Council of Governors

KLRC
KENYA LAW REFORM COMMISSION

REPORT ON THE AUDIT OF NATIONAL

AND

COUNTY POLICY AND LEGISLATION IN THE NATURAL RESOURCE MANAGEMENT SECTOR

REPORT ON

THE AUDIT OF NATIONAL AND COUNTY POLICY AND LEGISLATION IN THE NATURAL RESOURCE MANAGEMENT SECTOR

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 impending 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 Some of the key recommendations highlighted in the report are that some National laws need to be repealed while others require amendments in order to ensure conformity with the Constitution.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 the Attorney General

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.

Mbage 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. Collins Odote for the exhaustive research in the policy and legal frameworks. They worked

tirelessly with the technical committee to constantly revise, edit and improve the contents of this publication. It is through this effort that we have this comprehensive Report.

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

Thank you!

Ms. Jacqueline Mogeni, MBS

CEO, Council of Governors

Mr. Joash Dache, MBS

CEO/Secretary, KLRC

Council of County Governors

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

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

Kenya Law Reform Commission

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

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

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

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Abbreviations

AHADI	Agile and Harmonized Assistance for Devolved Institutions
NLP	National Land Policy
PPA	Physical Planning Act
CIC	Commission for the Implementation of the Constitution
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
UNDP	United Nations development Programme
MDA	Ministries Departments Agencies

NATURAL RESOURCES MANAGEMENT

1. Introduction

Kenya is endowed with numerous natural resources, including water, forests, wildlife, minerals, fisheries, wetlands and biodiversity. Many of these natural resources are finite. The resources are also for the benefit of the entire citizenry in Kenya. Being part of the environment, there is need for their integrated and sustainable management.

The manner in which natural resources are owned and their use regulated has been the focus of public policy discourse since the colonial period. The constitutional review process dealt with natural resource management under the broad rubric of land and environment. This dual lens was due to the fact that, firstly, natural resources are part of land. The land question that has confronted the country for long is partly a question about access to and exploitation of the country's vast natural resource base. Consequently, rules about land tenure and land use are intricately linked to the manner in which natural resources are managed, used and benefits from their exploitation utilised. At a second level, natural resources are also part of and found in the country's environment. From a conservation standpoint, rules about environmental management have to align with the imperatives of natural resource use. The concept of sustainable development, long accepted as the organising framework for the environmental sector, seeks to balance environmental prerequisites with development objectives so that the process of exploiting natural resources for development purposes does not compromise the environment. Similarly, environmental management has to be undertaken in a manner that enables society to derive benefits from the resources in the environment.

The Constitution captures several important underlying principles in the management of the environment. First, is the recognition that natural resources are public resources whose use should be undertaken

for the benefit of the entire Kenyan society. This is encapsulated in the Constitution through the inclusion of natural resources within the definition of public land. Article 62 includes in the definition of public land, forests, minerals and water. The broad rules that govern the management of public land, including the requirements that it must be used for the benefit of all Kenyans has become an important guiding principle in the design of implementing legislation and policy on natural resource management.

The second overriding principle derives from the recognition that natural resources are finite. Wanton destruction and over-exploitation of natural resources will result in their depletion and unavailability for future generations. This is the rationale for the requirement under Article 69 of the Constitution placing an obligation on the state to conserve and sustainably utilise natural resources within the country and ensure that benefits derived from the exploitation of natural resources are shared. People are also obligated to cooperate with state organs, at the national and devolved level, in the process of conserving and ensuring sustainable utilisation of natural resources in Kenya. There is need, therefore, for concrete legislative and policy measures for sustainable management and conservation of natural resources. In auditing legal and policy enactments in the natural resource sector, it is important to determine the extent to which they promote conservation and sustainability and allow for regeneration of renewable resources.

Thirdly, natural resources are to be utilised. The natural resource base of a country determines its wealth. The Constitution recognises this fact and underscores the need for measures to be put in place for the exploitation if natural resources. In the exploitation process several rules are captured in the Constitution to provide guidance. First is the need for the exploitation to be sustainable. Secondly is the requirement that the benefits to be derived from the exploitation of the resources have to be shared in an equitable and fair manner. While Article 69 of the Constitution provides for benefits-sharing in broad terms, indicating that natural resources must be utilised for the benefit of the people of Kenya, Article 67 specifies that local communities have to benefit from such exploitations.

The process of exploiting natural resources normally involves entering into contracts with those with the expertise, technology and resources

to be able to extract the resources from the ground and ensure they are processed. The manner in which those contracts have been entered into in the past have led to disaffection amongst communities, denied countries the required revenues and on occasions resulted in resource-based conflicts. Consequently, the Constitution provides that the process of concluding natural resource agreements must involve the legislature. This is the rationale for Article 71 of the Constitution which provides the enactment of legislation to provide for the ratification by Parliament of certain contracts seeking to provide for a right or concession relating to exploitation of certain natural resources.

Fourth is public participation. The Constitution recognises public participation as an important principle of governance that must be provided for and adhered to in all public processes. Public participation is also to guide the process of enacting and interpreting laws and policies. Courts have struck down laws and policies that have either been developed without public participation or that limit the involvement of the public in their implementation. In addition, Article 69 captures the importance of public participation in natural resource management processes.

In the conservation and management of natural resources, there is contestation between modern and traditional practices. In the introduction of modern laws for conservation, the obtaining philosophy was that traditional and cultural rules and practices were inimical to the sustainable management of natural resources. However, literature demonstrates that this postulation is erroneous. Scholars, such as Professor Okoth Ogendo, have argued that traditional rules promoted conservation and sustainable utilisation of natural resources. Consequently, the Constitution recognises the need to incorporate traditional practices in the management of natural resources and conservation of biodiversity.

In assessing legislations and policies on natural resource management, it is important to assess the extent to which they adhere to and promote the above principles. In addition, the laws and policies have to clarify the ownership and use of natural resources. As regards ownership, they have to clarify that natural resources are the heritage of all Kenyans. The laws and policies have to capture their public nature and demonstrate the role of national and county governments in the ownership, management and use of the natural resources. Secondly,

rules put in place for the management and use of the natural resources have to respect, align to and implement the functional divisions under the Fourth Schedule of the Constitution.

Under that Schedule, both national and county governments have a role in the management of natural resources. The manner in which the roles are elaborated must promote collaboration and inter-governmental relations, avoid conflicts, duplication and wastage. The rules must also adhere to the principle that resources follow functions. Consequently, the resource implications of the provisions and vesting of responsibility on the two levels of government must be clear and adhered to in the content of the laws and policies. This chapter reviews policies and laws in three sub-sectors: water, mining, and forestry. In each of the sectors, the applicable laws and policies are analysed with a view of identifying legislative and policy gaps. This is followed by a summary (in the form of a matrix) of the issues covered in the preceding analyses.

1.1 Water Sector

Water plays an important role in Kenya's socio-economic development, being used for domestic and industrial purposes. Despite this, Kenya remains a water-scarce country necessitating the continued revisions of the legal, policy and institutional framework governing sustainable management of water resources in Kenya. While communities had traditional rules to regulate use of water based on the principle that water was a public good, formal laws developed from the colonial period sought to divest ownership of water resources away from communities and put it in the government. In 2002, as part of liberalisation wave supported by the World Bank, the country adopted a Water Act.

The 2002 Act was enacted in response to the recognition that the existing fractured institutional mandates and outdated legislation were too focused on a demand-driven approach to water management and were not capable of achieving effective, efficient, and integrated water management for poverty alleviation and sustainable development. The reform process focused on separation of water supply and water resources management so that the Ministry of Water and Irrigation's role would be policy formulation and implementation while leaving

detailed regulations to a decentralized set of local institutions and parastatal organizations. The 2002 Act made several reforms to the water sector revolving around four themes: separation of management of water resources from the provision of water services; separation of policy making from day-to-day administration and regulation; decentralization of functions to local institutions; and the involvement of non-government entities in the management of water resources and in the provision of water services.

The adoption of the 2010 Constitution elevated water governance to Constitutional status. The right to water was included in the Bill of Rights, where everybody is guaranteed the right to clean and safe water in adequate quantities. The provision includes both issues of water quantity and quality, capturing the dual responsibility of eradicating water scarcity and dealing with water pollution. While the right to water is a socio-economic right requiring legislative and other measures to ensure its realisation, including budgetary allocation, the inclusion of the right within the Constitution is a demonstration of the importance the country attaches to water provision.

The Constitutional provision on functional distribution gives the national government the responsibility, under the Fourth Schedule, relating to use of international waters and water resources, and also the protection of the environment and natural resources with a view to establishing a durable and sustainable system of development, including, in particular— (c) water protection, securing sufficient residual water, hydraulic engineering and the safety of dams. Additionally, national government has responsibility for marine navigation. On the other hand, counties have the responsibility of implementation of specific national government policies on natural resources and environmental conservation, including soil and water conservation. Other relevant functions for county governments include:

- Agriculture including (e) fisheries
- County health services, including, in particular (g) refuse removal, refuse dumps and solid waste disposal
- Control of air pollution, noise pollution, other public nuisances and outdoor advertising
- Cultural activities, public entertainment and public amenities, including (i) county parks, beaches and recreation facilities.

- County transport, including (e) ferries and harbours, excluding the regulation of international and national shipping and matters related thereto.
- County planning and development, including (a) statistics; (b) land survey and mapping; (c) boundaries and fencing; (d) housing; and (e) electricity and gas reticulation and energy regulation.
- County public works and services, including (a) storm water management systems in built-up areas; and (b) water and sanitation services.

The upshot of the foregoing is to make provision of water a shared function between national and county governments. It is imperative that a law or policy developed by either the national and county level adhere to this reality and seek to promote the sharing of functions, clarifies the responsibility of each level of government and promote mutual cooperation. The issue has been litigated in the case of *Okiya Omtatah Okoiti and 3 others versus Nairobi City County and 5 others (2014)*. The Court held that water provision was a shared function between national and county governments and had to be discharged on the basis of mutual consultation and cooperation. The judgment points out that:

> *"From the analysis above, it is evident that water provision is essential to the health and wellbeing of citizens, and to the realization of other rights such as the right to health. The importance of its provision and management cannot be underestimated, and the Constitution and international covenants impose positive obligations on the state to ensure that it is available to all and have included an additional obligation on the state to ensure that it is available to vulnerable groups, such as women and communities in marginalized areas of the country.*
>
> *Further, under the provisions of Article 21(2) of the Constitution, the state has an obligation to take legislative, policy and other measures, including the setting of standards, to achieve the progressive realization of the rights guaranteed under Article 43, under which the right to water is guaranteed. The achievement of this right is dependent on the proper regulation and management of water and sanitation services, and of the entities that have the duty of service provision.*

It is thus evident that the provision and management of water services is a shared function, distributed between the two levels of government. Article 6(2) of the Constitution recognizes the fact that the governments at the national and county levels are distinct and inter-dependent. It enjoins them to conduct their mutual relations on the basis of consultation and cooperation. With regard to water provision, they should perform their respective functions in the spirit of consultation and co-operation, and in accordance with the legislation, policies and standards set by the state."

The role of national government is broadly that of developing policies and standards for the water sector. Regulation is a shared function between national and county governments. Counties have the responsibility of dealing with sanitation within their areas of jurisdiction. Due to its cross-boundary nature, the legislative framework has to promote both inter-country collaboration and also collaboration between national and county government.

1.1.1 National laws and policies

The main laws and policies that govern issues to do with water and sanitation at the national level include the following:

- Water Act, 2016
- Hydrologists Act, 2017
- The Kenya Water Institute Act, Act No. 11 of 2001
- Kerio Valley Development Authority Act, Chapter 441 Laws of Kenya
- Ewaso Ngiro North River Basin Development Authority, Chapter 448 Laws of Kenya
- Ewaso Ngiro South River Basin Development Authority, Chapter 447
- Irrigation Act, Chapter 347.
- Tana and Athi River Development Authority Act, Chapter 443 Laws of Kenya
- The Draft Water Irrigation Bill, 2017
- National Irrigation Policy

- Sessional Policy Number 1 of 1999 on National Policy on Water Resource Management and Development

The Water Act 2016 seeks to provide for the regulation, management and development of water resources, water and sewerage services and related purposes. The Act recognises the shared responsibility of national and county governments in the management of water in Kenya. However, there are several shortcomings in the Act that must be addressed if it is to meet the requirements of the Constitution and the imperative for collaborative engagement between national and county governments.

First, the Act fails to clarify the specific roles of national and county governments. Although it mentions counties, it proceeds on the premise that water and sanitation services management is mainly a national government function and that the only relevant function of county governments is that in function ten of the 4th Schedule of the Constitution which deals with implementation of specific national government policies on water conservation. In the areas of sanitation and works, for example, the Act does not clearly clarify how the role of national government differs from that of county governments leaving room for duplication and conflict.

The second issue relates to charging for service provision. While the Act empowers Counties to establish Water Service Providers at the county level with powers to levy fees for their services, the role of the Water Services Regulatory Board is not only overbearing, it is designed as a supervisor of the Water Service Providers and by extension county governments, a violation of the constitutional provisions of devolution which clearly recognises the distinct nature of county governments. This is exacerbated by the non-capturing of the principles of devolution as one of the guiding principles for the implementation of the Act.

Thirdly, the Act creates institutions with unwieldy, unclear and sometimes overlapping mandates. A critical review of the institutional architecture reveals that these are modelled along the lines of the Water Act, 2002 with only minimal changes of names and limited infusion of the devolution ethos.

Fourthly, is the challenge of the transitional provisions. The management of assets and liabilities in the water sector while dealt with in extensive provisions in the Water Act, the lack of clarity on

the roles of national and county governments makes the handling of assets and liabilities and its transfer in a manner that respects the shared functional responsibility for national and county governments a source of conflict. The Act, for example, provides that a waterworks development agency can develop and maintain a waterworks and enter into an agreement with a county government for the use of waterworks and repayment of loans relating to the waterworks. This is an area where the better approach would be the development of a framework for intergovernmental relations so as to ensure that the engagement is more structured and comprehensive. This will avoid the danger of national government saddling counties with loans relating to water works for which they were not consulted at the inception and development stage.

Despite Kenya having adopted the 2010 Constitution, the policy framework for the water sector still remains **the 1999 National Policy on Water Resource Management and Development.** The main goal of the policy is to ensure sustainable and integrated development and management of the water sector. To achieve this, the policy addresses water resources management, water supply and sewerage development, institutional arrangements for water management, and financing of the water sector. The specific objectives of the policy include: (i) the preservation, conservation, and protection of water resources and their sustainable, rational and economical allocation; (ii) the supply of sufficient quantities of good quality water to meet various needs including poverty alleviation while ensuring safe disposal of wastewater and environmental protection; (iii) the establishment of an efficient and effective institutional framework; and (iv) the development of a sound and sustainable financing system for effective water resources management, water supply and sanitation development.

The Policy formed the basis for the development of the Water Act, 2002. This Act has since been replaced by the 2016 Water Act discussed above. The Policy though still remains the 1999 Policy. That policy is outdated, unconstitutional and at variance with devolution. The ongoing efforts to develop a new policy requires to be expedited. In the process the policy has to clarify and not repeat the mistakes in the Water Act, discussed above.

The Irrigation Act, cap. 347 provides for the development, control and improvement of irrigation schemes and related purposes. Irrigation is a core part of the performance of the "agriculture" function given to the county level of government. The Act does not, however, recognize the role of the county government in the fulfilment of its mandate. Responsibility of regulating the irrigation function is vested in the national minister and no role given to county governments. The Act is one of the older laws that have been in place and require revision.

The draft Irrigation Bill 2017 seeks to repeal the Irrigation Act, Cap. 347. It has made attempts to recognize the role of county governments in irrigation matters. It demarcates functions of both the national and county governments, including areas that call for consultation between the two levels of government. It also recognizes the role of the water authority under the Water Act. The Bill proposes the formation of the National Irrigation Authority to replace the National Irrigation Board. However, some few concerns need to be addressed in order to realize the devolved functions more effectively as tabulated below. The draft Irrigation Policy captures the key elements of good policy framework and provides a sound reference point for developing a new irrigation law. It also recognises the ethos of devolution

1.1.2 County Level

The review of the County Acts is captured in the matrix below. The Acts are not unconstitutional but have provisions that require to be amended to align to national legislation.

Table 1 Review of the Water sector legislation and policies in a tabulated matrix

Water				
No.	**Name of Policy/Law**	**Issue**	**Rationale/Concern**	**Recommendation**
1.	**Kenya Water Institute Act No. 11 of 2001**	*Infusion of principles of devolution and general alignment to the Constitution* ***Section 4 (1)(a)*** provides one of the functions of the Institute as to provide services in human resource development, consultancy, research and development in the water sector public sector, state corporations, local authorities, the private sector and all other persons provides for local governments as opposed to county governments The function under ***section 4(1)***© to provide a forum for effective collaboration between the public and private sectors in the development of water and sanitation sectors ***Section 5*** which provides composition of the council of the institute similarly includes representation by minister responsible for matters of local government	The Act needs to incorporate the duty of national government to support county governments and duty to ensure cooperation with county governments in order to meet the objects of devolution and uphold the objects of devolution such as decentralization of services	Align the Act to the Constitution as a whole especially in respect of: ***sections. 4, 5,*** and 12 references to permanent secretary and local government, and recognise the role of, collaboration with and support to county governments.
2.	**Water Act, 2016**	*Infusion of principles of devolution in water services management* **Section 4** which sets out the principles governing the management of the Act however, lowers the constitutional basis for	The cited provisions of the ***Constitution*** do not encompass the entirety of obligations on right to safe and adequate water	Align the Act as a whole to the Constitution, mainstreaming the principles for implementation of the Act should include chapter VI, principles of devolution, right to water and ***Articles 69-72*** of the ***Constitution***

Water				
No.	**Name of Policy/Law**	**Issue**	**Rationale/Concern**	**Recommendation**
		the implementation of the Act, limiting the provisions to guide implementation to Articles 10, 43, 60 232 and therefore, limiting the place and function of county governments		
		The Act has maintained the Water Services Regulatory Board at **sections 70 and 72**, establishes the National Water Harvesting and Storage Authority at **section 30** with functions exclusive to the national government, the Water Resources Authority at **section 11** and water works development agencies under **section 65**. There is no representation of county government in the Water Services Board under **section 71**, yet some of its functions set out in **section 72** have implications on county government functions. In addition, some of the functions of the Water Resources Authority under section 11 constitutionally belong to counties.	County governments need to be represented in the water services regulation structure since counties have a function of implementing national standards in water services management. There is multiplicity of bodies charged with management of water resources. Some of the provisions may lead to duplication of functions for no-inclusion of county governments e.g. section 30 may result in conflict and duplication of functions between flood control and storm water management by the national and county government.	Revisit and review the establishment of the various institutions without clarity on their inter-relations as well as interplay of functions with the county government. Harmonize and mainstream the role of county governments in the entire chain of institutional framework of provision, regulation and overall management of water service
		Representation of county governments in institutional structures **Section 65** establishes the water works development agencies and gives power to the responsible cabinet secretary to determine areas of jurisdiction. It also gives powers over county assets, which are not defined	There is need for clearly set out areas for collaboration and consultation between national and county governments e.g. review of the water management strategy and operations affecting county assets such as the water works development agencies.	Amend **section 78**(*b*) to define the county assets in context. The Act needs to be reviewed to clarify functions of water development agencies which touch on county assets. There is need for streamlining section 69 on management of

Water				
No.	**Name of Policy/Law**	**Issue**	**Rationale/Concern**	**Recommendation**
		in the context of the Act yet fails to provide for involvement of the county government. **Section 67** also leaves to the cabinet secretary to develop the criteria for establishment of the water works development agencies without involvement of county governments. **Section 69** provides for handing over of waterworks to a county government which includes assumption of loans and liabilities of the waterworks yet the county had not been involved in the establishment and operation of the development agency in the first place.		liabilities between national and county government.
		Separation of powers and functions including collaborative interventions **Section 74** requires a person to make an application to be licensed as a water service provider to the Regulatory body and a copy to the appropriate county government for purposes of licensing. While **section 76** gives county governments power to set up water service providers. The county government is not represented in the regulatory body which may yet license providers to the county, without any provision for consultation. Water service providers are regulated by the (national) regulatory board that has no representation	Provision of water services is a shared function between national and county governments. However, there is limited involvement and functions of county governments in regulation of services specific to counties. This clearly creates room for conflict and duplication of functions in provision water services. Under **sections 74 – 77** there is no implementation clarity on how the national and county governments will regulate licensing water service providers. While submission of copy of the application for a licence to county government and incorporation of	Amend the Act to harmonize functions between national and county governments with clear demarcation and collaboration where appropriate for instance in regulation of water service providers Review provisions such as **sections 29, 30, 42, 26, 64** and **65** to ensure harmonization of functions, effective representation of county government where there are cross-cutting functions such as water service standards, basis water management, and flood management among others.

Water				
No.	**Name of Policy/Law**	**Issue**	**Rationale/Concern**	**Recommendation**
		of counties, yet some of the providers are appointed by the counties (**section 77**) **Section 42** provides no clarity on water use regulations and charges between national and county government. While section 42 provides that regulation function may be charged to water user association, there is no relation with or mention of water basin committee which establish user association and which provide for an avenue of participation of county government. Section 29 on establishment of water resource users associations should be a function for county governments.	views from the county government are provided for, the representation of the county government is not infused in the composition, actual monitoring including decentralization of information through counties on approved service providers.	
		Section 95 governs variations of conditions of services by the regulatory body on application by a licensee without provision on involvement of or information to the county government which may be affected. Similarly, there is no provision for involvement of county governments in **sections 76** which gives the Board powers regarding of revocations of licenses and **sections 97** and **98** give the Regulatory Board powers to vary areas of service provision	The Board has powers that have implications over provisions of services at the counties, but there is no duty to consult with counties in such instances. This poses potential conflict and disruption of services which directly impacts on service provision at the counties	Amend the Act to incorporate participation of county governments in such provision and regulation of provision of water services **sections 74, 97 98** as recognised under sections 101, 106 on the role of county government regarding complaints received on service provision and enforcement. Amend the Act to clarify that water service provision as captured under **Section 76** and **79** and other sections of the Act is a function of County Governments.

Water				
No.	**Name of Policy/Law**	**Issue**	**Rationale/Concern**	**Recommendation**
		Section 94 makes provisions with respect to provisions of water services to areas that are considered to be not commercially viable. This **section 94(1)** is couched in terms that are incompatible with the duty to promote realization of the right to water – as it reads: *'Nothing in this Act shall deprive any person or community of water services on the grounds only that provision of such services is not commercially viable'* which may be construed as allowing differential treatment or justification for denial of right to water. **Section 81** provides that a water service provider may extend its services to rural or developing area with approval of the Regulatory Board.	The Act needs to incorporate and place a positive duty upon both national and county governments to promote provision of services in such areas that would fall under the category of marginalized areas. In reality, some counties are essentially made up of rural and under-developed areas with scarcity of water resources and non-existent water works. It is the duty of the government to provide services (commercial viability) notwithstanding and progressively promote access to water in such areas under affirmative action programs. The rationale for ***section 84*** is not clear, it creates a presumption that operations of water service providers is limited to urban areas, yet counties are not necessarily urban or developed.	Amend **section 94** to comply with the duty of governments to progressively realise the right to water in rural and undeveloped areas.
		<u>*Role of Counties in Sanitation*</u> The Act Fails to recognise the role of counties in Sanitation. Section 109 empowers the Regulatory Board to impose a sewerage service levy despite this being a County function, while Section 117 which establishes a Water Sector Trust Fund also includes both monies and functions which are for County Government	The distinct and Constitutional nature of County Governments and their role in sewerage and sanitation must be clearly delineated in law.	Amend **Section 109** and **117** to remove the role of counites in sewerage and sanitation from the ambit of both the Regulatory Bard and the water Sector Trust Fund

Water				
No.	**Name of Policy/Law**	**Issue**	**Rationale/Concern**	**Recommendation**
		Public participation in water services management **Section 87** requires that an application for licence should be subjected to public participation in approval of water service providers by submitting complaints to the Regulatory Board. **Section 92** requires that every water service provider to provide a mechanism for public complaints for approved by the Regulatory Board.	This needs to be structured through regulations setting out the procedure and timelines for submission of applications, publication of all applications, feedback from public, appointment and public information of approved licensees. There is no clarity on when complaints mechanism should be provided and approved by the Board. It should be a considered as a condition to licensing and shared to the consumers of services.	Amend **sections 87** and **92** or clarify through regulations how public participation in licencing and monitoring provision of water services.
3.	**Kerio Valley Development Authority Act, Chapter 441**	Section 10 on the functions of the authority duplicates the functions of national and county government in the areas of natural resource management and the imperative of devolution	With devolution, there is no need for establishment of regional development authorities	Delete the entire Act
4.	**Tana and Athi Rivers Development Authority, Cap 443**	The Act seeks to advise on the institution and co-ordination of development projects in the area of the Tana River and Athi River Basins.	First this is duplicative of the institutional structures under the Water Act and the county government in the area whose responsibility include coordination of development at the local level	Delete the entire Act
5.	**Ewaso Ngiro South River Basin Development Authority, Cap 447**	The Act provides for the establishment of an Authority to plan and co-ordinate the implementation of development projects in the Ewaso Ng'iro South River Basin and catchment areas.	It conflicts with the provisions of the constitution dealing with devolution and duplicates provisions of the Water Act	Delete the entire Act

Water				
No.	**Name of Policy/Law**	**Issue**	**Rationale/Concern**	**Recommendation**
6.	**Ewaso Ngiro North River Basin Development Authority, Cap 448**	Provides for the establishment of an Authority to plan and co-ordinate the implementation of development projects in the Ewaso Ng'iro North River Basin and catchment areas.	Conflicts with the provisions of the constitution dealing with devolution and duplicates provisions of the Water Act	Delete the entire Act
7.	**Irrigation Act, Chapter 347**	The Act is outdated, refers to institutions like the Water Resource Management Authority and Local Authority that no longer exist, its provisions on compulsory acquisition do not align to the procedures under the Constitution which recognizes roles for county governments too. In fact, the Act is not aligned to devolution at all despite the constitutional recognition that counties have a role in water management and by extension irrigation as part of their agricultural functions of crop husbandry.	The Act no longer serves purpose in view of the Constitution and devolution of water management services.	Delete the entire Act
8.	**Irrigation Bill, 2017**	**Role of County Governments** While the Bill recognizes devolution, certain areas fail to entrench this function more effectively through consultation between the national and county governments: - Section 7(4) The Authority may establish such regional, county, catchments or sub-catchment or sub-county level offices as the Board, may consider necessary.	There is need to mainstream the role of counties in functions that affect counties uniformly in the entire Bill. Some areas that would need consultative implementation lack in this regard. Furthermore, the implementing authority which has representation from counties however, leaves the appointment to cabinet secretary which may defeat the principle of consultative government.	Revise clauses 7(4) 8 and 9(2) and 34 to provide for role of counties.

Water				
No.	**Name of Policy/Law**	**Issue**	**Rationale/Concern**	**Recommendation**
		- Section 8 gives responsibility to the Authority over infrastructure, in national or public and small holder schemes, including schemes which traverse or straddle more than one county – there is no consultation with county government as expressly recognized in other provisions yet this function directly involves counties. - Section 9(2) which provides for the composition of the Board of the Authority includes two representatives of county governments to be nominated by the Council of Governors, appointed by the cabinet secretary and approved by the president (section 1(e). The mode of appointment places county government under the cabinet secretary - There is no harmonization of functions between the national and county governments. Section 14 which provides for the formation of county development units does not elaborate on their composition despite setting out its functions. There is no clarification on how they should link with the Authority. - Transition – the Act under section 34 repeals the Irrigation Act, Cap. 347, transferring		

Water				
No.	**Name of Policy/Law**	**Issue**	**Rationale/Concern**	**Recommendation**
		assets and liabilities of the National Irrigation Board to the Authority. This has an implication on the county governments which is not taken into considering the transitional process.		
		Interface with other laws Need to consider more carefully interface of implementation with the structure under the Water Act to avoid duplication and conflict over roles. For instance - Section 2 which has a function on availability of water for irrigation – which is a function of provision of water services. - Section 2(2)(e) on the responsibilities of the cabinet secretary include subject to resource constraints, ensure availability and adequacy of water for irrigation. The cabinet secretary is the one responsible for matters related to irrigation - Section 15(2)(a) provides that the cabinet secretary will among others and with appropriate consultations approve appropriate tariff structures and make arrangements with the Water Resources Authority in respect of requisition of irrigation water in bulk;	Implementation of the proposed law in some areas as proposed would implicate on functions under other law, thus, need for harmonization to avoid duplication and conflict of functions.	Clarify water service functions and irrigation service functions under clauses 2, 8 and 17. Where there is an interface, there is need for express consultations with the responsible authority

Water				
No.	**Name of Policy/Law**	**Issue**	**Rationale/Concern**	**Recommendation**
		- Section 8 provides for the formation of irrigation water user associations in the counties – while the Water Act provides for water user associations. - Section 17 provides for the establishment of administrative and regulatory framework for water storage. - Section 14(3)(f) provides one of the functions of the counties as set up measures to implement adaptation and mitigation to climate change and enhance sustainable environmental management. This function touches on other laws and authorities – e.g. Climate Change Act, EMCA.		
		Section 16(2) provides for compulsory acquisition of land by the cabinet secretary through consultation. This needs to be revised to reflect the role of the National Land Commission. Need clarification of certain terms The Bill makes reference to the state department of irrigation. The function is not clarified in the Act nor its establishment or how it relates to the Authority. The Bill refers to national or public schemes. Public schemes are not defined.	The Bill makes reference to national or public schemes – only national schemes are defined. The role of the state department for irrigation is not clear, in view of the Irrigation Authority	Relook at clauses 8, 16, 19 Review clauses 2, 9(1)(b), 16(2), (3), on the place of the department

Water				
No.	**Name of Policy/Law**	**Issue**	**Rationale/Concern**	**Recommendation**
8.	**Kisii County Water Management and Water and Sanitation Services Act**	» Scope of application of the Act not clearly defined. » It is not clear whether implementation of the Act is to be done together with the other legislation e.g. Water Act, EMCA » No aspect of public participation including redress mechanisms » The responsible executive member and department not defined – s.6 (2), 15(2) – administration of the Act not clearly set out » No standards set out or contemplated through regulations in respect of water service providers Weak regulation of service providers – no issues of licensing, charges, approvals – s. 23 » No clear definition of rights and obligations of the county government and citizens » Demarcation of national public works and county public works not clear		
9.	**Kisii County Solid Waste Management Act, 2015**	» Objective set out in generalized terms – not focused to the context of solid waste management » S. 7(d) – need to be streamlined - all applications need to be published as opposed to publication of each application.		S. 7(e) – who determines what is false representation in an application. Making it an offence not appropriate – should be a basis for disqualification as opposed to an offence

Water				
No.	**Name of Policy/Law**	**Issue**	**Rationale/Concern**	**Recommendation**
		» S. 10(d) list of offensive trade waste appears to be exhaustive – may be considered as part of definitions » S. 11(d) – rationale for the record. » Missing provisions on public participation, dispute resolution, redress for complaints		
10.	**Makueni County Sand Conservation and Utilization Act, 2015**	» S. 3 – separate purpose and establishment of the authority » WRUA not defined » Relationship between the Board, Authority, County, WRUA, Sub-County Committees, Sand Resource Utilization Association » S. 19(3) Confirm if domestic purposes is defined » S. 23 – permissive – undertaking for responsibility of contravention under the Act. » S. 26 should follow after other provisions		Define WRUA Provide for clear demarcation of functions between Relationship between the Board, Authority, County, WRUA, Sub-County Committees, Sand Resource Utilization Association

2. Mining Sector

Despite the potential of the mining sector, the sector has for long been undeveloped contributing 0.8% of GDP in 2010, 0.9% in 2011, 1.1 % in 2012, 0.8 % in 2013, and 0.9% in 2014. For the last five years, with increased discovery of oil and other mineral resources such as coal, niobium, rare earth and gold, there has been increased focus on the sector. This influenced creation of a Ministry of mining in 2013 which has recently been combined with that of petroleum. Other initiatives have included cancellation of mining agreements, efforts to map out the country's mineral resource potential and review of the country's legal and policy framework governing mining.

In addition to the new discoveries, other minerals in the country include soda ash, fluorspar, titanium, gold, coal, manganese, iron ore, gypsum, diatomite, chromite, limestone, and silica sand. To ensure that the country sustainably manages its mineral resources and align to both the Constitution and the **Africa Mining Vision**, comprehensive reforms have been undertaken replacing the Mining Act of 1940 with the Mining Act of 2016 and adoption of a Mining and Minerals Policy of 2016.

The **African Mining Vision** seeks transparent, equitable and optimal exploitation of mineral resources to underpin broad-based sustainable growth and socio-economic development. It does this through six overarching goals including: Promoting transparent and accountable mineral sector, where resource rents are optimized and utilized to promote broad economic and social development; promoting good governance of the sector with participation of countries and citizens and equity in distribution of benefits; improving knowledge and optimizing benefits at all levels; harnessing potential of small scale mining for improved rural livelihoods and integration into national economy; fostering sustainable development principles based on environmentally and socially responsible mining; and building human and institutional capacities. By doing so, the Vision seeks to help address the myriad challenges facing the sector

The problems that hinder sustainable exploitation of the mining sector include lack of technical expertise to exploit mineral resources, corruption and governance challenges, nature of mineral development agreements, lack of adequate information on extent of mineral

resources, lack of value addition, disregard of small scale miners as a result of large scale focus of the sector, and environment and human rights violations.

The domestication of the Vision was given impetus by the provisions of the 2010 Constitution. The Constitution has several provisions relevant to sustainable mining operations.

The Constitution provides the basic foundation for ensuring effective natural resource governance in Kenya. It clearly defines the tenure of minerals and oils by stating that all minerals and oils form part of public land. This implies that minerals in Kenya are held in trust by the national government on behalf of the people. The Constitution also obligates the national government to ensure sustainable exploitation, utilization, management and conservation of the environment and natural resources. It also prescribes strict procedures including ratification by Parliament of some of natural resources agreements.

The Constitution lays a good foundation on revenue sharing. Parliament is mandated to enact legislation ensuring that investments in property benefit local communities and their economies. Further, it requires the State to ensure equitable sharing of benefits accruing from natural resources. The need to ensure equitable sharing of national and local resources throughout Kenya is also listed as one of the objects of devolution of government. The Constitution also requires revenue raised nationally to be shared equitably among the national and county governments. County governments may be given additional allocations from the national government's share of the revenue, either conditionally or unconditionally. Sharing of revenues to counties is predicated on *inter alia*, the fiscal capacity and efficiency of county governments; and the developmental and other needs of counties. The Constitution also establishes an Equalization Fund into which shall be paid one half percent of all the revenue collected by the national government each year. The fund is to be used to provide basic services to marginalized areas, in order to bring the quality of those services in those areas as much as possible to the level enjoyed by the rest of the nation.

The Chapter on the Bill of Rights seeks to preserve the dignity of individuals and communities, as well as to promote social justice. A number of the rights and fundamental freedoms protected by

the bill of rights have direct implications for exploitation of natural resources. These include respect and protection of human dignity, access to information, right to property, right to a clean and healthy environment and access to justice. The Constitution also requires public participation in all important decisions. It requires the state to encourage public participation in the management, protection and conservation of the environment.

2.1.1 National laws and policies

The Mining Act replaces the 1940 Mining Act and seeks to align the operations of the sector to the imperatives of the Constitution. Its preamble stipulates that it seeks to give effect to Articles 60, 62(1)(f), 66(2), 69 and 71 of the Constitution in so far as they relate to mining. The Act seeks to enhance the country's competitiveness as a mining destination by providing rules to regulate the entire mining process from prospecting, mining, processing, refining, treatment and transportation. The Popular Version of the Mining Policy describes the Act as "among the most progressive mining legislations in Africa and the world and seeks to achieve the right balance between investor interest and public interest and aligns the county's mining industry with the industry global trends and best practices."

The Act clearly interprets the provisions of Article 62 of the Constitution by providing that all minerals is property of the Republic of Kenya and vests in the national government in trust for the people of Kenya. Other issues discussed by the Act include mineral rights, institutional architecture for its management, artisanal mining, community engagement and environmental issues in the mining process.

The Act recognises the role of counties in the mining process, and even provides for the Council of county Governors to nominate a representative to Minerals Rights Boards.

One of the areas that has the potential of raising concerns for counties relates to such common materials and what the Act refers to as construction minerals. Under the Act, construction minerals are stated to "include stones, gravel, sands, soils, clay, volcanic ash, volcanic cinder and any other minerals used for the construction of buildings, roads, dams, aerodromes and landscaping or similar works, and such

other minerals as the Cabinet Secretary may from time to time declare to be construction minerals, by notice published in the Gazette."

There is no other provision relating to these minerals in the Act. Instead Section 7 allows any person to take soil, clay iron, salt or soda from any land which has been the custom of the member of the community to which that person belongs to take the same subject to conditions imposed by the Cabinet Secretary. These two provisions do not recognise the role of counties in relation to regulation of these common mineral related items. Taken together with the amendments to Sections 37, 74 and 85 of the Water Act through the Statute Law Miscellaneous Amendment Act as relates to licensing for water abstraction to exclude abstraction of sea water for purposes of salt, extraction denies county governments from participating in the regulation of these activities.

There has been a lot of disquiet from counties relating to the process of prospecting, licensing and mining operations. Information on who is granted minerals rights and the terms of such grants requires to be availed to counties so as to enhance their involvement and ensure their cooperation in the mining sector. This must be the idea behind the provision of Section 20(I)(*n*) of the Mining Act. However, to only keep it as a responsibility without elaborating how this would happen does not get to the core of the problem within the sector. Secondly, to make the cooperation process to go through the Principal Secretary and the Cabinet Secretary and take the approach of promoting cooperation amongst counties and not between county governments and the national government does not capture the constitutional requirements of Articles 189 and 6 of the Constitution.

The Mineral Rights Board has extensive powers relating to advising the Cabinet Secretary in relation to the grant, rejection, retention, renewal, suspension, revocation, variation, assignment, trading, tendering, or transfer of Mineral Rights Agreements; the areas suitable for small scale and artisanal mining; the areas where mining operations may be excluded and restricted; the declaration of certain minerals as strategic minerals; cessation, suspension, or curtailment of production in respect of mining licences; fees, charges and royalties payable for a mineral right or mineral. Despite the fact that it deals with issues germane to county governments and it provides the basis for roles that counties perform in relation to mining, there is no representation

or consultation with county governments. It is important that section 31 be amended to provide a mechanism for consultation through establishment of a joint committee between national and county governments.

Section 34 provides that county governments shall be notified when the Cabinet Secretary receives an application for a mining right without giving the relevant county government the opportunity to either comment on or even object to the grant of a mining right. This is despite the fact that some rights may be within community land which has not yet been alienated and is thus under the county government. Section 36(2) limits the approval of the county government only to instances where the land is situated within a town, municipality of trading centre. This should be amended to remove the restriction. It is also not clear why the National Land Commission and not the County Government is to be consulted in relation to unregistered community land under Section 38(1) yet this land is vested in County Governments by virtue of Article 63 of the Constitution and the provisions of the Community Land Act.

To avoid misuse of the powers vested in the Cabinet Secretary under Section 40, the section need to be revised to provide that in appropriate cases the Cabinet Secretary may request the National Land Commission to compulsorily acquire land required for mining purposes. This way the provision becomes an enabling as opposed to a circumventing provision for the Cabinet Secretary. Left in its current form, it has the intention of making the provisions on seeking consent, including from county governments irrelevant.

Employment is normally a thorny issue in mining operations. The provisions of sections 46 and 47 are a step in the right direction especially the requirements for skills transfer and submission of a plan for recruitment and training of local citizens. It is necessary to amend the provisions to ensure that counties are notified of the programme.

Sections 92 to 98 of the Act provide for the process of licensing artisanal miners. While there is provision for an artisanal mining committee to be chaired by a representative of the Governor, the committees have no substantive functions having being given the duty of simply advising the representative of the Director of Mines who is the one with the overall authority of licensing yet is also the Secretary of the

committee. These provisions need to be redrafted so that counties have substantive roles in regulation of artisanal miners and in accord with Article 189 of the Constitution.

Section 153(8) deals with compensation of those displaced as a result of mining operations and provides that this can happen through resettlement. Despite the fact that this has implications on planning within counties, the section does not capture the involvement of county governments. This needs to be included through an amendment to the section.

The Mining and Minerals Policy was developed at the same time as the Mining Act and adopted in 2016. It has the same challenges as the Mining Act identified above.

Fundamentally, as the policy document stipulating the Government's position in the mining Sector, it is telling that the Policy does not comprehensively recognise and detail the role of County Governments in the regulation and exploitation of the Sector. Counties are, for example only mentioned in the section of the Implementation when it comes to benefit sharing. The substantive Policy statements also has short sentences on role of counties in providing access to community land for mining operations. In addition, counties are mentioned in the context of benefit sharing and the responsibility of Government to develop a framework for participation of, amongst others counties in mining investments. Due to the importance of the Mining Sector, the Policy should have a stand alone and more robust provision on the role of counties.

The **Natural Resources (Classes of Transactions Subject to Ratification) Act, 2016** provides for the implementation of Article 71 of the Constitution. The Act applies to transactions that involve both national and county governments. There are several definitions in the Act that are not included in the Act which should be captured. Secondly, Section 5 provides that the after entering into a transaction, the beneficiary should submit an agreement or other instrument evidencing the transaction to the responsible Cabinet Secretary responsible. This seems to provide that ratification is only happening after an agreement is already entered into. This defeats the intended purposes, since ratification should be the basis for legitimizing public participation on ratification before a formal agreement can be entered

into. The section also seems to leave the discretion with the particular responsible ministry. Yet there is requirement for a register of all such transactions. It is not clear how this should be implemented, considering that the ministry responsible could be any that is charged with matters concerning a particular natural resource.

The procedure should be revised. Where an application is submitted falling under Article 71 transactions, the responsible cabinet secretary should review and develop a memorandum for presentation to the applicable ministry and eventual tabling in parliament as well as corresponding public participation. While section 7 provides that validity is subject to ratification, then there is need for qualification for definition of agreement as section 5 already suggests that an agreement is already in place.

There is also need for better coordination since there is no central receiving authority of such transactions (at whatever level). There is a risk that an agreement not vetted to be qualified under the Act may be approved without being subjected to the necessary ratification. Yet, there is no opportunity for taking back an agreement that ought not to be enforced. Thus, the need for a proper internal approval process before submission to Parliament without compromising the need for expedition of commercial transactions.

Section 9 needs to provide minimum standards but not a closed list of considerations to be made. Considerations should also consider aspects of sustainable development. In addition, the procedure for consultation of county governments needs to be elaborated on in the Act.

2.1.2 County Level

At the County level, despite the keen interest and public discussions that many counties have had over issues to do with mining, only Makueni out of the ten selected counties has enacted a law that addresses mining issues. This is **Makueni County Sand Utilisation and Harvesting Act.** Even then, this law only addresses sand harvesting. Garissa is also in the process of developing a policy and laws to regulate aspects of mining in the County. An assessment of its constitutionality is contained in the matrix below.

Table 2 Review of the Mining Sector laws and policies in a tabulated matrix

Mining				
No.	**Name of Policy/Law**	**Issue**	**Rationale/Concern**	**Recommendation**
1.	**Mining Act, 2016**	***Section 20(1)(n)*** The provision requiring the Director of Mines to promote cooperation among county governments places county governments in subservient positioning to the Director of mines	County governments have a role to play in management of natural resources, thus, engagement with the national government should be one of cooperation and not control.	Develop a comprehensive provision on intergovernmental relations and cooperation with counties as relates to mining operations
		Under ***Section 25(5)(c)*** a person shall cease to be a member of the Board of Corporation if s/he is convicted of an offence and sentenced to imprisonment for a term not exceeding six months	The section bars petty offenders and those convicted of misdemeanours from holding public office while allowing those convicted of major crimes that attract a sentence of more than six months to hold office.	There is need for review of qualification of members of the Board. ***Section 25(5)(c)*** to read '… convicted and sentenced to a term exceeding six months'
		Section 31(2) provides for formation of committees to advice the Mineral Rights Board on matters relating to mining of minerals.	There is need for more representations at all levels through formation of joint committees which will ensure that the Board is adequately advised on gender, youth and inclusiveness especially in relation to artisanal small-scale mining as envisioned in the mining policy.	***Section 31(2)*** of the Act be amended to include formation of joint committees as envisioned under Article 189(2) of the Constitution
		Section 34(1) provides that the Cabinet Secretary shall give notice to the relevant county government when an application for a grant of a mineral right is made; yet the Act does not provide for input by the county government on the said application. Furthermore, whereas the Act allows the land owner or community to object to a grant of licence, it does not provide for objection by the relevant county government.	The Act fails to recognise that county governments hold unregistered community land in trust on behalf of communities according to ***Article 63(3)*** of the Constitution. Therefore, there should be an opportunity for their input in approvals relating to their jurisdiction.	Amend ***section 34(1)*** to allow input of County government. ***Section 34*** to be amended to allow participation by the County Government on assessment of mineral rights.

Mining				
No.	**Name of Policy/Law**	**Issue**	**Rationale/Concern**	**Recommendation**
		Section 34 on mineral rights applications does not inculcate participation by the county government as envisioned under ***Article 189*** of the Constitution		***Section 34(4)*** be amended to allow objection by county government to grant of licence
		Section 38 on consent of National Land Commission in relation to unregistered community land	Unregistered Community Land is vested in county governments and not the National Land Commission	Remove National Land Commission and replace with relevant County Government. Allow for consultation of the Commission when such need arises.
		Section 40 provides for the cabinet secretary to compulsorily acquire land for mining prospects where consent is unreasonably withheld, in the opinion of the cabinet secretary contrary to the national interest.	Redraft to enable the cabinet Secretary to seek for the National Land Commission to compulsorily acquire the land in appropriate instances.	***Section 4***0 on compulsory acquisition needs to be redrafted to allow the necessary authority (National Land Commission) to undertake the necessary acquisition.
		Sections 47 and ***48*** on employment does not make provision for sharing the plan with relevant county government	Enhance involvement of counties in monitoring employment of locals in mining operation	***Sections 92-98*** to be amended to provide for substantive involvement of artisanal mining committees in the licensing process
		Sections 92-98 which cover operations of artisanal miners does not recognise the substantive role of county governments. ***Section 94*** only provides for the governor to be a member of the artisanal mining committee which plays an advisory role to the director.		

Mining				
No.	**Name of Policy/Law**	**Issue**	**Rationale/Concern**	**Recommendation**
		Section 153 on compensation to be amended to involve county governments		Amend ***section 153(8)*** on resettlement to provide for the involvement of relevant county governments.
2.	**Natural Resources (Classes of Transactions) Subject to Ratification Act, 2016**	***Section 5 and 9*** ***Section 5*** seems to leave the discretion with the particular responsible ministry. Yet there is requirement for a register of all such transactions. It is not clear how this should be implementing, considering that the ministry responsible could be any that is charged with matters concerning a particular natural resource. It does not provide for input by the county government where the agreement is in respect of a resource at a particular county. **Section 9** limits considerations to be made in determining qualification of an agreement.	It is important to make the procedure fool proof – to ensure there is proper checks and balances in entering agreements.	Amend ***Sections 5*** and **9** to clarify procedure for ratification and consultation of county governments in matters affecting exploitation of resources at the counties.
3.	**Makueni County Sand Conservation and Utilization Act, 2015**	**Section 4** makes reference to WRUAs and which are under the supervision of the Authority, and form part of the composition of the Authority's Board. However, the WRUA are not defined under the Act	The WRUA are not defined or established anywhere under the Act. Its role, composition is therefore unclear.	Provide a definition of WRUA

Mining				
No.	**Name of Policy/Law**	**Issue**	**Rationale/Concern**	**Recommendation**
		Section 4 establishes the County Sand Conservation and Utilization Authority charged with general supervision and co- the Authority ordination over all matters relating to sand conservation and utilization. **Section 7** establishes a Board and Secretariat to execute the Authority's mandate, however, there is an interchange of terms between the Authority and Board. There are several bodies under the Act with a function under the Act. The Authority under section 4, the WRUA referred to under section 4; Sub-County Committees under **section 12** and Sand Resource Utilization Association	The relationship between the Board, Authority, County, WRUA, the Committee, Sub-County Committees, Sand Resource Utilization Association is not very clear.	Reconsider the structure of the Authority to clarify the need to have both the Authority and the Board. ***Section 3*** – separate purpose and establishment of the authority Provide for clear demarcation of functions between the Board, Authority, County, WRUA, Sub-County Committees, and Sand Resource Utilization Association. Consider including provisions to regulate transboundary concerns in sand utilization.
		Sections 8, 9, 10 refers to the Committee – it is not clear which Committee is being referenced to.	There is need to clarify which Committee is being referred to.	Amend Section 2 to include definition of Committee.
		Section 19(3) requires licensing for harvesting of sand unless it is intended for domestic purposes. The scope of use of sand for domestic purposes is not clear thus open to abuse and difficult to implement. **Section 20** provides for licensing by the government on an annual basis unless authorized by the Executive Committee Member of persons transporting sand. **Section 21** provides for licencing trade or business in sand by the Authority.	There is need for harmonization of the licensing procedures and the responsible authority – Executive Committee, or the Authority.	Relook at various aspects of sand harvesting and utilization and their regulation. Clarify **section 19** on use of sand for domestic purposes.

Mining				
No.	**Name of Policy/Law**	**Issue**	**Rationale/Concern**	**Recommendation**
		Section 23 – permissive – undertaking for responsibility of contravention under the Act.	There is no provision for community participation or input by Associations on licencing of applications for harvesting and utilization of sand.	Include in the licencing procedure place of public complaints or feedback. Section 23 should set out the criteria – as couched it is permissive in nature
		Section 26 provides for penalties for violation of the Act. It gives graduated penalties. **Section 30** provides for penalty for violating prescribed timelines for harvesting of sand. Comparatively, this provision gives a harsh penalty and does not follow the graduated sentencing provided under the omnibus **section 26** penalties.	The penalties need to be harmonized. There should be other conditions besides imprisonment and fines. Section 26 penalties seem to focus only on loader, driver, or vehicle owner. It leaves out other aspects of dealing in sand such as companies, businesses etc. The persons mentioned may only be agents of the business owners.	Section 26 should follow after other provisions unless the provision is limited to the licensing violations only under which it is placed. **Section 26** needs to be expanded to capture all aspects of violations in respect of dealings in sand. There should be other forms of punishment since the Act deals with a natural resource e.g. forfeiture, restoration of sites etc.

3. Forestry sector

A core function of international law on forests is the promotion of sustainable forest management. The sustainable management of forests, including conservation and utilization, is an important element of the international and national objectives to attain sustainable development. Significant policy directions can be derived from international law, policy and other literature from the past two decades. Agenda 21 calls on states to focus on enhancing protection, sustainable management and conservation of all types of forests, including rehabilitation of degraded areas, and reversing deforestation through rehabilitation, afforestation or reforestation. States are also called upon to undertake policy and legislative measures to sustain the multiple roles and functions of all types of forests, forest lands and woodlands. This is supported by the 1992 UN Statement on Forest Principles which reiterates that forest conservation correlates with the entire range of environmental and development issues and opportunities, including the right to socio-economic development on a sustainable basis.

Notably, both Agenda 21 and the Forest Principles, adopted at the same Rio Conference, refer to 'all types of forests', which could be interpreted to include trees that are grown outside formal forest areas, including on privately or community owned agricultural lands. Further, there is a focus on sustaining the multiple roles and functions of these forests. These functions are important because they quite often determine the management objectives that law and policy will prescribe. The 2010 Global Forests Assessment demarcates three key functions of forests: productive; social and economic; and the protective. The productive function involves managing the economic and social utility of forest resources to national economies and forest-dependent local communities.

This simultaneously requires ensuring that production and harvesting are sustainable and do not compromise the management options of future generations for productive or other functions of forests. The socio-economic function, related to the productive role, recognizes that forests provide a wide variety of social and economic benefits, ranging from quantifiable economic values associated with forest products, to less tangible services and contributions to society. Forest health and vitality, which are instrumental to continuity of a forest

ecosystem, highlight the central role of the protective function. The term 'protective function' is applied to denote forests, or forest areas, that have soil and water conservation as the main function or management objective.

In order to attain sustainability in forest management, it is necessary that forest law, policy, and management actions endeavour to balance the productive (socio-economic) and protective (ecological) functions of forests. This has critical implications at the national level, where there is an ongoing tension between the need to ensure maintenance of ecological integrity and health of forests, which need is pitted against that of societies to derive their livelihoods from the forest resources. Creating this balance is at the heart of the efforts towards sustainable forest development.

Policy and law on forest must be geared towards achieving sustainability. Sustainable forest management, according to a 2008 UN General Assembly resolution on forests, is a dynamic concept that aims to maintain and enhance the economic, social and environmental values of all types of forests, for the benefit of present and future generations. This resolution emphasizes that forests, including trees outside forests, provide multiple economic, social and environmental benefits, in which case the sustainable management of forests contributes significantly to sustainable development and poverty.

Forest resources in Kenya are valuable natural endowment that must be sustainably managed for present and future generations. They rank high as some of the most important national assets in terms of economic, environmental, social and cultural values. The woody resources provide utility products (timber, poles, fuel wood and pulp wood) as well as a variety of non-wood products (resin, honey, medicine). Forests are critical for mitigating climate change through carbon sequestration; conservation of biological diversity, water and soil; as well as being major habitats for wildlife.

Kenya's forest sector has experienced poor performance in the past and improving forest governance has been an implicit objective in forest sector reforms over the past ten years. Some of the key challenges facing the forest sector include, excision and encroachment for agriculture and human settlement, inadequate stakeholder

participation in forest conservation, poor enforcement of laws and policies, illegal charcoal production, population pressure and climate change. This calls for strengthening of legal, policy and institutional frameworks and improved governance. Key features of good forest governance include adherence to the rule of law, transparency and low levels of corruption, stakeholder inputs in decision-making, accountability of all officials, low regulatory burden and political stability.

Effective governance of the forest sector remains one of the country's greatest challenges. The colonial administration set up the Forest Department headed by the Chief Conservator of Forests to superintend matters affecting the forest sector in 1942. The next half a century saw massive reduction in the country's forest cover from 60% to just about 2% in the 1990s. In 1963, when Kenya got its independence the forest cover stood at approximately 11 percent. Due to poor forest governance, deforestation reduced Kenya's forest cover to just about 2% in the late 1990s, with the country losing approximately 12,000 hectares of forest a year despite the government's attempts to alleviate the problem. Whereas the drivers of deforestation are diverse, the main ones in Kenya are conversion to agricultural land in response to demographic pressures; unsustainable production methods and consumption patterns for charcoal; degazetting of forest lands; ineffective institutions and enforcement; corruption; illegal logging; and unclear land tenure for forest-adjacent peoples.

Prior to 2007, Kenya did not have a forest policy articulated in a specific official sessional paper. This position changed as a result of increased degradation and encroachment of forests in the early 2000s seeing heightened pressure on government and court cases against forest excision. The Ndungu Land Commission report on illegal and irregular allocations of public land pointed out the massive excision of forests and its negative implications. Against this background, the Forest Act of 2005 was adopted and a Forest Policy of 2007 also promulgated so as to improve forest governance as well as to reverse the trend in forest degradation and destruction.

The Forest Act, 2005, focused on sustainability in forest management, which included both conservation, and rational utilization for the economic and social development of the country. It does this through focusing on all categories of forests be they state, community or

private forests. It established the Kenya Forest Services as the main institution for forest management and also developed clear frameworks for community and stakeholder participation in forest governance, recognising the role of community forest associations.

The overall spirit of the Act was decentralisation of authority and responsibilities in management of forests, and promotion of partnership through increased access of benefits to the communities and promotion of sustainable forest management through management plans.

The Constitution provided the framework for enhanced conservation and management of forest resources. Article 42 captures the overarching right to a clean environment, where forest conservation is anchored due to the contributions of forests to livelihoods and environmental management. In addition, Article 69 obligates the State to "ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits." The Article places similar obligations on the state as regards the entire environment and all natural resources and requires national and county governments to play a positive role in sustainable natural resource management.

In addition, Article 69 recognises the past massive forest degradation and the need for afforestation and reforestation programmes in the country by obligating the state to work towards a tree cover of a minimum of 10 percent of the land area. In addition, Article 10 provides that adherence must be had to the principle of governance including public participation and devolution.

Articles 186 and 187 then broadly discuss the functions of the national and county government. Within the context of forest management, the Fourth Schedule indicates that national government has the responsibility of protecting the environment and natural resources so as to establish a durable and sustainable system of development on environment and natural resources. As part of this task it will develop national policies and laws. On the other hand, the county government is mainly charged with the responsibility of implementation of specific national policies on natural resources. A reading of the Fourth Schedule, however, does not explicitly mention forests. However, the definition of natural resource included in Article 261 of the Constitution includes forests. Therefore, although the Fourth Schedule as part of

the elaboration of natural resource responsibilities mentions other resources like water and wildlife, the national government role includes forests. In addition, as relates to county governments, their responsibility to implement specific national government policies on natural resource conservation specifically mentions forests.

Consequently, the management of forests is a shared function between national and county governments which should be undertaken based on the principles of cooperation under Article 189 and Article 6 of the Constitution. Forest management is intricately linked to land tenure. Indeed, part of the reasons for forest encroachment is as a result of desire for land for agriculture and human settlement and other development activities. Consequently, rules for land tenure impact on how forest are conserved. The constitutional provisions on land clearly demonstrate that forests exist on all three tenure categories, public land, community land and private land with forest being explicitly mentioned in Article 62 on public land and Article 63 on community land.

3.1 National laws and policies

The Forest Conservation and Management Act, 2016 was assented to on 31st August, 2016 and came into force on 31st March, 2017. It replaced the Forests Act, 2005. This was done so as to align forest conservation and management with the imperatives of the Constitution. This is captured from the preamble, which indicates that its purposes is to "*give effect to Article 69 of the Constitution with regard to forest resources; to provide for the development and sustainable management, including conservation and rational utilization of all forest resources for the socio-economic development of the country*."

The Act is the most aligned to the Constitution and the spirit of devolution under the natural resource sector. It captures devolution and cooperation between national and county governments throughout its content. In Section 4 that deals with principles to guide the implementation of the law, the Act stipulates that one of the guiding principles is that of consultation and cooperation between national and county governments. This is fundamental for it ensures that in interpreting the provisions of the Act and dealing with the roles of various levels of government, regard shall be had to the need

to promote consultative and cooperative engagement. The Act also recognises that forests can exist on all three tenure categories of land recognised by the Constitution, and as the audit of the land sector laws demonstrate, county governments have responsibilities over certain categories of land, including unregistered community land and some categories of public land. They would, consequently have a role to play in the management of forest found in the lands under their purview. Indeed, the definition of concession under the Act stipulates that this can be granted either in a national or county forest. This is also evident in the definition of a forest manager which for public forests include the Kenya Forest Service or a County Government.

Section 6 provides for the development, every five years, of a public Forest Strategy. The Cabinet Secretary is required to develop this strategy so as to provide the plans and programmes that the government intends to implement with a view to ensuring protection, conservation and management of forests and forest resources. Importantly, the process of its development requires public participation, which should include involvement of counties and their governments. Importantly, the strategy is also required to include functional responsibility of national and county governments in relation to forest resource management. However, section 6 should be amended so as to explicitly provide for the participation of county governments in the development of the national forest strategy or alternatively require county government to adopt county specific strategies

The principal agency for managing forests in Kenya, especially public forests, is the Kenya Forest Service. The Service is appointed by the Cabinet Secretary. While its principal role relates to public forests, it can also help in preparation of management plans for community forests and private forests when requested and in consultation with the owner. It will also establish and implement benefit sharing arrangements. The Service is also given the responsibility of assisting county governments in building capacity in forestry and forest management in counties. This is good practice for it recognises the collaboration required to enhance forest conservation in Kenya and the need to address knowledge asymmetry. In addition, the Board of the Kenya Forest Service has a representative of the Council of Governors to be appointed by the Cabinet Secretary. This is good practice which should be maintained. There is need to rethink the appointment process so as to remove the fact that the person is appointed by the Cabinet Secretary and just

provide that a representative of the Council of Governors nominated by the Council. This will enhance the status of the nominee and avoid it looking like an agent of the Cabinet Secretary.

Section 17 of the Act provides for the establishment of the Kenya Forest College and vests it with responsibilities to provide education and training in forestry issues. At the same time, section 22 details the functions of the Kenya Forest Research Institute established under the Science, Technology and Innovation Act, which includes conducting expert training courses in forestry and related natural resource areas. This has the potential of duplicating each other. There is need to amend the two sections to either clarify the distinction of the two institutions or combine them into one, most probably by expanding the role of KEFRI. The link between the two and KFS also needs to be strengthened.

The Act gives the county governments a clear function in forest management, including the involvement of county assemblies. Section 21 requires every county to implement national policies on forest management and conservation; manage all forest on public land that falls within the constitutional control of counties by virtue of Article 62(2) of the Constitution; prepare an annual report for the Kenya Forest Service on the activities that a county has undertaken in implementation of the national policies on forest conservation and management.

Section 20 of the Act provides for the establishment of forest conservation areas and committees. This section is problematic and may raise both constitutional and practicality challenges. It requires to be amended. First the establishment of the conservation areas derives more from the functions of the Service under section 8 as opposed to that of the Board. It is not necessary to make the separation from Service and Board as the section seeks to do. It should broadly be the responsibility of the Service acting through the Board to establish the conservation areas. The more problematic issue with the provision is its lack of clarity on the distinctness of national and county governments and the required inter-governmental relations. First, it is not clear whether a conservation area will be per county or cross- county. This clarity is necessary and has implications on the membership of the committee and the links with county governments. The Forest Conservation Committee is a committee of the Board of KFS and has

a County executive committee member as part of its membership. In addition, it is expected to make recommendations to the Board and also to the relevant county governments. It is not clear how the recommendations would be made to the County government yet the committee is neither a committee of the county government or one formed based on the provisions of the Intergovernmental Relations Act.

Section 21(b) and 30(2) need to be harmonised. While section 30(2) defines public forests, it does not capture the public forests for which county governments have been vested responsibility under section 21(b). This must be aligned so that those under the control of counties are also considered as public forests under the Act.

There are no proper reasons why community forests are excluded from applying to the Service under Section 32 for technical advice once registered and instead this responsibility is to the County Governments. This is despite the fact that one of the functions of the Service is to assist community forest associations that so desire with the preparation of forest management plans. Section 32 should be amended to make this a role for KFS too. This is also an area for greater inter-governmental collaboration between national and county government. This way, even private owners under section 33 can also seek and obtain technical advice from county governments.

Sections 29, 35(2), 50 and 74 make reference to a director general, a member of the board of trustees of the forest trust fund (section 29) with functions in declaration and reversion of provisional forests (section 35) and sustainable management of cross-border forest resources (section 74). It is not clear who this person is. It is not clear if this is supposed to be the Chief Conservator of Forests.

Section 37 on the establishment of arboreta, recreational parks, planting of trees and the required consultation by the county government with residents of the area and between the county and the Service is an excellent provision on the required collaborative arrangements between national and county governments.

Under section 40 of the Act, there is need for an amendment to include dissemination of information to the public as well as county government on protected tree species as part of county government

function of implementing national policies on forestry. In addition, there is need to provide for information to the county government where concession has been granted in respect of public forests.

Public participation in governance of any kind is a right that ought to be facilitated. The provisions under section 48 seem to restrict this by providing for registration which may be denied. There should be active and deliberate effort to facilitate community participation. Considering aspects of devolution, the section requires too strict requirements (articles, financial regulations, development of forest management plan etc.). This may not pass the constitutionality test, it may well be that no group will seek or qualify to be an association, which would mean that there is no aspect of public participation in forest management. It is the positive duty of the government to facilitate community participation. A good example is the establishment of water user associations under the Water Act. The service should facilitate such associations and provide capacity as well as regulation of their functions.

Sections 43 and 45 need to be harmonised. Section 44 provides for management of plantation forests which may be done by either license, agreement, contract etc. while section 45 provides for agreements for forest management through a competitive process. Section 45 provides for better regulation (competitiveness of the process, call for applications, criteria and conditions for forest management). This is also an area which needs information sharing and collaboration with county government. If adopted under section 45, proposals under section 43 would be catered for.

In addition to incentives, the Act ought to provide a duty to increase forest cover to the required minimum and ensure that the forest cover is preserved. This can be implemented through Regulations. Part of the compliance and responsibility of the Forest Service is to realise this function and report on gradual compliance. Furthermore, Agroforestry, the practice of mixing afforestation with agriculture should also be incorporated and recognised as a way of sustainable use of forests.

Despite The adoption of the Forest Act in 2016, the Country still does not have a National Forest Policy, which is aligned to the Constitution, recognises and incorporates devolution and is aligned to the 2016 Act.

In fact, the Policy that continues to govern the section is Sessional paper Number 1 of 1968. When the 2005 Forest Act was enacted, an accompanying sessional Paper Number 9 of 2005 was also developed. However, there is no evidence of its discussions in Parliament and eventually adoption as a Sessional Paper. The continued existence and implementation of the 2016 Forest Act without adoption of the accompanying Forests Policy is problematic. There is, therefore, need to adopt the Policy so as to anchor the governance of the sector and provide policy clarity on the relationship between national and county governments in the management of the sector. Lack of Policy coherence may e partly to blame for the failure of many counties to sign the Transition Implementation Plans that were prepared by the Kenya Forest Service to enable counties undertake some functions relating to the management of forests. **The Draft National Forest Policy** should be debated and with input from Counties adopted as a mater of urgency.

The **Timber Act** was enacted in 1970 and provides for the control of the sale and export of timber; for the grading, inspection and marking of timber; and control of the handling of timber in transit. Timber is defined by the Act as "wood of any tree grown in Kenya, Tanzania or Uganda, whether such wood is unsawn, hewn, sawn or machined." The Act regulates the process of grading timber and subsequently the sale and export of timber. The Act came into force in 1971 ad does not align with the Constitution and neither does it mention devolution. It does not recognise the categories of forests from which timber can be derived and their management implications.

The Act was enacted to Govern the Transition to Devolved Governments following the 2013 elections which ushered in the full roll out of devolution as captured in the Constitution. A key entity under the Act was the Transition Authority. In Gazette Supplement Number 116 of 2013, the TA published legal notices specifying certain functions that had been transferred to County Governments. As relates to Counties, this included "*Forestry including farm forestry extension services, forests and game reserves formerly managed by Local Authorities, excluding forests managed by Kenya Forest Service, National Water Towers Agency and Private forests.*'

To provide for more orderly implementation of these transferred functions, the Kenya Forest Service prepared Transition Implementation Plans (TIPS) to be signed between it and respective County Governments. Just a few Counties, though have to date signed these. It is important that the development and implementation of the TIPS be expressly anchored in the Forest Act 2016. In addition, KFS should consult counties in the content of the TIPS and also undertake capacity building for counties on forest management.

The State Corporations Act empowers the National Government to establish State Corporations to undertake certain functions. On 13th April, 2012 through Legal Notice Number 27, then President Mwai Kibaki established the Kenya Water Towers Agency as a State Corporation. The Agency was established to help continue with the functions that was being undertaken by the Mau Task Force which had been established under the office of the Prime Minister's to explore modalities of rehabilitation the Mau Forest Complex.

The Functions of the Agency include to coordinate and oversee the protection, conservation and sustainable management of water towers; coordinate and oversee recovery and restoration of forest lands, wetlands and biodiversity hot spots; promote the implementation of sustainable livelihood programmes in the water towers in accordance with natural resources conservation ; mobilize resources; identity water towers and water sheds for protection in consultation with other stakeholders; and assess and monitor rehabilitation, conservation and management activities in the water towers.

The Legal notice defines a Water Tower as an area that acts as a receptacle for rain water and that stores water in the aquifers underneath it and gradually releases the water to the springs and springs emanating from it.

While conservation of water towers is essential, especially in light of the massive forest destruction taking place in the country, there are two problems with the mandate and operations of the Agency. First, it is based solely on a legal notice. Without a comprehensive legal and policy foundation, it is very easy for the Agency to encroach onto the mandate of other agencies, including the Kenya Forest Service and Water Resources Authority. Secondly, the legal notice was promulgated before Counties were formed. It does not recognise the

existence and operations of Counties. Its recent action to establish several more water towers, has been done without regard to the role of counties in the conservation of water Towers.

It is important that comprehensive conservation be undertaken on the future role and relevance of the agency and it should only be retained if the above two issues are addressed.

When the international community adopted the Convention on Biological Diversity in 1992, they grappled with the place of traditional knowledge in the conservation of biodiversity. Article 8(1)(j) captured the place of traditional knowledge, requiring that subject to national legislation, knowledge, innovation and practices of communities relevant to conservation of biodiversity must be respected, preserved and maintained.

The adoption of the Constitution grappled with the place of cultural practices in governance processes. At the Bomas Constitutional Conference, a working group on culture had to be established to deal with this issue resulting in the development of Article 11 of the Constitution. In addition to recognising the place of culture in the country's governance, it also called for the enactment of a specific legislation to "ensure that communities receive compensation or royalties for the use of their cultures and cultural heritage; and recognise and protect the ownership of indigenous seeds and plant varieties, their genetic and diverse characteristics and their use by the communities of Kenya."

The enactment of the **Protection of Traditional Knowledge and Cultural Expressions Act, 2016** is an implementation of Article 11, 40 and 69 of the Constitution. Article 69 on obligations of the state relating to environment and natural resource management and conservation, requires the state to "protect and enhance intellectual property, in, and indigenous knowledge of, biodiversity and the genetic resources of the communities." The Act is relevant for its provisions on use of traditional knowledge for conservation, a practice that is prevalence in the forest sector.

The Act provides that in its implementation, Article 10 and the principles and values contained therein shall be the guide. One of the principles is that of devolution. Consequently, the roles of counties and county

governments become an important aspect of the implementation of the Act. It is for this reason that Section 4 details the roles of county governments, to include:

- Registration of traditional knowledge and expression within the county for purposes of recognition
- the receipt, documentation, storage and updating of information relating to traditional knowledge and cultural expressions from communities within a county
- preservation and conservation of traditional knowledge and cultural expressions
- the protection and promotion of the traditional knowledge and cultural expressions of communities within a county, the facilitation of collaboration, access to or the sharing of information and data relating to traditional knowledge and cultural expressions between county governments.
- the allocation of financial resources for the promotion of cultural activities
- the establishment of mechanisms for using culture as a tool for conflict resolution and promotion of cohesion
- The national government on the other hand has responsibilities for:
- the establishment and maintenance of the repository at the Kenya Copyright Board
- the promotion and conservation of traditional knowledge and cultural expressions of communities in Kenya;
- the protection of traditional knowledge and cultural expressions from misuse and misappropriation
- the facilitation of access of information and the sharing of information and data relating to traditional knowledge and cultural expressions.

In the process of protection of traditional knowledge, counties are required to collect information, document and register traditional knowledge within their counties for purposes of recognition. In addition, if a community shares the knowledge with another community outside Kenya, the national and county government shall register the owners of traditional knowledge in Kenya and maintain

relevant records. While Section 7 recognises the role of national and county governments in the registration process, it is important that either regulations be developed or the section be amended to clarify the exact roles of counties and national governments in the registration process. This will ensure mutual cooperation and avoid conflicts in the registration process through overlaps of mandates or burden on one level of government due to the financial requirements for the registration process.

Section 8 is very elaborate and clear on the roles of counties and national governments. Section 7 needs to be amended to link it with the clarity in Section 8. Section 12 dealing with compulsory licence only captures a role for the Cabinet Secretary in the exercise of powers akin to compulsory acquisition under Article 40 of the Constitution. Despite the fact that counties are involved in the registration process under sections 7, 8 and 10, they are not involved at all in the process of grant of compulsory licence for exploitation or in alternative dispute resolution. This provision needs to be amended to provide for consultation and/or notification of the relevant county government.

Section 15 is worded in almost similar terms as the earlier section dealing with traditional knowledge save that this deals with culture. While it recognises the role of both national and county governments, section 15(6) on resolution of competing claims suggests that this can be dealt with by either national or county governments without clarifying under which circumstance either level can be involved, opening room for forum shopping and duplication.

Sections 18 and 19 also capture the cooperation between national and county governments in their implementation. The same applies to section 22. One of the most controversial issues is access and benefit sharing, an issue dealt with by section 24 of the Act. The section provides for mutual agreements to be entered into as the basis for benefit sharing and further that the Cabinet Secretary shall develop further regulations. It is important that counties in which the traditional knowledge and cultural practices which are commercially exploited derive are part of the benefit sharing discussions. This is a critical aspect of ensuring that the implementation of the ABS regime as captured in the Nagoya Protocol to the CBD involved counties.

Similarly, sections 27, 28 and 29 on compulsory licensing by the Cabinet Secretary should capture role of counties. For example, section 29 refers to use of public consultations spaces under the County Government Act but does not go as far as providing for this being done through the relevant county government.

Table 3: Review of forestry sub-sector legislation and policies in a tabulated matrix

Forestry				
No.	**Name of Policy/Law**	**Issue**	**Rationale/Concern**	**Recommendation**
1.	**Forest Conservation and Management Act**	**Section 6** on role of Cabinet Secretary in the development of a National Forest Strategy does not explicitly capture role of counties in the development and implementation of the Strategy	Counties are expected to implement national standards on policy management and therefore, should be involved in formulation, implementation as well as review	Amend Act as per the matrix to ensure alignment of few problematic sections to devolution Amend to provide for participation of counties in development of Strategy and their responsibilities to develop county specific strategies aligned to the national strategy Counties to consider developing county specific policies and laws on forestry
		Section 20 on Forest Conservation Areas and Committees does not demonstrate the modalities for intergovernmental relationships between national and county governments	This is a shared function that needs collaboration between the two levels of government	Amend to respect the distinctness of county governments and provide for clear relationships
		Section 17 and 22 on Kenya Forest College and KEFRI have duplicative functions on training and education	The two agencies may have turf wars, duplicate each other roles and result in resource wastage	Rethink the existence of both institutions or better align the difference in their functions

Forestry				
No.	**Name of Policy/Law**	**Issue**	**Rationale/Concern**	**Recommendation**
		Section 32 recognises the place of the community in forest management through community forest associations. However, the provisions as couched would have the effect of stifling community participation, requiring stringent requirements for registration.	The Kenya Forest Service as well as County need to have a function in supporting community forest associations in order to facilitate public participation in forest management. Communities need to be supported and empowered to participate.	Section 32 should be amended to vest responsibility for technical advice to community forest association on KFS in addition to county government
		Sections 34 Since public forest can also fall under jurisdiction of county governments, include role of county in the process of variation of boundaries.	Interventions involving county governments call for collaboration between national and county governments. Matters of boundaries and concessions on forests affect counties.	Make provision for information transmission to counties once boundaries of public forest within their jurisdiction are altered
		Sections 40 and 44 provide for grant of concessions on public forests but fails to include role of counties where such decisions affect public forests in particular counties.		Amend **section 40** to include information dissemination to the public and county government and **section 44** to provide information to county governments where concessions have been granted in respect of public forests that relate to counties
2	**National Forest Policy**	The current Forest Policy was adopted before the advent of devolution and is not aligned to the 2010 Constitution or the 2016 Act		Enact a new National Forest Policy

Forestry				
No.	**Name of Policy/Law**	**Issue**	**Rationale/Concern**	**Recommendation**
3	**Timber Act**	Does not recognise devolution and is not aligned to Constitution of Kenya 2010		Repeal and enact a new law.
4	**Transition to Devolved Act**	Anchorage of Transition Implementation Plans	While Transition Authority transferred certain functions to Counties under the Act, the consequential preparation of TIPS by KFS requires more sound legal footing	Amend the Forest and Management Act to provide for TIPS
5	**Kenya Water Towers Agency**	Established by a legal notice without robust legal and policy basis	The legal notice does not recognise the existence of counties and the place of devolution in management of water towers	Incorporate conservation of water towers in a legal framework. Rationalise the role of various agencies including KFS, Water Resources Authority and also the place of counties in conservation of various categories of water towers.
6	**Protection of Traditional Knowledge and Cultural Expressions Act, 2016**	Several sections do not clearly define role of counties		Amend Act at **sections 7, 12, 15, 24, 27, 28** and **29** to clarify role of counties

4. Conclusion and Recommendations

Forests: Forest Conservation and Management Act 2016

In the Forestry Sub-sector, the laws and policies should recognise the central role that counties play in conserving forests. The counties play an important role in the implementation of national policies and legislation and the legal framework governing this sub-sector should take the role of counties into consideration in the following areas:

- **Benefit Sharing:** clear mechanism for benefit sharing of forest resources with the counties and the community
- **Charcoal**: Framework for sustainable charcoal regulation and alternative energy sources and livelihood mechanism
- **Chain of custody:** Develop a chain of custody for forest products from the community and private lands
- **Participation of counties in management of public forest**: Need for a framework of engaging Counties and communities in management of public forests

Mining: Mining Act 2018

The Mining Act should be reviewed to provide for cooperation and consultation between the national government and county governments. Currently the 2016 Act provides for control rather than cooperation

- The land management aspects of mining should reflect the role of counties, especially in unregistered community lands. This is not given any recognition or treatment in the Act
- There is a narrow Interpretation of the Article 62(1)(F) provides that minerals are vested in the national government. The Mining Act interpretation of this clause does not appreciate the fact that county governments and communities are critical stakeholders that have to buy in to a mining proposal. This narrow interpretation can be blamed for the short timelines provided to county governments and communities to object to the issuance of a mineral rights (license).
- as well as a legislative framework that is biased towards large scale mining – to the detriment of counties and communities.
- This has affected transparency and accountability of the provisions and institutions in the act. It has neglected artisanal and small-scale mining which have the potential of becoming large revenue sources for counties.
- This neglect may result in serious environmental, health and safety concerns to citizen caused by concentrated artisanal mining which is poorly regulated.

- Local content provisions in the act are investor driven and are not linked to development and capacity building plans of the counties.
- The act suffers from an incomplete revenue management infrastructure and unclear fiscal regime.
- Finally, counties not adequately engaged in regulation development and review. A lacuna was identified in the post legislative scrutiny mandate of the committee on delegated legislation in the National Parliament (National Assembly and Senate).
- The mining act was developed without an approved policy to guide the sector. The policy has yet to be approved by the National Parliament which means this review was not based on a known policy baseline. To assist this process and ensure that international best practice inform the development of a financially beneficial and environmental sustainable extractive sector county governments must lobby National Government to develop and Parliament to approve an extractive sector policy that would guide extractive law which includes Mining.

The National Environmental Policy 2013 should be revised to incorporate the role of county governments in implementing national policies and standards as spelt out under Part 2 of the Fourth Schedule to the Constitution

- Specific areas of involvement of county governments include:
  - Human settlements
  - Management of biodiversity
  - Energy use
  - Efficiency and conservation
  - Air quality
  - Noise control
  - Water and sanitation
- EMCA to ensure effective engagement of counties in the review, supervision, monitoring and auditing of EIAs; and

- Criteria should be provided in selection of County Environment Committee
- EMCA is not clear on who facilitates the Committee
- The Role of the County Environment Committee should be clear
- The law should be clear on social safeguards

Water Act 2016

The Water Act 2016 does not provide clearly for the division and alignment of functions between the national government and the county governments. The Act should be revised to incorporate the principles of devolution, clarify the relations between counties and water sector institutions, and the two levels of government. Specific issues/ roles of counties that should be clarified include: sanitation and water services, water resources management, etc.

- The Establishment of the Water Sector Trust fund is procedural given all water funding should be channelled through the constitutional structures such as annual funding and equalisation funds
- Water Works Development Agencies and National Water Harvesting and Storage Authority would be taking over powers of the county governments to develop water works and infrastructure to deliver water and sanitation services, a function constitutionally assigned to the county governments. This includes the design, borrowing for financing and implementation of water works development. Secondly, county governments argue that the agencies proposed undermine the ability of county governments to establish cross county waterworks or projects through joint committees or authorities established by the counties. *Article 189 (2)* of the Constitution empowers counties to establish joint committees or authority to implement projects that are cross county in nature.
- There is no representation of Counties Governments in the Water Service Regulatory Board (WASREB) although there is room for the regulatory board to work with the county

governments in enforcing certain regulatory requirements including terms of service provision

- Water Resource Authority (WRA) being an agent of the National Government cannot coordinate the County Government this will take the powers of the county government in management of water resources, there is also no representation of the County Government on the WRA Board
- The Kenya Water Institute Act of 2001 should be revised to incorporate the water sector governance arrangements and specifically the role of counties

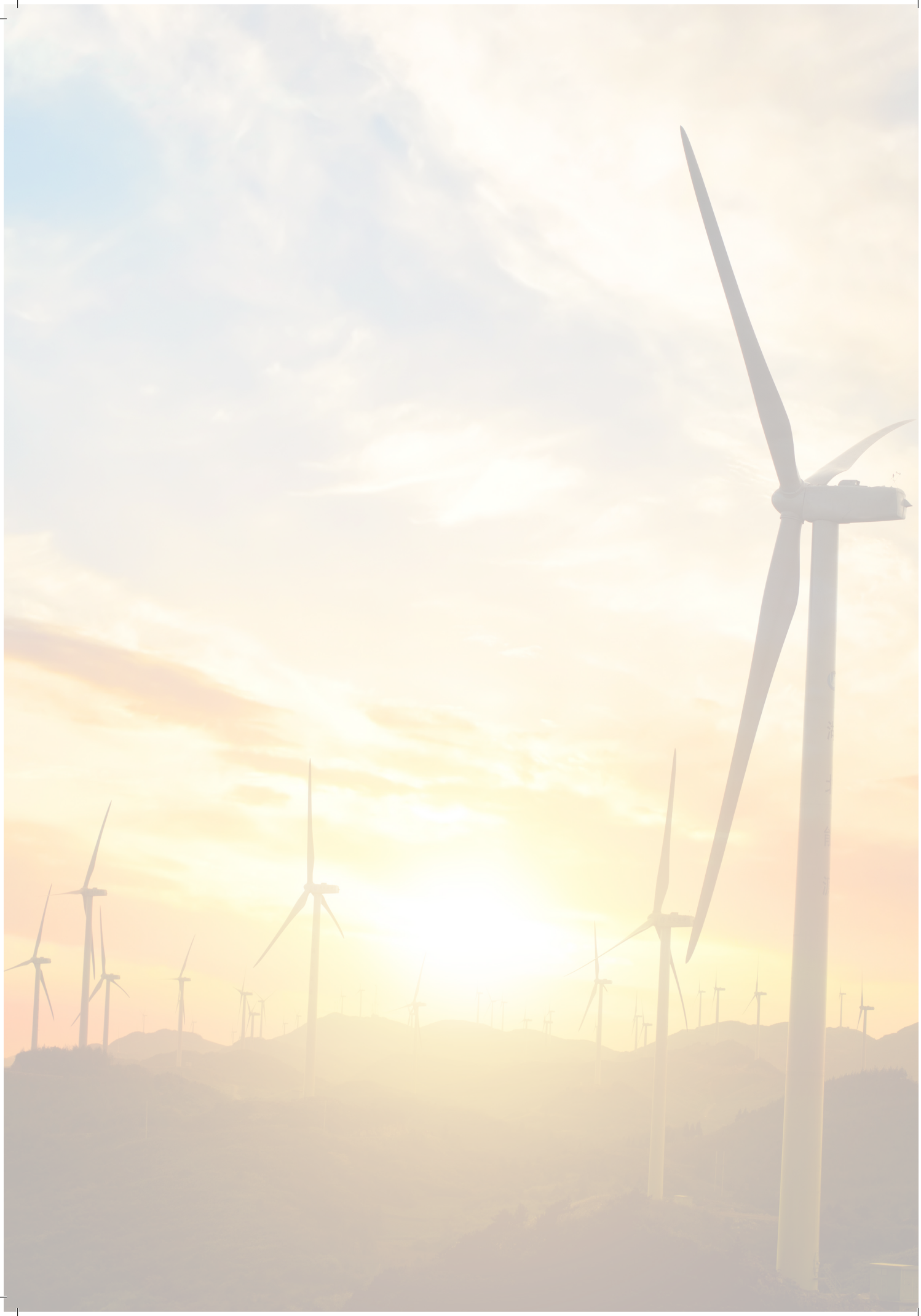
The Constitution envisages that the management of natural resources will be a cooperative process with national government having overall responsibility for policy formulation and being vested with majority of the natural resources in trust for the people of Kenya. This audit has revealed that in the field of water, forests and mining, the forest sector is the most compliant. The Water Act is the most problematic and requires substantive revisions to ensure it complies with the ethos of devolution. Additionally, the laws creating the various regional development authorities which are established along river basins require to be repealed for being unconstitutional. Following their repeal, new legislation may be enacted if it is desired that combination of counties manage a specific region or managed a shared resource. In developing such new legislation respect must be had to the role of national and county governments.

Additionally, a comprehensive audit of the natural resource sector needs to deal with the remaining subsectors including wildlife and also address the framework environmental legislation, The Environmental Management and Coordination Act and those on climate change and also the Petroleum (Exploration, Development and Production) Bill once enacted into law.

The Audit reveals that the natural resource sector is largely a shared regulatory space between national and county government. It requires greater collaboration and consultation so as to ensure that the policies and legislation clarify the responsibility of each level of government and promote collaborative regulation out of the appreciation that

natural resources are the heritage of all Kenyans and that they are a finite resource requiring sustainable and prudent management.

While Counties have responsibility for aspects of natural resource management, there is very little legislative interventions by the counties under review in this sector. This leaves the regulatory field solely to national level legislation. It is imperative that counties exercise their legislative mandate to provide clarity on the discharge of their mandate in the natural resource sector and provide linkages with national level policies and laws.



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