes of this Act, and different rules may be made in respect of different forms of rating areas.		generally for the better carrying out of the provisions and purposes of this Act, and different rules may be made in respect of different forms of rating areas.
10. Kisii County Trade and Markets Act, 2015	<p>Section 40. The County Executive Committee member may make regulations-</p> <p>It was observed that professionals carry out functions within a county (under the Trades Markets Act), treated as traders and subjected to separate license fees by the county government apart from the license professional fees charged by the national government?</p>	<p>Stakeholder participation</p> <p>This needs to be reviewed to give a clear definition of a ‘trader’.</p>	<p>Section 40. The County Executive Committee member in consultation with the Directorate may make regulations-</p> <p>Review definition of a trader and professionals qualifying for a single business permit.</p>
11. Nairobi City County Alcoholic Drinks Control and licensing Act, 2014	<p>Section 55: The Executive Committee Member may, with the written approval of the Governor, make regulations for the better carrying out of the provisions of this Act.</p>	<p>The Constitutional requirement for stakeholder consultation.</p>	<p>Section 55: The Executive Committee Member in consultation with the Board may, with the written approval of the Governor, make regulations for the better carrying out of the provisions of this Act.</p>
12. The Nairobi County Tax waivers Administration Act, 2013	<p>Section 10(1): The Executive Committee Member may, with the approval of the Governor make regulations or the better carrying out of this Act.</p>	<p>Stakeholder participation</p>	<p>Section 10(1): The Executive Committee Member may, with the approval of the Governor and in consultation with the Executive Committee, make regulations or the better carrying out of this Act</p>
13. The Nairobi County Betting, Lotteries and Gaming Act, 2014	<p>Section 12: The Executive committee member may, with the approval of the Governor, make regulations or the better carrying out of this Act.</p>	<p>Stakeholder participation</p>	<p>Section 12: The Executive committee member in consultation with the Board may, with the written approval of the Governor, make regulations or the better carrying out of this Act.</p>

5. Conclusions and recommendations

- » The Trade Sector lacks a legislation that guides the development and growth of the sector with a view of bringing together all related trade legislations at the National level to central body that coordinates the implementation of the Trade Policy.
- » It is recommended that all the parastatal institutions established under Legal Notices (eg. Kenya Accreditation Service (KENAS) and Export Promotion Council (EPC) should be reviewed and be established under Acts of Parliament.
- » The Public Private Partnership Act, 2012 should be reviewed to ensure make it easier for both National and County Governments to finance huge infrastructural development projects.
- » Any Amendment Bill on any of the reviewed laws that are pending before Parliament (eg. Micro and Small Enterprises) Bill, (Senate bill No. 12 of 2015) should be reviewed to incorporate the recommendations of this audit and then subjected to public participation.
- » A number of key National legislation (eg. Special Economic Zones Act, 2015 and Export Processing Zones Act, Cap. 517) the responsible National Government agencies should work with County Governments to review the legislations in a view of providing the roles of each level of Government.
- » The majority of the National legislation do not cater for County Government representation in the Boards and Committee structures yet the legislation cover important trade and investment issues affecting Counties.
- » Any National Policies pending (eg. National Investment Policy) should be reviewed conform to the CoK, 2010 and then subjected to public participation.





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