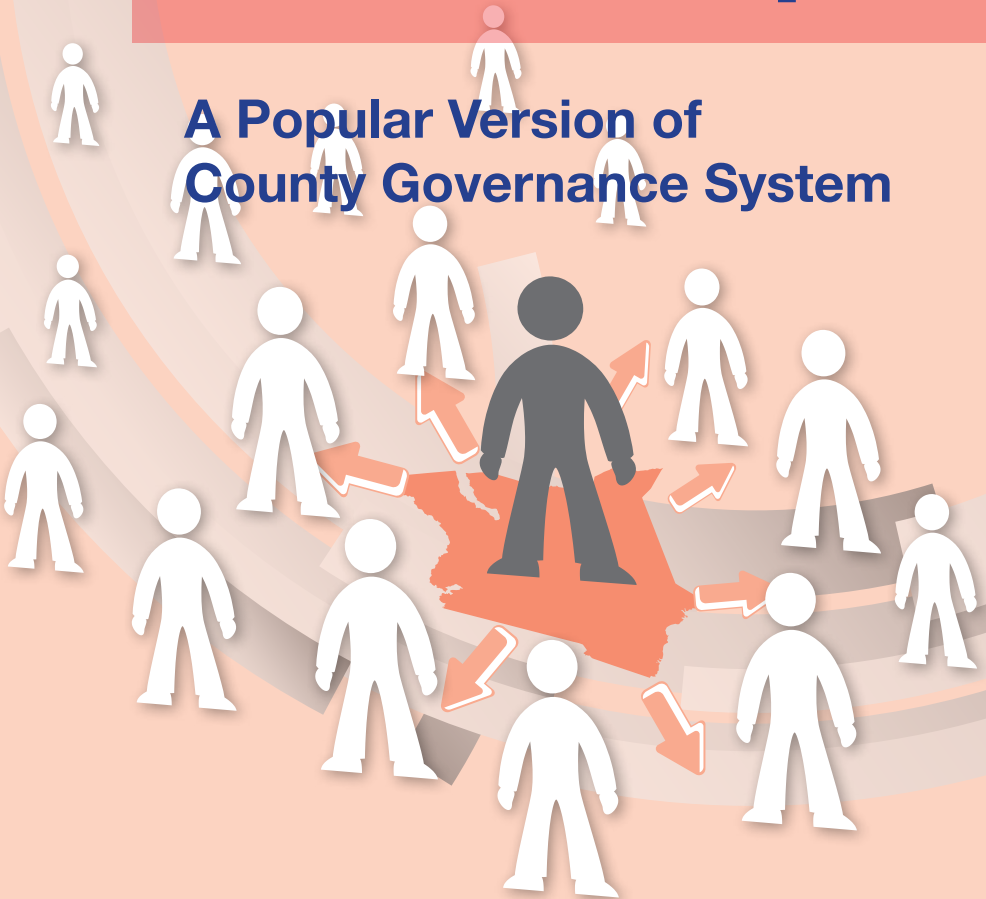




Devolution made Simple

**A Popular Version of
County Governance System**



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County Governance System

Updated October, 2013

Patrick O. Onyango - Paddy

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Introduction

This reader-friendly publication has been produced to make the new devolved system in Kenya easy to understand. It is intended to help in avoiding confusion which normally comes with very many interpretations of devolution in Kenya. It is organized to flow logically so a reader is able to follow while at the same time linking information to constitutional and legislative provisions relating to the devolved system. The Constitution, together with relevant policies and pieces of legislation has made clear provisions for a number of institutions to guide successful implementation of devolution. After the promulgation of the new Constitution of Kenya on 27th August 2010, the government took a number of steps to prepare for successful implementation of devolution. One of these steps was the appointment of the Task Force on Devolved Government (**TFDG**).

The TFDG was established by the then Deputy Prime Minister and Minister for Local Government through Kenya Gazette Notice No. 12876 of 25th October 2010. The purpose of the task force was to work on the implementation of the devolution and process and advise the government on policy and legal frameworks for devolving power, resources and responsibilities to the people of Kenya for effective local development. The task force was also to make recommendations on an appropriate civic education programme on devolution. Public resources were used in facilitating the work of the TFDG. The task force carried out its mandate in a very participatory manner bearing in mind that under Article 1 (1) of the Constitution, ***“All sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution”*** The task force carried out exhaustive consultative processes with the people of Kenya in all the 47 Counties and also visited other countries to see how devolution was being implemented in those countries. At the end of its work, the task force prepared a report titled ***‘Final Report of the Taskforce on Devolved Government Volume I: A Report on the Implementation of Devolved Government in Kenya’*** It also prepared a ***‘Draft Sessional Paper on Devolved Government in Kenya, 2011 - Developmental Devolved Government for Effective and Sustainable Counties’*** and recommended a number of legislation to facilitate implementation of the devolved system.

From the above therefore, it is very clear that implementation of devolution in Kenya is guided by adequate preparation and planning, which among other things involved effective participation by citizens in all the 47 Counties.

1. Past Experience with Devolution

Kenya had a form of devolution under the independence Constitution of 1963. There were two levels of government just as is the case with the Constitution of Kenya 2010. There was national and seven autonomous regional governments (*Majimbo*¹). The seven regions had a President each. Nairobi City was a special provincial region, governed by a City Council headed by an elected City Mayor. The powers of the regions were protected by the independence Constitution, various policies, laws, a Senate and exclusive assignment of functions and sources of funding; to ensure effective delivery of services to the public. Political representation at the regional level was through Regional Assemblies. At the national level, representation was through the Senate, which also took care of the interests of the regional governments. Regional governments were given specific functions with a clear timetable for their transfers just as is the case with the present counties. At that time just as now most of the functions given to the regional governments included: -

- Community development, which included primary education
- Housing and
- Health services.

There was also a system of local community governance arrangement to facilitate citizen participation in governance and cater for the welfare of marginalized groups and minorities.

The *Majimbo* was abolished within three years of independence and the local authorities that remained as units of governance at the local level lost most of their powers to deliver services and self-financing. The abolition was achieved through two major constitutional changes and enactment of legislation. The first amendment made Kenya a republic, while at the same time weakening the regional governments. This amendment reduced the powers and functions of regional governments over taxation, local authorities and functions

1 Kiswahili word for regions

that were shared with national government (concurrent) such as agriculture, education and housing. The second amendment replaced the regions with provinces and also abolished the Senate. The law that affected functions earlier given to the regional governments was the Transfer of Functions Act, 1969.

2. The Constitution of Kenya 2010 and the Devolved System

Devolution is one of the major changes that the Constitution adopted by Kenyans at the referendum held on 4th and promulgated on 27th August 2010 has made to the organization of government in Kenya. The devolved system is unique and a new experience to a majority of Kenyans. This is in spite of the fact that Kenya had a similar system at independence. There are seven major principles in the Constitution of Kenya 2010 (CoK 2010), on which the devolved system is based. These are: -

- **Sovereignty of the People of Kenya:**

This principle is found in Article 1 (1). **Citizen Participation**, which cuts across the entire Constitution, is based on this principle. It means that citizens must be consulted and involved at all levels on matters affecting them. Article 1 (3) provides that sovereign power of the people is only **delegated** but not **surrendered** to –

- > Parliament (Senate and National Assembly) and County Legislative assemblies
- > National executive and the executive structures in the county governments (County Executive Committee); and
- > Judiciary and independent tribunals.

- **Constitutionalism:**

This is the practice of doing things in line with the Constitution. It is to give life to and following of the Constitution in day to day life and in making decisions by all. Therefore all things done and decisions made in the devolved system must respect and follow the Constitution. This means that both County and National

government, including institutions under them have to respect and follow the Constitution at all times.

- **Rule of Law:**

This is the practice of doing things according to the law. All individuals and institutions at both the county and national level have to obey the law at all times.

- **Social Justice:**

Social justice is applied to and among the various social classes of a society. This principle is highlighted in the Preamble, Article 10 and in the Bill of Rights of the Constitution. In it applies to equal access to resources and wealth by all irrespective of position in society. Other equal access variables include justice, services and opportunities including access to fundamental economic, social and cultural rights such as housing, health, education and clean environment among others. These rights are set out in Article 43 of the Constitution. In this regard for example there should be equal access to justice and treatment before the law whether one is poor or not. There should not be two systems of justice and the law – one for the poor and one for the rich. The Constitution requires that this principle is applied both at the county and national level when it comes to development planning priorities and revenue allocation.

- **Development:**

This principle puts emphasis on exercising of political power at all levels for purposes of development. It is expressed in Article 1 (3) and (4) of the Constitution. The exercise of political power as an end in itself is therefore limited by the Constitution. It can only be exercised at both levels of government as a means of facilitating development.

- **Service delivery governance:**

The Constitution lays emphasis on delivery of services to citizens at both levels of governments. The principle is clearly expressed in Articles 174 and 175 of the Constitution on Objects and Principles of Devolution.

- **Leadership and Integrity:**

This is important in ensuring that citizens benefit from the gains of the devolved system. The Chapter Six of the Constitution includes specific qualifications for and the means to regulate leadership. It emphasizes that public trust is the basis for leadership and authority delegated to state and public officials. Chapter Six re-emphasizes Article 1(3) of the Constitution, which provides that sovereign power of the people is only delegated and not surrendered. This means that those holding public and state offices do so in trust on behalf of the citizens. It is for this reason that there is a recall provision in the Constitution. The recall clause implies that the people of Kenya are sovereign and hire and fire public and state officials in accordance with Article 1 (2) which provides that the people of Kenya may exercise their sovereign power directly or through democratically elected representatives. It means that if public and state officers betray the delegated authority, they should leave office.

3. Understanding the Devolved System

Devolution

Devolution is the proper distribution of State functions and powers amongst and between the three arms of government. Kenya's devolved system is provided for in Article 1 (3) and (4); Article 6 (1) and (2); Chapter Eleven and in the First, Fourth and Section 15 of the Sixth Schedules of the CoK, 2010. The three arms of government are: -

- > Legislature, which is the law and policy making body at County and National levels;
- > Executive, this is the arm that implements laws and policies made by the Legislature at County and National levels. It also runs the day to day operations of government; and
- > Judiciary, which interprets and enforces the laws, resolves disputes between the Legislature and Executive and also between and amongst the citizens.

Characteristics of Kenya's devolved system

- There are two levels of government created on equal basis by the Constitution. These are the County and National governments. Although the Constitution has created two levels of government and forty-seven counties, Kenya is still a unitary state.
- Although the two levels are distinct, they are required to respect, support and work in harmony. This is provided for in Article 6 (2) of the Constitution. This means that relationship between the two must be consultative and cooperative. Neither the County nor the National Government is senior or superior to the other.

- Both levels of government have power to secure resources.
- There are forty-seven (47) counties which have clearly defined geographical boundaries. This is provided for in Article 6 (1) and in the First Schedule of the Constitution. The boundary of each of the counties has been drawn by the Independent Electoral and Boundaries Commission (IEBC) as provided for by the Constitution.
- Governments at county and national level and institutions established under them are required by the Constitution to ensure effective participation by citizens in their affairs.
- The two levels have democratically elected representatives and autonomous political authority. The elected representatives are for Senate, National Assembly, the President, the County Assembly and the Governor in each of the forty-seven counties.
- The two levels of governments have clear mandate to provide a range of significant services. These are outlined in the Fourth Schedule of the Constitution. It is important to note that the national government has been assigned mostly policy roles, while it is the counties which have been assigned actual implementation and service delivery.
- The two governments can be taken to court or can take others to court. They can hold bank accounts and employ staff.
- They have the power to control own budget and accounts and the ability to raise their own revenue.
- The county governments have been given constitutional authority to make and enforce local legislation.
- Citizens' equal access to available resources at either level is guaranteed.

The objects and principles of devolution

These are set out in Articles 174 and 175 of the Constitution

Objects (Article 174):

- Promote democratic and accountable exercise of power;
- Foster national unity by recognizing diversity;
- Give powers of self-governance to the people and enhance the participation of the people in the exercise of the powers of the State and in making decisions affecting them;
- Recognize the right of communities to manage their own affairs and to further their development;
- Protect and promote the interests and rights of minorities and marginalized communities;
- Promote social and economic development and the provision of proximate, easily accessible services throughout Kenya;
- Ensure equitable sharing of national and local resources throughout Kenya;
- Facilitate the decentralization of State organs, their functions and services, from the capital of Kenya; and
- Enhance checks and balances and the separation of powers.

Principles (Article 175):

- County governments shall be based on democratic principles and the separation of powers;
- County governments shall have reliable sources of revenue to enable them to govern and deliver services effectively; and

- No more than two-thirds of the members of representative bodies in each county government shall be of the same gender.

Types of counties

There are three broad types of counties, namely: -

- Rural Counties, which have predominant rural population and characteristics
- Counties with both rural and urban characters; and
- Urban and City Counties

Levels of devolution

There are four main levels with room for a fifth level. Article 176 (2) of the Constitution provides that ***“every county government shall decentralize its functions and the provision of its services to the extent that it is efficient and practicable to do so.”*** This means that county governments have power to establish other levels below the County. The County Governments Act, 2012 provides for the following levels: -

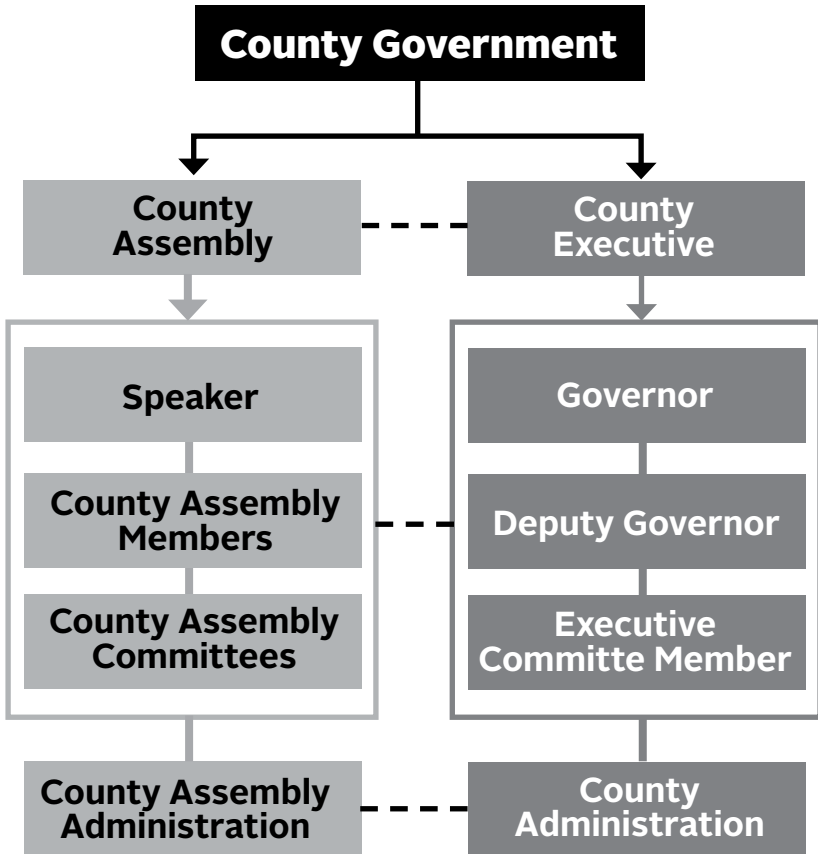
- County level, whose head is the Governor.
- Sub-County level which is the same as the parliamentary constituency, headed by a Sub-County Administrator, appointed by the Governor and approved by the County Assembly.
- Ward level, which is represented by an elected Member of County Assembly (MCA) and headed by a Ward Administrator appointed by the Governor and approved by the County Assembly.

- Village level, headed by a Village Administrator appointed by the Governor and approved by the County Assembly

There is also the Village Council appointed by the Governor through the Village Administrator and approved by the County Assembly. The County Government Act allows the County Government to further decentralize its functions and services below the village with the approval of the County Assembly.

4. Structures of Devolved Government

The County Government



The County Government has two main structures as illustrated above. These are: -

- The Legislature, which is the County Assembly which is made up of Members of the County Assembly elected from each Ward within a County. There are also nominated MCAs

- The Executive arm which is the County Executive Committee. It is made up of people appointed by the Governor and approved by the County Assembly
- The Judiciary, which is the third arm of government and has presence and operation at both the County and National level.

Establishment of County Assembly

The County Assembly is established through direct and indirect elections.

- The direct election is where registered voters in a County go to a polling station and cast votes for their preferred candidates as Members of County Assembly.
- Counties have been divided into Wards by the Independent Electoral and Boundaries Commission (IEBC).
- The Wards are not the same as the wards under the former Local Authorities. These wards are bigger. Representatives to the former Local Authorities were known as Councilors because they were representing electors in Councils. The name Councilor comes from one who sits in a Council.
- On the other hand, the one elected to represent us in the new County Assembly is known as Member of County Assembly. They are like members of parliament at the County level, because the County Assembly is a local parliament where laws are made.

Direct Representation at the County Assembly

There are two categories of candidates elected directly to the County Assembly at the Ward level. These are: -

- Candidates presented or sponsored by political parties
- Independent candidates who sponsor themselves

- The candidates must be supported by at least five hundred (500) registered voters in the Ward to be allowed by the IEBC to run for elections as Member of County Assembly
- Candidates sponsored by a political party must have their forms signed by members of their respective parties only and not members of other parties.
- Independent candidates must also NOT belong to a political party and their nomination forms must be signed by supporters who are not members of any political party.

Indirect Representation at the County Assembly

Article 177 (b) and (c) make provision for special representation to ensure that no more than two-thirds of the membership of the assembly are of the same gender and marginalized groups, including persons with disabilities and the youth. This is a form of affirmative action. This is done through Party Lists as follows: -

- Special Seat members to meet the principle of two-thirds in the Constitution.
- Marginalized groups, including Persons with Disabilities, minorities and youth.

The number of members from these categories is determined by the IEBC after all the results of the County Assembly elections have been announced. The number of seats in each case will depend on the number of seats a political party has won during the direct elections. Those running as independent candidates are not beneficiaries of this arrangement.

Composition of the County Assembly

The County Assembly consists of: -

- Members of County Assembly elected directly from each Ward.

- Members of County Assembly nominated to meet the requirements of two-thirds.
- Members of County Assembly nominated to represent Marginalized groups, including Persons with Disabilities, minorities and youth
- The Speaker of County Assembly, who is neither elected nor nominated. The Speaker is nominated and elected by Members of County Assembly during the first sitting of the County Assembly following a general election

Qualifications for election or nomination as Member of County Assembly

- A registered as a voter
- Sound mind
- Not an un-discharged bankrupt
- Not serving a sentence of imprisonment of at least six months
- Has not been found by law, to have misused or abused a State or public office or to have contravened Chapter Six of the Constitution
- Satisfies any educational, moral and ethical requirements prescribed by the Constitution or an Act of Parliament. The Elections Act requires one to have at least form four level of education
- Nomination by a political party or is an independent candidate supported by at least five hundred registered voters in the ward who are not registered members of any political party
- Is not a State officer or other public officer, other than a member of the county assembly

- Has not been, at any time within the five years immediately before the date of the election for which the person is a candidate, held office as a member of the Commission; and
- Must have been a citizen of Kenya for at least ten years immediately preceding the date of election.

Functions of the County Assembly

There are three main functions of the County Assembly. These are: -

- Representation - Members of County Assemblies (MCAs) represent those who elected them to the law making body at the county.
- Legislation - which is making of laws for the County i.e. legislation
- Oversight, which is looking after the interest of the people with regards to management of public affairs at the county level including implementation of policies, use of resources and delivery of services.

The specific functions are -

- Law making or legislation
- Election of Speaker of County Assembly
- Removes the Governor from office if the Governor fails to perform
- Vets and approves appointments by the Governor
- Vets and approves County government budgets, expenditure and development plans
- Approves County Government borrowing.

Duties and responsibilities of Member of County Assembly

- Maintain close contact with the electorate and consult them on issues before or under discussion in the county assembly
- Present views, opinions and proposals of the electorate to the county assembly;
- Attend sessions of the county assembly and its committees;
- Provide a linkage between the county assembly and the electorate on public service delivery;
- Extend professional knowledge experience or specialized knowledge to any issue for discussion in the county assembly.

Removal of Member of County Assembly

The Constitution provides for circumstances under which elected officials can leave office. This includes the recall, which allows citizens to remove President, Governor, Senator, Women Representative, Member of Parliament and Member of County from office. The process of doing this is provided for in the Elections Act and the County Government Act. The recall clauses allow citizens to remove elected officials from office before the end of their term.

A Member of County Assembly can leave office in the following instances: -

- When one resigns
- When one dies
- When one is incapable of performing functions because of severe illness or other cause
- When one is convicted by a court of law and is imprisoned for more than six (6) months

- When one fails the integrity test set out in Chapter Six (6) of the Constitution

The recall clause for Members of County Assemblies applies when a member breaches the Constitution, fails to attend County Assembly proceedings or does not comply with requirements of Chapter Six of the Constitution.

Establishment of the County Executive

The establishment of the County Executive is provided for in Article 179 of the Constitution.

- The County Executive is established through election of County Governor and Deputy Governor. The other members of the County Executive are appointed by the Governor. Together, the Governor, Deputy Governor and those appointed form the County Executive Committee. Apart from the Governor and Deputy Governor, other members of the County Executive Committee are the Cabinet of the County Government.
- The County Executive is headed by the County Governor
- Members of the County Executive Committee appointed by the Governor must be vetted by residents of a county and approved by the County Assembly.
- The maximum number of Executive Committee members is twelve (12) including the Governor and Deputy Governor.

Qualifications for election of County Governor

- A registered voter
- Qualified to be elected a member of the National Assembly of Kenya

- Has been a resident in County for past 12 months before the election
- Holder of a degree from a university recognized in Kenya.
- Is not of unsound mind
- Is not an un-discharged bankrupt

Duties and responsibilities of the County Governor

- Appointment of members of the Executive Committee and other county public officers with the approval of the County Assembly;
- Preside over meetings of the Executive Committee;
- Diligently execute the functions and exercise the authority provided for in the Constitution and legislation;
- Perform State functions within the county as agreed with the President;
- Represent the county in national and international fora and events;
- Prepare reports for consideration by the County Assembly and county citizens; and
- Facilitate participation by citizens in the county governance affairs

Removal of County Governor from office

The County Governor, just like Members of County Assemblies can be removed from office before end of her/his term

- The reasons for the removal of a Governor are the same as those for a County Assembly Member
- The procedure for removal is also similar to that of removal of a County Assembly Member.

Functions of the County Executive Committee

Implement county and national legislation;

- Preparation of proposed legislation to be considered by the county assembly;
- Management and coordination of the functions of the county administration and its departments; and
- Perform any other functions determined by the Constitution or national legislation.

5. Urban Areas and Cities

Article 184 (1) of the Constitution provides that “**National legislation shall provide for the governance and management of urban areas and cities ...**” This law has been enacted and is known as the Urban Areas and Cities Act, 2011. It provides for the manner in which urban areas and cities within a County are classified and managed. The provisions are found in Sections 5 (1) (a) to (h), 9 (1) to (3) (a) – (i) and 10 (1) (2) (a) – (e). The law categories urban areas cities as follows: -

- Cities, with a population² of five hundred thousand (500,000) residents and above.
 - Municipalities, with a population of two hundred and fifty thousand (250,000) residents and above
 - Towns, a minimum of ten thousand (10,000) residents
- The Act provides that urban areas and cities will be under the County Government and will be managed by boards appointed by the Governor with the approval of the County Assembly.
 - Urban areas within counties will be headed by Managers appointed by the Governor and approved by the County Assembly.
 - With the passage of the Urban Areas and Cities Act, the existing local authorities have been abolished. So there will be no city, municipal, county or town council clerks. There will also be no Councilors.

2 Population is based on the final gazetted results of the latest population census carried out by an institution authorized by law.

6. Relationships Between County and National Governments

The relationship between the County and National governments or intergovernmental relations, is provided for in Article 6 (2) of the Constitution. It states that governments at the national and county levels are distinct and inter-dependent and shall conduct their mutual relations on the basis of consultation and cooperation. Other provisions on intergovernmental relations are Article 186 on functions and powers, Article 187 on transfer of functions and powers, Article 189 on cooperation between national and county governments, Article 190 on support for county governments, Article 191 on conflict of laws made by county assembly, Senate and National Assembly; and Article 192 on suspension of county governments. The law that guides relationships between the county and national government is the Inter-Governmental Relations Act, 2012.

Functions and powers

A close look at the Fourth Schedule of the Constitution on functions shows that on the most part national government is assigned policy, regulatory and capacity building functions. County governments are assigned actual implementation and service delivery.

- The functions of County and National governments are set out in Article 185, Article 186(1) and listed in Fourth Schedule. However there are other functions not directly mentioned in Articles 185, 186 and the Fourth Schedule, but in which both levels of governments have a responsibility. These are: -
 - Article 21 (Implementation of Bill of Rights)
 - Article 43 (Economic and Social Rights), which are exclusive mandate of county governments
 - Article 62 (2) & (3) (Vesting of Land on County Governments), and

- Article 235 (County Public Service)
- Article 186 of the Constitution identifies three categories of functions. These are: -
 - Exclusive functions are those that are clearly assigned by the Constitution to either levels of governments
 - Concurrent functions are those that are performed by both levels of government
 - Residual functions are those that are not clearly assigned to either level of government. These are considered as functions of the National Government. The term residual is borrowed from the word 'residue' which is a remainder of something. So after assigning functions to both levels of government, the remainders which are not assigned are the residual ones.

Transfer of functions and powers

- The manner and procedure for the transfer of functions and powers is set out in Article 187. The institution responsible for transfer of functions during the transition period is the Transition Authority.
- One level of government may transfer a function or power to the other through a written agreement. So there must be a written agreement
- Transfer of function or power may happen in the following circumstances: -
 - Where the function or power would be more effectively performed or exercised by the receiving government; and
 - Where the transfer of the function or power is not prohibited by the legislation under which it is to be performed or exercised.

- Where a function or power is transferred from a government at one level to a government at the other level, the following measures should be put in place: -
 - There should be guarantee of resources necessary for the performance of the function or exercise of the power are also transferred; and
 - Constitutional responsibility for the performance of the function or exercise of the power shall remain with the government to which it is assigned by the Fourth Schedule.
- Functions and powers are only being transferred after they are broken down into detailed particulars. The term used in this exercise is 'unbundle', e.g. the health function should be broken down into required human resource, infrastructure and supplies among others.
- Once functions are broken down, costing is done to determine the level of financial and other resources necessary to enable the government to which a function has been transferred to effectively implement them.

Cooperation between national and county governments

- The nature of corporation between County and National governments is set out in Article 6 (2) and Article 189.
- County and are required to perform their functions and exercise their powers in such a way that: -
 - There is mutual respect for functional and institutional integrity of government at either level
 - There is respect for constitutional status and institutions of government at the either level

- In the case of county government, there is a duty to respect institutions and structures within it, especially those relating to citizen participation
 - Mutual consultations and support in implementation of laws made by either level of government; and
 - Mutual exchange of information, coordination of policies and administration and capacity building.
- The Constitution makes it mandatory for County and National governments to co-operate in the performance of functions and exercise of powers and allows setting up of joint committees and authorities. The same is required of the 47 County Governments in relating with each other.
 - Disputes arising between governments (County and National and County and County) should be settled through laid down procedures, including alternative dispute resolution mechanisms such as negotiation, mediation and arbitration.

Support for county governments

Article 190 provides for the required support to enable county governments perform their functions effectively. The most important of these: -

- Legislation to ensure that county governments able perform their functions. This means that legislation should be facilitative and not restrictive; and
- Capacity building including adequate resources

Conflict of laws

Article 191 provides on resolution of conflict of laws made by county assembly, Senate and National Assembly. This is especially in respect of matters falling within the concurrent jurisdictions of both levels of government.

County legislation prevails over national legislation if it does not relate to matters that require uniform legislation throughout Kenya or is intended to set national policy or set uniform norms and standards country wide.

National legislation prevails over county legislation where the national legislation applies uniformly throughout Kenya, is aimed at preventing unreasonable action by a county and provides for uniformity by establishing norms and standards or national policy.

Suspension of county governments

- Article 192 makes provisions on suspension of county governments. It allows the President to suspend a County Government on the following circumstances: -
 - Emergency arising out of internal conflict or war; or
 - Exceptional circumstances.
- Before a county government is suspended an independent commission of inquiry is established to investigate allegations against the county government.
- The Senate and the President must be satisfied that the allegations are justified. Whatever the outcome of the independent inquiry, the Senate has to authorize any suspension and has constitutional mandate to terminate a suspension.
- During suspension of a County Government, the affairs of the county will be managed by a Board.
- A County Government can only be suspended for a maximum period of ninety (90) days after which election for the relevant County Government is held.

7. County Planning and Budgeting

- Unlike in the past, development planning and budgeting under the Constitution of Kenya 2010 has to respect the principle of sovereignty of the people in Article 1 (1) to (4) and the objects and principles of devolution in Articles 174 and 175.
- The Constitution and the County Governments' Act require that both planning and budgeting start from below and not from the top within counties. This means that priorities for development and allocation of resources should come from the residents at the lower units.
- Citizens are to participate in both planning and budgeting from the village level within wards in a County.
- In order of what comes first, planning should be the initial process. On the basis of priorities set in planning, then budgeting is done to allocate resources to the needs of the citizens.
- Planning within the counties must be linked to national plans, i.e. there should be integrated development planning. The reasons for this are: -
 - There will be alignment of national and devolved government development and spending priorities;
 - Alignment of financial and institutional resources behind agreed policy objectives and programmes;
 - Will serve as a basis for engagement between County government and the citizenry at the local level, and with various stakeholders and interest groups; and
 - Translation of participatory and accountable government priorities and relating them to concrete issues, plans and resource allocations.

8. County Finances and Revenue

The Constitution provides in Article 203 (2) that “For every financial year, the equitable share of the revenue raised nationally that is allocated to county governments shall be not less than fifteen per cent of all revenue collected by the national government” This is the money to be given to counties. The national government remains with eighty-five percent (85%). This is the first source of revenue for counties. The law guiding management of county government finances is the Public Finance Management Act, 2012.

Other County Revenue Sources

- Own revenue raised through levying taxes approved by the residents of a county
- Borrowing
- Commissions from investments
- Income generated from partnerships with private sector
- Grants from the national and other development partners.
- The Equalization Fund, established by the Constitution in Article 204. This Fund is strictly for special groups and regions that over time were left out in terms of development

9. Citizen Participation

Constitutional basis for Citizen Participation

- The Constitution of Kenya provides in Article 1 (1), (2), (3) and (4) that “All sovereign power belongs to the people of Kenya and Sovereignty of the shall be exercised only in accordance with this Constitution”; “The people may exercise their sovereign power either directly or through their democratically elected representatives”
- Since the Constitution gives sovereign power to the people of Kenya, it emphasizes citizen participation in all the Chapters in the form of values and principles. So citizen participation in the governance processes at county and national levels is a constitutional requirement and therefore a right.

Elements of Citizen Participation

- Entitlement, which to say that it is an inalienable right which is secured in the Constitution and is there not negotiable – it is granted by the Constitution itself.
- Enhancement of transparency, where citizens demand timely and accurate information on matters affecting them.
- Enhancement of accountability, where public officials and institutions are held to account from many fronts and levels. This is related to development planning and accountability from below.
- Equity, where citizens demand for justice in the allocation of resources.
- Self-determination, which brings to life the objects and principles of devolution in Articles 174 and 175 of the Constitution.

- Decision-making where citizens influence decision making on matters affecting them and therefore giving life to Article 1 (2) of the Constitution; and
- Dialogue, where citizens facilitate dialogue within counties with diversity of ethnicity, minorities and marginalized groups.

Avenues for citizen participation

- As registered voters electing county leadership
- As candidates themselves
- In the making of laws through petitions. This is at both County and National levels and is provided for in Article 118 and 119 of CoK, 2010.
- In budgeting and planning processes through memoranda
- In County Referendum on major issues affecting them
- Facilitation of dialogue
- County platforms including: -
 - Citizens Forum
 - Village Councils

10. Institutions for Implementation of Devolution

Institution	Constitutional & Legislative framework	Remarks on mandate
Parliament	Article 93	Comprises the National Assembly and Senate. Provides a forum through which counties share in legislation making at the national level
Commission for the Implementation of the Constitution	Articles 248, 254, Sixth Schedule Section (5) Commission for the Implementation of the Constitution Act, 2012	Monitor, facilitate, and oversee the development and enactment of legislation and administrative procedures required to implement the Constitution
Commission on Revenue Allocation	Article 215; Commission on Revenue Allocation Act, 2011	Recommends the vertical and horizontal sharing of revenue raised nationally
Ethics and Anti-Corruption Commission	Article 79; Ethics and Anti-Corruption Act, 2011	Enforces the constitutional integrity standards at both levels of government and in all counties.
Human Rights and Equality Commission	Article 59; Kenya National Human Rights Commission Act, Gender and Equality Commission Act, Commission on Administrative Act	Enforces human rights at both levels of government and in all counties.
The National Land Commission	Article 67; National Land Commission Act, 2012	Manages public land at both levels of government and in all counties.
Public Service Commission	Article 233; Public Service Commission Act, 2012	In addition to its duties to national government, hears appeals of public servants of all county governments.
Salaries and Remuneration Commission	Article 230; Salaries and Remuneration Commission Act, 2012	Sets salaries for certain categories of public servants at both levels of government and recommends salaries for other categories of public servants at both levels of government and in all counties.

Institution	Constitutional & Legislative framework	Remarks on mandate
The Independent Electoral and Boundaries Commission	Article 88; Electoral and Boundaries Commission Act, 2011	Manages elections at both levels of government and in all counties
The Controller of Budget	Article 228	Controls expenditure by both levels of government and in all counties.
The Auditor General	Article 229	Audits and reports on the accounts of both levels of government and in all counties.
The Transition Authority	Sixth Schedule CoK; Transition to Devolved Governments Act, 2012	Facilitate and co-ordinates the transition to the devolved system of government, including analysis, costing and phased transfer of the functions, preparation and validation of inventory of existing assets and liabilities of government, other public entities and local authorities
National and County Government Co-ordinating Summit	Articles 6 (2), 189; Inter-governmental Relations Act, 2012	Comprises the President and Governors of the 47 Counties. Forum for consultations and cooperation including on facilitating and co-ordinating the transfer of functions, power or competencies from and to either level of government, in consultation with the Transition Authority
Intergovernmental Technical Relations Committee	Articles 6 (2), 189; Inter-governmental Relations Act, 2012	Comprises chairperson and eight members competitively recruited and responsible for the day to day administration of the Summit. Takes over the residual functions of the Transition Authority at the expiry of its tenure i.e. after three years from date of establishment

Institution	Constitutional & Legislative framework	Remarks on mandate
Council of County Governors	Articles 6 (2), 189; Inter-governmental Relations Act, 2012	Comprises of all the Governors of the 47 Counties and facilitates consultation amongst county governments, sharing information, dispute resolution and capacity building for the governors

The Senate's special role

The Constitution establishes the Senate as a special entity with very clear mandate with regards to Devolution and the devolved governance system. The strategic significance of the Senate to devolution is elaborated by the Constitution in detail in comparison to other organs of State such as County and National Assembly. This is particularly so on matters relating to the interests of county governments. This constitutional anchoring sets the Senate apart as an indispensable integral part of the devolved system. The Senate's role in Devolution is unique. In this sense therefore, the Senate created by the constitution is a reasonably powerful institution. The elaborate role of the Senate is set out the following provisions of the Constitution: -

- Article 93 of the constitution establishes a bicameral Parliament comprised of the National Assembly and the Senate.
- The National Assembly is conceptualized and designed as representing the broad national interests and the people of Kenya generally.

- Under Article 96(1) it is provided that “the Senate represents the counties, and serves to protect the interests of the counties and their governments”. The Senate therefore represents the counties, their governments and interests. In Clause 2 of Article 96 it is further provided that “the Senate participates in the law-making function of Parliament by considering, debating and approving Bills concerning counties, as provided in Articles 109 to 113.”
- Articles 94, 95 and 96 indicate provides that Parliament is a shared institution through which the people of Kenya in the counties share in legislation making at the national level. Sub-article (3) confers upon the Senate the power to determine the allocation of national revenue among counties, as provided in Article 217 and the power of oversight over the use of resources by the counties.
- Article 110 of the constitution defines Bills concerning counties as Bills which have provisions affecting the functions and powers of the county governments as set out in the Fourth Schedule; Bills which relate to the election of members of the county assembly or county executive; and Bills referred to in Chapter Twelve affecting the finances of the county governments. This is a very broad definition which creates room for the Senate to participate in the passing of Bills in the exclusive functional areas of the national level of government for as long as it can be shown that such Bills have provisions affecting the functional areas of the county governments. In this regard, although security and policing are national functions, how security and policing services are provided affects how county governments discharge their functions. So a bill on security and policing would be a Bill concerning counties.
- Articles 96(3) and 217 gives Senate a dual role in the area of finances. This is in the determination of the five and three

year formula for the allocation of revenue among counties and in the annual vertical and horizontal sharing of revenue between national and county levels of government and among the counties, respectively, as provided for by articles 96(2) and 218.

The constitutional elaboration of the place of the Senate in the Devolved system is further strengthened by the threshold of legitimacy bestowed on Senators as compared to Members of the National Assembly. Senators are elected directly by the voters of geographic County constituencies, which are far larger than those which elect members of the National Assembly.

11. Transition to County Governance

Transition Mechanisms

- A special law has been passed to make movement from the current system to the devolved one. The law is called the Transition to Devolved Government Act, 2012.
- The Act establishes the Transitional Authority as the body responsible for the transition

Work of the Transition Authority

- Co-ordinate the transition to the devolved system of government
- Analysis and the phased transfer of the functions provided under the Fourth Schedule to the Constitution to the national and county governments;
- Determine the resource requirements for each of the functions;
- Develop a framework for the comprehensive and effective transfer of functions as provided for under section 15 of the Sixth Schedule to the Constitution;
- Facilitate the development of the budget for county governments during Phase One of the transition period;
- Establish the status of ongoing reform processes, development programmes and projects and make recommendations on the coordinated management, reallocation or transfer to either level of government during the transition period;
- Ensure the successful transition to the devolved system of government;
- Prepare and validate an inventory of all the existing assets and liabilities of government, other public entities and local authorities;
- Make recommendations for the effective management of assets of the national and county governments;
- Provide mechanisms for the transfer of assets which may

include vetting the transfer of assets during the transitional period;

- Develop the criteria as may be necessary to determine the transfer of functions from the national to county governments;
- Carry out an audit of the existing human resource of the Government and local authorities;
- Assess the capacity needs of national and county governments;
- Recommend the necessary measures required to ensure that the national and county governments have adequate capacity during the transition period to enable them undertake their assigned functions;
- Co-ordinate and facilitate the provision of support and assistance to national and county governments in building their capacity to govern and provide services effectively;
- Advise on the effective and efficient rationalization and deployment of the human resource to either level of government;
- Submit monthly reports to the Commission for the Implementation of the Constitution and the Commission on Revenue Allocation on the progress in the implementation of the transition to the devolved system of government.

Transition process

The law provides for two major phases. These are: -

- Phase One (Section 7 (1)); which is the period running from the date of promulgation to midnight of the first general election under the Constitution, i.e. 4th March 2013.
- Phase Two (Section 7 (3)); which is the first day following the first general election under the Constitution.

12. Laws Relating to the Devolved System

The Constitution is the supreme law that anchors devolution. Parliament (Senate and National Assembly) has enacted the following laws to guide implementation of the devolved system: -

LEGISLATION	MAIN PROVISIONS
County Governments Act, 2012	This is the main devolution law. It outlines the structure and operations of County Government
Transition to Devolved Government Act, 2012	Establishes the Transition Authority, its powers and functions
Urban Areas and Cities Act, 2011	Provides for the classification and governance of urban areas and cities
Intergovernmental Relations Act, 2012	Establishes the Summit, the Governors Council and provides guidelines on the relationships between various levels of government, including resolving of conflicts whenever they arise
County Governments Public Finance Management Transition Act, 2013	Provides for how and the type of funds to be disbursed to the counties in the transition period
Contingencies Fund and County Emergency Funds Act, 2011	Provides for the effective operation of the Contingencies Fund and County Emergency Funds established by County Governments
National Government Loans Guarantee Act, 2011	Provides for the transparent, prudent and equitable management of the authority to guarantee loans conferred on the National Government by Article 213 of the Constitution of Kenya 2010

Public Finance Management Act, 2012	Provides for the effective management of public finances by the national and county governments; the oversight responsibility of Parliament and county assemblies; the different responsibilities of government entities and other bodies
Political Parties Act, 2012	Provides for formation, registration, management and funding of Political Parties
Elections Act, 2012	Provides for the conduct of elections to the office of the President, the National Assembly, the Senate, county governor and county assembly; to provide for the conduct of referenda; to provide for election dispute resolution
Independent and Boundaries Commission Act, 2012	Provides for the appointment and effective operation of the Independent Electoral and Boundaries Commission established by Article 88 of the Constitution
Leadership and Integrity Act, 2012	Provides for establishment of procedures and mechanisms for the effective administration of Chapter Six of the Constitution
Public Service Commission Act, 2012	Establishes the Public Service Commission, its powers and functions
Commission for the Implementation of the Constitution Act, 2012	Establishes the Commission on the Implementation of the Constitution, its powers and functions
Commission on Revenue Allocation Act, 2012	Establishes the Commission on Revenue Allocation, its powers and functions
Teachers Service Commission Act, 2012	Establishes the TSC, its powers and functions
National Land Commission Act, 2012	Establishes the National Land Commission, its powers and functions

Salaries and Remuneration Commission act, 2012	Establishes the SRC, its powers and functions
National Government Co-ordination Act, 2013	Provides for establishment of administrative and institutional framework for co-ordination of national government functions at the national and county levels of governance. Operationalizes Articles 131(1) (b) and 132 (3) (b) of the Constitution
Kenya Police Service Act, 2012	Provides for establishment of the Kenya Police Service and the command structures
Police Service Commission Act, 2012	Establishes the Police Service Commission, its powers and functions
Independent Policing Oversight Authority Act, 2011	Establishes the IPOA, its powers and functions
Land Act, 2012	This is the main land law. It categorizes land and provides for management and acquisition. It also establishes County Land Boards at the County level
Land Registration Act, 2012	Provides for registration of titles to land

Annex One: First Schedule (Article 6 (1)) of the Constitution

Counties

CODE	COUNTY	CODE	COUNTY
001	Mombasa	025	Samburu
002	Kwale	026	Trans Nzoia
003	Kilifi	027	Uasin Gishu
004	Tana River	028	Elgeyo/Marakwet
005	Lamu	029	Nandi
006	Taita/Taveta	030	Baringo
007	Garissa	031	Laikipia
008	Wajir	032	Nakuru
009	Mandera	033	Narok
010	Marsabit	034	Kajiado
011	Isiolo	035	Kericho
012	Meru	036	Bomet
013	Tharaka-Nithi	037	Kakamega
014	Embu	038	Vihiga
015	Kitui	039	Bungoma
016	Machakos	040	Busia
017	Makueni	041	Siaya
018	Nyandarua	042	Kisumu
019	Nyeri	043	Homa Bay
020	Kirinyaga	044	Migori
021	Muranga	045	Kisii
022	Kiambu	046	Nyamira
023	Turkana	047	Nairobi City
024	West Pokot		

Annex Two: Fourth Schedule (Article 185(2), 186(1) and 187(2))

Distribution of Functions Between the National Government and the County Governments

PART 1—NATIONAL GOVERNMENT			
REF	FUNCTION	REF	FUNCTION
1	Foreign affairs, foreign policy and international trade	18	Transport and communications, including, in particular— (a) road traffic; (b) the construction and operation of national trunk roads; (c) standards for the construction and maintenance of other roads by counties; (d) railways; (e) pipelines; (f) marine navigation; (g) civil aviation; (h) space travel; (i) postal services; (j) telecommunications; and (k) radio and television broadcasting
2	The use of international waters and water resources	19	National public works
3	Immigration and citizenship	20	Housing policy
4	The relationship between religion and state	21	General principles of land planning and the co-ordination of planning by the counties

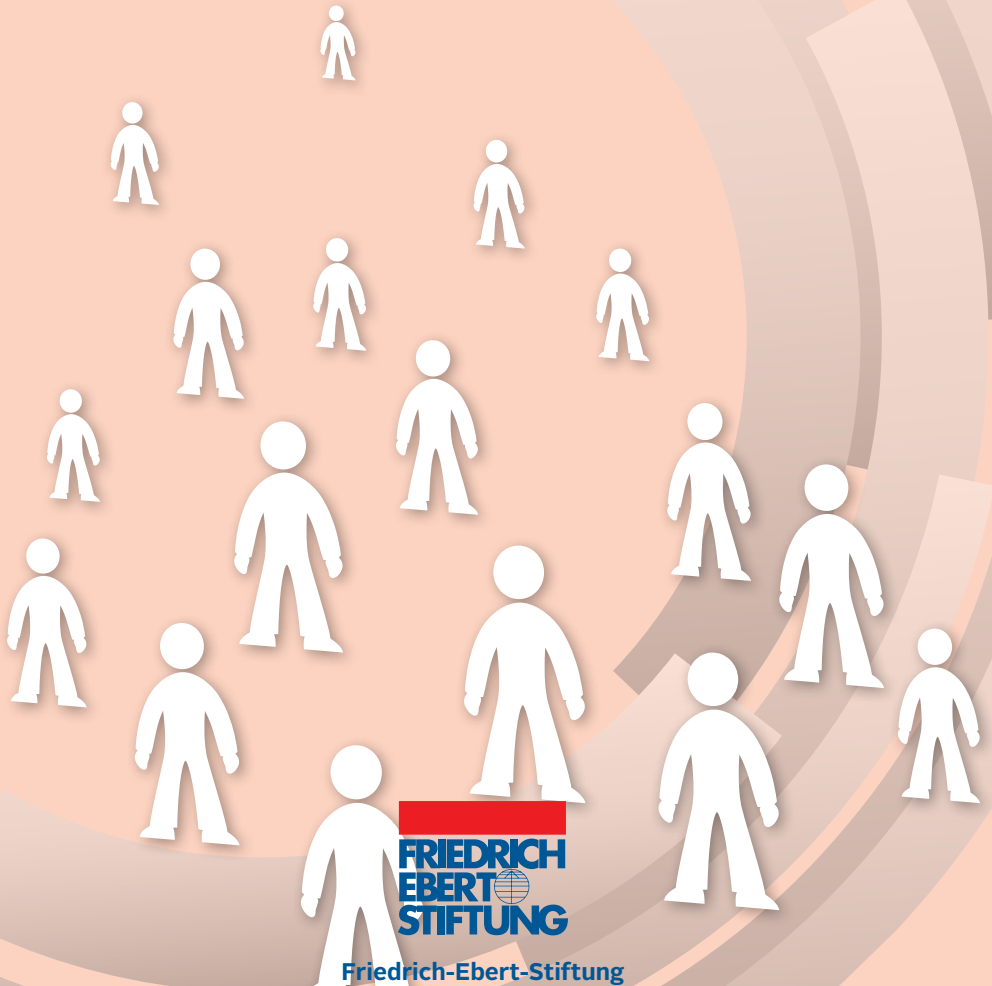
5	Language policy and the promotion of official and local languages	22	Protection of the environment and natural resources with a view to establishing a durable and sustainable system of development, including, in particular— (a) fishing, hunting and gathering; (b) protection of animals and wildlife; (c) water protection, securing sufficient residual water, hydraulic engineering and the safety of dams; and (d) energy policy
6	National defence and the use of the national defence services	23	National referral health facilities
7	Police services, including— (a) the setting of standards of recruitment, training of police and use of police services; (b) criminal law; and (c) correctional services	24	Disaster management
8	Courts	25	Ancient and historical monuments of national importance
9	National economic policy and planning	26	National elections
10	Monetary policy, currency, banking (including central banking), the incorporation and regulation of banking, insurance and financial corporations	27	Health policy

11	National statistics and data on population, the economy and society generally	28	Agricultural policy
12	Intellectual property rights	29	Veterinary policy
13	Labour standards	30	
14	Consumer protection, including standards for social security and professional pension plans	31	Energy policy including electricity and gas reticulation and energy regulation
15	Education policy, standards, curricula, examinations and the granting of university charters	32	Capacity building and technical assistance to the counties
16	Universities, tertiary educational institutions and other institutions of research and higher learning and primary schools, special education, secondary schools and special education institutions	33	Public investment
17	Promotion of sports and sports education	34	National betting, casinos and other forms of gambling

PART 2—COUNTY GOVERNMENT

REF	FUNCTION
1	Agriculture, including— (a) crop and animal husbandry; (b) livestock sale yards; (c) county abattoirs; (d) plant and animal disease control; and (e) fisheries
2	County health services, including, in particular— (a) county health facilities and pharmacies; (b) ambulance services; (c) promotion of primary health care; (d) licensing and control of undertakings that sell food to the public; (e) veterinary services (excluding regulation of the profession); (f) cemeteries, funeral parlours and crematoria; and (g) refuse removal, refuse dumps and solid waste disposal.
3	Control of air pollution, noise pollution, other public nuisances and outdoor advertising
4	Cultural activities, public entertainment and public amenities, including— (a) betting, casinos and other forms of gambling; (b) racing; (c) liquor licensing; (d) cinemas; (e) video shows and hiring; (f) libraries; (g) museums; (h) sports and cultural activities and facilities; and (i) county parks, beaches and recreation facilities
5	County transport, including— (a) county roads; (b) street lighting; (c) traffic and parking; (d) public road transport; and (e) ferries and harbours, excluding the regulation of international and national shipping and matters related thereto

6	Animal control and welfare, including— (a) licensing of dogs; and (b) facilities for the accommodation, care and burial of animals
7	Trade development and regulation, including— (a) markets; (b) trade licences (excluding regulation of professions); (c) fair trading practices; (d) local tourism; and (e) cooperative societies
8	County planning and development, including— (a) statistics; (b) land survey and mapping; (c) boundaries and fencing; (d) housing; and (e) electricity and gas reticulation and energy regulation
9	Pre-primary education, village polytechnics, homecraft centres and childcare facilities
10	Implementation of specific national government policies on natural resources and environmental conservation, including— (a) soil and water conservation; and (b) forestry
11	County public works and services, including— (a) storm water management systems in built-up areas; and (b) water and sanitation services
12	Firefighting services and disaster management
13	Control of drugs and pornography
14	Ensuring and coordinating the participation of communities and locations in governance at the local level and assisting communities and locations to develop the administrative capacity for the effective exercise of the functions and powers and participation in governance at the local level



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