

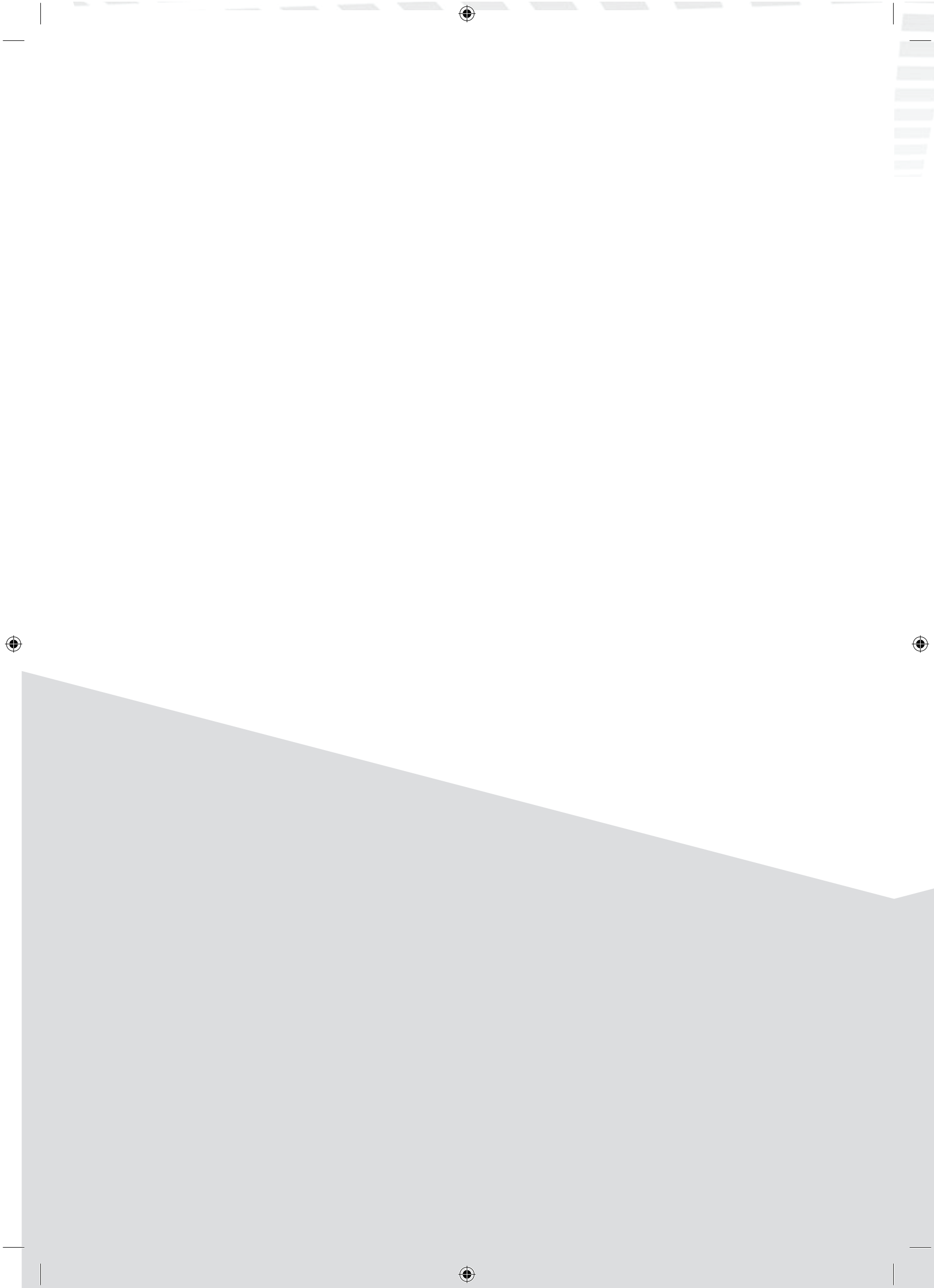


IGRTC
INTERGOVERNMENTAL
RELATIONS TECHNICAL
COMMITTEE

Consultation, Cooperation & Coordination in Devolution

**EMERGING ISSUES ON
TRANSFER OF FUNCTIONS
TO NATIONAL AND
COUNTY GOVERNMENTS**







EMERGING ISSUES ON TRANSFER OF FUNCTIONS TO NATIONAL AND COUNTY GOVERNMENTS



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Abbreviations and Acronyms

CIC	Commission for the Implementation of the Constitution
CoG	Council of Governors
CRA	Commission for Revenue Allocation
GTRC	Inter-Governmental Technical Relations Committee
HIV	Human Immuno-deficiency Virus
IBEC	Inter-Governmental Budget and Economic Council
KEMSA	Kenya Medical Supplies Authority
KNBS	Kenya National Bureau of statistics
LASDAP	Local Authorities Service Delivery Action Plan
LATF	Local Authority Transfer Fund
LGRP	Local Government Reform Program
M&E	Monitoring and Evaluation
MDAs	Ministries, Departments and Agencies
MODP	Ministry of Devolution and Planning
MoU	Memorandum of Understanding
NCPB	National Cereals and Produce Board
NEMA	National Environment Management Authority
O&M	Operation and Maintenance
RDA	Regional development authorities
TDGA	Transition to Devolved Government Act



Executive Summary

The Constitution of Kenya, 2010, the Transition to Devolved Government Act and the Intergovernmental Relations Act, provide for the criteria and other related considerations for the transfer of functions from the national government to county governments. This exercise was largely carried out between 2013 and 2016 by the now-defunct Transition Authority (TA). The Intergovernmental Relations Act sets up the Intergovernmental Technical Relations Committee (hereinafter IGTRC) as the successor to the TA and one of its principal activities is to conclude the process of unbundling and transfer of any remaining functions to county governments.


The IGTRC commissioned this study intending to determine the status of the transfer of functions including an analysis of exclusive and concurrent functions that are yet to be operationalized, exclusive functions that are still being performed at the national level, despite having been transferred, the status of concurrent functions, the unbundling of the functions of state corporations and finally, proposing a framework for remedying function duplication and overlaps.

This report details the findings deduced from the study and proposes a variety of recommendations on how to deal with the identified bottlenecks. The issues, which emerged from the analyses, are summarized below.

First, it appears that there are only a few exclusive functions that are yet to be operationalized across all counties. The major difficulty concerning exclusive functions is that the national government is still performing some of these functions or certain aspects of them, despite the functions having been transferred to the county governments. This challenge is most evident in the functions of housing, libraries, museums, roads, water, and agriculture. It emerged from this study that several intergovernmental discussions are ongoing on how to mitigate issues arising from these challenges, but the issues are yet to be fully determined and agreed upon. This study analyses specific functions in which challenges exist and proposes ways of dealing with them.

Thirdly, the precise mode of operationalizing concurrent functions has not been resolved in all sectors. The exact levels of responsibility and accountability of each level of government concerning most of the concurrent functions remain indeterminate. The study proposes a framework for unbundling concurrent functions and the consequent assignment of responsibilities between the two levels of governments applying *inter alia* the subsidiarity principle.





Fourthly, significant functional overlaps and duplications have been noted. The two levels of government have not always adhered to their respective roles and levels of responsibility regarding the functions that they have been assigned to counties. Their planning and budgeting still capture functions that are legally outside their jurisdictions. The study proposed a framework for managing the instances of functional duplication and overlaps by way of enhanced intergovernmental cooperation.

Fifthly, the national government continues to perform functions that are constitutionally allocated to county governments through Ministries, Departments, and Agencies (MDAs). The functions of these state corporations largely remain unbundled to date, a process which is a necessary precursor to transferring any component of their functions that should be performed by county governments. Considering this fact, the study has proposed a framework for the unbundling of the functions of the state corporations for purposes of redressing the identified problem above.

In conclusion, the implementation of the system of Devolved Government is largely on course. Nonetheless, it was also evident from the assessment that there was a need to expedite the establishment as well as the review of existing policies, legislation and institutional frameworks to ensure that they facilitate improved governance and service delivery which can only be attained if the respective levels of government adequately carry out their responsibilities as spelt out in the Constitution and the law.





Introduction


The dynamics of federal-state relations within the federalist constitutional framework is one of a seesaw between interdependence and cooperation on one hand and conflict on the other hand, between the centre and the units and between the units themselves.

Generally, devolution is the transfer of power to lower-level governments is invariably accompanied by the challenges of how to manage the functional relationships between the different levels of government. Kenya's devolved system was introduced by the current Constitution and is part of a global trend with numerous countries opting to devolve power, responsibility, and resources from the centre to lower levels for improved service delivery and increased accountability.

As shall be seen elsewhere in this report, the devolution of government functions is informed by the law, court decisions, and several constitutional principles including the subsidiarity principle, explained hereafter. The latter principle advocates for the performance of government functions or the exercise of political power to be undertaken by the lowest competent authority, which makes sense to do. Therefore, it is consistently argued that devolution serves not only to maintain political stability but also more effective and efficient service delivery. Notwithstanding its numerous benefits, it must be remembered that devolution is not an end but a means to achieve development and the improvement of governance including service delivery to the citizenry.

Central to the proper grounding and functioning of devolution is the transfer of functions from the higher-level government units to the lower units. This means that there must be a formal process of functional analysis, unbundling, assignment, and consequently, transfer to the lower-level units of government. As shall be seen in the report, the process of functional unbundling and transfer has not been without challenges in Kenya, even though the Constitution and accompanying legislation have defined a clear process for carrying out of the transfer of functions.

Kenya's county governments were formed in 2013 after first elections under the current Constitution. The largest batch of functions' transfer from the National to the county governments was undertaken in August 2013 by the now-defunct TA. Subsequently, the Authority effected other transfers, but numerous difficulties are still evident. This has undermined the full delivery by the two levels of government on their respective



functions. These problems are structural, administrative, and sometimes deliberately designed to cripple the process of effective devolution. Consequently, different approaches are necessary for ensuring a full and effective transition to devolution in the manner anticipated by the Constitution.

This study interrogated the various challenges that have characterized the process of functions transfer in Kenya from the National to county governments and offered recommendations on how best to ameliorate these problems. The study was undertaken in recognition of the mandate assigned in law to the Intergovernmental Technical Relations Committee (IGTRC) to oversee intergovernmental relations but more specifically, to undertake the residual functions of the now-defunct TA, whose general remit was to ensure the completion of the functions transfer process.

I Background

I.1 Background to the Study


Studies that have been undertaken on the transitioning from centralized to devolved systems of governance affirm that no issue is more contentious than the transfer of functions between different levels of government¹. Even in jurisdictions like Kenya where functional allocation is, on the face of it, clearly articulated by the Constitution, numerous political economy risks still affect the actual implementation of the functions transfer process.

At a macro-level, there are legitimate conflicts in the interpretation of the law relating to the transfer process and concerns about the destabilizing impact of the transfer of functions on service delivery. It is also inevitable that central government officials accustomed to exercising power concerning the functions meant to be devolved will always resist such transfer. However, even where there is agreement at the policy level that functions ought to be transferred, significant bureaucratic glitches at the micro-level can hamper the seamless transfer of functions. Significant challenges also arise in the funding of functions.

Kenya's fiscal decentralization principles, like most other devolving jurisdictions, requires that any functions transferred must be accompanied by the resources that enable the devolved governments to implement the transferred functions. Unfortunately, differences in the implications of this principle between central and local government functionaries are inevitable and prejudice the ability of county governments to carry out their assigned functions.

It was in light of this understanding that Parliament passed a comprehensive law specifically intended to guide the process of assignment and transfer of functions between the national and the county governments. The Transition to Devolved Government Act not only set up the institutional infrastructure to oversee the transfer of functions process but also contained comprehensive and detailed procedures and mechanisms on how the functional analysis and assignment process would be carried out.

¹ See *inter alia* Kimenyi, S. (2013), *Kenya Devolution and Resource Sharing Calculator*, retrieved from <http://www.brookings.edu/research/interactives/2013/Kenya-resource-sharing> and Nyanjom, (2010), *Devolution in Kenya's New Constitution Working Paper No. 4*. Nairobi: Society for International Development.



Upon the expiry of the term of the TA; the institution mandated under the Transition to Devolved Government Act (hereinafter TDGA) to oversee the process of functional assignment and transfer, is the Intergovernmental Relations Technical Committee (hereinafter the IGRTC) which is a body established under the Intergovernmental Relations Act (2012) (hereinafter the IGRA).

The constituting statute of the IGRTC assigns it the primary responsibility of promoting intergovernmental relations between the National and county governments, and it does this through a framework of consultation and cooperation between the two levels of government. This function is in tune with Article 6(2) of the Constitution that provides that the governments at the national and county levels are distinct and inter-dependent and shall conduct their mutual relations based on consultation and cooperation.

As the premier institution that is established under the Act to monitor and oversee the interrelationships between the two levels of government, section 5(b) of the same Act mandates the IGRTC with the specific responsibility of facilitating co-operation and consultation between the National and the county governments. This is as provided for under Articles 6 and 189 of the Constitution.


In this context of cooperation and consultation, the IGTRC is, as mentioned here above, also mandated under the Act to take over the residual functions of the now-defunct Transition

Authority. The Act tasks the IGRTC with the responsibility of managing all aspects of functions transfer that were still outstanding upon the demise of the TA.

The principal tasks to be taken over by the IGRTC are contained in section 7(2) (h) of the Transition to Devolved Government Act, which had required the TA in conformity with section 15(2) (b) of the Sixth Schedule to the Constitution, to develop the criteria as may be necessary to determine the transfer of functions from the national to county governments. The Constitution also required the TA to set necessary criteria to guide the transfer of functions to county governments and to determine the transfer of previously shared assets, liabilities and staff of the government and local authorities.

In line with the Constitution and the law as stated above, one of the principal duties that the TA undertook was the process of transferring functions from the National to the county governments. The first batch of functions was transferred immediately before the first elections under the Constitution. These were the functions that had been performed by the defunct local authorities and their transfer was largely non-contentious.

After the first elections Constitution and upon the county governments coming to being,



the TA was however pressured to transfer a substantial number of functions after an intergovernmental agreement at the first Summit meeting in 2013. This infamous “big bang” transfer was implemented in violation of the asymmetrical and phased transfer process anticipated under Section 15 of the 6th schedule to the Constitution, which inter alia provides as follows: -

Before the transfer of functions, the capacity of the respective counties would have been built to equip them with the necessary knowledge, skills and manpower related to the effective receipt and carrying out of that function.

The functions were to be transferred in an asymmetrical manner including ensuring that no county receives a function that it cannot perform. In that transfer, many critical functions including agriculture and health were transferred. Due to the problematic nature of this transfer process, numerous challenges were experienced in the course of the exercise and additional problems experienced in the course of implementing some of these functions². In the absence of the TA, the onus now rests with the IGTRC to ameliorate these challenges including identifying where they lie and devising strategies for dealing with and resolving them.

This study revolved around an analysis of the status of the functions by transferred November 2017, the challenges that had been experienced and sought to make clear recommendations on how to resolve those bottlenecks whilst using the Constitution and the implementing statutes as a background. A critical part of the task involved an evaluation of the challenges that had beset the implementation of concurrent functions, an assessment of the relevance and role of state corporations in the sphere of functions transfer. It also set to determine how best to resolve these challenges including the development of a framework for the unbundling of functions being undertaken by ministries and state corporations whose functions had not yet been unbundled.

1.2 Objectives of the Study

Although the Fourth Schedule of the Constitution details the separation of functions to be undertaken by each level of government, it obvious that not all devolved functions have been transferred to county governments by the national government. There are

² An analysis of the challenges experienced after the initial transfer of functions is discussed in several reports including the CIC quarterly reports and report on the transition and the TA quarterly reports

also instances of duplication of responsibilities as well as the existence of functions that despite being transferred to the lower units are still not being performed by the national government for various reasons.

Additionally, some functions are supposed to be concurrently performed by both levels of government. Finally, certain functions have not been assigned to either level of government so, considering the Constitution, remain functions of the national government. They are then legally deemed as residual functions).


Consequently, the study was defined by the consideration and determination of the following issues.

- i. Reviewing and identifying the status of transferred functions including a determination of the functions yet to be operationalized or transferred.
- ii. Analyzing the functions, if any, which although stand transferred, are still being performed by the national government.
- iii. Defining standards for the review of and operationalization of concurrent functions.
- iv. Defining remedial proposals for dealing with functional overlaps and duplication.
- v. Analyzing the status of State Corporations and MDAs that are performing functions that are yet to be devolved and preparation of a draft tool for the unbundling and transfer of such functions that are yet to be transferred and are being performed by the State Corporations.

1.3 Justification of the Study

Under the Constitution and specifically the Fourth Schedule, the National and county governments are assigned disparate functions and responsibilities. These functions are generally classified into three categories: exclusive, concurrent, and residual functions, which based on Article 186 of the Constitution. These are detailed below.

- i. Exclusive functions are those that are assigned by the Constitution to either level of government.
- ii. Concurrent functions are those that are allocated by the Constitution to be performed by both levels of government.
- iii. Residual functions are those that are not assigned to either level of government and by default are thus considered as functions of the national government.



Several challenges have been identified with each of these categories of functions. Concerning exclusive functions, various concerns have been raised by several entities engaged³ in this process and these concerns include those listed hereunder.

- i. The incomplete and ineffective unbundling and consequent costing of the exclusive functions. It has been alleged that the functions were transferred without being properly unbundled and cost and as a result of that, some functions were transferred without the resources necessary to ensure their implementation being allocated, thus violating the constitutional principle of “funds following functions”.
- ii. Allegations that functions that were transferred are still being undertaken at the national level. The national government is said to be still budgeting for and executing functions that, under the Constitution, are wholly county governments’ functions and which, in any event, have been transferred through the necessary legal instruments. The principal concern has been that the national government through continued funding of regional development authorities and state corporations as the case may be is performing functions that ought to be undertaken by county governments.
- iii. Related to (b) above there are allegations that state corporations, which are largely national government institutions and the regional development authorities, are still performing functions that are, by law, assigned to county governments.

For concurrent functions, concerns that have been raised include the ones below.

- i. The absence of sufficient clarity on the functional boundaries for each level of government with clearly defined roles and responsibilities for each level with the concurrent functions. A need has been noted for a succinct definition of the point at which the roles of these different levels of government intersect and resolution of any outstanding issues that may be of concern in that regard. Specifically, whether both levels of government fully understand the full extent of their responsibilities in respect of concurrent functions. Also, how committed or otherwise they are to these areas of responsibility without undermining the role and space of the other level.
- ii. That there is no sufficient demarcation of the boundaries upon which the two levels of government should interact and jointly deliver on these specific

³ The defunct Commission for the Implementation of the Constitution (CIC), the Commission for Revenue Allocation (CRA) and the Council of Governors (COG), in numerous reports have all expressed concerns on the management of the function transfer process

functions leading to functional overlaps or duplication. Thus, the need for functional separation is still not being respected and in some cases resulting in unnecessary conflicts between the two levels of government.

- iii. The inequitable allocation of resources for the performance of functions between the two levels of government. Whether both levels of governments are getting adequately resourced for the specific areas of responsibilities falling within their domain.

On the residual functions, several concerns that are listed below have been raised.

- i. The absence of a comprehensive listing and evaluation of all the residual functions and an appreciation of how their performance by the national government, notwithstanding the provisions of Article 186(3), respects other constitutional principles including the principle of subsidiarity.
- ii. The lack of unbundling of such functions so that those components of the functions that can be better implemented at the county level, be transferred.

Several reports have been published assessing the status of the transfer and implementation of the functions but comprehensive analyses of the bottlenecks existing and an investigation of the issues that inform the inability of the two levels of government and the intergovernmental mechanisms to conclude these matters have not been carried out.


1.4 Scope of the Study

The study entailed an assessment of the status of the transfer process including that of the implementation of the functions fully or partially transferred and those undergoing concurrent implementation. It also gave recommendations on how to unlock the impasse plaguing the process.

The study was guided inter alia by the framework set out in Section 15 of the 6th Schedule to the Constitution, the Transition to Devolved Government Act, the Intergovernmental Relations Act and the County Governments Act.

Additionally, the study centred on the following parameters:

- ♦ An analysis of the TA process between 2013, when the first batch of functions was transferred, to 2016, when the TA was dissolved.
- ♦ A report and analysis on which of the functions that were devolved are still



being undertaken at the national level and whether there are intergovernmental agreements in support of such arrangements.

- a. Most critically. An investigation into whether any of the county governments' functions are being implemented by various parastatals with recommendations on how this arrangement can be adjusted to align it with the Constitution and the law.
- b. A review of the engagement framework in place between the National and county governments for purposes of delivery on concurrent functions and determining how the same has impacted the realization of these functions from a service delivery perspective. Some of the issues that come to the ones listed below.
 - i. If a framework for engagement around concurrent functions as between the two levels of government has been developed.
 - ii. Whether concurrent functions clearly defined/unbundled for purposes of a proper understanding of the respective roles of the levels of government sharing responsibility around them have been clarified.
 - iii. If resource allocation for these concurrent functions respected both constitutional and legal principles.
 - iv. Whether both levels of governments were appreciating the functional dichotomy that exists between them.
 - v. Determining what is fueling or informing the continued functional overlap despite clear directions from both the Constitution and the law on the distinct roles and responsibilities of each level of government. For instance, is the continued spate of functional overlap deliberate or unintended? Depending on the outcome, whether there is a proposed harmonized framework for resolution of these matters.
 - vi. Defining and crafting a framework for unbundling of functions that are yet to be unbundled but are still being performed by state corporations and MDAs.

The study made recommendations on how to resolve these functional overlaps both

in the short term and in the long term. The study proposed a detailed framework for resolving the impasse that has plagued the functional transfer process as anticipated under the Constitution and the law.

On unbundling of functions, the study evaluated and proposed a framework upon which

1.5 Methodology

further function unbundling can be undertaken with the intention of improving relations between the national and county governments, and consequently ensuring seamless service delivery by the respective governments.

Several methods were relied on in carrying out the study. These included:

- a. Desk review:

Review of the various reports that have been published on the subject matter, in particular, the TA annual reports, gazette notices and its exit report, the CIC end of term report, the National Budget, the Council of Governors periodic reports on the transfer of functions and reports from the Intergovernmental Budget and Economic Council on the subject.
- b. Stakeholder consultations: These include representatives of the National Treasury, Council of Governors, Intergovernmental Budget and Economic Council (IBEC), several ministries including the Ministry of Devolution and Planning and select Non-State Actors (NSAs) for an in-depth interrogation of the issues forming the basis of the assignment.
- c. Key informant interviews with select but diverse Counties to establish how the implementation, particularly of concurrent functions, is being operationalized.

2

Functions Transfer; Status, Issues and Challenges

2.0 Historical Background

One of the greatest highlights of the Constitution is the redefinition of the exercise of state power inter alia through the creation of the system of devolved governance, which largely transformed the Kenyan governance landscape. With devolution came the establishment of two levels of government; national and 47 county governments that are by law distinct though interdependent⁴. Further, Articles 6 and Chapter II of the Constitution provide greater details on the legal and institutional structure put forth for purposes of operationalizing and giving support to the system of devolved governance as posited under the Constitution.

Though it appears novel, the system of devolved governance is not a new phenomenon. At independence in 1963, Kenya had a system of regional government that was dubbed *Majimbo*. The system witnessed the creation of seven regions⁵ in Kenya that were secured by the Constitution and several laws. Representation was secured through the establishment of regional assemblies, and the creation of the Senate at the national level. The Senate had the task of taking charge of the interests of regional governments, like the current Constitution.⁶

In the same manner that the Constitution delineates functions between the two levels of government, the regional governments had very clear and specific functions assigned to them, including assured finances for the undertaking of these functions. Some of the functions that were assigned the regional governments included community development, housing, and health services.⁷

Nonetheless, President Mzee Jomo Kenyatta formed a Commission of Inquiry on 22nd March 1966 with the principal task to inquire into and advice on the reforms necessary to make the local government system in Kenya a more effective instrument for the provision of local services and local development within the framework of national policy and national programs....⁸

⁴ Article 6(3) Constitution of Kenya

⁵ An amendment Act of 1965 changed the names of the regions and assemblies to Provinces and Councils, a move seen as emphasizing their inferior status. The amendment also removed the constitutional protection of regional boundaries. Another amendment abolished the bicameral national legislature, establishing a unicameral house.

⁶ Article 96 (1) of the Constitution assigns the Senate the power to represent and protect the interests of the counties and their governments.

⁷ Friedrich Ebert Stiftung, *Devolution Made Simple* (October 2013) pg. 2-3. Available at <http://library.fes.de/pdf-files/bueros/kenia/10642.pdf>

⁸ See Sessional Paper No. 12 of 1967.


The Commission reviewed the distribution of functions between Local authorities at and the central government. Of utmost importance is the fact that the Commission advised on the need for the Central Government to transfer the following functions to local authorities.

- i. Primary Education – this function was deemed as being a service that is local and therefore local authorities needed to play a mandatory role in its delivery subject with reasonable financing.
- ii. Health Services – the Commission took note of the lack of clarity in the delivery of this function and more particularly in the areas of ambulatory s and maternity services. Notwithstanding this lack of clarity, it was the opinion of the Commission that the existing arrangement on functional separation is maintained.
- iii. Maintenance of secondary roads – these roads were to be maintained by the local authorities subject to road grants from the central government. Of immediate concern to the Commission was the duplication of roles between the Ministry of Works and the local authorities. Also, the need for proper classification of roads was brought to the fore to the extent that it was felt that road classification ought to be a continuous process wherein the central government at the time would significantly enhance its road maintenance grants to the local authorities based on the kind of classification or reclassification that the roads under the control of the Local Authorities required.
- iv. Housing – on this issue, the Commission had this to say:

Since housing development involves the provision of ancillary services by local authorities, they must, for this reason, be intimately concerned with all proposals for the provision of housing. The government has now established the National Housing Corporation to co-ordinate housing development throughout the country.”

As to the financing of these functions, the Commission proposed that the distribution of the general vertical discretionary transfers amongst the county councils be based on a formula that took into account the relative expenditure needs and relative fiscal abilities of the county councils then. It went on to state that the best available indication of expenditure needs is the relative population of county councils, and the best available indication of fiscal ability is an index of per capita income. The underlying assumptions of the grant formula were that grants should vary directly with population and be inverse with fiscal ability.⁹

⁹ See Para 69 of Sessional Paper No. 12 of 1967.



From the foregoing, it is quite discernible that there were significant attempts to assign government functions to the local authorities. Though the government of the day largely agreed with the views of the Commission as expressed under the Sessional Paper No. 12 of 1967, its recommendations were ultimately defeated with the enactment of the Government (Transfer of Functions Act) of 1969).

Beyond the passage of the Government (Transfer of Functions Act), 1969, subsequent revisions to the Local Government Act, Cap 265 ensured that the central government regained its stranglehold over the local authorities including empowering the Local Government Ministry with the powers to supervise local authorities¹⁰ Consequently, the abolition of the Majimbo system so soon after independence meant that the country never really benefitted from a real assessment of its values. The indifference, and been demonstrated as acts of sabotage, extended to Majimbo by the government went further to demonstrate the capabilities and the extent to which the proponents of status quo in, their determined desire not to embrace change, can occasion a government system that they do not deem desirable.

The next attempt at decentralization of functions was through the Local Government system, was predicated on the now-repealed Local Government Act (Cap 265) of the Laws of Kenya. This Act created the various categories of Local Authorities, which principally were: municipal councils, county councils and town councils.

These local authorities had a distinct structure provided for under the Local Government Act that wove together civic and administrative functions. The civic function was vested in elected and nominated councillors. Additionally, the Local Government Act assigned immense powers to the Minister of Local Government to the extent that the minister had the powers to virtually approve all matters relating to the local authorities.

The foregoing notwithstanding, these local authorities played a fundamental role in the development of infrastructure and to the extent that they did, catered for the socio-economic needs of Kenyans.

In 1990, the World Bank initiated the Local Government Reform Program (LGRP) that had as one of its manifestations, the decentralization of some aspect of service delivery to the local authorities including the expansion of the revenue base of these local authorities. One of the most prominent outcomes of this process was the Local

¹⁰ *Devolution Policy, June 2015.*

Authority Transfer Fund (LATF) grant that enhanced the viability of the local authorities from a revenue perspective¹¹.

In 1992, the call for multiparty politics and the critical need to involve the participation of Kenyans in the affairs of government shifted the discourse towards devolution, with the local authorities being the central players in this regard. The Local Government Ministry working in synchrony with the Ministry of Finance inter alia took the lead role in coming up with strategies and various reforms that primarily endeavoured to improve the intergovernmental fiscal structure, enhancing local financial management, strengthening citizen's participation amongst others. Planning was also introduced through the Local Authority Service Delivery Action Plan (LASDAP).


Even though some of these developments put the Local Authorities on the right trajectory, the Kenya Economic Recovery Strategy for Wealth and Employment Creation (2003-2009) still called for the acceleration of local government reform process to further improve local service delivery, governance and poverty alleviation. The principal issues areas of reforms as proposed included the ones listed below.¹²:

- i. Restructuring of Local Authorities based on viability.
- ii. Rationalizing central-local financial relations.
- iii. Improving local authority budgeting, financial management and revenue mobilization.
- iv. Strengthening local authority participatory planning and service delivery.
- v. Rationalizing local authority staffing and structure.
- vi. Reviewing Local Government Act and legal framework.

Taking all the above into account, the system of local government had to grapple with numerous problems which inter alia included undue political interference by the then central government, lack of consistency of policy focus and implementation, corruption, nepotism, lack of political will, poor political culture, intergovernmental disputes, low level and intermittent funding and overall apathy amongst the grassroots population. Further, the institutional complexity that was inherent in the abolished system led to less than optimal outcomes that included; poor systems of planning, lack of ownership and accountability in management and service delivery, and weak citizen involvement.

¹¹ LOCAL GOVERNMENT ADMINISTRATION IN KENYA: PROBLEMS AND PROSPECTS; ERUNKE CANICE ESIDENE
(Department of Political Science Nasarawa State University, Keffi)

¹² Ibid.



One of the principal shortcomings of this system of local governance was the fact that it led to neglect or skewed development in many parts of the country and it did so in a big way. Leadership became synonymous with access to resources at the centre and thus setting the stage for each community wanting to be at the core of governance for purposes of having their respective communities represented in the distribution of the resources of the state. The inefficiencies and discontent that the system of local governance occasioned enhanced the resolve of Kenyans to clamour for devolved governance.

Consequently, the push for devolution was aimed at moving away from a system of resource allocation based on political discretion to a rule-based system, giving a greater role to the citizen in matters of governance, ensuring counties had an equitable chance for development and that services were brought closer to the people based on a constitutionally and legally defined framework for the financing of devolved units.

In a widely celebrated and colourful event, the Constitution of Kenya, 2010 was promulgated and became effective on 27th August 2010, thus ushering in a revamped and revolutionized the system of governance for the country. At the core of the Constitution lies devolution and fiscal decentralization. The Constitution created two levels of government at the national and county level. This change made nationwide matters including policy and non-severable functions like defence and security the responsibility of the national government while local needs such as the delivery of various services were made the responsibility of the 47 county governments. Both governments were allowed autonomy of planning, budgeting and financial management within a national planning and public finance framework. The main objectives of this change were to bring the government to the community level, increase civic engagement, improve service delivery, as well as achieve equity across the nation in resource sharing.

Despite each level of government being assigned specific mandates, the Constitution is clear that the responsibility of each level of government is to ensure service delivery for the benefit of the citizenry. Additionally, the Constitution demands levels of cooperation and consideration between the two levels of government by making it clear that even though they are distinct, they must carry out their affairs in a cooperative manner.

However, achieving the true intention of devolved governance is dependent on the mode of reorganization that the national government adopts concerning restructuring its operations as per the dictates of the constitution. It is not always that a bureaucracy that has been in existence since independence shall be open to the kind of radical transformation that the Constitution lays out. This is indeed has been a real threat to the process of constitutional implementation and the realization of the benefits that accrue


thereto. This is because, ever since independence, the exercise of government powers and delivery on public goods and services has largely been confined to the centre with the resultant consequence of pro-status quo forces being keen to frustrate or delay the system of devolved governance from effectively taking root whilst retaining as many resources as possible at the centre.

Under the reforms ushered in by the new Constitution, significant political functions, fiscal resources and administrative responsibilities have been devolved to forty-seven county governments at the sub-national level. Both levels of government are meant to perform their respective functions within the framework of intergovernmental relations whilst also respecting the functional separateness between them as provided for under the Fourth Schedule to the Constitution. This study shall involve an introspection of the process of transitioning from the former centralized system of government including a determination of matters as they stand in the realm of functions transfer, the challenges being experienced thereto and a roadmap for dealing with these challenges in tandem with the defined scope of the study.

2.1 Transition to Devolution and Resultant Functions Transfer

Articles 186 and 187 provide for the respective functions and powers of national and county governments and set out the principles that inform the transfer of functions and powers between the two levels of government. The Fourth Schedule to the Constitution then assigns specific functions to the National and county governments. Further, Section 15 of the Sixth Schedule provides for asymmetrical devolution and criteria for the transfer of functions below.

- i. Parliament shall, by legislation, make provision for the phased transfer, for not more than three years from the date of the first election of county assemblies, from the national government to county governments of the functions assigned to them under Article 185.
- ii. The legislation mentioned in subsection (i) shall:
- iii. Provide for how the national government shall facilitate the devolution of power, assist county governments in building their capacity to govern effectively and provide the services for which they are responsible and support county governments.
- iv. Establish criteria that must be met before particular functions are devolved to county governments to ensure that they are not given functions which they cannot perform.

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- V. Permit the asymmetrical devolution of powers to ensure that functions are devolved promptly to counties that can perform them but that no county is given functions it cannot perform.
 - VI. Provide mechanisms that ensure that the Commission of the Implementation of the Constitution can perform its role in monitoring the implementation of the system of devolved government effectively.

While the law may appear clear and unambiguous, there is a considerable difference between what is intended in law and how the same is implemented in fact. Whether by intent or habit, central or national governments involved in functions transfer processes tended to organize their deliberations and intentions in ways that are familiar or comfortable to them, even if the arrangements place other parties at a disadvantage or might not strictly conform to the dictates of the Constitution or the law.

That notwithstanding, the general success of functions transfer largely boils down to the legal and institutional design on one hand and prevailing politics on the other and goodwill between the actors. When these two elements are aligned, then the process of transferring functions is set on a path of success and is also technically sound, politically feasible and socially acceptable. Ideal functions transfer should be viewed as a policy dialogue that may yield fruits concerning broader devolution decisions or may serve to initiate some learning opportunities through piloting (by sector or service function) – all in a process that builds capacity, clarity in the vision of decentralization, and confidence in the benefits to be gained¹³. This logic is captured in the following quote.

“Functional assignment is a fundamental building block of multi-level governance, affecting other key features of intergovernmental relations. It needs to be considered in deciding the scale of subnational units, in calculating intergovernmental financial transfers, setting organizational structures, devising planning roles and focusing supervision. Because of the significant shift from centralized to decentralized governance seen in many developing countries, functional assignment ought to be the starting point of decentralization, to ensure that other sub-systems accord with it”¹⁴

When the legal, institutional, and political dimensions are aligned, it is also possible to undertake the transfer process in a gradual or phased manner. It then becomes evident that some functions are capable of decentralization immediately, others in the medium

¹³ *Functional Assignment in Multi-Level Government (Volume II: GTZ-supported Application of Functional Assignment)* – available at: http://www2.giz.de/wbf/4tDx9kw63gma/GA_Functional_Assignment_Voll.pdf

¹⁴ *Functional Assignment in Multi-Level Government - Volume I: Conceptual Foundation of Functional Assignment*. Available at http://www2.giz.de/wbf/4tDx9kw63gma/GA_Functional_%20Assignment_Voll.pdf

term and the rest in the long term or never at all. Those functions about which there is an agreement between the central government and regional and local governments, and which are easy to decentralize should always be decentralized immediately.

Those functions which are generally agreed for decentralization according to the criteria in law or policy but where or questions related to them, due to some complexities, issues, ought to be decentralized in the medium term, giving time to resolve the outstanding questions, be they political, technical or administrative.

Those functions which are left in the long-term category are those which, either because of their complexity or national nature, will either need a long time to assess and debate for decentralization or will not be decentralized at all.


Under Kenya's transfer of functions legal framework set out in the Transfer to Devolved Government Act, the transfer process was to be undertaken in two phases as below.

- i. The first phase, which coincided with the pre-election period, was to entail the preparation for the uptake of county governments' functional roles, including auditing of assets, liabilities and staff of the national government in the now-defunct local authorities, facilitation of civic education and preparation of county budgets and financial management systems.
- ii. The second phase which would commence immediately after the first elections involved the completion of activities commenced during the first phase including the gazettment of the functions to be transferred, rolling out the transfer and implementation of the specific functions asymmetrically and in a phased manner to the county governments.

2.2 Functions Analysis, Unbundling, Costing and Transfer

Under the Fourth Schedule to the Constitution, each level of government is assigned very specific functions. A critical discernment of these functions as apportioned between the national and the county governments espouses the notion that the national government is largely assigned policy, regulatory and capacity building responsibilities whilst the county governments have implementation roles.

The Constitution called for a systemic phased and asymmetrical transfer of functions from the national level to the county governments. Essentially, the transfer process would be informed by an analysis of the nature and content of the function to be transferred, an assessment of the resources necessary to implement the function and by a county's state



of preparedness. Functions unbundling, costing, capacity assessment and capacity building would ideally precede the function transfer process.

Function analysis involves an evaluation of the nature of the functions while unbundling is the deliberate exercise aimed at unravelling the true components of these functions before their transfer from the national level to the county governments. In other words, these functions ought to be disaggregated to their bare components and each of those components assigned a cost within the larger framework of functional analysis and consequent transfer to the deserving level of government. It also includes the process of analyzing a sector to identify its functions and then determining what part of a function should be allocated to the lower level of governance.

This process is critical because it also enables the effective allocation of the funding that is necessary to facilitate the performance of each component of the disaggregated functions. Costing of functions involves determining the financial resources necessary to ensure effective implementation of the transferred function.

Unfortunately, this process (unbundling and subsequent costing) was not effectively undertaken consequently to which the country is witnessing substantial friction on matters on the financial resourcing of transferred functions. The devolved units are contesting the sufficiency of the finances at their disposal for purposes of effective delivery on their respective functions.

The national government, on the other hand, has taken the position that all the funds historically applied to perform the transferred functions were duly transferred. The devolved units have contended that historical allocation as a basis for revenue sharing does not conform with the true cost that enables effective service delivery taking into scope the functions that they are assigned to the counties.

In one of his addresses, the then Chairperson of the Council of Governors Josphat Nanok had this to say on the matter:

*As we mention functions transfer, we must in the same breath mention that, funds follow functions. As the ground is laid for the transfer of the pending functions, so must the resources be availed for the performance of those functions. Not only must resources be availed, but also institutions must be restructured. The national government must be ready to downsize which is expected in the restructuring.*¹⁵

¹⁵ PRESS STATEMENT AFTER THE COUNCIL OF GOVERNORS EXTRAORDINARY MEETING OF 14th January 2016 (Nairobi) by His Excellency Hon Peter Munya

According to the Transfer to Devolved Governance Act, the now-defunct TA was allocated the responsibility of ensuring the transfer of functions and in this regard to ensure the requirements below.

- a. If a function or power is transferred from a government at one level to a government at the other level, arrangements shall be put in place to ensure that the resources necessary for the performance of the function or exercise of the power are transferred¹⁶.
- b. Parliament shall, by legislation, make provision for the phased transfer, for not more than three years from the date of the first election of county assemblies, from the national government to county governments of the functions.

Ideally, and taking into account the construct of the Constitution, functional assignment and transfer processes must be preceded by steps that ensure sufficient funding and capacity building initiatives as is necessary for the performance of the assigned function or power by the concerned counties and thus protect the counties from unfunded mandates. Considering the aforementioned, an apt functional unbundling and assignment process ought to have been undertaken via the following steps.

Table 2.1: Steps of Functional Unbundling and Assignment Process

I. Unbundling and definition of functions	X. Criteria for proposals of service delivery frameworks
II. Analysis of unbundled functions by staffing/assets/cost	XI. Development of service norms and standards and attendant monitoring framework
III. Costing of assigned functions and competencies	XII. Development financing rules to guide resource mobilization and service tariffs
IV. Determination of capacity needs per sector by staff/assets/cost	XIII. Assigning of monitoring responsibilities
V. Development of a human resource transition plan for the period until counties commence operations	XIV. Design of a performance management system
VI. Establishment of an inventory of assets and liabilities and reassignment plan	XV. Identification of capacity building needs and preparation of a capacity building plan
VII. Recommendations on the transfer of assets and liabilities;	XVI. Transition implementation plan per county
VIII. Re-clarification of National Government roles;	XVII. A list of all relevant legislation and policy and make recommendations for review.
IX. Making of budget estimates to inform the budget for transition and subsequent budgets	

¹⁶ See Article 187(2) of the Constitution

2.3 Status of Transfer of Functions to date

According to its aforesaid mandate, the TA gazetted the transfer of functions in several notices¹⁷. In February 2013, the Authority transferred all the functions that had previously been performed by the Local Authorities. These were largely non-contentious though the issue of the transfer of liabilities associated with the defunct local authorities remains unresolved. In August 2013 after an intergovernmental agreement at the Summit, the Authority carried out the controversial “big bang” transfer, effecting the bulk transfer of the functions under Schedule 4 to all counties simultaneously.

Several contestations on the content of this transfer remain unresolved as will be discussed in detail later in this report. A gazette notice to clarify the issue of the mechanization stations within the agriculture function was issued in February 2014. Challenges to this function persist and are discussed hereunder. The last batches of functions were transferred by the Authority in 2016 just before its term came to an end. This final transfer by the Authority related to the roads sector and awaits formalization through the enactment of the Roads Act. In the series of gazette notices referred to above, the under listed functions were transferred after being unbundled (Table 2.2). As will be clear, significant challenges persist in most of these functions.

17 1. Kenya Gazette Supplement No. 116 August 9, 2013

2. Kenya Gazette 28th February 2014

3. Kenya Gazette Supplement No. 17 of February 26, 2016

4. Kenya Gazette Supplement No. 4 of January 22, 2016

Table 2.2: Functions Transferred after being Unbundled

Function	Unbundled Components	Comments
Agriculture	<p>a) Crop husbandry including</p> <ul style="list-style-type: none"> i. Provision of agricultural extension services/farmer advisory services ii. Development and implementation of programs in the agricultural sector to address food security in the county. iii. Construction of grain storage structures. iv. Enforcement of regulations and standards on quality control of inputs, produce and products from the agricultural sector v. Availing farm inputs such as certified seeds, fertilizer, and other planting materials (cassava cuttings, potato vines etc.) to farmers. vi. Development of programs to intervene on soil and water management and conservation of the natural resource base for agriculture. vii. Promotion of market access for agricultural products. viii. Provision of infrastructure to promote agricultural production and marketing as well as agro-processing and value chains. ix. Enhancing accessibility to affordable credit and insurance packages for farmers. x. Management of Agricultural Training Centers and Agricultural Mechanization Stations but delayed for six (6) months to provide for the necessary mechanisms and structures to be put in place. xi. Land development services such as the construction of water pans for horticultural production for food security. xii. Formulation and review of county-specific policies, xiii. Developing and enacting legislation and regulatory frameworks for county-specific policies xiv. Implementation of national and county-specific policies and legislation. <p>b) Animal husbandry including livestock extension services to deliver husbandry technologies to livestock farmers and pastoralists through farmer field days, farm demonstrations, farmer field schools, agricultural shows, individual farm visits, farmer training courses (residential and non-residential), <i>barazas</i>,</p>	<ul style="list-style-type: none"> i. Some components of this function that were being carried out by the National Government institutions before devolution are still being performed by it. ii. These include bulk grain storage carried, out by the National Cereals and Produce Board (NCPB) and a host of agriculture-based entities. iii. The constitutional remit of the National Government in agriculture as a food security issue and considering its role in foreign affairs (hence its interest in export of agricultural commodities) remains undefined. iv. The institutional and legal framework for the Sector, including the structure and functions of Agriculture and Foods Authority Act and the Crops and Fisheries Act requires review for harmonization with the Constitution as portions of the Act derogate from the constitutional functions of county governments.

Table 2.2: Functions Transferred after being Unbundled (Cont'd)

Function	Unbundled Components	Comments
	<p>farmer tours, posters, brochures, leaflets etc.</p> <p>c) Plant and animal disease control including carrying out, coordinating and overseeing services such those listed below.:</p> <ul style="list-style-type: none"> i. Communal dipping and spraying operations and vaccination campaigns ii. Control of plant pests, diseases and noxious weeds that are specific to counties. <p>d) Fisheries including:</p> <ul style="list-style-type: none"> i. Fisheries extension services ii. Upscaling seaweed, fin-fish and crustacean culture iii. County fish seed bulking units iv. Maintenance of county fish auction centers (Nyeri, Meru, Migori, Kisumu, Homabay, Siaya, Busia, Kakamega and Lamu). v. On-farm trials vi. Fish health certification vii. Development and maintenance of fish landing stations and jetties, fish auction centres and fish landing fees viii. Demarcation of all fish breeding areas and fencing of fish landing stations ix. Fish trade licensing and fish movement permits x. Collection of fish production statistics xi. Enforcement of fisheries regulations and compliance with management measures xii. Implementation of fisheries policy, fisheries management measures and regulation, limiting access to fishing xiii. Fisheries monitoring, control, and surveillance zoning for aquaculture-county specific disease control 	
<p>County Health Services</p>	<p>County health facilities and pharmacies including:</p> <ul style="list-style-type: none"> i. County facilities- Including former provincial hospitals; county health services including county and sub-county hospitals; rural health centres; dispensaries; rural health training and demonstration centers. Rehabilitation and maintenance of county health facilities including maintenance of 	<p>While most issues in this sector were resolved through intergovernmental understanding, challenges on the funding of the former Level 5 hospitals remain. All the hospitals have</p>

Function	Unbundled Components	Comments
	<p>vehicles, medical equipment, and machinery. Inspection and licensing of medical premises including reporting.</p> <p>ii. County health pharmacies - including specifications, quantification, storage, distribution, dispensing and rational use of medical commodities, provided the first point of call for the procurement of all medical commodities by counties will be the Kenya Medical Supplies Authority (KEMSA) unless the particular commodities required are not available at the said institution.</p> <p>e) Ambulance services including emergency response referral system.</p> <p>f) Promotion of primary health care including, health education, health promotion, community health services, reproductive health, child health, tuberculosis/HIV/, malaria, school health program, environmental health, maternal health care, immunization, disease surveillance, outreach services, referral, nutrition, occupational safety, food and water quality and safety, disease screening, hygiene and sanitation, disease prevention and control, ophthalmic services, clinical services, rehabilitation, mental health, laboratory services, oral health, disaster preparedness and disease outbreak servicespatient</p> <p>g) . Planning and monitoring, health information system (data collection, collation, analysis, and reporting), supportive supervision, patient and health facility records and inventories.</p> <p>h) Licensing and control of undertakings that sell food to the public including food safety and control.</p> <p>i) Veterinary services – carry out/coordinate and oversee veterinary services including clinical services, artificial insemination, and reproductive health management; but excluding regulation of the profession.</p> <p>j) Enforcement of waste management policies, standards and regulations. In particular:</p>	<p>undergone a significant reduction in their funding thus prejudicing service delivery levels. They require a significant injection of funds either through conditional grants or regional joint funding agreements bringing together several counties. The management of human resources in the sector has also been problematic leading to persistent labour unrests thus prejudicing the provision of services in the sector. The management of conditional grants including the free maternity health program and donor-funded programs within the health sector has largely been aligned upon the issuance on the National Treasury policy guidelines on conditional grants.</p>

Table 2.2: Functions Transferred after being Unbundled (Cont'd)

Function	Unbundled Components	Comments
	<p>Refuse removal (Garbage)</p> <ul style="list-style-type: none"> • Provision of waste collection bins • Segregation of waste at source • Licensing of waste transportation <p>Refuse dumps:</p> <ul style="list-style-type: none"> • Zoning waste operational areas • Conducting environmental impact assessment for the siting of dumps • Fencing of dumps • Controlling fires • Monitoring waste characteristics • Monitoring of wastewater from the dumpsite (leachate) <p>k) Solid waste disposal including enforcement of national waste management policies, standards, and laws concerning landfilling, incineration with energy recovery, composting, recycling, and operation of transfer stations.</p>	
Control of air pollution, noise pollution, and other public nuisance and outdoor advertising	<ol style="list-style-type: none"> a. Control noise pollution and other public nuisances b. Licensing for persons exceeding the permissible noise levels. c. Noise mapping and action plan development d. (Excluding implementation of nationally set ambient air quality standards). 	The role of the National Government institutions including the National Environment Management Authority (NEMA) in the performance of this concurrent function needs clearer delineation to avoid jurisdictional conflicts.
Cultural services public entertainment and public amenities	<ol style="list-style-type: none"> a. County betting, casinos and other forms of gambling, b. Racing and cinemas c. Libraries (excluding the Kenya National Library Services (KNLS)) d. Museums <p>The following were further transferred:</p> <ol style="list-style-type: none"> a. Cultural activities, public entertainment, and public amenities including-Libraries <ul style="list-style-type: none"> • Provide library and information service responsive to the needs of the community • Undertake collection, development, and distribution of information materials • Provide the community with a variety of information materials, programs, and 	The persistent challenges in the betting sector have largely been resolved through the IGRTC while the transfer of the management of museums, which had been managed by the National Government despite being transferred to the county governments, is in the process of being resolved. The issue of libraries has also been clarified and is awaiting transfer of the

Function	Unbundled Components	Comments
	<p>services for personal growth and development</p> <ul style="list-style-type: none"> • Establish a local collection section in each library holding the respective community's resources, history, people, customs, and traditions to promote the capture of indigenous knowledge and languages • Support formal and informal self-education • Support and complement research in all fields of Endeavour • Provide wholesome use of leisure time in a most conducive learning environment, stimulate and promote public interest in reading books and multimedia for information, knowledge and enjoyment • Provide lending, Inter-library loans, outreach, specialized and home-bound services • Provide consultancy and research services to individuals, organizations, and the general community; • Provide advisory, reference and referral services using a variety of information materials • Liaise with the national library and other relevant institutions to enhance information sharing <p>Excluding the (KNLS) Services facilities at the Headquarter Offices, Buruburu Library and Nakuru Library, which shall remain under the National Government.</p>	<p>necessary funds to follow this function.</p>
<p>County Transport</p>	<p>County roads including primary roads linking all sub-county headquarters and minor roads linking markets and administrative centres but excluding roads currently managed by Kenya Urban Roads Authority, Kenya Rural Roads Authority, Kenya Wildlife Services and Kenya Forest Service.</p> <ol style="list-style-type: none"> a. Mechanical and Transport equipment - b. Public road transport c. Licensing of public service vehicle (PSV) operations d. Ferries and harbours- development, maintenance and operations of ferries and harbours operating in inland lakes and sea waters (Kisumu, Kwale, Mombasa and Homabay) 	<p>The demarcation of County and National Government roads, as gazetted by the Transition Authority is still contested by the county governments, and the resolution of the matter is pending the enactment of the Roads Act.</p> <p>The issue of the quantum of the County Government's entitlement to the Road Maintenance Levy Fund remains unresolved.</p>



Table 2.2: Functions Transferred after being Unbundled (Cont'd)

Function	Unbundled Components	Comments
	<p>Further, the following Roads and county transport-related functions were transferred; (County transport including)-</p> <p>I. County roads-</p> <ol style="list-style-type: none"> a. Management and development of County roads that run and end within the county (Classified as Class D, E and other unclassified roads as directed by the Senate) during the transition period pending enactment of legislation on road classification. b. Construction of county roads c. Upgrading of county roads d. Rehabilitating and maintaining county roads e. Controlling reserves for county roads and access to roadside developments f. Implementing road policies concerning county roads g. Ensuring that the quality of county road works is under nationally set standards h. Collecting and collating all such data related to the use of county roads as may be necessary for efficient planning i. Monitoring and evaluating the use of County roads j. Planning the development and maintenance of county roads k. Liaising and co-coordinating with other authorities in planning and operations respect of county roads l. Resource mobilization for development of county roads. 	<p>The performance of the concurrent function of ferries and harbours has been clarified and awaits full implementation in the manner defined by the TA.</p>
<p>Trade development and regulation</p>	<ol style="list-style-type: none"> a. Fair trading practices including: <ol style="list-style-type: none"> i. Verification of weighing and measuring instruments ii. Inspection of weighing and measuring instruments and pre-packed goods iii. Investigation of complaints relating to unfair trade practices. iv. Prosecution of offences arising from unfair trade practices b. Co-operative societies <ol style="list-style-type: none"> i. Promotion of co-operative societies ii. Processing of application for registration iii. Inspections and investigations 	<p>The legal framework for the management of cooperatives remains unaltered to take into account the devolved nature of the service. The Joint Loans Board through which the National and local governments provided funding for micro-lending to traders was disbanded by operation of law, but the process of assignment of the service to county governments</p>

Function	Unbundled Components	Comments
	<ul style="list-style-type: none"> iv. Training needs assessment for the co-operative movement v. Market information dissemination & advisory services vi. Banking inspections (local SACCOs) vii. Risk assessment in SACCOs viii. Investment advisory services ix. Coordination & monitoring of co-operative indemnity by co-operative leaders x. Promotion of co-op ventures & Innovations (for local co-operatives) xi. Carrying out certification audits xii. Carrying out continuous and compliance audits xiii. Co-operative advisory services xiv. Pre-cooperative education xv. Settlement of disputes (arbitration) xvi. Registration of co-operative societies 	<p>and transfer of assets and liabilities was never carried out.</p>
<p>County planning and development:</p>	<ul style="list-style-type: none"> a) Statistical services including: <ul style="list-style-type: none"> i. Custodian of official statistics in the county ii. Maintenance of a comprehensive and reliable county socioeconomic database iii. Quality assurance of statistical information iv. Collection and compilation of statistical information v. Analysis of statistical information vi. Publication and dissemination of statistical information for public use vii. Coordination; monitoring and supervision of the County statistical system b) Boundaries and fencing including: <ul style="list-style-type: none"> i. Determination of property boundaries. ii. Solving of property boundary disputes iii. Showing of property boundaries iv. Ensuring fencing and development properties v. Finalization of surveying of Administrative boundaries within the Counties c) Identification of renewable energy sites for development. d) County planning and development, including: <ul style="list-style-type: none"> i. Electricity and gas reticulation and energy regulation 	<p>The respective roles of the counties and the Kenya National Bureau of Statistics (KNBS) on the collection and management of statistical information are not fully delineated. The respective roles of the National and county governments in the concurrent function of disaster management remain unresolved.</p>

Table 2.2: Functions Transferred after being Unbundled (Cont'd)

Function	Unbundled Components	Comments
	<p>County energy planning</p> <ol style="list-style-type: none"> a. Preparation of county energy plans, incorporating petroleum, coal, renewable energy, and electricity. b. Physical planning relating to energy resource areas such as dams, solar and wind farms, municipal waste dumpsites, agricultural and animal waste, ocean energy, woodlots, and plantations for the production of bioenergy feedstocks. c. Provision of land and rights of way for energy infrastructure. d. Facilitation of energy demand by planning for industrial parks and other energy-consuming activities. e. Preparation and implementation of disaster management plans. <p>County energy regulation</p> <ol style="list-style-type: none"> a. Regulation and licensing of county gas reticulation systems. b. Regulation, licensing, and supply of retail coal products for domestic use. c. Regulation and licensing of designated parking for petroleum tankers. d. Regulation and licensing of biomass production, transport, and distribution. e. Regulation and licensing of biogas systems. f. Regulation and licensing of charcoal production, transportation, and distribution g. Customization of national codes for energy efficiency and conservation in building to local conditions. <p>County operations and development</p> <ol style="list-style-type: none"> a. Electricity and gas reticulation. b. Provision and maintenance of adequate street lighting. c. Provision of designated parking for petroleum tankers. d. Collection and maintenance of county energy data. e. Implementation of county electrification projects. f. Undertaking feasibility studies and maintenance of databases within a view to avail the same to developers of energy resources and infrastructure. 	

Function	Unbundled Components	Comments
	g. Establishment of energy centres for promotion of renewable energy technologies, energy efficiency and conservation.	
Village Polytechnics		No unbundling was carried out for this function
Implementation of specific National Government policies on natural resources and environmental conservation.	<ul style="list-style-type: none"> a. Soil and water conservation: <ul style="list-style-type: none"> i. Implementation of county-specific water conservation and forestry policies through water resource users ii. Water pollution control iii. Borehole site identification and drilling iv. b) Forestry including farm forest extension services, forests and game reserves formerly managed by local authorities. 	The precise boundaries of the roles of the National and county governments in the forest sector require further analysis and unbundling to avoid jurisdictional conflicts.
County public works and services	<ul style="list-style-type: none"> b. Public Works including designing, documentation, post contracting, project management of construction and maintenance of public buildings and other infrastructural services. Construction of footbridges. c. Water and sanitation services including rural water and sanitation services; provision of water and sanitation service in small and medium towns without formal service providers; water harvesting (specific to counties); urban water and sanitation services with formal service provision including water, sanitation and sewerage companies but excluding water service boards the Water Services Regulatory Board and Water Resources Management Authority. 	Water is a concurrent function but the boundaries between National Government and county governments from a roles standpoint remains undefined comprehensively. The operations of the various Regional Development Authorities in the sector remain not in sync with the constitution.
Public Participation and Civic awareness	Ensuring and coordinating the participation of communities and locations in governance at the local level and assisting communities and locations to develop the administrative capacity for the effective exercise of the functions and powers and participation in governance at the local level.	



2.4 Challenges Besetting Functions Transfer

The general challenges that normally beset the functions transfer process and for which Kenya has not been immune to, have been noted in the following areas:

- i. Transfer of functions without any or with insufficient resources. This was evident in the transfer of the library services function where no corresponding funds were transferred and in health where the counties complained of most of the funds being retained at the national government.
- ii. Transfer of tiny and fragmented functions (activities), or what can be called the high granularity of functions such as wage expenditures, operation and maintenance (O&M) expenditures and inter alia spending on sectoral supplies.
- iii. Transferring functions that were never done or funded in the first place or are discretionary such as public participation.
- iv. Promoting general competence (instead of transferred functions) but without finances to make a 'right of initiative' meaningful.
- v. Obtaining or disentangling data is not easy and in the absence of data, it becomes difficult to make appropriate decisions that the situation may demand.
- vi. Financial transparency by ministries is not always welcome – there is a tendency to want to keep rather than share financial information with critical agencies by state departments.
- vii. When functions fall under the mandate of more than one institution – the severance of such a function and transferring it for purposes of meriting the requirements of the Constitution is problematic.

The current situation is that counties are not only suffering from unfunded mandates but are also:

- a. Contending with extensive duplication of functions by the two levels of government whilst undertaking their respective performance of either concurrent or exclusive functions. Some of the principal areas where these occurrences have been notable include security, water services provision and agriculture.
- b. Dealing with the fact that there are functions that had been gazetted for transfer by the TA, from the national government to county governments but unfortunately are still being performed at the national level. The most prominent in this category is in agriculture, water, museums, and library services.
- c. Interestingly, there are also exclusive functions of the national government

or certain aspects of these functions that are still being performed by county governments. The most prominent in this regard are security and education.

- d. Additionally, there are functions of county governments that are largely donor-funded being performed by the national government. Some of these functions fall within sectors such as the water sector and relate to several programs whose financing agreements were put actualized before the onset of the system of devolved governance.

Following international best practices, the assignment of functional responsibilities

2.5 Principles that Should Guide the Transfer of Functions

between different levels of government is generally guided by several principles, which inform not just policy choices but define how the process of transfer is managed. These include the principle of subsidiarity and the principle that funds must follow functions (Table 2.3).

Table 2.3: Principles that Should Guide the Transfer of Functions

a. Subsidiarity Principle

Public responsibilities shall generally be exercised, in preference, by those authorities that are closest to the citizen. Allocation of responsibility to another authority should weigh up the extent and nature of the task and requirements of efficiency and economy.

The principle of subsidiarity suggests that functions and expenditure responsibilities should be assigned to the lowest government level that can perform each function efficiently. Advocates of subsidiarity aver that national or regional (local) responsibilities should be differentiated both in the Constitution and the law as a way of clarifying the powers, and also guarantees access to resources necessary for the devolved institution to perform the functions assigned to them.

Subsidiarity is a well-established principle that advocates for public responsibilities to be undertaken by those elected authorities that are closest to the people and at the lowest level possible. At present, subsidiarity is one of the most important principles of distribution of powers and competences, which requires governments to make decisions at their most effective level. This requirement presupposes hierarchy and decentralization of the structure of the society, which is transfers of some functions and responsibilities of the central

institution to smaller social units (among others, family, community, local self-government institutions), One of the benefits upon which the subsidiarity principle is touted is the notion that decentralization benefits the citizenry by giving them greater influence over the public services that they receive.

The Constitution supports the application of this principle. Specifically, Article 174 calls for the giving of power of self-government to the people, and enhancing their participation in making decisions, and recognizing the right of communities to manage their affairs. Further, article 176(b) convincingly asserts that county governments should decentralize (and basically to the lowest possible) their functions and service delivery, to the extent that it is efficient and practicable to undertake the same.

Additionally, article 187(1)(a) of the Constitution also makes it clear that a function or power of government at one level may be transferred to a government at the other level by agreement between the governments, the function or power would be more effectively performed or exercised by the receiving government. Essentially, this provision also sets the stage and allows for Intergovernmental arrangements wherein functional transfers can be mutually entered into as between the two levels of governments based on need though with the overriding consideration that the receiving government is the level that is best suited to undertake the transferred function.

It is argued that the transfer of powers to regional or sub-national governments enhances public sector efficiency and the same positive impact on economic development. In a multiethnic country with diverse regions as Kenya, the officials administering or manning the various aspects of service delivery within the larger context of decentralization are in a better position to appreciate and respond to local intentions and demands by providing efficient quantity and quality of public goods.

Further, decentralization brings the government closer to the people so that local officials are better informed on the local needs of the people, and are thus more capable to provide the optimal mix of local policies, which in turn increase in, efficiency contributes to economic growth.

Consequently, and based on the subsidiarity principle inter alia, the Constitution significantly affirms the objects of devolution and in comprehensive manner detail out the obligations and responsibilities of each level of government including the need for both levels to interrelate and coexist within set principles of comity and cooperation. The basis of cooperation between and amongst the two levels of government and their functional responsibilities are detailed out under articles 6(2), 186, 187 and the Fourth Schedule to the Constitution. It shall be worthwhile to clarify that the schedules are not meant to be a static list of national or county governments' functions these can be shared or transferred across the different

governments or levels of government based on intergovernmental agreements entered into to that effect.

b. Funds following Functions

As a general principle of fiscal decentralization, the resources necessary for the execution of the transferred functions or powers would also have to be transferred to the level to which the function is transferred. It must be borne in mind that the transfer of functions to the lower level governments generally has a direct impact on these governments' fiscal framework and capacity. Ideally, the functions transfer process must be such that the devolved governments are provided with financial resources that are adequate or favourably compare with the functions and powers that they are constitutionally and legally responsible for. It must not be lost on us that the fiscal aggregate of the resources available to the devolved governments is designed to fund the entire polity or bureaucracies that the counties are, including the transfers from the national government.

In Kenya, the minimum amount of fiscal resources that the devolved units are entitled to as part of their shareable revenue is constitutionally guaranteed at 15 per cent of the revenue collected nationally. This minimum allocation has a historical perspective. It is intended to avoid the challenges of funding devolved governments which occurred during Kenya's first attempt at devolution where devolved units were so starved of resources that they were not able to function at all. Taking into account the functions of the devolved units as assigned under the Fourth Schedule, 15 per cent of national revenue is hardly sufficient for purposes of delivery on the functions that they are constitutionally allocated and a more elaborate assessment of the cost of functions is anticipated by the Constitution.

The notion of funds following functions can be categorized into the following issues or concerns.

- i. Transferring a function without the corresponding resources (finances, personnel, assets) means an unfunded mandate.
- ii. When a function is transferred, at the same time its corresponding resources must be transferred.
- iii. Just as functions will be re-allocated, therefore, finances, personnel and state assets will be re-allocated or re-deployed.
- iv. Part of the functional review process is to identify what resources correspond to a function to be transferred.

2.6 Challenges in Costing of Functions

Generally, the costing and transfer of functions from national or central governments to the subnational units have always been undertaken through negotiated political processes as opposed to a proper analytical process of determining the true cost of the function. Ideally, the costing of functions and the subsequent release of funds for their performance must fit within the notion of funds following functions. In this case, the assigned funds for the implementation of the function must as of necessity be adequate for the performance of the function for continued service delivery by the receiving level of government. Some of the challenges that have been witnessed in the costing of functions as a precursor to transferring include:

- i. The complexity of the overall costing exercise since it requires a lot of time and institutional auditing.
- ii. Inadequate baseline information and data on the cost of functions. This has slowed down the process since the historical resource allocations were skewed thus generalization is difficult.
- iii. Costing of functions follows a comprehensive unbundling and analysis of the functions. The analyzed functions should then be converted into expenditure assignments for which costs are assigned.
- iv. The reliance on historical data or historical allocations as the basis for determining the costs of transferred functions is not scientific nor analytical and in that regard, does not necessarily reveal the true costs associated with the implementation of the functions assigned to county governments due to the apparent fiscal gaps that such an approach is unable to provide for. This historical approach heavily relies on the historical spending that the entities that provided services before the onset of devolved governance engaged in and most importantly, these costs were guided by the centralized planning approach associated with the former central government and as such, their accuracy has always been subject to contest.

The basic rule of thumb within the framework of functions transfer has been that resources must follow functions. Equally, the process of unbundling and costing of functions should ideally precede the functions transfer process. Despite, the cardinal principle resources following functions, the TA never concluded the exercise of costing of functions with the resultant effect that the failure to conclude the exercise has been a continuous source of rifts concerning budgeting and fiscal transfers to the county governments with counties continually complaining of insufficient funds.

2.6.1 Transfers and County Capacity

As already mentioned here above during the first summit after the general elections, each county applied for all the functions due to them under the Fourth Schedule of the Constitution. As agreed at the summit, most of these functions were transferred all counties simultaneously. This “big bang” transfer was not just affected in violation of the asymmetrical and phased transfer process anticipated Section 15 of the 6th schedule to the Constitution but it also compromised the capacity of the TA to effectively assess the costs of the functions before transferring them.

The procedure (criteria) for the transfer of functions or the issues upon which the determination as to whether or not to transfer the function revolved, had been clearly outlined in the Transition to Devolved Government Act, which criteria stressed on the need to assess and determine;

- i. Whether there does exist legislation concerning the function.
- ii. Whether there is a framework of service delivery in place.
- iii. An assessment of the capacity to perform the function.
- iv. Arrangements for further decentralization of the function.
- v. Infrastructure and systems to perform the function.

Largely, these criteria revolved or seemed to try to evaluate whether or not the counties were ready for the receipt of the function including having the requisite capacity needed to receive and undertake the transferred function without any form of disruption to service delivery. Unfortunately, with the big bang transfer and with no attendant unbundling and costing of functions exercise, the counties took on functions without a thorough analysis and determination of whether or not they had the administrative wherewithal to carry out the functions as transferred.

The former Commission for the Implementation of the Constitution (CIC) stated¹⁸:

The “big bang” transfer had adverse effects on the performance of some of the transferred functions as follows (i) Some counties did not have adequate capacity to perform the transferred functions. (ii) The functions were not costed hence resource allocation was not commensurate with the functions being performed. (iii) Some counties took on functions that they were not able to perform. (iv) Some functions, especially the concurrent ones, were not unbundled leading to conflict and mandate over-laps between the national and county governments.

¹⁸ Commission for the Implementation of the Constitution (CIC) End Term Report (December 2015)



In view of this, there is a need to finalize analysis and costing of functions and further unbundling of concurrent functions before the end of the three-year transition period.

2.6.2 Other Challenges

Other than the above general challenges that have impacted the process of unbundling, costing and assignment of functions, other challenges continue to plague this process.

These include:

- i. The absence of a framework agreement detailing out a systemic and comprehensive transfer of pension, benefits and records of all personnel that have been seconded from the national to the county governments.
- ii. The continued existence of state corporations and the need for realignment of their operations with the ideals of the constitution and the system of devolved governance.
- iii. The lack of effective dispute resolution strategies within the intergovernmental framework posited under the law especially in the context of functions transfer and resourcing thereto.
- iv. There exists a significant number of unfunded mandates which arise from instances where county governments are legally mandated in terms of the Constitution or by policy pronouncement to undertake specific functions but do not receive funds from nationally raised revenues to perform these functions. This situation arises when a County Government is assigned a service delivery function without an accompanying level of funding for the performance of the function or even the service delivery standards that come with the same. When such scenarios arise, the county governments are forced to financially spread thin including diversion of funds from other sectors to be able to deliver on the function and this has been predominantly felt in the areas of libraries and public participation.
- v. Incomplete legal regimes: It is incumbent on Governments both at the national and county level to take steps to ensure that all mandates have a legal basis. The functions performed by each sphere of government must, therefore, have a secure legal footing. Otherwise, performing functions falling outside of their respective mandate impinges upon the lawfulness of their budgets, even though their expenditure is not necessarily illegal.

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- vi. Duplication of functions: Despite the foregoing, and recognition of the fact that functions ought to be properly transferred through a recognized legal framework for them to be effectively implemented, there are still instances of duplication of roles between the national and county governments. It is unfortunate that in most cases, the national government entities continue to perform functions of the county governments that were devolved by the TA.



3

3.1 Outstanding Issues and Completion of the Functional Transfer Process

As intimated elsewhere in this report, the success of the Kenyan System of devolved governance significantly rests on the operation and performance of the county governments. At the core of the evaluation of the performance of the county governments rests the allocation of their assigned functions, competencies and resources distribution between the two levels of government.

Kenya's devolution system incorporates the three different components of functions, exclusive, concurrent and residual. Each of these components exhibits different challenges and requires different approaches to resolve these challenges.

3.2 Concurrent Functions

In its report, the Task Force on Devolved Governance observed as follows.:

The concept of concurrent functions involves the idea of joint tasks and or overlaps in terms of functional jurisdiction. There may be many cases in which a certain aspect of an issue is assigned to the national level of government while another aspect of the same issue is assigned to the lower level of government. For instance, certain aspects of the education function may fall under one level and others fall under the jurisdiction of another level. Good constitutional design, in this case, must specify which level of government will prevail in the event of a conflict between the two levels of government. For example, if the two levels legislate on the same matter but in different ways so that two laws are governing the same matter but which are in conflict or contradiction with each other, it must be clear which one of the two laws will take precedence over the other.¹⁹

The notion of concurrent functions is often loosely used, and in some cases, the usage seems to simply point out to broad sectors that are assigned in a block as unbundled functions that are placed at different levels. The levels of government involved can be said to be sharing the 'sector'. This is due to the inevitable nature of functional overlaps while carrying out these concurrent activities and the inseparable manner inbuilt into certain government activities that cannot easily be compartmentalized into separate activities.

¹⁹ The Task Force Report on Devolved Governance

The issue of the concurrence of functions is quite complex and the notional functional boundaries that the Constitution places are not as clear even on what are termed exclusive functions. It has been argued concerning the balance of power when it comes to national and county legislation on matters to do with functional spread (concurrent functions) between the two levels of government as quoted below.


“A significant number of powers are concurrent, with the county laws prevailing in case of conflict with national law, but subject to national law in certain circumstances, which give the centre considerable scope for overruling county law — Schedule 4 and Article 191 (2) and (3) of the Constitution of Kenya 2010. There is no list of concurrent powers; Article 186 (2) says that a concurrent power is that which appears in the list of both national and County Government. And then there is a somewhat puzzling statement in Article 186 (4) that for “greater certainty, Parliament may legislate for the Republic on any matter”²⁰.

“When a matter appears in both the national and county lists, it is deemed to be concurrent. It is an unusual way to define concurrent powers, especially as the national and county lists have only one common, precise, item (“betting, casinos and other forms of gambling”). “Agriculture, including (a) crop and animal husbandry; (b) livestock sale yards; (c) county abattoirs; (d) plant and animal disease control; and (e) fisheries” appear in the county list. But the national list includes “Agricultural policy”, “Veterinary policy”, “Protection of the environment... including (a) fishing, hunting, and gathering; (b) protection of animals and wildlife. How do these three items affect the scope of county powers over “Agriculture” and how does the “protection of animals and wildlife” by the national government affect the responsibilities of “Animal control and welfare”? Similar comments can be made about health: a long list of responsibilities of counties, and then in the national list: “Health policy”. Also, counties have the responsibility to plan and develop housing, but the policy about housing is with the national government”²¹.

The author argues that compared with other federal or autonomous jurisdictions wherein government powers have been devolved from the centre, county governments might be reduced to a level where they have a diminutive policy and regulatory functions especially if the national government adopts an aggressive and domineering stand on its policy functions. The matter will be further compounded because both policy setting and regulation including the setting of common standards rests with the national government which may perform these functions without any consultation with the county governments.

²⁰ See *Animating Devolution in Kenya, The Role of the Judiciary; Commentary and Analysis on Kenya’s Emerging Devolution Jurisprudence under the New Constitution* at page 25

²¹ *Ibid* at pg. 27



Therefore, it is incumbent that the following are borne in mind in the context of policy setting and intergovernmental relations:

- a. Commitment to the achievement of key national policy goals, with clear objectives, informed national and county level circumstances.
- b. Clearly demarcated areas of responsibility and accountability for all state institutions.
- c. The encouragement of creativity for collaboration and partnership while strengthening the performance and accountability of distinctive institutions.
- d. Elimination of wasteful and unnecessary duplication avoiding “turf battles”.

Depending on the kind of influence and arm-twisting that the national government wields or even gets to assign itself in terms of responsibility sharing over concurrent functions, it might be taken to mean that the national government legislates on matters of concurrent functions whilst the County Government remain with the role of implementing policy and legislation as formulated by the national government. Even as this is advocated, we must also take into perspective the view that the Fourth Schedule needs further breakdown and understanding since those functions listed therein are still highly aggregated by nature. A casual division along the lines of “policy versus implementation” or “national versus county” is still a broad spectrum for classification or delineation with a high degree of haziness on the specific boundaries of these functions. Therefore, reliance on the Fourth Schedule alone as the basis for delimiting the boundaries of responsibility as between the national and county governments in matters of the division of functions might prove futile.

Consequently, this is an area that requires deep focus and a thorough evaluation of the pitfalls that may encumber the process of function implementation especially, concurrent functions. Like we surmised earlier, it is an area that cannot be exhausted within the scope of the current engagement though effective platforms for intergovernmental relations may offer apt suggestions and solutions, and potentially curb any controversies that are bound to arise in that regard.

More rigorous and meaningful ways of using the concept of concurrency are evident in the following distinct situations (Table 3.1):

Table 3.1: Concurrent Functions

Situation I	Situation II
A function can be carried out by more than one level of government, in a simultaneous fashion.	A function can be taken up by a level of government if it has yet to be taken up by another level of government or does not infringe on another level of government (usually higher level).
This situation relates to the joint occupation, which is a common occurrence. It encompasses a subset of all governmental functions, usually a small, to modest proportion. (Too much concurrence is thought to lead to difficulties in determining roles and accountability) ²²	In the second case, concurrency means the ‘opportunity’ to take on a function rather than have a joint occupation of the same as between the levels of government. This means that the lower governments are recipients of what the National Government is yet to take over or in another way, the lower take what the nation is yet to take by way of regulatory involvement.

Naturally, it is not strange for misunderstandings and disputes to arise between national and regional governments especially for concurrent functions and where both levels of government either have or feel they have more stakes in the administration of those functions²³

Based on the fact that the Constitution provides for concurrency of functions, there is an absolute necessity for clarity in the unbundling and mapping out of all activities related to duplicitous concurrent functions to bring out precision on functional assignment to both levels of Government. Thus, it is important to identify which level has specific responsibilities for various aspects of concurrent functions in the following areas: policy, regulation, and implementation so that functions are implemented smoothly and the funds are where they need to be for implementation.

The national government through the Ministry of Devolution and Planning in its policy document titled “Policy in Devolved System of Government” makes the following observation:

“Concerning concurrent functions, Section 7 of The Transition to Devolved Government Act 2012 required the TA to unbundle and cost these functions and provides a

²² http://www2.giz.de/wbfl/4tDx9kw63gma/GA_Functional_%20Assignment_Voll.pdf

²³ <http://www.gp.gov.za/wp-content/uploads/2015/07/Decentralisation-the-south-african-experience-feinstein1.pdf>

mechanism of joint implementation by the two levels of government. This process was not completed. Consequently, misunderstandings have emerged between the national and county governments in the performance of some concurrent functions. It is also important to put in place processes and measures to eradicate incidences where the two levels of the government budget for and implement similar activities.”²⁴

Taking the above views into context, and as a way of resolving the duplication of budgeting and implementation activities touching on these functions, it is critical to try to analyze and determine which of the two levels of government in terms of their respective mandates in respect of a function has the power or authority over the resources that are critical for delivery on the service or function.

For instance, it may be critical to determine, which of the two levels of government has the budgetary control over the function and if both are, the extent to which their responsibilities and authority lie concerning the function. The fundamental question to be answered here is who has the control over resources needed to perform that function and in what aspects or areas. Additional consideration will be the level of government the function is most efficiently and effectively performed.

3.2.1 Court Cases surrounding Concurrent Functions

The two cases discussed below indicate the difficulties the Courts are presented with when required to determine disputes on functional, assignment between the two levels of government. They underline the critical need for resolution through other avenues as opposed to court action.

In *Africa Rafiki Ltd & 2 others v Nairobi City County Government & 3 others* [2015] eKLR²⁵, the dispute revolved over the functional responsibilities between the national and county governments concerning betting, gaming and lotteries. This mainly rested on the provision and understanding of section 34 of Part I of the Fourth Schedule to the Constitution as well as Section 4(a) of Part II of the Fourth Schedule. From the two sections, this is a concurrent function though what was not clear hence the court dispute, was the true extent of responsibility that either level of government exercises over the function.

²⁴ http://urbanlex.unhabitat.org/sites/default/files/urbanlex/policy_on_devolved_system_of_govt_final_as_launched_0.pdf

²⁵ *High Court of Kenya (Nairobi) – Petition Number 295 of 2014* and available at <http://kenyalaw.org/caselaw/cases/view/116083/>

The court had this to say on the matter:


“What is before me is an obvious conflict of legislations and I am certain that the delineation of functions both in the Sentrim Elmentaita Meeting and Section 4(1) and (2) of the counties legislation only fuel that conflict because it is unclear what Enforcement of compliance e.g. spot checks on betting and other forms of gambling licensed by the County Government means when the licensing function has not been explicitly given to county governments, save that they can license business premises including those in the said business. I would have expected language such as licensing of and enforcement of compliance in the betting, gaming or lotteries business or stating categorically that licensing of casinos, gaming activities including online gaming shall be functions of the national government and similar language used in the specific functions assigned to county governments. An example is licensing of business premises in which gaming, casino or betting and lotteries business are conducted shall be the function of a County Government. The said clarity is lacking as stated elsewhere above and therein lies the conflict.”

Consequently, the court suspended the operations of the Nairobi City County Betting Act, 2014 as passed by the County Assembly of Nairobi to license, gaming, betting and lotteries within the City in 2014 until further notice. Equally, the court directed the TA as the interested party in the dispute to organize a meeting between stakeholders in the matter including concluding the function unbundling exercise that it was conducting over this matter.

Secondly, the Council of Governors through Petition number 278 of 2017²⁶ - Council of Governors vs the Attorney General & 19 others, has sued several national government agencies including inter alia Sports Kenya, National Museums of Kenya, KNLS, Tourism Regulatory Authority and the National Housing Corporation (NHC). Of interest for this report is NHC and housing as a devolved function in the Fourth Schedule of the Constitution.

In a matter filed by the Council of Governors, the bone of contention by the Council is that to the extent that the NHC, under section 7B of the Housing Act continues to establish, promote, organize companies and syndicates for purposes of carrying out housing functions, which is a devolved function, then it is in contravention of articles 6(2), 186, 189 and 259 of the Constitution.

²⁶ High Court of Kenya at Nairobi (Constitutional and Human Rights Division – Petition Number 278 of 2017) – Petition was filed on 8th June 2017.



But what does constitute housing as a function? Under the Constitution, the national government oversees housing policy, while the county governments are in charge of planning and development including housing. This easily amounts to the national government overseeing the housing regulatory framework whilst county governments deal with matters on the implementation of the framework.

The International Budget Partnership fronts the following argument²⁷.

At the policy level, both land and housing policy are functions of the national government. At the implementation level, housing belongs to counties whereas land issues largely remain at the national level. However, if one takes the idea of land stock and other mechanisms for ensuring the availability of land for affordable housing, this will necessarily involve coordinated efforts by the two levels of government. There is a strong link between the availability of land and housing development.

When we look at the Constitution and Sessional Paper, we get a general sense that housing policy will continue to be developed by national government, but counties will largely be responsible for construction and management of housing stock and ensuring an adequate housing supply for Kenyans. It is less clear how national and county governments will coordinate on land issues related to housing. And where this constitutional division of labour leaves the NHC.

The lingering question is the level of responsibility between the two levels of government concerning housing as a function, and the role that the NHC plays in that regard. The unbundling and assignment of respective components of the housing will require urgent attention through the IGRTC.

In High Court Petition No 593 of 2013 Okiya Omtatah Okoiti and Anor Vs The Attorney General and two Others the Petitioners filed the matter seeking inter alia an interpretation of Section 23, Part 1 of the Fourth Schedule to the Constitution and section 2, Part 2 of the Fourth Schedule to the Constitution as regards the meaning of the words “national referral health facilities” and “county health facilities”. They particularly claimed that the Respondents as well as the 2nd interested party, have given the wrong interpretation to the words “national referral health facilities” in Section 23, Part 1 of the Fourth Schedule and the words “county health facilities and pharmacies” in Section 2(a), Part 2 of the Fourth Schedule to the Constitution.

²⁷ *Who's in charge of the housing sector?* By Eric Kanyi, Haki Jamii, available at <http://www.internationalbudget.org/wp-content/uploads/Whos-in-Charge-Housing.pdf>

According to the Petitioners, the words “national health referral facilities” do not mean only the Kenyatta National Hospital and Moi Teaching and Referral Hospital, but mean all public hospitals from Level 2 to Level 6, as designated by the Ministry of Health. Further, the words “county health facilities and pharmacies” refer to health facilities previously managed by local authorities, or which presently, counties may and are reasonably expected to establish. The court held that the Constitution has not classified the health facilities into certain levels, as that is a matter of policy. The presiding judge said:

“I therefore politely decline to get into the arena of defining what the phrases ‘national referral health facilities’ and ‘county health facilities’ are or what hospitals belong to what category. I say so because the court is not the maker of the health policy in Kenya. The Court has no ability or mechanism to determine the criteria to be used to categorize hospitals, and it cannot examine the equipment, facilities and manpower available in the hospitals, as that is the exclusive mandate of the national government through the Executive.

“I am therefore in agreement with the submissions by the respondents, the 2nd interested parties and the Amicus Curiae that this Court cannot determine the issues raised herein as it would amount to implementing and making policies for and on behalf of the Executive. To paraphrase that finding, the Court will be stepping into the mandate of the Executive State organs and agencies which act is generally constitutionally frowned upon and in that regard, I am also in agreement with the High Court in Republic v The TA (supra) where the learned Judges stated: “The inadequacies of the provision of health services in this County is a matter of national concern and the national government must ensure that every person’s right to the highest attainable standard of health as stipulated under Article 43 of the Constitution is attained...”

3.2.2 Identified Concurrent Functions

Under the Fourth Schedule to the Constitution and based on the unbundling that was undertaken by the now-defunct TA, the concurrent functions are listed as follows (Table 3.2).


Table 3.2: Identified Concurrent Functions



NO.	National function	County function
1	11) National statistics and data on population, the economy and society generally	8) County planning and development, including- Statistics
2	17) Promotion of sports and sports education	4) Cultural activities, public entertainment, and public amenities, including- h) Sports and cultural activities and facilities
4	19) National public works	11) County public works
5	24) Disaster management	12) Firefighting services and disaster management
6	34) National betting, casinos, and other forms of gambling	4) a) Betting, casinos, and other forms of gambling
7	31) Energy policy including electricity and gas reticulation and energy regulation	8) e) Electricity and gas reticulation and energy regulation
8	Promotion of local languages	Promotion of Kiswahili, sign, and indigenous languages
9	Tourism development	Local tourism
10	Promotion of the Environment	Control of air pollution
11	Water protection securing sufficient residual water safety of dams	Water and sanitation services

Division of functions is a grave and important aspect in the entrenchment and success of devolution. This is because the realization and relevance of devolved units revolve around their ability to undertake their constitutionally guaranteed and statutorily pronounced functions. If one level of government opts to usurp or obstruct another government's implementation of its function, the design and relevance of devolution are greatly undermined.

3.2.3 Operationalization of Concurrent Functions

As a way of addressing the rigours that have beset the performance and delivery on concurrent functions on the part of the two levels of government, several approaches are recommended. These are in addition to the specific proposals for resolving specific sectors provided elsewhere in this report.

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- a. It is necessary for the two levels of government within the sectoral intergovernmental arrangement (overseen by IGRTC) to first agree on the overall structure of the sectoral service delivery mechanism and the general assignment of authority and responsibility for the key inputs that combine to form service provision regarding such sectors. That way, it is easy to discern how specific parts of service delivery should be operationalized and with whom lies such responsibility based on the sector under scrutiny.
 - b. Where concurrent functions have been determined, sub-functions and/or the attributes (regulation, financing, administration, and delivery) associated with the particular competence have to be assigned to a particular or level of government. When any of these attributes or sub-functions is still shared by two or more levels of government further unbundling of that function (attribute) in sub-functions (sub-attributes) has to be carried out until the latter can be exclusively assigned to one level of government. Once the sub-functions are identified it will be easier to make assignments and make respective governments accountable to service delivery.
 - c. Stakeholder agreement on the overall structure of the sectoral service delivery mechanism and the general assignment of authority and responsibility for the key inputs that combine to form service provision regarding such sectors.
 - d. Analysis and unbundling of the function including a determination of the sub-functions that constitutes the function taking into account aspects of regulation, financing, administration and delivery answer the questions, who regulates and or who finances? Who implements?
 - i. Proceed to assign activities and responsibilities to be carried by either level of government in the context of that unbundling.
 - ii. Estimate the likely cost to counties of delivering the devolved functions
 - iii. Identify the institutional arrangements for intergovernmental management for purposes of coordination and delivery on the function.
 - iv. To the extent that it is necessary, come up with statutory or regulatory definitions as relates the exercise.
 - v. In exceptional circumstances wherein the above strategy cannot apply, then recourse must be had to article 191 of the Constitution for purposes of judicial determination on the extent and powers of each level of government over a disputed function taking into account the criteria put forth under article 191 of the Constitution.

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- e. There are functions, which are more responsive to local input, benefit from local knowledge and take on local characteristics, regardless of who is carrying them out. In line with the subsidiarity principle such functions are better carried out at, and by the local level and in the context of concurrent functions ought to remain with the county governments as opposed to being assigned to the national government.

3.3 Residual Functions

It must at all times be appreciated that the assignment of functions to the various levels of government, particularly where the legal boundaries are unclear as is the case for concurrent functions, is not simply a technical process, but is also inherently a political process. Thus, an appreciation of the fact that the process is subject to the political processes of the day means that there is need to recognize the prevailing political and institutional interests as they are key in determining the successes of function assignment and the delivery systems that the same comes with.

Article 186(3) of the Constitution makes it clear that a function or power not assigned by the Constitution or national legislation to a county is a function or power of the national government. The effect of this provision is that all functions that are not assigned to the County Government fall within the jurisdiction and control of the national government. Essentially, a function that cannot be classified as either exclusive or concurrent remains a function of the national government.

It is therefore critical to know which level of government such power resides and in any event, it is noteworthy that the greater the listing and assignment of functions courtesy of Constitutional pronouncements, the less crucial is the need to determine residual functions. But is the national government well placed in performing all residual functions? As a response to this question, we must be ready to assess whether residual matters that fall within the competencies of the national government are subject to the subsidiarity principle and if so, how best to apply the principle. As it stands, county governments are the level of government closest to the people and as such is involved in the rendering of a wide range of services that materially affect the lives of the people within their areas of competence.

There is also need to entertain the possibility of being able to transfer either whole functions or certain aspects of those functions that would be best delivered at the local level, even though they are residual functions and by operation of the law, are within the competence of the national government. This is because some of these functions

are central to the living conditions of the local people and provide them with basic infrastructures, which the County level of government may more effectively provide than the national government.

3.3.1 Identified Residual Functions

Based on an exercise that was led by the now-defunct TA, some of the Residual functions that were identified included the one in table 3.3.

Table 3.3: Identified Residual Functions

No	Function	Unbundled
1	Social Development	a) Develop and review policies and programs on community development, volunteerism, family protection, older persons and ageing, disability, social protection, social assistance and matrimonial property.
		b) Implementation and enforcement of Disability Policy and Persons with Disability Act. Disability Mainstreaming & Community based rehabilitation issues Disability prevention Advocacy on disability issues
		c) Vocational rehabilitation for persons with disabilities.
		d) Implementation of the Social Assistance Act. Social transfers for cash transfer for older persons, persons with severe disabilities and urban food subsidy.
		f) National Program for Persons with Albinism
		g) Develop programs for community mobilization and development.
		2

No	Function	Unbundled
3	Mining	<p>Mineral exploration and mining policy and management</p> <p>Inventory and mapping of mineral resources</p> <p>Mining and minerals development</p> <p>Policies on the management of quarrying and mining of rocks and industrial minerals such as limestone, building stones, clay, gemstones, cement, sand and coal among others.</p> <p>Management of health conditions and death and safety in mines</p> <p>Policy around the extractive industry</p> <p>Resources survey and remote sensing; and</p> <p>Maintenance of geological data (research, collection, collation, analysis).</p>
4	Adjudication, Settlement, and land registration	
		Setting standards on how cultural affairs will be managed at all levels
5	Implementation of Regional Development programs and projects	<p>Preparation of Integrated regional development master plans (IRDMP)</p> <p>International waters and rivers management and regulation (Kenyan Nile basin, trans-boundary lakes and rivers resource management)</p> <p>Preparation of integrated strategic plans for the basin</p> <p>Resource mobilization and Implementation of specific integrated projects</p> <p>Resource mapping and planning including the establishment of resources data centres</p> <p>Undertaking pre-feasibility and feasibility studies on natural resource use in the basins.</p> <p>Initiating implementation of the integrated projects.</p> <p>Identification of and engagement with the relevant authorities in exploration and development of marine activities within the exclusive economic zones</p> <p>Undertake Thematic research/ Studies on natural resources, in collaboration with institutions of higher learning.</p> <p>Knowledge and technology transfer to communities.</p> <p>Facilitate development, compliance and implementation of MOUs and other protocol agreements for the implementation of integrated development programs.</p> <p>Catchment and water towers management interventions e.g. Mwache, Kimira–Oluch, Upper Turkwel, Cherangany watershed, Mau, Mt Elgon, Taita Hills.</p> <p>Climate change mitigation measures such as river basin floods and drought control measures</p> <p>River basin regulation and transfer measures</p>

No	Function	Unbundled
		Development and implementation of an Integrated coastal/shoreline zone management policy
		Preparation of status technical reports on the resources support in negotiations between riparian states on sustainable use of the waters

3.3.2 Criteria for Determination of Residual Functions

A probable criterion for determining the assignation of residual functions especially when confronted with the possibility of transfer from the national level to the county level would most likely be determined using the following parameters (table 3.4).

Table 3.4: Criteria for Determination of Residual Functions

Would transferring the power to the county governments create incentives for better service delivery and accountability?	<p>Will local decision-making better reflect local preference (political benefits)?</p> <p>Are there spill-over costs associated with local service delivery (economic benefits)?</p> <p>Would managing service delivery locally be more efficient (administrative benefits)?</p> <p>Is the service to be funded by county governments subject to hard budget constraints (fiscal benefits)?</p>
Are there adequate funding arrangements for transferring the power to the County Government?	<p>Has the funding gap been adequately quantified, and the sources of funding determined?</p> <p>Is there a medium-term projection of costs for providing the service?</p> <p>Are the funding commitments of each sphere clear, explicit, and agreed?</p>
Would transferring the power have unintended negative consequences for essential local and national interests.	
Can authority in the functional area be disaggregated to maximize and minimize adverse consequences without compromising the overall integrity of the function?	<p>Do the internal properties of the functional area make it conducive for assignment to the local level?</p> <p>Can the function be disaggregated into constituent services, sub-functions, and funding sources? ^[1]_{ISEP}</p>
Is assigning authority to some but not all counties justifiable on the grounds of demand, readiness, and equity?	
Do the county governments have the capacity to perform the function and are they ready to exercise additional authority?	
Would the mode of transfer suit the function or sub-function, the benefits sought, and any local and national interest to be secured?	
Do the county governments have the capacity to regulate the function and oversee its execution at the local level?	

3.4 Exclusive Functions

Generally, these are functions that are solely assigned to one level of government to the exclusion of the other levels of government. This means that a function is exclusive if one sphere of government is solely assigned the responsibility of making policy, legislation, administration or monitoring performance-related aspects of a function.

Even though a function might be exclusive, the following ought to be observed.

- a) A function that is devolved to the county governments is still to some extent accountable to the national level of organization of government in the sense that the national government can set standards and norms for these functions based on consideration like economic unity.
- b) Secondly, a function may be an exclusive responsibility of the national government through when looked at from a subsidiarity perspective, the need for its devolution whether wholly or partly cannot be dispensed with. This means that a greater utility in the realization of the function would rest with the lowest level of government that the function is best performed.

Under the Constitution, the exclusive functions for the respective governments include (table 3.5).

A criterion that may be employed for purposes of defining whether or not and at what time to transfer an exclusive function to a county level of government would revolve around a determination of the following issues (Table 3.6)

Table 3.5: Exclusive Functions

<p>National Government</p>	<ul style="list-style-type: none"> • Foreign affairs, foreign policy, and international trade. • The use of international waters and water resources • Immigration and citizenship • The relationship between religion and state. • Language policy and the promotion of official languages. • National defence and the use of national defence services. • Police services • Courts • National economic policy and planning • Monetary policy, currency and banking • National statistics and data on population, the economy and society generally • Intellectual property rights • Labour standards. • Consumer protection. • Education policy, standards, curricula, examinations, and the granting of university charters • Universities, tertiary educational institutions and other institutions of research and higher learning and primary schools, special education, secondary schools, and special education institutions.
<p>County Government</p>	<ol style="list-style-type: none"> i. Agriculture ii. County health services iii. Control of public nuisances and outdoors advertising. iv. Cultural activities, public entertainment and public amenities but excluding betting, casinos, and other forms of gambling, which is a concurrent function v. County transport, including ferries and harbours excluding the regulation of international and national shipping and matters related thereto vi. Animal control and welfare vii. Trade development and regulation viii. County planning and development (except for electricity and gas reticulation and energy regulation) ix. Pre-primary education, village polytechnics, home craft centres and childcare facilities x. County public works and services xi. Control of drugs and pornography



Table 3.6: Criterion Transfer an Exclusive Function

<p>Are there adequate funding arrangements for transferring the power to the County Government?</p>	<p>Has the funding gap been adequately quantified, and the sources of funding determined?</p> <p>Is there a medium-term projection of costs for providing the service?</p> <p>Are the funding commitments of each sphere clear, explicit and agreed?</p>
<p>Would transferring the power have unintended negative consequences for essential local and national interests?</p>	
<p>Can authority in the functional area be disaggregated to maximize fit and minimize adverse consequences without compromising the overall integrity of the function?</p>	
<p>Is assigning authority to some but not all counties justifiable on the grounds of demand, readiness, and equity?</p>	
<p>Do the county governments have the capacity to perform the function and are they ready to exercise additional authority?</p>	
<p>Would the mode of transfer suit the function or sub-function, the benefits sought, and any local and national interest to be secured?</p>	
<p>Do the county governments have the capacity to regulate the function and oversee its execution at the local level?</p>	

As examples, education and security are exclusively devolved functions of the national government though it is increasingly becoming clear that county governments to have a stake in the fulfilment of these functions. Further, concerning education, county governments have long clamoured for the devolution of school infrastructure and related responsibilities, In that regard though, the national government has not been willing to accede to their request. County governments have always fronted the argument that they are better placed to manage the functions based on the subsidiarity principle and thus effective delivery.

3.5 Functions not yet Operationalized

Consequently, and taking into account the principle of subsidiarity, there is need to design an effective institutional framework for policy reforms that promote good governance through greater devolution of power and responsibilities to county governments, notwithstanding the existing classification of functions. This calls for a further unbundling and assignment of functions between the two levels of government based on subsidiarity and economies of scale.

By the conclusion of its term, the TA had transferred all the principal functions that the Constitution had allocated to county governments. What remained unresolved were certain components of functions largely carried out through Regional development bodies and parastatals. From engagements with key institutions engaged in the process of transfer of functions, it was evident that only a few functions had not been operationalized by counties despite their transfer. The status, therefore, is set out in the table below.

Table 3.7: Functions not yet Operationalized

FUNCTION	STATUS	COMMENTS
Libraries	Transferred, not fully taken over	National Government still running the libraries but intergovernmental discussions on shared implementation and funding are ongoing
Museums	Transferred, not fully taken over	National Government still running the museums but intergovernmental discussions on shared implementation and funding are ongoing
Statistics	Transferred, not operationalized	Most counties have not defined the scope of function considering the decentralization of the Kenya National Bureau of Statistics
Land survey and mapping	Transferred, not operationalized	Institutional framework for county operationalization of the function unclear
Boundaries and fencing	Transferred, not operationalized	Institutional framework for County operationalization of the framework unclear
Cooperatives	Transferred, not operationalized	Institutional framework for operationalization unclear considering existing legal regime

3.6 Proposed Remedies for Overlapping and Duplicative Functions

3.6.1 General Principles

It is evident from the study that numerous occurrences of functional overlaps and duplication exist. These are most evident in concurrent functions or those, which though exclusively allocated to county governments, are still being carried out by the national government through various parastatals and regional development authorities. To reduce and eventually eliminate these challenges the following is proposed:

- a) Introducing greater clarity and accountability into the roles and responsibilities of the national and county governments.
- b) Embedding greater levels of intergovernmental relations and cooperation into national – county governments relations.
- c) Fixing financial relations between the two levels of government.

3.6.2 Clarification of Roles and Responsibilities

There must be deliberate actions aimed at ensuring the clarification of roles and responsibilities between the two levels of government. The current status not only undermines service delivery but also hurts public finances.

The actions needed to clarify the roles and responsibilities of the two levels of government include:

- i. Evaluation and determination of the areas of duplication or overlaps; for instance, are the areas of duplication in policy development, service delivery, mandates or accountability?
- ii. Defining the priority areas where rationalization of government functions can be achieved quickly and/or where considerable efficiency gains can be made without unnecessary friction or disruption
- iii. Conducting of a mapping exercise that singles out programs/ activities that are not consistent with devolved governance and consequently agree on a program for rationalization of the said functions including timelines thereto.
- iv. A zero-based budget costing of function components from which a clearer idea of the proportionate cost of the components of functions being transferred can be assessed objectively
- v. Evaluation and coming up with agreements on regulatory, legal and administrative impediments to proper functional implementation and where necessary amendments or abolition of those laws/regulatory practices that undermine devolution and functional separation between the two levels of government

Facilitating the above actions will however require strong and effective intergovernmental cooperation and consultation. To this end the following is necessary.

- vi. The sectoral intergovernmental frameworks anticipated by the Intergovernmental Relations Act must be fully operationalized and specific guidelines on their modus operandi including their leadership and reporting structures are formalized. Many of the sector-specific issues where duplication exists are resolvable through consultations at this level. Where necessary issues unresolved can be presented to the Summit for final resolution.
- vii. The Summit needs invigoration so that it can resolve and give guidance on issues that cannot be resolved at the sectoral level. In the five years of its existence, the Summit meetings were erratic and hardly achieved their statutory meeting threshold.
- viii. A more effective process of ensuring the implementation of the decisions of the Summit must be initiated.

Table 3.7 below brings out functions that were transferred to county governments but unfortunately are still being performed at the by the national government either by itself or through its agencies. Some of these functions belong exclusively to Counties but some are concurrent, but the functional boundaries are not fully clarified.

3.7 Transferred Functions that are still being Performed at the National Level

Table 3.8: Transferred Functions that are still being performed at the National Level

Function	Status	Recommendation
County transport-county roads	<p>A. Mechanical and Transport equipment</p> <p>1. In the Financial Year, 2014/15, based on transfer process conducted by TA, equipment under the Mechanical and Transport Fund were shared between the national and county governments. The ratio of sharing was 20 to 80 per cent</p> <p>2. It is unfortunate that due to non-collection, the equipment is still lying in waste at the national level.</p>	<p>1. County governments ought to be implored to collect the machinery to avoid continued waste and deterioration of the said equipment.</p> <p>2. The relevant Intergovernmental sectoral committee must take lead on the matter.</p>
	<p>B. County Roads</p> <p>a) The TA reclassification of roads remains contested and has been the subject of intergovernmental discussions and litigation.</p> <p>b) The apportionment of Class D roads between the National Government (24,00 km) and to county governments. (32,000 km) and the proposal to enhance the proportion of RMLF to counties to 25 per cent awaits formalization by Parliament</p>	<p>a) Both levels of government must continue in consultations to finalize outstanding issues on roads classification and transfer of respective entitlements.</p> <p>b) Parliament needs to finalize the Roads Act formalizing the current agreement but leaving room for future review</p> <p>c) All resources necessary for the counties to implement this function need to be included in the revenue allocation.</p> <p>d) The continued roles and levels of responsibility of KERA and KURA ought to be analyzed and the institutions restructured to accord with the law and the intergovernmental agreements reached on the matter.</p>

Table 3.8: Transferred Functions that are still being performed at the National Level Cont'd)

Function	Status	Recommendation
<p>Water protection, securing residual water</p>	<ol style="list-style-type: none"> 1. This function is carried out by the National Government through regional development authorities. 2. The TA analyzed the functions of the regional authorities and intergovernmental consultations are ongoing on their restructuring 3. There is currently no framework for intergovernmental cooperation between the county governments and the regional bodies in the areas of project identification, implementation, and management. Continued interactions between the counties and the RDA's shouldn't continue to happen on an <i>ad hoc</i> basis. 	<ol style="list-style-type: none"> i. The mandate of the RDAs needs review so that they only perform components of functions that are best performed by regional organs. Sectoral intergovernmental consultations are necessary to agree on appropriate functions retention. ii. There will be the need to restructure the governance structure of the RDAs to include representation by county governments from the regions where they operate. iii. The IGTRC should cost the functions that the TA transferred to the counties, and the funds are transferred to the relevant counties.
<p>Water Reticulation and related services</p>	<p>Water services are a concurrent function and each level of government is undertaking various aspects of the function. Due to inadequate functional disaggregation, there is extensive duplication of services in the sector particularly through the water boards and RDAs</p>	<ol style="list-style-type: none"> i. There is need for the unbundling of the roles of the Ministry of Water and Irrigation, Water Services Boards, Water Services Trust Fund, National Water Conservation and Pipeline Corporation, National Irrigation Board, Regional Development Authorities, and in some instances Ministry of Agriculture under the smallholder irrigation schemes and soil and water conservation programs ii. The unbundling should inform the process of assignment to counties of any roles carried out by any of these organs that are best performed by the counties while the national or regional bodies retain those aspects strategically best performed at the national or regional level. The latter will include large infrastructure projects which require national intervention in funding and implementation.

Function	Status	Recommendation
		<ul style="list-style-type: none"> iii. The resources necessary to enable Counties to carry out any transferred function must be transferred iv. The capacity needs of the counties for purposes of preparing them to take over any components of these functions ought to be assessed and enhanced as is appropriate. v. Policy and legal realignment of the sector requires a speedy conclusion.
Library Services	<ul style="list-style-type: none"> i. Library services are a devolved function under the Fourth Schedule of the Constitution. ii. There are 62 public libraries in Kenya, which are spread over 33 counties. While the function was transferred through LN 22 of 2016 the libraries have still not been handed over to county governments. iii. li. There are ongoing intergovernmental consultations on the shared performance of the function. 	<p>Review the draft legal and institutional framework for managing the sector requires completion. This will include the enactment of the pending Library Services Bill, which should incorporate the intergovernmental; agreements on the matter.</p>
Agriculture Sector	<ul style="list-style-type: none"> i. The TA exhaustively transferred functions to the county governments under this sector but the implementation of the function is at variance with this transfer. ii. The National Government continues to be engaged in the agriculture sector through various parastatals 	<ul style="list-style-type: none"> i. The key legal and institutional framework for the sector ought to be reviewed. In this regard, the role of AFFA should be evaluated against its legality/suitability from a devolved governance perspective taking into account the fact that Agriculture is largely a devolved function. ii. There is a need for budget rationalization since the majority of these national-level institutions operating in the sector have retained their budgets and operational space without due regard to the transfer of functions that was undertaken by the TA.

Table 3.8: Transferred Functions that are still being performed at the National Level Cont'd)

Function	Status	Recommendation
		iii. Intergovernmental consultations are required to determine which aspects of agriculture can be performed at the national level from a strategic and food security perspective. It is also critical that the recommendations of the Task Force on State Corporations be reviewed with the intention of adoption under the sector particularly as relates to privatization of some of the agriculture-related parastatals.
Betting Control Activities	<ol style="list-style-type: none"> 1. Betting control activities are a function of the county governments while the National Government is responsible for betting and gambling at a national level. The National Government is also responsible for regulation, norms and standards. 2. The precise functional boundaries are still not formally defined but intergovernmental consultations on the function are ongoing 	The functional assignment between the two levels of government should be incorporated in a legal and institutional framework upon conclusion of intergovernmental consultations. The latter must be completed and formalized urgently to reduce jurisdictional conflicts in the sector
Ferries/Harbors	<p>This is a concurrent function because while the county governments are allocated ferries and harbour the National Government is allocated marine navigation and the use of international waters.</p> <p>The precise functional boundaries are still not formally defined but intergovernmental consultations on the function are ongoing</p>	The functional assignment between the two levels of government has largely been concluded. It should be incorporated in a legal and institutional framework upon conclusion of any outstanding issues.
Disaster management	<p>This function is allocated to both national and county governments</p> <p>There is no formal mechanism for determining the respective responsibilities of disasters</p>	A national disaster policy that incorporates the respective responsibilities of the national and county governments should be adopted. Intergovernmental consultations are required to ensure ownership of the policy.

State Corporations and Performance of Devolved Governance Functions

4

The Taskforce on State Corporations Reforms in its report made it clear that there are a total of 18²⁸ State Corporations that were still performing functions that had been devolved with the onset of devolution. The Taskforce advised that these entities do not qualify as Government Owned Entities and consequently it was incumbent on the governments of the day and all relevant stakeholders to agree on the modalities for the dissolution of these entities in line with the dictates of the Constitution and especially the functional assignment put forth in the Fourth Schedule²⁹.

Specifically, it was the submission of the Taskforce that in the performance of their respective functions as assigned under the Constitution, both levels of government ought to abide with the functional separateness spelt out in the Constitution and the law. The Taskforce also took note of the fact that majority of these state corporations had largely been in operation before August 27th 2010 and at that time had been carrying out functions that the Constitution later assigned to county governments.

Consequently, the Taskforce concluded that as a way of resolving the disputes revolving around the continued existence these state corporations and the larger public need to curb their continued performance of county functions, that some of these state corporations should³⁰:


- a. Transit to entities owned by county governments
- b. Transit to entities owned jointly by several county governments as joint authorities
- c. Be owned jointly between national government and one or more county government/s
- d. Cease to exist since their functions shall be taken over by county governments

Generally, state corporations in the history of the country and before the Constitution of Kenya, 2010 had largely been formed to meet both commercial and social goals. In essence, they had existed for various reasons including the correction of market failure, exploitation of social and political objectives and income redistribution. All this came in

²⁸ See annexure marked B.

²⁹ Entities perform functions that stand dissolved in line with Schedule Four of the Kenya Constitution 2010 and as such, do not qualify as GOEs. Further Consultation on handling modalities between the National and County governments is advised. (See page 110 Table 8.2 of the Task Force Report).

³⁰ See page 35 of the Report by the Presidential Taskforce on Parastatal Reforms.



the wake of the sessional paper no 10 of 1965 that called for the indigenization of the Kenyan economy.

While the place and significance of state corporations in the Kenyan economy cannot be downplayed, the reality occasioned by the passage of the current Constitution must be fully taken into consideration; meaning that, state corporations that are performing county functions ought to have their operations realigned with the Constitution. The process of realignment or reformulation of the existence and operations of the State Corporations to conform to the Constitution requires careful analysis and consideration so that policy or performance gaps do not accrue because of the process. Each corporation must be looked at it in terms of the services it is offering and the dynamics that define the need for the devolution of the services that they offer.

For instance, some of these corporations perform regional functions that cannot mechanically be devolved to the counties without a proper and detailed understanding of the crosscutting nature (both geographically and operationally) of the services that they offer. While such bodies may not be devolved to individual counties, it may be possible to transfer the same to a consortium of counties based on an agreed framework for engagement and sharing between the counties.

4.1 State Corporations that ought to be Devolved

The Report by the Presidential Taskforce on Parastatal Reforms listed 18 state corporations as being worthy of being devolved because they are performing devolved functions (Table 4.1). Based on that notion, a scrutiny of the budget for the financial year 2012/13 by the International Budget Partnership (IBP) showed that these 18 state corporations had an allocation amounting to 52 billion, which by the financial year 2014/15 had increased to Kshs. 57 billion as per the table below. Further, the IBP in its study reached the conclusion quoted below.

A substantial amount of this funding is in the form of local AiA and external funding, although the share has decreased from 46 per cent in FY 2012/13 to 38 per cent in FY 2014/15. This means that these corporations are more dependent than before on government transfers, which comprise the other 62 per cent of their funding. There are some changes in the expenditure estimates for individual entities, the most notable of which is the increase from Kshs. 2.4 billion to Kshs. 13.9 billion for the Rural Electrification Authority.

Table 4.1: State corporations that ought to be devolved based on the Taskforce Report

	State Corporation Performing Developed Functions in the Parastatal Report	Expenditure Estimates (2012/13)	Expenditure Estimates (2014/15)	Proportion of funding by sources to the Total Expenditure (2012/13)	Proportion of funding by the source to the Total Expenditure (2014/15)
1.	Athi Water Services Board	3.5	4.6		
2.	Coast Water Services Board	3.7	2.8		
3.	Lake Victoria North Water Services Board	0.9	2.2		
4.	Lake Victoria South Water Services Board	2.5	2.2		
5.	Northern Water Services Board	2.4	0.4		
6.	Rift Valley Water Services Board	0.5	2.1		
7.	Tana Water Services Board	3.4	0.9		
8.	Tanathi Water Services Board	3.4	1.0		
9.	Coast Development Authority	0.2	0.2		
10.	Ewaso N'giro North Development Authority	0.9	0.4		
11.	Ewaso N'giro South Development Authority	0.2	0.3		
12.	Kerio Valley Development Authority	0.6	0.6		
13.	Lake Basin Development Authority	0.4	0.3		
14.	Tana & Athi Rivers Development Authority	0.6	0.5		
15.	Kenya Rural Roads Authority	17.1	15.9		
16.	Kenya Urban Roads Authority	9.0	8.0		
17.	Rural Electrification Authority	2.4	13.9		
18.	Kenya National Library Services (KNLS)	0.8	11		
	Total	52.5	57.2		
	Of which:	-	-		
	Government Transfers	28.5	35.6	54%	62%
	Local Appropriation in Aid (AiA)	14	4.1	3%	7%
	External AiA + External Revenues	22.5	17.6	43%	31%

Source: International Budget Partnership (Kenya)

Table 4.2: State Corporations that are Performing County Government Functions

#	State Corporation	Enabling Legislation	M
1.	Rural Electrification Authority	Energy Act, Cap 12	To ele so
2.	Athi Water Services Board	Water Act, Cap 372	Eff wa At
3.	Coast Water Services Board	Water Act, Cap 372	Eff wa Re
4.	Lake Victoria North Water Service Board	Kenya Gazette Notice No. 1717 of March 12, 2004, and licensed by the Water Services Regulatory Board (WSREB) on April 5, 2004	Pr se
5.	Lake Victoria South Water Service Board	Water Act, Cap 372	Pr se
6.	Northern Water Services Board	Water Act, Cap 372	Pr se
7.	Rift Valley Water Services Board	Water Act, Cap 372	Pr se
8.	Tana Water Services Board	Water Act, Cap 372	Pr se
9.	Tanathi Water Services Board	Water Act, Cap 372	Pr se
10.	Coast Development Authority	Coast Development Authority Act, Cap 449	Pla im pr Pr zo

Mandate	Sector	Recommendations
To accelerate the pace of rural electrification to promote sustainable socio-economic development	Energy & Petroleum	The function assigned to County Government
Efficient and economical provision of water services within the Nairobi and Athi Basin/Region	Environment, Water & Natural Resources	Transfer as a joint authority to counties covered under Article 189 (2) subject to discussions between the National Government and county governments
Efficient and economical provision of water services within the Coast Region	Environment, Water & Natural Resources	.Transfer as a joint authority to counties covered under Article 189 (2) subject to discussions between the National Government and county governments
Provision of water and sanitation services	Environment, Water & Natural Resources	Transfer as a joint authority to counties covered under Article 189 (2) subject to discussions between the National Government and county governments
Provision of water and sanitation services	Environment, Water & Natural Resources	Transfer as a joint authority to counties covered under Article 189 (2) subject to discussions between the National Government and county governments
Provision of water and sanitation services	. Environment, Water & Natural Resources	Transfer as a joint authority to counties covered under Article 189 (2) subject to discussions between the National Government and county governments
Provision of water and sanitation services	.. Environment, Water & Natural Resources	Transfer as a joint authority to counties covered under Article 189 (2) subject to discussions between the National Government and county governments
Provision of water and sanitation services	Environment, Water & Natural Resources	Transfer as a joint authority to counties covered under Article 189 (2) subject to discussions between the National Government and county governments
Provision of water and sanitation services	.Environment, Water & Natural Resources	Transfer as a joint authority to counties covered under Article 189 (2) subject to discussions between the National Government and county governments
Plan and coordinate the implementation of development projects in the whole of the Coast Province and the exclusive economic zone	Environment, Water & Natural Resources	Transfer as a joint authority to counties covered under Article 189 (2) subject to discussions between the National Government and county governments

Table 4.2: State Corporations that are Performing County Government Functions (Cont'd)

#	State Corporation	Enabling Legislation	M
11.	Ewaso Ng'iro North Development Authority	Ewaso Ng'iro North River Basin Development Authority Act, Cap 448	Pla im pr Ri
12.	Ewaso Ng'iro South Development Authority	Ewaso Ng'iro South River Basin Development Authority Act, Cap 447	Pla im pr Ri
13.	Kerio Valley Development Authority	Kerio Valley Development Authority Act, Cap 441	To m an ad op m be G ot de du th
14.	Lake Basin Development Authority	Lake Basin Development Authority Act, Cap 442	C de de co an an re de
15.	Tana & Athi Rivers Development Authority	Tana and Athi Rivers Development Authority Act, Cap 443	Pla im pr
16.	Kenya National Library Service (KNLS)	Kenya National Library Services Board Act, Cap 225	Pr
17.	Kenya Rural Roads Authority	Kenya Roads Act, Act No. 2 of 2007	Cl th re ru
18.	Kenya Urban Roads Authority	Kenya Roads Act, Act No. 2 of 2007	M re pu m th

Mandate	Sector	Recommendations
Plan and coordinate the implementation of development projects in the Ewaso Ng'iro North River Basin and catchment areas	Environment, Water & Natural Resources	Transfer as a joint authority to counties covered under Article 189 (2) subject to discussions between the National Government and county governments
Plan and coordinate the implementation of development projects in the Ewaso Ng'iro South River Basin and catchment areas	Environment, Water & Natural Resources	Transfer as a joint authority to counties covered under Article 189 (2) subject to discussions between the National Government and county governments
To plan, initiate, coordinate and monitor implementation of programs and projects that transcend administrative boundaries within the operation area of KVDA. It is also mandated to maintain a liaison between the institutions (KVDA), Government, Private sector and other agencies on matters of development in the area given limiting duplication of activities and ensuring the best use of technical, financial, human and natural resources	Environment, Water & Natural Resources	Transfer as a joint authority to counties covered under Article 189 (2) subject to discussions between the National Government and county governments
Carry out integrated sustainable development planning, Implement development programs and projects, coordinate development programs and activities, promote management and conservation of natural resources, and monitor and evaluate development programs and projects	Environment, Water & Natural Resources	Transfer as a joint authority to counties covered under Article 189 (2) subject to discussions between the National Government and county governments
Plan and coordinate the implementation of development projects in the TARDA areas	Environment, Water & Natural Resources	Transfer as a joint authority to counties covered under Article 189 (2) subject to discussions between the National Government and county governments
Provide public library services	Sports, Culture & The Arts	Transfer as a joint authority to counties covered under Article 189 (2) subject to discussions between the National Government and county governments
Charged with the responsibility for the management, development, rehabilitation, and maintenance of rural roads, including	Transport & Infrastructure	Transfer as a joint authority to counties covered under Article 189 (2) subject to discussions between the National Government and county governments
Management, development, rehabilitation and maintenance of all public roads in the cities and municipalities in Kenya except where those roads are national roads	Transport & Infrastructure	Transfer as a joint authority to counties covered under Article 189 (2) subject to discussions between the National Government and county governments


Table 4.3 Cost of Financing these State Corporations that primarily ought to be Devolved:

State Corporations Performing Devolved Functions in the Parastatal Report	Expenditure Estimates 2012/13	Coded to Be Devolved 2012/13	
Athi Water Services Board	3,463,000,000	-	
Coast Water Services Board	3,700,480,111	-	
Lake Victoria North Water Service Board	881,676,634	-	
Lake Victoria South Water Service Board	2,452,400,000	-	
Northern Water Services Board	2,371,480,000	-	
Rift Valley Water Services Board	506,000,000	-	
Tana Water Services Board	3,433,960,000	-	
Tanathi Water Services Board	3,391,672,549	-	
Coast Development Authority	249,389,860	199,389,860	
Ewaso Ng'iro North Development Authority	939,340,579	754,340,589	
Ewaso Ng'iro South Development Authority	242,444,166	222,444,166	
Kerio Valley Development Authority	569,986,104	569,986,104	
Lake Basin Development Authority	421,661,127	271,661,127	
Tana & Athi Rivers Development Authority	593,148,582	528,648,582	
Kenya Rural Roads Authority	17,076,641,790	139,464,362	
Kenya Urban Roads Authority	8,971,248,000	1,452,150,000	
Rural Electrification Authority	2,415,000,000	330,000,000	
Kenya National Library Service (KNLS)	788,000,000	20,000,000	
Total	52,467,529,502	4,488,084,790	

Source: International Budget Partnership (Kenya)

	Local AIA	External Funding	Local AIA+ External Funding	Total Exp - (Local AIA+ External Funding)
	250,000,000	3,123,000,000	3,373,000,000	90,000,000
	601,445,000	2,923,092,911	3,524,537,911	175,942,200
	35,000,000	674,276,634	709,276,634	172,400,000
	35,000,000	2,070,000,000	2,105,000,000	347,400,000
	13,000,000	2,091,000,000	2,104,000,000	267,480,000
	100,000,000	270,000,000	370,000,000	136,000,000
	84,250,000	3,085,600,000	3,169,850,000	264,110,000
	42,820,239	3,033,000,000	3,075,820,239	315,852,310
	-	-	-	249,389,860
	-	542,000,000	542,000,000	397,340,579
	1,500,000	-	1,500,000	240,944,166
	75,000,000	200,000,000	275,000,000	294,986,104
	21,500,000	-	21,500,000	400,161,127
	157,000,000	85,000,000	242,000,000	351,148,582
	-	928,000,000	928,000,000	16,148,641,790
0	-	3,500,000,000	3,500,000,000	5,471,248,000
	-	-	-	2,415,000,000
	25,000,000	-	25,000,000	763,000,000
0	1,441,515,239	22,524,969,545	23,966,484,784	28,501,044,718





Whilst the tables above show the kind of budgetary expenses that are being incurred by state corporations that ideally should be devolved, it is also indisputable that state corporations are undertaking functions that belong either fully or partially to county governments. Significant monies that are being utilized by these corporations may be for components of their functions that have no strategic reason for remaining with the national government. Those components of the functions and the requisite funds should be transferred to county governments.


The National Treasury has argued that the TA undertook and concluded the process of unbundling of functions touching or relating to regional authorities without adequately or correctly identifying the resources that flow with those functions. It would be impossible to effectively transfer the functions in totality and any partial transfer would be impossible without disaggregating each component of their function and costing it. Such a process must be undertaken before concluding any transfer process.

In its publication, the International Budget Partnership (IBP) affirms that state corporations performing devolved functions had a total allocation of Kshs. 127 billion in FY 2014/15 and which amount was Kshs. 10 billion higher than the FY2012/13 allocation. While it cannot be assumed that all these monies are county government entitlements, they do indicate a challenge that requires solution so that only those components of these functions that are necessary and can only be carried out these institutional arrangements are retained.

For instance, the monies that are currently disbursed to the counties courtesy of the Kenya Roads Board are collected from a dedicated revenue source and have since been converted to conditional grants to the counties with specific earmarks on road maintenance. This has been done without devolving whether fully or partially, the Kenya Roads Board.

4.2 Determinations and Way Forward for State Corporations and Regional Development Authorities

- i. While there have been consistent calls for the immediate transfer of the functions being performed by state corporations to county governments, the same cannot be done without a detailed framework for transfer so as not to cripple critical service delivery functions currently carried out by these organs. These entities within their respective areas of coverage have a tremendous social and economic impact within their areas of operation that cannot be wished away.

- 
- ii. These institutions especially the Regional Development Authorities ought to recalibrate their activities and reposition themselves as resource institutions that can aid counties in the implementation of large development infrastructure projects including mobilization of funds of such projects for and on behalf of county governments.
 - a. The RDAs are National Strategic Institutions that implement strategic integrated projects on behalf of both levels of governments such as integrated multipurpose dams and strategic national investments. In that regard, there should be a deliberate restriction of their mandate to undertaking multipurpose projects.
 - iii. Some of these entities largely generate their income from the activities that they undertake and such income is predominantly in the form of Appropriations in Aid (AIA), which monies largely meet their operations cost with probably very little funding from the national government. The circumstances of each state corporation should be looked into and a proper determination on the way forward thus undertaken based on facts, figures and information unravelled thereto. This is because the existence of some of the state corporations/ regional authorities are still implementing projects that are donor financed and thus incapable of being partitioned into several dockets of management by as many counties that have such regional authorities falling within their respective enclaves of influence.
 - iv. These entities ought to review the legal and institutional framework upon which their current activities and operations are predicated to ensure that they conform to the requirements of the Constitution as specifically those put forth in the Fourth Schedule.
 - v. As part of such restructuring, they must take cognizance of the need to involve counties through an intergovernmental consultative framework on matters of project identification, implementation and management. This is particularly important where the matter at hand is a devolved function that generates own revenue.



- vi. Lastly, some of the proposals put forth by the Presidential Task Force on Parastatal Reforms included the ones below.
 - a. Identification of functions that were previously being undertaken by state corporations courtesy of the national government, yet these functions have been assigned to the county governments as per the Fourth Schedule to the Constitution. This would therefore include.
 - i. With the Fourth Schedule as a reference point, review and identification of the relevant state corporations that have their activities or operations not compliant with the Fourth Schedule of the Constitution.
 - ii. Design strategies and mechanisms for ensuring the smooth transfer and takeover of these functions that belong to counties though still being performed at the national level. These strategies must be formulated and backed with appropriate legal and institutional infrastructure.
 - b. As for state corporations that are purely carrying out national government functions, there is a need to find ways of creating an operational interface between their activities and those of the county governments wherein they operate. Such interfaces also ought to be backed with policy and regulatory frameworks that conform to the Constitution and existing laws on devolution.

Framework for Functions Unbundling and Transfer

5

The complete and comprehensive transfer of functions allocated to county governments is a constitutional and statutory imperative that will facilitate the effective implementation of governmental functions as contemplated by the Constitution. This study identified areas that are outstanding in this process, isolated the related challenges and outlined ways in which they are best resolved.

One of the significant bottlenecks to the completion of the transfer process are the functions yet to be unbundled and transferred given, inter alia, the institutional frameworks in which they are currently being performed. The implementation framework proposed herein is aimed at assisting the IGTRC more efficiently and effectively conclude this outstanding process in a manner that respects the dictates of the Constitution and the applicable laws.

To ensure the completion of the outstanding process the IGTRC must ensure the realization of the following.

- a. Ensuring that all relevant stakeholders understand and commit to the full implementation of the constitutional principles of devolution and fiscal decentralization as they relate to the transfer of functions process. This will help scale down on any potential resistance to the implementation of the system of devolved governance.
- b. Review existing legal and institutional frameworks for purposes of determining and eliminating disputes, duplication of mandates and resources.
- c. Invest in capacity building initiatives that enhance the abilities of both levels of government to deliver on their policy, legal and functional mandates provided for under the Constitution. Deliberate strategies must be employed for purposes of identifying capacity gaps as well as designing activities to improve capacity for performance especially on the part of county governments.
- d. Fostering of effective intergovernmental relationships that will reduce institutional turf wars and roles duplication.

5.1 Unbundling and Transfer of Remaining Functions: Implementation Framework

Component One: Institutional Survey and Mapping

Objective

- i. To ensure that all institutions against whom functional unbundling and transfer is to be undertaken and those that are to be impacted by the same are mapped out.
- ii. To create and strengthen institutional capacities to implement, manage and support the process of functional unbundling costing and transfer.

Outputs

- i. Concluded institutional mapping and responsibility identification survey.
- ii. Appropriate strengthening of organizational/institutional and management structures and systems at both levels of government and intergovernmental level to ensure capacity for effective unbundling and transfer.
- iii. All concerned departments of government at both levels and other key stakeholders are aware of the decentralization policy needs and processes as they relate to the subject of functions assignment.

Table 5.1: Unbundling and Transfer of remaining Functions: Implementation Framework

Activity	Sub-activity	Responsibility
<p>i. Identification of all the state corporations/MDAs whose functions are affected by the intended process of function unbundling, and consequent transfer.</p>	<p>i. Study of the mandates and the services that these institutions offer, and how the same aligns with the Constitution particularly the Fourth Schedule.</p> <p>ii. Mapping of stakeholders and all relevant sector mobilizations and agreements that are critical to the function intended to be unbundled – what their respective roles and responsibilities are in the process.</p> <p>iii. Strengthening the capacity of relevant institutions to engage in the process.</p>	<p>Intergovernmental Technical Relations Committee (IGTRC).</p>
<p>Component Two – Consultative Legal and Policy Framework Review</p> <p>Objectives</p> <p>i. To enhance inter-governmental consultation</p> <p>ii. To review the legal policy and institutional frameworks</p> <p>Outputs</p> <p>Devolution related policies and laws impacting the functions in question are reviewed and gaps identified.</p> <p>i. Enhanced levels of communication and effective consultation between the two levels of government.</p> <p>Strategies</p> <p>Identification of legal, policy and regulatory gaps.</p> <p>i. Sector-wide Stakeholder Consultation forums and related initiatives.</p>		
Activity	Sub-activity	Responsibility
<p>i. Sectoral intergovernmental consultations</p> <p>ii. Review of existing sector policies to determine their complementarity with the system of devolved governance.</p> <p>iii. Draft bills/policies as the case may be, based on the outcome of the process of policy review as above.</p>	<p>i. Operationalization of sectoral intergovernmental forums</p> <p>ii. Identification of all legislative and regulatory provisions associated with the sectors intended to be unbundled.</p> <p>iii. Evaluation of how they compare or relate with the Constitution and relevant legislation.</p>	<p>Sector ministries in consultation with county governments, Kenya Law Reform Commission</p>



Activity	Sub-activity	Responsibility
	iv. Identification of possible gaps or overlaps that may undermine the process of transfer.	
<p>Component Three - Intergovernmental agreements and timelines for functions unbundling and Assignment.</p> <p>Objective To agree on the framework and institutional responsibilities for functions unbundling.</p> <p>Outputs</p> <ul style="list-style-type: none"> i. Agreement on the principles for functions unbundling and assignment. ii. Disaggregation and assignment of the functions in question. 		
Activity	Sub-activity	Responsibility
<ul style="list-style-type: none"> i. Define the coordination and consultative framework between the two levels of government in the process. ii. Determine the Principles and criteria to aid decisions on functions assignment (subsidiarity, externalities, economies of scale, current & potential capacity of receiving levels and others). iii. Review the operations, composition, and relationships of all identified institutions in the context of devolved governance. iv. Agree on timelines for the conduct of the functions unbundling and assignment process. v. Conduct the functions unbundling process including assignment. vi. Define in detail the functions and responsibilities of the entity whose functions are under review separating them into policy, programs, and regulatory responsibilities. 	<ul style="list-style-type: none"> i. Categorization of the functions into exclusive, reversionary or concurrent. ii. Agreeing on the norms and standards for the unbundling of the function taking into account the principles of devolution, public finance, subsidiarity, and service delivery standards. iii. Analysis and unbundling of the function including a determination of the sub-functions that constitutes the function taking into account aspects of policy, regulation, administration and service delivery. <p>These shall include:</p> <ul style="list-style-type: none"> a. Unbundling of substantive parts of the sector/functions into substantive areas, services, activities and sub-activities (e.g., “water” into irrigation, clean water 	<p>MODP, relevant sectoral committees, IGTRC and IBEC</p>

Table 5.1: Unbundling and transfer of remaining functions: implementation framework (Cont'd)

Activity	Sub-activity	Responsibility
<p>vii. Assign the unbundled components of the functions based on consultations guided by agreed principles.</p>	<p>supply, hydro-generation etc.).</p> <p>b. Unbundling of management functions (like planning, policy formulation, financing, implementation, regulation etc.) for a detailed scope of assigned responsibility.</p> <p>4. Devise strategies for the identification of personnel, assets and financial resources as the circumstances of each function to be unbundled may demand.</p>	
<p>Component Four - Functions Costing and Transfer Process</p> <p>Objective</p> <p>i. To assign costs to unbundled Functions.</p> <p>ii. To effectively transfer the functions to the relevant level of Government.</p> <p>Outputs</p> <p>Appropriate financial resources allocated to the relevant level of government in line with the status of functions</p> <p>i. Intergovernmental Agreements for Transfer implemented.</p> <p>ii. Functions transferred.</p> <p>iii. Appropriate organizational/institutional and management structures and systems developed at all levels of government for service delivery and development in line with new functional status</p> <p>iv. An appropriate legal review was undertaken to align with new function assignment status</p>		
Activity	Sub-activity	Responsibility
<p>i. Agreement on the costing and financial resourcing of the identified functions</p> <p>ii. Revision of legal and institutional framework to accord with new function assignment status</p> <p>iii. Facilitate the transfer of the functions</p>	<p>i. Consultations on the appropriate method of costing including dealing with assets and liabilities</p> <p>ii. Transfer of functions and all resources including human resources necessary for effective implementation</p> <p>iii. Timelines for the conduct and completion of the exercise</p>	<p>IGTRC, COG, Summit, MODP and concerned ministries.</p>



Activity	Sub-activity	Responsibility
	iv. Agreement on a comprehensive implementation process.	
<p>Component Five: Institutional Capacity Building</p> <p>Objective</p> <ul style="list-style-type: none"> i. A capacity-building program that is holistic in the approach that takes into consideration the entire system required for the functioning of the county governments. ii. A capacity-building program that is designed according to the different needs of the different county governments. iii. Formal and informal training of relevant county personnel on the general role of counties and the uptake of the functions transferred to the counties. <p>Outputs</p> <ul style="list-style-type: none"> i. An effectively structured and well-coordinated capacity building program for receiving agencies or counties. ii. Prioritized and well-covered areas of capacity development intervention. 		
Activity	Sub-activity	Responsibility
<ul style="list-style-type: none"> i. Identifying the key players in the decentralization effort. ii. Delineating the roles of the key players and how these are to be played. iii. Clearly examining their normal institutional missions, mandates and objectives vis-à-vis how they would relate to the decentralization process. iv. Clearly mapping the different interfaces and how these are to be managed. v. Assessing of the individual and collective capacity of all the key stakeholders to carry out their functions in the whole exercise, including the coordinative/collaborative Junction which is essential for the process to go forward smoothly. vi. Strengthening the management and coordinating capacity of ministries and intergovernmental agencies through restructuring and 	<ul style="list-style-type: none"> i. Training ii. Performance management iii. Financial management iv. Installation of systems v. Capacity Development in legislation and policy formulation. 	IGTRC, MODP and COG.



Activity	Sub-activity	Responsibility
training. vii. Strengthening and guiding implementing agencies to effectively spearhead the implementation of existent decentralization policies.		
<p>Component 6: Monitoring and Evaluation</p> <p>Objective</p> <p>I. Develop and institutionalize an appropriate monitoring and evaluation system that facilitates effective tracking of the implementation of the devolved system of governance.</p> <p>Outputs</p> <p>i. An effective results-based monitoring and evaluation system ii. Functional monitoring and evaluation units at all levels iii. Improved feedback mechanisms</p> <p>Strategies</p> <p>i. Work towards the design and implementation of an effective monitoring and evaluation system that will take into consideration the implementation of the system of devolved governance. ii. Work towards strengthening the oversight role of stakeholders through their effective participation in monitoring and evaluation.</p>		
Activity	Sub-activity	Responsibility
i. Review of the current monitoring and evaluation framework ii. Design and institutionalize effective results-based monitoring and evaluation framework iii. Develop Monitoring and Evaluation training manuals for the application of the M&E system and use by various levels of policy implementers iv. Facilitate annual reviews of the implementation program		IGTRC, MODP, and COG.

Table 5.2: Timelines for Undertaking the Functional Unbundling and Transfer

Activity	3months	6 months	One Year	Continuous
Institutional Survey and Mapping				
Consultative Legal and Policy Framework review				
Intergovernmental agreements and timelines for functions unbundling and Assignment.				
Functions Costing and Transfer Process.				
Institutional Capacity Building				
Monitoring and Evaluation				

6

Conclusions and Recommendations

As already noted in the course of this study, functions assignment and transfer is one of the most critical aspects of Kenya's devolved governance structure. Even though the same is constitutionally provided for, there are still challenges that are being experienced in the transfer of functions and the role that is played by each level of government. The Constitution envisages that there should be a fair degree of comity between the two levels of government and in that regard, the Intergovernmental Relations Act, 2012 establishes the legal and institutional framework for consultation, cooperation on and dispute resolution between the National and county governments and amongst the county governments inter alia, in the process of transfer and performance of functions³¹

To the extent that an effective functions transfer process has a direct impact on the quality of service delivery, any outstanding issues in the transfer process must be concluded with utmost urgency. In addition to the issues addressed in the body of the study, the following issues require attention as a matter of urgency.

6.1.1. Further Unbundling of the Fourth Schedule

It is our considered view that the Fourth Schedule of the Constitution needs further breakdown because the functions listed therein are still highly aggregated. A casual division along the lines of "policy versus implementation" or "national versus county" is still a broad spectrum for classification or delineation with a high degree of haziness on the specific boundaries of these functions. Therefore, reliance on the Fourth Schedule alone as the basis for delimiting the boundaries of responsibility between the National and county governments in matters of the division of functions might prove futile. This may take the form of formulation or revision of the law as was proposed in the IGRTC report on "Emerging issues on Devolution and Best Practices in Intergovernmental Relations" which stated in part³²

"It is submitted that there is need to, through cooperative government and intergovernmental relations, enact national legislation on functions and powers to clarify the constitutional assignment of functions and powers to the two levels of government. This legislation, which should be styled "The Functions and Powers Act", should aim to operationalize Articles 186(1), (2) and the Fourth Schedule, 186(3), 183(1)(b), and 187

³¹ South Africa has come up with Intergovernmental Dispute Guidelines (2007)

³² Page 60

of the constitution. This must be achieved through making provision for the clarification of functional assignment and the functional lists; establishment of a framework for the national government assignment of additional functions and powers to county governments; and establishment of a framework for the intergovernmental transfer of functions and powers.”

6.1.2 Intergovernmental Relations

Generally, intergovernmental relations are the relationships that arise between different levels of governments or between organs of state from different levels of governments in the conduct of their affairs. It encompasses all the complex and interdependent relations among various spheres of government as well as the coordination of public policies (including policies on sustainable development) among national and local governments through program reporting requirements, grants-in-aid, the planning and budgetary process and informal communication among officials. Intergovernmental relations are therefore a set of formal and informal processes as well as institutional arrangements and structures for bilateral and multilateral co-operation within and among the three spheres of government³³

Cooperation and intergovernmental relations may involve a wide array of institutional processes ranging from phone calls between civil servants to inter-ministerial meetings. It may encompass activities that range from the creation of joint bodies to the creation of a variety of consultation mechanisms for purposes of deliberations on various aspects of government responsibilities and their delivery.

It is against this background that the Act establishes the following intergovernmental relations bodies: National and County Government Coordinating Summit, the Intergovernmental Relations Technical Committee and the Council of Governors. The Public Finance Management Act, 2012 creates the Intergovernmental Budget and Economic Council as a forum for consultation and cooperation between the two levels of government on fiscal matters. The Intergovernmental Relations Act allows for the setting up of sectoral working committees, which must be fully operationalized and consequently made functional for purposes of redressing the intergovernmental challenges that stem from function implementation.

These entities are meant to deliberate and agree on issues that are of common interest to the country and the advancement of the prospects of devolved governance. At the

³³ *Intergovernmental relations and co-operative government in South Africa: The ten-year review.* L. Malan (University of Pretoria).



core of devolution lies functional assignment and the costing that defines the process.

However, while some sector ministries have tried to incorporate principles of devolution in their policy development process, others have continued to create structures, which ignore to some extent the devolution and fiscal decentralization imperative. Thus apart from general inertia, there have been problems such as lack of policy clarity, lack of clarity on the institutional development required to implement decentralization, and lack of clarity on the part of each sectoral ministry as to what initiative they are expected to take.

There are also of course issues such as the professional and other capacity constraints at national and county levels, as well as in some cases, questions on the need to develop further the Kenyan model of devolution so that it is contextually relevant to the Kenyan situation. We should be learning from our experiences and applying those lessons towards the betterment of the Kenyan model of devolution. What has been lacking is a conscious and joint effort pitting both levels of government on the coordination of their government activities to ensure a common decentralization philosophy, program and strategy.

Consequently, there would be immense value if these institutions were able to jointly huddle around the issues afflicting devolved governance and give direction on outstanding issues.

For instance, several functions, such as disaster management, and casinos and betting control are shared between the two levels of government. Such concurrency of functions requires that the two levels of governments work or closely associate with each other for effective delivery on these functions.

Any failure at cooperation consigns the process of implementation of such functions to the arena of institutional conflicts with the potential or real consequence that effective implementation of devolution is undermined. In any event, the disputes that have been witnessed have been largely political and they have arisen out of the misunderstanding emanating from the carrying out of shared/joint mandates. Some of the technical deficiencies that have been witnessed within the duration of the existence of these forums include;

- i. Absence of effective administrative procedures for establishing and managing intergovernmental sector forums.
- ii. The decisions of the forums are not binding

- iii. Absence of enforcement mechanism for forum decisions. Follow up mechanisms are either weak or nonexistent.


Some of the suggestions that have been floated for purposes of dealing with these deficiencies;

- i. Development of regulations that operationalize the Intergovernmental Relations Act, 2012 for purposes of giving greater certainty to the ideals and operations of the Act.
- ii. Adopting and inculcating Alternative Dispute Resolution (ADR) as a key mechanism for the resolution of disputes in the first instance.
- iii. Review the legislation and regulations to strengthen intergovernmental relations, in particular:
- iv. Gazette and operationalize the intergovernmental sector consultative forums including focal points at both levels of government for purposes of facilitating a cooperative government.
- v. Clearly demarcated areas of responsibility and accountability for all institutions whether at the national or county level.
- vi. The encouragement of creativity for collaboration and partnership while strengthening the performance and accountability of distinctive institutions.
- vii. Elimination of wasteful and unnecessary duplication to avoid `turf battles.

6.1.3 Policy Formulation and Alignment

Within a system of cooperative governance, it is important to ensure that the different spheres and departments of government complement each other in achieving nationally accepted policy goals. Where the national government has been allocated a policy function, the necessary policies must be formulated so that the obligations of each level of government are clear. Naturally, such policies must respect inter alia the devolution principles set out in Article 189 including ensuring maximization of the functional autonomy of the counties. Policy formulation must never be used as a means of clawing back on Counties planning and implementation powers. Because county governments also have limited policy formulation powers, both levels of government must align policy to ensure that the rules and procedures of various policies do not contradict one another, but rather support one another and work in the same direction.

Policymaking, implementation, monitoring and review of capacity are necessary determinants of the pace of implementation of decentralization. The High Court in Petition No 593 of 2013 Okiya Omtatah Okoiti Vs Attorney General and 3 others emphasized the critical role that policy plays in defining functional boundaries.



The Constitution has not classified health facilities into certain levels, as that is a matter of policy. I therefore politely decline to get into the arena of defining what the phrases ‘national referral health facilities’ and ‘county health facilities’ are or what hospitals belong to what category. I say so because the Court is not the maker of the health policy in Kenya. The Court has no ability or mechanism to determine the criteria to be used to categorize hospitals, and it cannot examine the equipment, facilities and manpower available in the hospitals, as that is the exclusive mandate of the national government through the Executive. I am therefore in agreement with the submissions by the Respondents, the 2nd Interested Parties and the Amicus Curiae that this Court cannot determine the issues raised herein as it would amount to implementing and making policies for and on behalf of the Executive.

In light of the difficulties faced with the current constitutional architecture on functional assignment and transfer, it is incumbent on the IGTRC to embark on a process of clarifying the policy instruments for purposes of ensuring that the constitutional objectives are eventually met.

6.1.4 Capacity Building

Capacity building is the mainstay of devolved governance and in that regard, Administrative and institutional development capacity is necessary, and the same includes an appreciation of the fact that technical capacity to implement also determine at what pace decentralization can be implemented. Therefore, there is a need for a level capacity building that spans individual, organizational, institutional and system-wide capacity to be instilled across the devolution implementation spectrum.

It will be foolhardy to expect that the counties as they are and considering the reorganization occasioned by devolution, wouldn’t require significant retooling for purposes of ably supporting and delivering on devolution. Therefore, time and resources must be invested in assessing what is needed to create capacity in the system - the capacity to conceptualize, adopt, implement, and monitor the decentralization process in conformity with the dictates of the Constitution of Kenya, 2010.

Given the high degree of concurrency in the division of powers, the close fiscal ties, and the extent of national supervision over county governments, cooperation among the two levels of government is critical. Moreover, the Constitution mandates – and the massive task of capacity building in the new institutions requires - support and, sometimes, intervention by the national government, especially in the affairs of county governments.

In this regard, capacity building in the context of intergovernmental relations and considering the role of the national government in capacity building; the following ought to be observed as part of capacity building.

- i. Identifying the key players in the decentralization effort
- ii. Delineating the roles of the key players and how these are to be played
- iii. Clearly examining their normal institutional missions, mandates, objectives etc. vis-à-vis how they would relate to the decentralization process
- iv. Clearly mapping the different interfaces and how these are to be managed
- v. Assessing individual and collective capacity of all the key stakeholders to carry out their functions in the whole exercise, including the coordinative/collaborative function, which is essential for the process to go forward smoothly
- vi. Human resource management – the national government should be at the forefront in helping counties to undertake capacity building initiatives around these issues which include; helping them to design and implement staffing plans, HR competencies among other types of support. We must also be aware of the Capacity Assessment and Rationalization of the Public Service (CARPS), which is a process that ought to be fully concluded and consequently implemented.

6.1.5 Enhanced Clarity on Function Assignment

The table below offers a platform for redressing or reviewing areas of possible lack of clarity when it comes to functions responsibility and implementation.

Table 6.1: Enhanced Clarity on Function Assignment

Challenges arising from lack of clarity in functional assignment	Strategies for addressing the same
Duplication of services	Judicial/Negotiated interpretation
Increased contestation ^[1] _[SEP]	Judicial/Negotiated definitions
Ineffective or No services ^[1] _[SEP]	Statutory/ negotiated definitions ^[1] _[SEP]
Unfunded mandates	Negotiated definitions

6.2 The Threat of Re-centralization

This is a matter that is a constant threat to the wellbeing of devolution. Generally, for any decentralization process to succeed, the central or national government must be willing to concede or shed off powers to the lower level of government. What this means is that the national government must be willing to relinquish power and resources and must have the political will to engage in a shared exercise of power and authority. However, there lies a difficulty that stems from the fact that the National or central governments are always in a continuous state of wanting to recapture the same powers that have been transferred to the lower level governments thus undermining decentralization. This may be achieved through policy pronouncements or national legislation that allows national-level entities to operate in ways that go against the legal structure of devolution and effectively claw back on the gains of devolution.

Decentralization is often seen as a goal or an output, but in fact, successful decentralization is a process of gradually and strategically passing the responsibility of service delivery to lower-level governments. To this end, not only was functions transfer and adequate funding a necessary corollary to the success of devolution, the national government is required to build capacity in the county governments to enable them effectively carry out the functions transferred to them.

In the absence of adequate funding and capacity building the clamour for retransfer of functions back to the centre will be real as citizens are led to believe that the challenges in transfer of functions are a result of decentralization. The threat of re-centralization in those circumstances is real. What the clamour for re-centralization fails to appreciate is that decentralization is a necessary feature of self-government and citizen empowerment and the only way to ensure sustainable peace and stability for many nations, including Kenya.

ANNEXES

Annexe I

Institutions interviewed for this report

1. The Ministry of Devolution and Planning
2. The Ministry of Trade
3. The Ministry of Housing
4. The National Treasury
5. The Council of Governors
6. The Intergovernmental Budget and Economic Council
7. The Joint Loans Board
8. International Budget Partnership
9. The Privatization Commission
10. County Government of Muranga
11. County Government of Taita Taveta
12. County Government of Garissa

Questionnaire on Transfer of Functions (National government)

Ministry/Department: Date:

Name of Respondent:

Designation of Respondent:



Indicator and Short Definition/ Explanation	Study Questions	Instructions and Guiding Notes.									
Output 1: Transfer of functions under Schedule 4 of the Constitution											
Schedule 4 to the Constitution distributes functions between the National Government and the county governments	<p>Q1. Have you transferred all functions assigned to county governments as per Schedule 4 to the Constitution?</p> <p>1. Yes</p> <p>2. No</p>										
	<p>Q2. If No, which functions are still outstanding and for what reasons?</p>	Use a separate sheet for this section									
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	Functions not transferred		Reasons								
<p>Q3. Are there transferred functions to the County Government that you are still implementing?</p> <p>1. Yes</p> <p>2. No</p>											
<p>Q4. If YES, which function are these that were transferred but still getting implemented nationally and why?</p>	Use a separate sheet for this section.										
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Indicator and Short Definition/ Explanation	Study Questions	Instructions and Guiding Notes.						
	<p>Q5. For each function that has been transferred to the County Government and taken up,</p> <p>a) Are the county governments fully in charge of their implementation or are there external influences from other sectors or institutions of the National Government??</p> <p>b) Have the functions been fully transferred to the extent that the County Government is fully in charge of these functions and all their components?</p> <p>c) What is the understanding and approach of the National Government in the implementation of exclusive functions?</p> <p>i) How conjoined or detached do you work or associate with the county governments on the performance of these exclusive functions?</p> <p>ii) Which are the specific areas of the association if any?</p> <p>iii) Are you content with the situation as it obtains or would you advocate for it to be improved?</p> <table border="1" data-bbox="565 1374 1124 1608"> <thead> <tr> <th data-bbox="565 1374 878 1471">Function</th> <th data-bbox="881 1374 1124 1471">External Influence or Interference</th> </tr> </thead> <tbody> <tr> <td data-bbox="565 1476 878 1536"></td> <td data-bbox="881 1476 1124 1536"></td> </tr> <tr> <td data-bbox="565 1541 878 1608"></td> <td data-bbox="881 1541 1124 1608"></td> </tr> </tbody> </table>	Function	External Influence or Interference					<p>In this area, kindly be guided by considering the following;</p> <ol style="list-style-type: none"> 1. The Constitution assigns both the national and county governments functions under the 4th schedule. 2. Functions transfer was to be preceded by functional analysis (unbundling), costing and then transfer. 3. The Transfer Process was to be undertaken through the phased transfer process including capacity building. 4. There have been concerns that there are functions that were transferred though are still being performed at the national level. 5. The role of State Corporations and the implementation of County Functions.
Function	External Influence or Interference							
	<p>d) In terms of the interferences pointed out in (a) above, what steps have been taken in resolving the disputes above?</p> <p>i) Which specific steps have been undertaken towards the redress of the same? Kindly highlight.</p> <p>ii) What roles have the intergovernmental bodies played in helping resolve the disputes? (IBEC, Summit and CoG)</p> <p>iii) Are you content with the outcome of these processes? If not, what would like to be done differently?</p>							





Indicator and Short Definition/ Explanation	Study Questions	Instructions and Guiding Notes.
	<p>e) Kindly list any functions that were transferred to the county governments but are yet to be taken up by the county governments?</p> <ul style="list-style-type: none">i) Any reasons for these functions not being taken up? Kindly highlight.ii) For the functions that were transferred but not yet taken up, what became of the financing that comes with them?iii) Who is currently performing these functions? Kindly specify. <p>f) What are the implementation Challenges relating to delivery on these functions from a functional transfer perspective?</p> <ul style="list-style-type: none">i) Are these difficulties structural or capacity-related?ii) Any form of discussions with the county governments in helping resolve these difficulties?iii) Concerning (ii), what has been the outcome of such processes?iv) What solutions do you propose to address these challenges? <p>g) State Corporations and Regional Bodies:</p> <ul style="list-style-type: none">i) What roles are the State Corporations still playing?ii) The restructuring attempts – how much of the same has been realized in terms of conforming to the Constitution?iii) Does their continued existence compete with or compliment the functional roles of the county governments? Kindly elaborate.iv) Any attempts/recommendations on how best to manage or transition the existence of state corporations/ regional bodies into the framework of devolved governance?	

Indicator and Short Definition/ Explanation	Study Questions	Instructions and Guiding Notes.	
	h) Concurrent Functions: <ul style="list-style-type: none"> i) How has the issue of concurrent functions been approached? ii) Is there a framework for consultation including a responsibility matrix on the performance of concurrent functions as between the national and county governments? iii) In the absence of any framework, how has the matter been dealt with? iv) Any recommendations on how best to deal with concurrent functions? 		
	i) Functional Overlaps and Duplication <ul style="list-style-type: none"> i) Which are the reported areas of functional overlaps between the two levels of governments? ii) Which are the most affected functions based on the (categorize them either into concurrent, reversionary or exclusive functions) iii) Any remedial measures that have been taken to curb the situation including the agencies involved. 	(Use Separate Sheet)	
	Function	Specific Challenges Experienced	Recommendation on the resolution of challenges.
	a) Agriculture , including- crop and animal husbandry; Livestock sale yards; county abattoirs; plant and animal disease control and fisheries.		
	b) County health services including in particular— county health facilities and pharmacies; ambulance services; promotion of primary health care; licensing and control of undertakings that sell food to the public; veterinary services (excluding regulation of the profession); cemeteries, funeral parlours and crematoria; and refuse		





Indicator and Short Definition/ Explanation	Study Questions	Instructions and Guiding Notes.	
	removal, refuse dumps and solid waste disposal.		
	c) Control of air pollution , noise pollution, other public nuisances and outdoor advertising		
	d) Cultural activities , public entertainment and public amenities, including— betting, casinos and other forms of gambling; racing; liquor licensing; cinemas; video shows and hiring; libraries; museums; sports and cultural activities and facilities; and county parks, beaches and recreation facilities.		
	e) County transport , including— county roads; street lighting; traffic and parking; public road transport; and ferries and harbours, excluding the regulation of international and national shipping and matters related thereto.		
	f) Animal control and welfare , including—licensing of dogs; and facilities for the accommodation, care and burial of animals.		
	g) Trade development and regulation , including—markets; trade licenses (excluding regulation of professions); fair trading practices; local tourism; and cooperative societies.		
	h) County planning and development , including—statistics; land survey and mapping; boundaries and fencing; housing; and electricity and gas reticulation and energy regulation		

Indicator and Short Definition/ Explanation	Study Questions	Instructions and Guiding Notes.	
	i) Pre-primary education, village polytechnics, home craft centres and childcare facilities.		
	j) County public works and services, including—stormwater management systems in built-up areas; and water and sanitation services.		
	k) Fire-fighting services and disaster management.		
	l) Control of drugs and pornography.		
	<p>m) Implementation of specific National Government policies on natural resources and environmental conservation, including, soil and water conservation; and forestry.</p> <ul style="list-style-type: none"> • Availability of National Government policies on the environment • Knowledge of counties on environmental management laws • Public participation in natural resource management <p><i>(Application of Article 69)</i></p>		
	<p>n) Ensuring and coordinating the participation of communities and locations in governance at the local level and assisting communities and locations to develop the administrative capacity for the effective exercise of the functions and powers and participation in governance at the local level.</p> <p><i>(Explore if counties have put in place mechanisms to enhance citizens participation in county governance)</i></p> <p>County Government Act, 2012:</p> <ul style="list-style-type: none"> • Citizen participation (Sec 83-92 		





Indicator and Short Definition/ Explanation	Study Questions	Instructions and Guiding Notes.	
	<ul style="list-style-type: none">• Public communication & access to info. (Sec. 93-97)• Public (citizen) participation in county Governance (Sec. 98-101)o) What shows (<i>indicators</i>) that there has been public participation in governance at the local level?p) County, sub-county, ward, village and any other level defined by the County Government.		

Annexe II

Questionnaire on Uptake and Implementation of County Government Functions

Name of the County:

Date:

Name of Respondent:

Designation of Respondent:

Indicator and Short Definition/ Explanation	Study Questions	Instructions and Guiding Notes.								
Output 1: Uptake and Implementation of County Government functions under Schedule 4 of the Constitution										
Schedule 4 to the Constitution distributes functions between the National Government and the county governments	<p>Q1. Is your County Government in receipt of all functions assigned to county governments as per Schedule 4 to the Constitution?</p> <p>1. Yes 2. No</p>									
	<p>Q2. If No, which functions are still outstanding and for what reasons?</p> <table border="1"> <thead> <tr> <th>Functions not transferred</th> <th>Reasons</th> </tr> </thead> <tbody> <tr><td> </td><td> </td></tr> <tr><td> </td><td> </td></tr> <tr><td> </td><td> </td></tr> </tbody> </table>	Functions not transferred	Reasons							Use a separate sheet for this section
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	<p>Q3. Are there transferred functions to the County Government that you are not implementing?</p> <p>1. Yes 2. No</p>									
	<p>Q4. If YES, which function are these that were transferred but not get implemented and why?</p> <table border="1"> <thead> <tr> <th>Functions not being implemented</th> <th>Reasons for not implementing the function</th> </tr> </thead> <tbody> <tr><td> </td><td> </td></tr> <tr><td> </td><td> </td></tr> <tr><td> </td><td> </td></tr> </tbody> </table>	Functions not being implemented	Reasons for not implementing the function							Use a separate sheet for this section.
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Indicator and Short Definition/ Explanation	Study Questions	Instructions and Guiding Notes.						
	<p>Q5. For each function that your County Government has taken up,</p> <ol style="list-style-type: none"> Is the County Government fully in charge of its implementation or are there external influences from other sectors or institutions of the National Government? E.g. are there State Corporations undertaking the same function? Have the functions been fully transferred to the extent that the County Government is fully in charge of the same? How do the counties understand and approach the implementation of exclusive functions? How conjoined or detached do you work or associate with the National Government on the performance of these exclusive functions? Which are the specific areas of the association if any? Are you content with the situation as it obtains or would you advocate for it to be improved? <table border="1" data-bbox="557 1194 1095 1387"> <thead> <tr> <th data-bbox="557 1194 857 1278">Function</th> <th data-bbox="857 1194 1095 1278">External Influence or Interference</th> </tr> </thead> <tbody> <tr> <td data-bbox="557 1278 857 1331"></td> <td data-bbox="857 1278 1095 1331"></td> </tr> <tr> <td data-bbox="557 1331 857 1387"></td> <td data-bbox="857 1331 1095 1387"></td> </tr> </tbody> </table> <ol style="list-style-type: none"> In terms of the interferences pointed out in (a) above, what steps have been taken in resolving the disputes above? Which specific steps have been undertaken towards the redress of the same? Kindly highlight. What roles have the intergovernmental bodies played in helping resolve the disputes? (IBEC, Summit and CoG) Are you contented with the outcome of these processes? If not, what would like to be done differently? <ol style="list-style-type: none"> Kindly list any functions that were transferred to the county governments but are yet to be taken up by the county governments? Any reasons for these functions not being taken up? Kindly highlight. For the functions that were transferred but not yet taken up, what became of the financing that comes with them? 	Function	External Influence or Interference					<p>In this area, kindly be guided by considering the following;</p> <ol style="list-style-type: none"> The Constitution assigns both the national and county governments functions under the 4th schedule. Functions transfer was to be preceded by functional analysis (unbundling), costing and then transfer. The Transfer Process was to be undertaken through the phased transfer process including capacity building. There have been concerns that there are functions that were transferred though are still being performed at the national level. The role of State Corporations and the implementation of County Functions.
Function	External Influence or Interference							

Indicator and Short Definition/ Explanation	Study Questions	Instructions and Guiding Notes.
	<ul style="list-style-type: none"> iv. Who is currently performing these functions? Kindly specify. <hr/> <ul style="list-style-type: none"> i. What are the implementation Challenges relating to delivery on these functions from a functional transfer perspective? ii. Are these difficulties structural or capacity-related? iii. Any form of discussions with the National Government in helping resolve these difficulties? iv. Concerning (ii), what has been the outcome of such processes? v. What solutions do you propose to address these challenges? <hr/> <p>a) State Corporations and Regional Bodies:</p> <ul style="list-style-type: none"> i. What are the experiences of the counties with the roles that the state corporations have played so far? ii. Does their continued existence compete with or compliment the functional roles of the county governments? Kindly elaborate. iii. Any recommendations on how best to manage or transition the existence of state corporations/ regional bodies into the framework of devolved governance? <hr/> <p>b) Concurrent Functions:</p> <ul style="list-style-type: none"> i. How has the issue of concurrent functions been approached? ii. Is there a framework for consultation including a responsibility matrix on the performance of concurrent functions as between the national and county governments? iii. In the absence of any framework, how has the matter been dealt with? iv. Any recommendations on how best to the deal with concurrent functions? <hr/> <p>c) Functional Overlaps and Duplication</p> <ul style="list-style-type: none"> i. Which are the reported areas of functional overlaps between the two levels of governments? ii. Which are the most affected functions based on the (categorize them either into concurrent, reversionary or exclusive functions) 	





Indicator and Short Definition/ Explanation	Study Questions		Instructions and Guiding Notes.	
	d) Any remedial measures that have been taken to curb the situation including the agencies involved			
	Function	Specific Challenges Experienced	Recommendation on the resolution of challenges.	
	i. Agriculture , including- crop and animal husbandry; Livestock sale yards; county abattoirs; plant and animal disease control and fisheries.			
	ii. County health services including in particular— county health facilities and pharmacies; ambulance services; promotion of primary health care; licensing and control of undertakings that sell food to the public; veterinary services (excluding regulation of the profession); cemeteries, funeral parlours and crematoria; and refuse removal, refuse dumps and solid waste disposal.			
	iii. Control of air pollution , noise pollution, other public nuisances and outdoor advertising			
	iv. Cultural activities , public entertainment and public amenities, including— betting, casinos and other forms of gambling; racing; liquor licensing; cinemas; video shows and hiring; libraries; museums; sports and cultural activities and facilities; and county parks, beaches and recreation facilities.			
	v. County transport , including— county roads; street lighting; traffic and parking; public road transport; and ferries and harbours, excluding the regulation of international and national shipping and matters related thereto.			
	vi. Animal control and welfare, including—licensing of dogs; and facilities for the accommodation, care and burial of animals.			



Indicator and Short Definition/ Explanation	Study Questions	Instructions and Guiding Notes.	
	vii. Trade development and regulation, including—markets; trade licenses (excluding regulation of professions); fair trading practices; local tourism; and cooperative societies.		
	viii. County planning and development, including—statistics; land survey and mapping; boundaries and fencing; housing; and electricity and gas reticulation and energy regulation		
	ix. Pre-primary education, village polytechnics, home craft centres and childcare facilities.		
	x. County public works and services, including—stormwater management systems in built-up areas; and water and sanitation services.		
	xi. Firefighting services and disaster management.		
	xii. Control of drugs and pornography.		
	i) Implementation of specific National Government policies on natural resources and environmental conservation, including—soil and water conservation; and forestry. <ul style="list-style-type: none"> • Availability of National Government policies on the environment • Knowledge of counties on environmental management laws • Public participation in natural resource management <i>(Application of Article 69)</i>		
	xiii. Ensuring and coordinating the participation of communities and locations in governance at the local level and assisting communities and locations to develop the administrative capacity for the effective exercise of the functions and powers and participation in governance at the local level. <i>(Explore if counties have put in place mechanisms to enhance citizens participation in county governance)</i> County Government Act, 2012:		





Indicator and Short Definition/ Explanation	Study Questions	Instructions and Guiding Notes.	
	<ul style="list-style-type: none">• Citizen participation (Sec 83-92• Public communication & access to info. (Sec. 93-97)• Public (citizen) participation in county Governance (Sec. 98-101) <p>What shows (<i>indicators</i>) that there has been public participation in governance at the local level?</p> <p>County, sub-county, ward, village and any other level defined by the County Government.</p>		



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