CONSTITUTIONAL
AND
LEGISLATIVE POLICY INSTRUCTING THE DRAFTING OF COUNTY REVENUE LAWS IN KENYA

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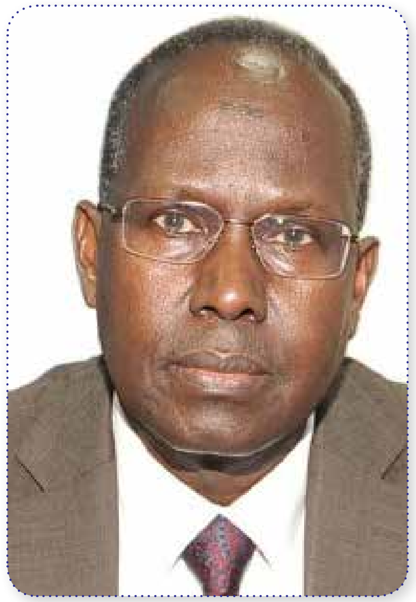

As part of implementing devolution, County governments embarked on developing different legislation to govern them. In particular, County governments have developed revenue legislation targeted at increasing revenue generation. However, the development of any legislation must be in tandem with the Constitution to ensure there are no contraventions.

Some of the legislation passed by County governments has been challenged in court and in some cases nullified. In recognition of the need to have laws aligned to the Constitution, the Commission on Revenue Allocation together with stakeholders embarked on the development of these guidelines.

These guidelines provide principles, values, policies and standards that should be considered while drafting County revenue legislation. Counties will benefit from the guidelines by obtaining proper rationale for establishing key revenue streams for counties; and how they can utilise their natural resources to generate revenue. Businesses will benefit from the predictability of County revenue laws. Cooperation and consultation among County governments, individuals, businesses, National government and other agencies will be key in ensuring that devolution works.

Micah Cheserem
Chairman
COMMISSION ON REVENUE ALLOCATION

PREFACE

As the saying goes “new roads, new ruts.” From the onset of devolution, everyone expected new challenges during the transition period to the new system of government. Perhaps we set our sights too much on the goals and not on the process. Whatever the case, the impact on private sector and especially the manufacturing sector has been great particularly with regard to levies and charges from county governments.

The charges and levies have multiplied almost overnight and double taxation is now the norm as each county seeks new ways to raise revenue. The effects have led to company closures and job losses. The situation is simply untenable and unsustainable for business. If allowed to continue, the private sector will crumble under the strain.

That is why we conceived this project: to work with the Commission on Revenue Allocation to help counties draft revenue laws that would help them not only lawfully collect revenue which most were doing illegally due to the absence of proper legislation. We also encouraged county officials to come up with a rationale for the charges by drawing up a proper tariff policy. The endorsement of the bills needs a Public Participation Act in place targeting the right stakeholders for each piece of legislation and we have been very keen to see that this law is passed in the various county assemblies.

While we only paid attention to areas where the shoe pinches and restricted ourselves to five laws, namely, the Revenue Administration Act, the Finance Act, the Rating Act, the Public Participation Act and the Trade Licensing Act, more legislation is needed that will affect charges and levies in the County. The Constitutional and Legislative Policy Instructing the Drafting of County Revenue Laws in Kenya offers the rationale behind drafting these laws at the local level and clear guidelines on drafting them guided by the Constitution. We hope that county executives will take these guidelines into account.

We would like to thank our partners particularly the Kenya National Chamber of Commerce and Industry (KNCCI). Their commitment and support during the National forum held in Maanzoni, Machakos County and in most of the County forums has been a great source of strength. They too as business representatives understand the challenges we face. We also acknowledge the role played by the Commission of Revenue Allocation, without whom we would never have achieved any of the goals target, at the beginning and it is only due to their cooperation that this project has borne fruits. We are very grateful for this.

Pradeep Paunrana
Chairman
Kenya Association of Manufacturers

ACKNOWLEDGMENTS

These policy guidelines document were prepared to help County governments in the drafting of revenue laws. I wish to acknowledge all our partners in this project who helped us see the project from start to finish.

I would like to thank the Kenya Association of Manufacturers (KAM) which has been instrumental not only in preparing the document but also in the implementation of the whole project across the 47 counties. KAM's support has seen the development of the five County revenue bills in all the 47 counties.

I am also grateful to Business Advocacy Fund for both the financial and technical support accorded to this project and especially Mr. Clive Davis, the BAF Fund Manager, without whose support this whole project would not have been successful. The preparation of this Guide was undertaken by a consultant, Prof Ben Sihanya of the University of Nairobi Law School and Sihanya Mentoring, whose extensive knowledge of constitutional matters has enriched the document. We are grateful for his contribution.

I also wish to thank the commissioners here at CRA for their guidance throughout the entire project.

George Ooko
Chief Executive officer and Commission Secretary
COMMISSION ON REVENUE ALLOCATION

EXECUTIVE SUMMARY

This policy document was commissioned by the Commission of Revenue Allocation (CRA) to act as a guide in drafting of county revenue legislation. Specifically, this document is intended to provide guidance and a legal framework upon which county and national governments as well as the public can use when drafting, contributing to or assessing laws on revenue mobilization and administration for the counties.

The Commission on Revenue Allocation had major concerns about the nature and quality of most of the revenue laws that had been passed by County governments considering that it was a new process for counties. Some complaints were registered by the members of the public and the business community regarding the manner of revenue imposition, collection and administration by the counties. Some of the issues had also been the centre of challenges before courts of law on their constitutionality.

This document not only highlights the challenges counties are facing on revenue management, but it will also propose key constitutional and legal rules, principles, values, policies and standards that should be considered and applied when drafting county revenue legislation. The document begins by addressing some definitions and controversial concepts that arise in the drafting of County revenue legislation due to the new tax dispensation where counties are allowed not only taxing rights, but the right to impose fees, charges and levies.

This document makes the following proposals:

1. Regard should be given to constitutional implementation and compliance;
2. The laws passed must also uphold respect to Kenya's EAC and other international obligations under international law especially regarding County revenue legislation;
3. The County revenue laws should also maintain fidelity to the established legislation and policy framework as well as administrative systems, processes, procedures and justice;
4. County revenue laws drafted must be tailor-made to suit the specific needs of every county and its particular economic strengths;
5. Trade Licences: This is solely a county's function. The revenue laws should be geared towards the reduction of the number of trade licences required to attract doing business at the County level. The definition and applicability of the term 'trade license' should be included in the revenue laws. The definition and applicability of the terms may be developed by using the Constitution as the benchmark and the repealed laws of the former local authorities as starting points. However, the county revenue laws should consider the enabling national legislative framework and policy on licensing and trade. The County revenue laws should also be aligned with the World Trade Organisation (WTO), the East African Community (EAC) and Common Market for East and Southern Africa (COMESA).
6. Trade Licence Law: In a bid to streamline the current single business permit regime, the following proposals have been made:
   (a) That the law on single business permits be replaced by the Trade Licensing Act.

(b) That the trade licence should be all-inclusive That the licence fees should be based on premises.

(c) The trade licensing law should also contain a statement or clause on a licensing policy. The clause on the trade licensing policy should specify the frequency of review of the licensing policy, for example, annually. This policy should form the rationalization and proper legal basis of review of the trade licensing fees in the County governments. This can be added as one of the clauses in Preliminary part of the trade licensing law.

7. Alcohol Law: currently the Alcohol law is a national legislation empowering the national administration to collect alcohol fees. Counties are required to pass their own laws so as to collect these fees since it is a devolved function.

8. Cess: Individual counties should be allowed to pass their own specific cess laws. The counties should use part of the cess collected County to facilitate economic development of that specific sector in which it was collected. The law on imposition, collection and administration of cess should indicate the portion (or fraction) of the cess that is to be ploughed back to the specific sector; and the fraction to be used for general County development. Cess can be charged per volume of output.

9. Agricultural Produce Cess: Currently, the County governments cannot levy agricultural produce cess until they enact appropriate and specific revenue laws to enable them to levy agricultural produce cess. In the case of *Cereal Growers Association & Hugo Wood v. County Government of Narok, County Government of Nairobi, County Government of Nyeri & 8 Others,* the court issued an order prohibiting County governments from levying agricultural produce cess or related tax until they enact appropriate revenue laws. The same would apply to other functions that are for counties.

10. Entertainment Taxes: County should formulate their County entertainment laws for imposing entertainment taxes. They may be guided by the National Entertainment law in place.

11. Property Rates: County governments may also be guided by the National Rating Act while formulating legislation to impose property rates. The parameters for determining rates under the Rating Act may still be applicable under the County government system. The provisions under the Rating Act may be adopted in enacting the County revenue laws with the necessary modifications, e.g. as regards the existing area rating and valuation rating under the Act.

12. Fees and Charges: County governments can levy fees and charges for the provision of services; that is, there must be a relationship between fees charged on service delivery. This is in accordance with the constitutional provision that National and County governments may impose fees and charges for service provision.

13. Finance Bills: County Finance Bills should not form the basis for the imposition of taxes, fees and charges. A County Finance Bill is only supposed to set out the revenue raising measures of a County government in a particular year. In light of this, counties are expected to enact enabling County legislation before enacting annual County finance bills. Article 210 of the Constitution provides that no tax, licensing fee or charge may be imposed, waived or varied except by legislation. The legislation must comply with constitutional standards and criteria. While formulating their finance bills or adopting their revenue raising measures, County governments should be guided by the following factors in accordance with section 132 of the Public Finance Management Act 2012:

(a) take into account the principles of equity, certainty and ease of collection;

(b) consider the impact of the proposed changes on the composition of tax revenue with reference to direct and indirect taxes;

(c) consider domestic, regional and international tax trends;

(d) consider the impact on development, investment, employment and economic growth; and

(e) take into account the taxation and other tariff agreements and obligations that Kenya has ratified, including taxation and tariff agreements under the East African Community Treaty 2010.

14. County Tax and Revenue Administration: While designing their taxation and revenue administration systems, County governments should be guided by the following principles:

(a) Equality: the canon of equality means that a good tax system must be based on the tax payer's ability to pay.

(b) Equity: Article 201 of the Constitution identifies equity as one of the principles of public finance in Kenya. It provides, inter alia, that the public finance system should promote an equitable society and in particular ensure that the burden of taxation is shared fairly. The principle of equity has two aspects including horizontal equity and vertical equity. Horizontal equity means individuals with the same level of wealth or in the same income bracket should pay the same rate. Vertical equity on the other hand means that wealthier persons or those in higher income brackets should pay higher tax rates. Equity as a principle that guides tax policy refers to fairness in taxation.

(c) Neutrality: Neutrality refers to efficiency in the taxation system.

(d) Certainty: The canon of certainty means that tax payers should not be subjected to arbitrariness and discretion of tax officials. The principle requires that the terms of the amount, when and the place of payment must be made known to the tax subjects.

(e) Convenience: The canon of convenience requires that every tax ought to be levied at the time or in the manner in which it is most likely to be convenient for the contributor to pay.

(f) Economy: The canon of economy means that the cost of tax administration and collection should be the minimum possible both to the Government and the tax payers.

(g) Fiscal adequacy: Adequacy in this sense refers to a tax system that is able to raise enough funds to pay for public services in a sustainable manner. Adequacy of a tax system is predicated on various factors such as predictability and elasticity. Other important principles are simplicity, equality, certainty, convenience, and economical.

14. Public Participation: Before levying any tax, fees or licenses, Counties must adhere to the principles on public participation. The Kenya High Court has provided guidance in the criteria to be used in determining whether public participation is sufficient while a County government makes a particular decision. County governments ought to do *"whatever is reasonable"* to ensure as many of their constituents are involved in the decision making

process. This is now effectively the test in establishing whether the public participation criterion has been met, i.e. governments must do whatever is reasonable to ensure they have met public participation criteria. County governments must also provide the information in a format, manner and language that facilitates the public to participate effectively; and must be given sufficient time to study the documents and information. Further, in determining the scope of public participation, the following factors should be taken into account:

(a) the possibility of real influence in relation to the subject matter of the legislation;
(b) the formal involvement of citizens and workers' organisations in the legislative process; and
(c) adequate publicity for the participatory process.

15. County Budget and Economic Forum: County governments should make full use of the County Budget and Economic Forum to ensure that the views of members of the public are fully represented through the Forum. County governments should therefore prioritize the formation and strengthening of the Forum to deal with County revenue matters.
16. Tariffs and Pricing Policy: County governments should formulate tariffs and pricing policies for all sectors to guide members of the public on the rationale for fees and charges in every sector.
17. Tourism: Local tourism is a devolved function. There is need for legislative reforms at the National level to prevent conflict and duplication of functions between the two levels of government as far as local tourism is concerned. For instance, the National Tourism Act 2011 needs to be amended. Or the County government can legislate and collect revenue from this sector as it is a devolved function.
18. Betting, Lotteries and Gambling: Betting, lotteries and gambling is a concurrent function for the two levels of government. There is currently confusion about how far each level of government should go in performing this function. Hopefully, the ongoing intergovernmental discussions will clear the confusion as soon as possible.
19. Taxation on Minerals and other Natural Resources: There is need for intergovernmental consultations on the scope of taxation, or the imposition of fees and charges on natural resources by County governments.
20. Conflict of laws and disputes between the National government and County governments: To prevent conflict of laws between the two levels of government, County governments should be guided by the provisions of Article 191 of the Constitution, and should also refrain from imposing taxes or charges for services which are functions of the National Government. The National Government should also refrain from imposing taxes and charges on services where the functions have been devolved to County governments. Governments should adopt an approach that emphasizes human rights, the rule of law in public administration in the Constitution including under arts. 10, 47, 48, 50, and 232 as well as chapter six. Where there are disputes, both levels of government must endeavor to utilize the alternative dispute resolution (ADR) mechanisms established in law; namely the Intergovernmental Co-ordinating Summit, and the Intergovernmental Budget and Economic Council (IBEC). County governments should utilize the Council of Governors, and the Intergovernmental Budget and Economic Council to resolve such disputes.
21. It is also proposed in this policy that the National government should emulate the USA mode of establishing a Surface Transportation Board to harmonise trade licences and fees and charges for transit goods inter-County; to eliminate negative impact on trade and investment. A similar approach in Kenya would of necessity require the input and participation of the CoG and IBEC. It will also contribute to solving the problem of double licensing.
22. Health Services: County governments are responsible for community health services, primary care services and County referral services. County Governments can therefore charge fees for health services rendered in the County health facilities pursuant to Article 209(4) of the Constitution of Kenya (as read with the Fourth Schedule) and section 120 of the County Government Act on a tariff and pricing policy. Some have proposed that County Governments should also establish the County Health Department (CHD) whose function is to establish and facilitate an institutional management structure to coordinate and manage delivery of the health mandate at the County level. One of the roles of the CHD could be to provide a legal framework for lending arrangements, and to facilitate loan repayments and fees for use of assets by licensed health service providers.

However, most importantly, it should be noted that this document should also be read together with a similar documents on County Revenue Legislation. Some of these include the CRA & Kenya Law Reform Commission (2014) *Model County Revenue Legislation,* Government Press, Nairobi, and an accompanying document the Economic Policy Considerations in County Revenue Legislation.

PRELIMINARIES

List of abbreviations and acronyms

ADR	Alternative Dispute Resolution
BCLB	Betting Control and Licensing Board
BMO	Business Management Organisation
BSF	Benefit Sharing Formula.
CAJ	Commission on Administrative Justice
CBEF	County Budget and Economic Forum
CBSC	County Benefit Sharing Committee
CEC	County Executive Committee
CFSP	County Fiscal Strategy Papers
CHD	County Health Department
CIC	Commission for the Implementation of the Constitution
CIFOR	Centre for InterNational Forestry Research
COG	Council of Governors
COMESA	Common Market for East and Southern Africa
CRA	Commission on Revenue Allocation
EAC	East African Community
EAC-CUP	East African Community Customs Union Protocol
EAC CMP	EAC Common Market Protocol
EMCA	Environment Management and Coordination Act, 1999
IBEC	Intergovernmental Budget and Economic Council
ILM	International Law Materials
KAM	Kenya Association of Manufacturers
KEBS	Kenya Bureau of Standards
KHP	Kenya Health Policy
KEPSA	Kenya Private Sector Alliance
KFS	Kenya Forest Service
KRA	Kenya Revenue Authority
KTB	Kenya Tourism Board
LAPSSET	Lamu Port Southern Sudan-Ethiopia Transport project
LATF	Local Authority Transfer Fund
MDA	Ministries, Departments and Agencies
MFN	Most Favoured Nation
NARA	National Accord and Reconciliation Act, 2008

NLC	National Land Commission
NTS	National Tourism Strategy
PESTLE	Political, Economic, Social, Technological, Legal and Environmental
PWD	Persons with Disabilities
SADC	Southern African Development Community
SGR	Standard Gauge Railway
SWOT	Strengths, Weaknesses, Opportunities and Threats
TLP	Transnational legal process
TRIPs	Agreement on Trade Related Aspects of Intellectual Property Rights, 1994
UNTS	United Nations Treaty Series
VAT	Value Added Tax
WTO	World Trade Organisation
WARMA	Water Resource Management Authority.

LIST OF CONSTITUTIONS AND CONSTITUTIONAL INSTRUMENTS

Constitution of Kenya, 1963 (Independence Constitution) (Kenya Independence Order in Council, 1963, Extraordinary Issue, Kenya Gazette Supplement No. 105, 10/12/1963, Legal Notice No. 718, Statutory Instruments, 1963 No. 1968, Kenya's Independence Order in Council 1963 (made 4/12/1963; to be laid before Parliament 4/12/1963; Coming into operation 12/12/1963); At the Court at Buckingham Palace, the 4th day of December 1963, Queens's Most Excellent Majesty in Council...).

Constitution of Kenya, Act No. 5 of 1969 (Consolidating amendments from 1964). Constitution of Kenya 2010 (Ratified in a referendum, 4/8/2010; promulgated 27/8/2010).

Constitution of Kenya (Amendment) Act No. 1 of 2008.

Constitution of Kenya (Amendment) Act, 2008 (incorporating National

Reconciliation Act (NARA)). Accord and

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Uganda Constitution 1995, 2005 (as amended) (adopted 2012)

Constitution of Rwanda, 2003.

Constitution of Burundi, 2005.

Constitution of Nigeria, 1999.

List of TransNational Legal Instruments

Agreement on Trade Related Aspects of Intellectual Property Rights including Trade in

Counterfeit Goods, 33 ILM 1197 (1994).

East African Community Common Market Protocol, 2010.

East African Community Customs Market Union Protocol, 2005. East African Community Treaty, 1999, 2144 UNTS 255.

List of Kenyan Statutes

Basic Education Act, No. 14 of 2013.

Constituencies Development Fund Act, No. 30 of 2013. Continental Shelf Act, Cap 312 (repealed).

County Government Act, No. 17 of 2012.

Diamond Industry Protection Act, Cap 310 (repealed). Division of Revenue Act, No. 31 of 2013.

Gold Mines Development Loans Act, Cap 311.

Income Tax Act, Cap 470.

Intergovernmental Relations Act, No. 2 of 2012. Maritime Zones Act, 1989, Cap 371.

Mining Act, 1940, Cap 306 (repealed).

National Government Co-ordination Act, No.1 of 2013. Natural Resources (Benefit Sharing), Bill 2013.

Petroleum (Exploration and Production) Act, Cap 308. Public Finance Management Act, No. 18 of 2012.

Tourism Act, 2011.

Trading in Unwrought Precious Metals Act, Cap 309 (repealed). Transition County Allocation of Revenue Act, No. 6 of 2013. Transition County Appropriation Act, No. 7 of 2013.

Transition to Devolved Government Act, No. 1 of 2012.

Urban Areas and Cities Act, No. 13 of 2011. Value Added Tax, Cap 472.

List of Kenyan Rules, Regulations and Bye-Laws

Central Depositories (Regulations of Central Depositories) Rules, 2004

County Governments Procurement Regulations, Legal Notice No. 60 of 2013

EAC Customs Management Regulations, 2010

Environmental Impact Assessment and Audit Regulations – Legal Notice No 121 of 2003

Petroleum (Exploration and Production) Regulations, 1986

Nairobi City County Bye-Laws

Value Added Tax Regulations, 2014

List of Cases

Bahamas District of the Methodist Church in the Caribbean and the Americas v. Symonette; Poitier v. Methodist Church of the Bahamas [2000] JCJ 31, 26 July 2000 (Privy Council).

Cereal Growers Association & Hugo Wood v. County Government of Narok, County Government of Nairobi, County Government of Nyeri, County Government of Murang'a, County Government of Trans Nzoia, County Government of Uasin Gishu, County Government of Nandi, County Government of Nakuru, Ministry of Agriculture, Livestock & Fisheries, Ministry of Devolution and Planning and The National Treasury High Court Petition No. 385 of 2013.

City of Eastlake v. Forest City Enterprises, Inc. [1976] USSC 128; 426 US 668.

David Ngunyi Kimani & 3 Others v. County Government of Machakos & another in the High Court of Kenya at Machakos Petition No. 63 of 2013.

David Ngunyi Kimani & 3 Others v. County Government of Machakos & Another (2014) eKLR.

Doctors for Life InterNational v. Speaker of the National Assembly and Others (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC).

Government of the Republic of South Africa and Others v. Grootboom and Others (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (4 October 2000).

Law Society of Kenya v. Attorney General & 2 Others (2013) eKLR Petition 518 of 2013.

Marbury v. Madison, 5 U.S. 137 (1803).

Marie Sarah Eurig, as Executor of the Estate of Donald Valentine Eurig v. The Registrar of the Ontorio Court (General Division) and the Attorney General for Ontorio, Supreme Court Judgment Number 565 of 1998, at https://scc-csc.lexum.com/scc-csc/scc- csc/en/item/1651/index.do (accessed 16/11/2014).

Michael Mutinda Mutemi v. Permanent Secretary, Ministry of Education & 2 Others [2013] eKLR.

Mitubell Welfare Society v. The Attorney-General & 2 Others Petition No. 164 of 2011Re the Matter of the Interim Independent Electoral Commission, Sup. Ct. Const. Appl. No.2 of 2011.

Robert N. Gakuru & Others v. Governor Kiambu County and 3 Others Petition No. 532 of 2013.

Taomae v. Lingle 118 P.3d 1188 (Hawaii Sup. Ct. 2005).

Wycliff Indalu Adieno v. Attorney-General & 2 Others [2014] eKLR Petition No. 315 of 2014.

CONSTITUTIONAL POLICY INSTRUCTING THE DRAFTING OF COUNTY REVENUE LAWS

1. OVERARCHING ARGUMENT AND INTRODUCTION ON POLICY INSTRUCTING THE DRAFTING OF COUNTY REVENUE LAWS IN KENYA

The Constitution of Kenya empowers County governments to raise revenue by imposing specific taxes and charges for services rendered. However, County governments are required to further enact enabling legislation to be able to discharge their constitutional mandate of revenue collection in those select areas. County governments can only actuate this mandate by enacting enabling revenue legislation. Any attempt to collect revenue without specific county revenue laws is illegal.

The constitutional and legal framework should form the basic minimum standards in creating the County revenue framework. Article 186 of the Constitution of Kenya 2010 classifies functions and powers between the National and County governments in the following manner:

(a) Exclusive functions and powers exclusive to the National Government and
(b) Exclusive functions and powers exclusive to the County Government
(c) functions and powers not allocated to either level. In this case, these are powers and functions of the National Government (residual functions).
(d) Concurrent functions and powers which are then dealt with in accordance with Article 191 of the Constitution.

The powers and functions discussed under the Fourth Schedule of the Constitution are further subdivided in a 35:14 ratio between the National and County governments, respectively. The National Government is therefore constitutionally barred from intruding in the County government's role under the Fourth Schedule, except in certain cases which may require Parliament's approval.

The County revenue laws must be tailor-made to suit the specific needs of every County. One good reason is that counties have varied economic strengths: for instance, Mombasa's focus is on tourism, Nairobi's is on business, Taita Taveta's is on mining, and Nyeri's is on agriculture. These economic strengths should be the main focus of the relevant counties. These economic strengths should be identified through a study and analysis of the County's financial returns. More work needs to be done in this area.

The drafting of County revenue legislation should also be preceded by a study of Kenya's economic activity and economic strengths. The drafting of the County revenue legislation should also be in line with the County Fiscal Strategy Papers (CFSP), and take into account the Commission for Revenue Allocation (CRA's) model legislation based on the following seven relevant standards and criteria:

1. Constitutional implementation and compliance of County revenue laws in Kenya;
2. Kenya's interNational obligations;
3. Fidelity to the established legislative framework;
4. Economic and social considerations;
5. Cross-County trade dispute and resolution; and
6. Equity, efficiency and reasonableness.

CRA has developed model laws on County revenue legislation. Several meetings have been held between County government representatives and Business Member Organisations (BMOs) with a view to brainstorming on solutions on some of the issues in County revenue laws. This project seeks to assist counties in enacting legislation on revenue collection and administration as well as developing a tariff policy. Under this project, the counties are grouped into clusters as follows:

Cluster	Counties
1	Mombasa, Kwale, Kilifi, Tana River, Taita Taveta, Lamu
2	Garissa, Wajir, Mandera, Marsabit, Isiolo
3	Siaya, Kisumu, Migori, Nyamira, Homa Bay, Kisii
4	Turkana, West Pokot, Trans Nzoia, Uasin Gishu, Samburu, Elgeyo, Marakwet
5	Bomet, Narok, Nakuru, Kericho, Kajiado, Baringo
6	Kakamega, Vihiga, Bungoma, Busia, Nandi, Laikipia
7	Nairobi, Embu, Makueni, Machakos, Kitui

2. RESEARCH METHODOLOGY ON COUNTY REVENUE LAWS

This document is based on qualitative and quantitative research methods. It relies on published works of legal scholars, lawyers, policy makers and policy analysts. It also relies on the provisions of the Constitution and other relevant statutes. CRA's model revenue laws have also been very instrumental in providing policy direction. Data was also collected from the counties during County visits.

3. SITUATIONAL ANALYSIS ON DRAFTING COUNTY REVENUE LEGISLATION IN KENYA

Situational analysis entails a systematic collection and evaluation of past and present economic, political, social, and technological data, aimed at at least two objectives. First is the identification of internal and external forces that may influence the country's performance and choice of strategies. Second is the assessment of Kenya's current and future strengths, weaknesses, opportunities, threats and strengths (SWOT).This should also incorporate aspects of political, economic, social, technological, legal and environmental (PESTLE) analysis.

4. CONCEPTUAL AND THEORETICAL FRAMEWORK IN THE MAKING OF COUNTY REVENUE LAWS

Conceptualising or defining key terms in County revenue legislation can be problematic. As such, this document has offered brief discussions of some of the key terms and concepts to be taken into account while drafting County revenue laws.

4.1. Key Concepts in Revenue Legislation Defined

Some of the key terms for consideration in making of County revenue legislation include:

(a) Decentralisation and devolution
(b) Tax
(c) Charge
(d) Business permit
(e) Trade licence
(f) Cess
(g) Fees
(h) Levies
(i) Duties

4.1.1. DECENTRALISATION AND DEVOLUTION

The term decentralization does not lend itself to a specific definition. However, there have been numerous attempts by scholars of repute in defining the term. For example, decentralisation has been taken to refer to the transfer of authority and power in planning, management and decision making from higher to lower levels of organizational control. Decentralistion has also been taken to refer to the subdivision of a state's territory into smaller areas and creation of political and administrative institutions.

Decentralisation can cover different areas of governance including politics, administration, fiscal matters and market functions. Depending on the level of transfer of functions, powers and authority, there are several forms of decentralization, including:

1. Delegation.
2. Deconcentration.
3. Decongestion
4. Devolution.
   Devolution is the most advanced form of decentralization. Devolution has been adopted by various governments around the world such as Kenya's under Chapter Eleven, the Fourth Schedule and other provisions of the Constitution of Kenya 2010.

4.1.2. TAX

The imposition, collection and administration of taxes in Kenya is regulated by the Constitution of Kenya 2010 and various statutes. Scholars have differed regarding the definition of tax. Tax however has been described by economists' to mean,

"Any leakage from the circular flow of income into the public sector, excepting loan transactions and direct payments for publicly produced goods and services up to the cost of producing these goods and services."[1]

[1] Allan Charles M. (1971) *The Theory of Taxation,* Penguin Books, London, at 24.
[2] Oseni Michael (2014) "Multiple Taxation as a Bane of Business Development in Nigeria," *Academic Journal of Interdisplinary Studies,* MCSER Publishing, Vol.3 No. 1, Rome, Italy. Cf. Oxford Dictionaries website, at http://www.oxforddictionaries.com/definition/english/tax (accessed 7/4/2015).

A simplified definition of tax is;

"A compulsory contribution to state revenue, imposed by the government on workers' income and business profits, or added to the cost of some goods, services and transactions." [2]
Tax is therefore a compulsory sum of money that the government requires its citizens to pay to support the Government in providing services and special facilities.[3] It may be levied by the different levels of government e.g. in Kenya it is levied by both the National Government and County governments. The Government uses its discretion to choose what tax is to be imposed in consideration to the provisions of the Constitution and other relevant laws.[4] This is referred to as the taxation base. Taxation base refers to the income, profits, payments, goods, services and transactions upon which the government may exercise tax jurisdiction.

The taxation base is founded upon the Constitution and Acts of Parliament. The Constitution lays out the taxation bases upon which the National and County governments shall impose taxes.[5] These include income, property, imported and exported goods, and entertainment, among others. The Constitution allows for the establishment of further taxation bases where need may arise. This may only be done through an Act of Parliament.

A tax must be differentiated from a licence fee in the sense that a licence fee is imposed for the purposes of regulation while a tax is primarily levied for purpose of raising revenue.

The Income Tax Act (ITA) was enacted to govern the collection of income tax. Under the ITA, income tax is tax chargeable upon gains or profits from a business, employment or occupation of a property, dividends, among others.

The Value Added Tax (VAT) Act was enacted to review and update the law relating to value added tax and to provide for the imposition of value added tax on supplies made in, or imported into Kenya. Section 2 of the act defines tax to mean "value added tax chargeable under the Act." It defines "value added tax" to mean a duty imposed on the importation of taxable goods, supply of imported taxable services and on taxable supply made by a registered person in Kenya.

The Customs and Excise Act does not define tax within the context of customs and excise duties. Rather, the Act bundles together tax or surtax imposed on goods, services and gaming, excise duty, import duty, export duty, levy and impositions, together as duty.

The different use of the term tax brings about a subjective element to the use of the term where the definition and application of the term "tax" changes depending on the circumstances. Common in all these pieces of legislation is that tax may only be imposed, waivered or varied as provided for by legislation pursuant to Article 210 of the Constitution.

The suggested criteria that are used to determine what amounts to tax were stated by the Ontario Court in the case of *Re Eurig Estate* case where the court stated that tax:

[3] ibid.
[4] Article 209 Constitution of Kenya, 2010.
[5] ibid.

(a) is legally enforceable;
(b) is levied by a public body; and
(c) is intended for a public purpose

This means that any duty imposed by a public body, intended for a public purpose and legally enforceable amounts to tax. What "tax" means is clearer on considering related concepts such as "fees" and "charge."

4.1.3. CHARGE

The definition and the application of the term "charge" may be deduced from its use and application in the repealed local authority laws and existing County revenue laws. The repealed Local Government Act, Cap 265 mandated the local authorities to impose fees and charges. The term charge was used synonymously with fees in this repealed law. For instance, section 148(b) empowered local authorities to impose fees or charges for any service or facility provided or goods or documents supplied by the local authorities. These fees remain alive by virtue of the fact that they are subsidiary and according to the Statue laws of Kenya, subsidiary legislation remains in force until repealed or replaced.

From the use of the term above, charges were imposed for services performed, for facilities provided or for goods or documents supplied. An instance where a charge was imposed by the local authorities is where a business enterprise would pay for dust bin charges.

4.1.4. Business Permits and Trade Licenses

The repealed Local Government Act, Cap 265, defines a business permit as a permit issued in respect of a class of business activities in lieu of the separate licences which would otherwise require to be issued in respect of each activity.

Respective licenses are issued irrespective of whether the activities are done in the same premises or not. Under Article 209 of the Constitution business permits can only be issued in accordance with specific County laws where initially they were issued by the local government authorities. Section 148 of the Act had empowered local authorities to issue licences and permits.

The application and use of the term "business permit" has led to various controversies that have been witnessed in the counties. For example, Safaricom raised concerns that the M-pesa business was being forced to acquire separate permits or licences even where the M-pesa businesses are in the same premises along with other businesses such as shops. The use and application of the term permit has resulted in double licensing of business activities in some counties.

The failure to define and operationalize the use and applicability of the term "single business permit" has concretized the problems on revenue collection and issuance of single business permits.

So far some of there are two approaches adopted by the counties in dealing with this multiple businesses under one roof. These are:

(a) Counties can adopt the "Embu County approach" where the County government resorted to charging a reducing percentage for issuing single business permits for various businesses in the same premises. This approach would ensure revenue to the counties is secured without distorting market forces in the collection of revenue. For example, the main business activity is charged 100% of the fee, while the second and third are charged 75% and 50%, respectively. Further to this, the approach by Embu County is a move to combat double licensing on trading entities.

(b) Other counties can also adopt the Bungoma County approach where a single permit is issued for the business activity that attracts the highest fee. For instance, if one has an M-pesa business and a Kiosk and the permit for an M-pesa business is more expensive than that of a kiosk, then the County government only charges for the M-pesa business permit.

4.1.4.1. Background on permits and trade licences

The law on single business permits in Kenya is best understood within the proper historical context in the development of this area of trade law. The issue of trade licences and single business permits (SBPs) has had a complex history in Kenya. There had been complaints and concerns by businesses that the trade licences and fees, then issued by the Central Government and the local authorities, were too many. The business community raised concerns that the growing number of fees and licences were opening numerous areas for corruption. Another concern was that the numerous licences and fees were too heavy a burden on businesses and was a main hurdle to conducting business in Kenya. The Central Reform Committee created by the Ministry of Finance conducted an inventory of licences and identified a staggering 1, 325 licences countrywide.[6] After this, the committee was advised to adopt the "guillotine approach" in a bid to identify the illegal and unnecessary licences. From this reform project, many licences were declared unnecessary, others were reviewed accordingly and the single business permit which had been introduced earlier was also reviewed.

The SBP was introduced in Kenya by the Kenya Local Government Law Reform Programme (KLGLRP) which was established in 1998. Initially, businesses were required to get multiple licences before getting authorization to start new establishments. In order to reduce compliance costs and the scope of rent-seeking activities by officials, the KLGLRP proposed the multiple licences be replaced with an SBP.[7] Some of the reforms to introduce the SBP include: First, and most importantly, business licensing was decoupled from regulatory requirements. The regulation of public health and safety was to be enforced by way of inspections under their relevant laws. Second, businesses were only required to get one business permit based on premises to start operating.

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6 Scott Jacobs, Peter Ladegaard & Ben Musau (2007) "Kenya's Radical Licensing Reforms, 2005-2007: Design, Results, and Lessons Learned," Paper for the Africa Regional Consultative Conference "Creating Better Business Environments for Enterprise Development: African and Global Lessons for More Effective Donor Practices," November 2007, Accra.

7 Nick Devas & Roy Kelly (2001) "Regulation of Revenues? An analysis of local licences, with a case study of the single business permit reform in Kenya," 21 Public Admin. Dev.381-391, 386.

In spite of these reforms, there were persistent complaints by businesses that the Local Authorities continued to issue multiple licences and charge multiple fees when starting businesses.

4.1.4.2. Recommendation on trade licensing law

Section 7 of Part 2 of the Fourth Schedule of the Constitution of Kenya gives the County governments the power to regulate trade development including licensing.

In a bid to streamline the current single business permit regime, the following proposals have been made:

(a) That we do away with the term "single business permit." That the law on single business permits should be called the Trade Licensing Act.
(b) That the all-inclusive trade licence should include a business permit, among other licences.
(c) That the licence should be based on premises.
(d) The trade licensing law should also contain a statement or clause on a licensing policy. The clause on the trade licensing policy should specify the frequency of review of the licensing policy, for example, annually. This policy should form the rationalization and proper legal basis of review of the trade licensing fees in the County governments. This can be added as one of the clauses in Preliminary part of the trade licensing law.

In the case of multiple businesses under one roof, as is the common occurrence in the counties, then the one trade license shall be issued. Licences tend to be related to individuals, firms or companies. The issue of multiple businesses under roof therefore becomes convoluted by cases where there are multiple businesses under one roof owned by an individual and multiple businesses under one roof owned by different individuals.

However, the proposed Trade Licensing Law should provide a upper limit as to how many businesses one can have under one roof. This limit shall work better for the smaller businesses. It is proposed that the ideal upper limit is three small businesses under one roof. For example, a M-pesa business, a grocery and a kiosk. The Trade Licensing Act should define "small businesses."

In the case of malls and similar institutions, the Trade Licensing Law should create a coding system. It should be noted that the effectiveness of the proposed coding system under the current constitutional dispensation has yet to be determined. This coding system has been discussed at length in the Economy Policy Consideration.[8] Streamlining will ensure that the original principles of the single business permit are resuscitated by adoption of a uniform business licensing code to cover all licenses in all Counties. The rule of separation of licences in case of suspension ought to apply.

The revenue laws should provide for the reduction of the number of trade licenses required to run a business at the County level.

8 See discussions on trade licensing under the Economic Policy document.

The definition and applicability of the term trade licence should be included in the revenue laws. The definition and applicability of the terms may be developed by using the Constitution as the benchmark and the repealed laws as starting points. However, the County revenue laws should consider the enabling National legislative framework and policy on licensing and trade. The County revenue laws should also be made in comprehension of the regional trade commitments under the World Trade Organisation (WTO), the East African Community (EAC) and Common Market for East and Southern Africa (COMESA).

4.1.4.3. Hawker's licence

The existence of hawkers, peddlers and other street vendors in the County trading areas is an increasingly important issue. Some are of the view that hawkers and other street traders should be licensed and regulated so as to give them legal recognition and supervision of their activities. The proposed law on hawkers and other street traders should designate areas for example specific streets and time frames for the operation of hawkers. The law should also list the items that hawkers are allowed to trade in and those that they are not allowed to.

However, some counties favour the view that hawking is unlawful even illegal, and therefore should not be permitted or licensed.

The definition of a trade licence could be borrowed from the repealed trade licensing law to mean "authority or a warrant issued to a trading entity to run various entities under the same management and or premises."

4.1.5. CESS

4.1.5.1. Conceptualising cess

There is no widely agreed definition of cess. Cess has been defined differently in various jurisdictions. For example, in Ireland cess is defined as a tax; and in Scotland it was charged as property tax. In India, cess is it is charged as a surcharge. All taxes in India are subject to an education cess, which is 3% of the total tax payable. This education cess is used for the specific purpose of provision of education in India.

4.1.5.2. Contextualising cess in Kenya

The power to impose taxes and charges is enshrined in the Constitution of Kenya 2010. According to Article 209, the National Government may impose income tax, value added tax, custom duties and excise tax. The County government may only impose property rates, entertainment tax and any other tax that is authorized by an Act of Parliament.[9] Devolution has created the need to collect revenue at the County level. Yet the function of the County on collection of revenue is very limited. Counties have experienced challenges on the collection of revenue mainly because most of the counties have not enacted legislation to facilitate the collection of revenue.

Collection of cess by counties has elicited various views on the counties' powers to impose, collect and administer revenue. For instance, on the collection of cess by the counties, there are two schools of thought.

9 Article 209, Constitution of Kenya 2010

Cess has not been specifically mentioned in the Constitution of Kenya 2010. Some experts in the field are of the view that cess is a tax. However, such a view would mean that the regulation and legislation on cess matters would be a preserve of the National Government under Article 209(3)(c). This would mean that the National Government passes a National cess statute. Such a view would be inconsistent with trite constitutional interpretation since it would leave regulation of matters under the domain of the counties to the National Government.

Out of this controversy rises a second school of thought that posits that individual counties should be allowed to pass their own specific cess laws. This approach is more constitutionally sound following the division of powers and functions in the Fourth Schedule to the Constitution of Kenya, 2010.

Even within this second school of thought, a few issues continue to persist. One of the main issues is whether to create an omnibus cess bill or individual cess bills. The omnibus cess bill would then be divided into parts dealing with specific economic sectors and subsectors. For example, Part II- Agriculture Produce, Part III – Livestock, Part IV – Timber, Part V – Salt, among others depending on every County's specific needs. The omnibus cess bill would also have schedules on the fees to be collected on specific products such as crops, livestock and sand, among other products.

A second approach is where the counties develop County cess bills on each specific economic sector; for example, Agriculture Produce Cess Bill, Livestock Cess Bill, Salt Cess Bill, among others.

4.1.5.3. Elements of a cess

Here we adopt a three-pronged approach in highlighting the elements of a cess.

4.1.5.4. Where is it charged?

In Kenya, cess is charged at the source in case of extraction and also at the point of production including manufactured goods. For example, a farmer will be charged cess once she harvests coffee from her farm. A second cess will be charged at the point of exit from the County, for example the farmer who has harvested her coffee will be charged cess once her coffee is ready for the market.

4.1.5.5. What is the rationale for charging cess?

Cess collected for a County is meant for the development of that County and should therefore be collected for the benefit of the County. The cess collected is to be used to improve the infrastructure of the County which should facilitate the economic growth of the County.

The counties should plough back part of the cess collected to the County to facilitate economic development of the specific sector in which it was collected. The law on imposition, collection and administration of cess should indicate the portion (or fraction) of the cess that is to be ploughed back to the specific sector; and the fraction to be used for general County development.

For example, if cess is collected on livestock, part of it should be used to improve the livestock sector in the County[10] This approach has also been adopted in the Kenya National Livestock Policy, 2008. The Livestock Policy provides that,[11]

> "In particular, the [local County councils] will *plough back some of the cess revenue towards the development of livestock marketing infrastructure in order to improve local livestock market."*

The Kenya Meat Commission (Amendment) Act 1966 provides that the proceeds received by the Commission as cess is to be applied by the Commission to the interest of the livestock industry. The Act also provides for the rate of the cess payable. Further, it provides for how the Commission will recover the cess as a civil debt due from the person who received the cess payable.[12] The Act though enacted in 1966 explains how the cess on the livestock was to be collected. Collection of cess should be pegged on provision of services.

4.1.5.6. How will cess be charged?

Cess to be collected will be charged per volume of output. For example, price per a tonne of sand. The cess should not be charged on turnover after sale because the charge will then be an income tax which under Article 209(1)(a) can only be charged by the National Government.

The elements of cess will guide its collection and administration.

4.1.5.7. Agriculture Produce Cess

Agriculture produce cess was initially collected by defunct local authorities under section 201 of the repealed Local Government Act, Cap 265 and section 192A of the repealed Agriculture Act, Cap 318. The collection of agriculture produce cess was addressed under section 192A where local governments were empowered to impose a cess on any kind of agricultural produce. This, in essence, was an imposition of a charge on agricultural produce.

In the case of *Cereal Growers Association & Hugo Wood v. County Government of Narok, County Government of Nairobi, County Government of Nyeri & 8 Others,* the court issued an order prohibiting County governments from levying agricultural produce cess or related tax until they enact appropriate revenue laws.

Horticulture Crops Development Authority (HCDA)

HCDA levies a cess on export growers based on tonnage to support its functions. This is a County function and the position is similar to the Agricultural produce cess herein above.

4.1.6. FEES

There is no legal set definition of the term "fees." The meaning and use of the term varies in different contexts. The Constitution does not define the term "fees." Article 209 (4) empowers the National and County governments to impose charges for services provided. The term "fees" was used synonymously with the term "charge" under the repealed Local Government Act. Section 148(b) of the repealed Local Government Act empowered the local authorities to impose fees or charges for any services or facility provided or goods or documents supplied by the local authorities.

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10 Government of Kenya (2008) National Livestock Policy, Session Paper No. 2 of 2008, Government Printer, Nairobi.
11 Clause 3.6.3 of the National Livestock Policy of 2008, Session Paper No. 2, 2008.
12 Kenya Meat Commission (Amendment) Act 1966

Sections 163A (2) and 201A of the repealed Local Government Act stated that a local authority will charge fees for the grant of a business permit. The term "fees" is used several times through the repealed Act in reference to monies collected by the local authorities. For instance, Section 201A of the repealed Act states and that "all….fees….imposed by every local authority shall be resubmitted to the Minister for new approval notwithstanding that an approval may have been given by the Minister in respect of such by-laws, licences, fees, permits or other charges prior to the commencement of this section.

Under the Kenya Revenue Authority Act, Cap 469, revenue is defined to include fees. Here the Kenya Revenue Act sets out that revenue means taxes, duties, fees, levies, charges, penalties, fines or other monies. The term 'fees' is categorized in the same class as charges, levies and penalties to mean revenue.

The County Government Act, No. 17 of 2012, uses the term "fees" to imply the imposition of a fee for the discharging of an obligation. Section 96 (4) of the Act states that a County government may impose reasonable fees or charges for accessing information held by the County government. Additionally, section 120 states that a tariffs and pricing policy may be implemented by a County government for the provision of public services.

In summary, fees are described to mean monies charged for services performed, for facilities provided or for goods or documents supplied.

4.1.7. LEVIES

The term levy is used in two ways that are relevant to County revenue laws. The first being the act of imposing tax. For instance, the section 3 of the Rating Act, Cap 267, empowers local authorities to levy rates. The second, being what is described in various legal instruments. Some of which include:-

(a) Standards Levy Order, 1990

The term levy is mentioned in the Standards Levy Order, under Legal Notice No 267 of June, 1990. The order mandates each manufacturer to pay to Kenya Bureau of Standards (KEBS) a standard levy. There is no clear definition of the term under the Standards Levy Order.

(b) Hotels and Restaurants Act, Cap 494 (repealed)

The repealed Hotels and Restaurants Act, Cap 494, provides for the imposition of a levy for training persons to be employed in hotels and restaurants. It defined levy under section 15 to mean a catering training and tourism development levy imposed by the minister. The Hotels and Restaurants Act was repealed by the Tourism Act, Cap 383. Section 105 of the Act provides for the imposition of a tourism levy by persons engaged in tourism activities and services.

(c) Kenya Revenue Act, Cap 469

The term "levies" is used in to define what revenue is under the Kenya Revenue Act, Cap 469. This is found under section 2 of the Act where it is states that revenue means taxes, duties, fees, levies, charges, penalties, fines or other monies collected or imposed under the written laws set out in the First Schedule.

(d) County Governments Act, No. 17 of 2012The term "levies" is pressed slightly by the County Governments Act. Section 120 (3) (a) of the Act mandates the County governments to adopt a tariff policy that reflects equity in the application of tariffs, fees, levies or charges. The Act does not define the term. The use of the term in the Act is with regards to the equitable application of tax in the counties.

(e) Road Maintenance Levy Fund, Cap 425D

The term "levy" is used severally in the Road Maintenance Levy Fund Act. Section 2 of the Act defines levy to mean the road maintenance fuel levy. Section 3 of the Act empowers the minister (Cabinet Secretary) to impose on any or all petroleum fuels a road maintenance levy where the road maintenance levy is established by section 7 of the Act.

(f) Horticultural Crops Development Authority (Imposition of Fees and Charges) Order 2011: An order implementing Agriculture Act Cap 318 [repealed].

Under the Horticultural Crops Development Authority Order, 2011, the term levy is used severally with regards to horticultural produce. For instance, under section 33 of the Order, levies are imposed on all horticultural crops destined for export.

The definition of the term "levy" varies greatly with its use in different contexts. What we can distill from the use of the term in various statutes is that levy is revenue collected and imposed in various industries in Kenya. In foreign jurisdiction, the term levy is used differently from Kenya. In the US for example, the term levy is used in relation to property tax.

4.1.8. DUTIES

This term is used in the Constitution and several statutes. Article 209 (1)(c) of the Constitution empowers the National government to impose customs duties and other duties on import and export goods. Several statutes impose duties without necessarily defining them; for instance, stamp duty under the Stamp Duty Act; and customs and excise duty under the Customs and Excise Act, Cap 472.

Section 2 of the East African Community Customs Management Act, 2004 defines duty as any cess, levy, imposition, tax, or surtax, imposed by any Act. For the purposes of the definition, "any Act" refers to any legislation passed by the partner states with provisions on duties to be charged on various goods. Surtax is levied upon another tax and evaluated to fund specific government programs while cess is a type of tax on the movement of farm agricultural produce, livestock and products marketed in various outlets. This definition of duty is fundamentally consistent with that under the Protocol on the Establishment of the East African Customs Union enacted at Arusha on 08/03/2004.

According to the EAC Customs Union Protocol, duty is defined as any duty that can be levied under any customs law and includes surtax while customs duty means import or export duties and other charges of equivalent effect levied on goods by reason of importation or exportation, respectively, on the basis of legislation in the Partner States and includes fiscal duties or taxes where such duties or taxes affect the importation or exportation of goods. It does not include internal duties and taxes such as sales turnover or consumption taxes imposed other than in respect of the importation or exportation of goods.

A harmonized definition of duty must therefore incorporate elements mentioned under the EAC Customs Management Act as well as the EAC Customs Union Protocol EACCUP on the establishment of the East African Customs Union in full recognition of the regional integration goals. Duty would thus be defined to mean any cess, levy, tax or surtax as may be imposed under any Act by any partner state to the East African Community.

The use of the term in various other legal instruments may inform the definition of the term. They include the Kenya Revenue Act, the Provisional Collection of Taxes and Duties Act, the Stamp Duty Act, and the Customs and Excise Act.

(a) Kenya Revenue Act, Cap 469

The term "duties" is used to define what revenue is under the Kenya Revenue Act, Cap 469. This is found under section 2 of the Act where it states that revenue means taxes, duties, fees, levies, charges, penalties, fines or other monies collected or imposed under the written laws set out in the first Schedule. Additionally, the term is used in section 5A of the Act where a reward is offered to a person for information leading to the identification or recovery of unassessed taxes or duties.

(b) Provisional Collection of Taxes and Duties Act, Cap 415

This is an Act of Parliament that sought to give statutory effect for limited periods to orders of the Minister imposing any new tax or duty or rate of tax or duty, or creating any new allowance, or altering or removing any existing tax or duty or any such allowance or rate.

Cap 415 empowers the Minister (now Cabinet Secretary) to make orders relating to duties in a Bill take effect as if the Bill were passed into law. The Provisional Collection of Taxes and Duties looks into giving effect to bills before they become law. The term duty here is used synonymously with the term tax.

(c) Stamp Duty Act, Cap 480

Cap 480 defines duty to mean any stamp duty for the time being chargeable by any written law. Here duty is paid on the value of land transferred from one party to another. This is now a county function that requires alignment.

(d) Customs and Excise Act, Cap 472

The Customs and Excise Act defines duty to include excise duty, import duty, export duty, levy, imposition, tax or surtax imposed on goods, services and gaming takings under the Act. Under the Act, excise duty means a duty imposed on goods manufactured in Kenya or imported into Kenya. Import duty means duty on goods imported into Kenya.

With regards to county revenue, the term duty refers to tax imposed upon certain articles and financial transactions rather than on persons. It is evident that stamp duty is levied on land transfers, not on the parties transacting in land. Similarly, duty is imposed on imported as well as exported goods, not on the importing or exporting parties.

4.2. Revenue Laws, Tax Laws and Finance Laws

There are debates on the meaning of revenue, finance and tax laws.

4.2.1. Revenue laws

Revenue is defined by the Kenya Revenue Authority Act, Cap 496, to mean taxes, duties, fees, levies, charges, penalties, fines or other monies collected under the written laws. Revenue laws refer to the legislation for the purpose of facilitating the collection of revenue as prescribed by the Kenya Revenue Authority Act.

Revenue laws may be enacted by the national government and the county governments at the county level. The purpose of revenue laws is to facilitate revenue imposition, collection and administration within the national or the county levels.

Before the adoption of the Constitution, there existed by-laws and mechanisms to facilitate collection of revenue by local authorities. For instance, the repealed Trade Licensing Act and the Licensing Act, No. 17 of 2006 provided for the issuance of trade licences. County governments continued to impose, collect and administer revenue pursuant to section 23 of the County Governments Public Finance Management Transition Act, 2013.

4.2.2. Finance laws and finance bills

Finance laws are passed on an annual basis by Parliament. They are prepared as bills for parliamentary approval by the National Treasury mandated with the responsibility of formulating revenue raising measures for the National Government under section 40 of the Public Finance Management Act, 2012.. Finance laws are also to be prepared by County governments for the purpose of providing revenue raising measures for a County government in a particular financial year, as provided for in section 132 of the Public Finance Management Act, 2012.

Currently, there are two notions on finance law. There is the broad notion and the narrow notion on finance laws. The broad notion relates to Chapter 12 of the Constitution of Kenya. Chapter 12 of the Constitution is on public finance. Finance laws under the Constitution refer to tax laws, revenue laws, remuneration, audit laws and other laws that affect revenue collection, allocation and administration. The use of the term in its broad notion may be found under Article 203 of the Constitution on equitable sharing of revenue between the National and County government, and other finance laws.

The narrow notion is on the usage of the term, "Finance laws," and especially "Finance Bill." The term has been used as a term of art. Where this happens, "Finance laws" acquire a specific meaning depending on the circumstances of its usage. For instance, some counties in Kenya have been using the term finance laws to refer to finance bills.

Finance Bills are passed to review revenue laws by amending the provisions of the existing revenue or finance laws, and do not form the basis of revenue imposition.

Article 210 of the Constitution provides that "no tax or licensing fee may be imposed, waived or varied except as provided by legislation." Parliament has the power to expand the mandate of

County governments on taxation or licensing. In light of these provisions, counties are expected to put in place enabling County legislation before enacting annual County finance bills.

Most County governments wrongly attempted to use their Finance Bills as the basis for imposition of taxes and revenue collection. However, Nairobi City County came up with a helpful provisional law as the basis for the collection of revenue including imposition of tax. The Nairobi City Provisional Collection of Revenue Act, 2013, provides for immediate execution of taxation and other revenue-raising measures pending the passage of substantive legislation.

It is proposed that other counties can adopt the Nairobi approach in the meantime until they pass the relevant revenue laws such as the County agriculture acts, and the County health acts, among others.

4.2.3. Tax Laws

Tax laws refer to legislation providing for the imposition, waiving and varying of tax or licensing fee. Tax laws are prepared in compliance with Article 210 of the Constitution of Kenya, 2010.

No tax may be imposed without proper legislation providing for it. Tax laws are enacted to provide the constitutional and legal basis for the imposition, collection and administration of taxes. The purpose for the imposition of tax law is to operationalize the collection of taxes in different industries in the Kenyan economy. Examples of tax laws include Income Tax Act, Cap 470, Value Added Tax, No 35 of 2013, and Customs and Excise Act, Cap 472, among others. Tax laws may be procedural or substantive, and at times both substantive and procedural.

4.3. Proper Remit on Entertainment Tax and Property Rates

Article 209 of the constitution empowers the county governments to impose property and entertainment taxes. Any other tax can only be imposed by authorisation of Parliament.

However, the Constitution has not defined what these two taxes mean and include. Article 209(2) provides that:

"(3) A County may impose—

(a) property rates;
(b) entertainment taxes; and
(c) any other tax that it is authorised to impose by an Act of Parliament."

4.3.1. Entertainment tax

We first focus on the definition of "entertainment tax." In light of the need for funds at the County level, there is a need to determine what definition to attach to entertainment tax. It is arguable that the use of the term "entertainment taxes" implies that it includes more than one type of tax related to entertainment, such as amusement tax.

Entertainment tax is imposed on and borne by the consumer of the entertainment and mostly remitted by the provider of the service. It is levied on the services that are consumed and is generally non-regressive. This is also the practice in other countries as far as imposition of entertainment tax is concerned within decentralized units such as in the American State of Nevada, India and in Nigeria, among others. In India and Estonia, entertainment tax is mainly levied on entertainment activities services that require purchase of tickets such a cinema, theatre and access to amusement parks, among others.

Section 2 of the Entertainment Tax Act, Cap 479 defines entertainment tax as:

"entertainment" includes an exhibition, performance or amusement to which persons are admitted for payment, but does not include the following—
(a) entertainment offered by persons registered for value added tax purposes by the Commissioner of Value Added Tax under the Value Added Tax Act, 1989 (No. 7 of 1989);
(b) stage plays and performances which are conducted by educational institutions approved by the Minister for the time being responsible for Education as part of learning; or
(c) sports, games or cultural performances conducted under the auspices of the Ministry of Culture and Social Services."

This definition can help in defining entertainment tax at the County level.

4.3.2. Property Rates

Prior to the 2013 General Elections, property taxation in Kenya was done by local authorities. The Rating Act was the key legislation that guided this. The Rating Act gave the local authority the power to set the tax rate. The Rating Act also allowed for variation in rating based on valuation rating, area rating, and a combination of both valuation and area rating.
However, Article 209(3) of the Constitution of Kenya 2010 gives the County government powers to raise funds through property rates. This effectively shifts the roles assigned to local authorities under the Rating Act to the County Governments. This has necessitated the enactment of county Rating Laws.

The parameters for determining rates under the Rating Act can still be applied under the county government system. The provisions under the Rating Act can be adopted in enacting the County revenue laws with the necessary modifications, e.g. as regards the existing area rating and valuation rating under the Act.

Rates revenue forms a major component of the total revenue collected by the present county governments.

The Rating Act, Cap 267 and the Valuation of Rating Act provides for three systems of rating;
(a) Area rates based on the size and use of the land;[13]
(b) an agricultural rental value rate;
(c) site value rate or a site value rate in combination with an improvement rate (unimproved site value and improved site value).[14]
Site value rating means that rates are based on the market value of the unimproved bare land and in the case of where land is developed; the improvements are not taken into consideration. Area rates applied to agricultural land.

[13] Section 5 of the Rating Act, Cap 267 of the Laws of Kenya.
[14] Section 6 of the Rating Act.

Unimproved site value tax (USV) is levied on the capital value of the land assuming it is bare. Any improvement on site is disregarded in the assessment of capital value. Unimproved site value rating has been used by most local authorities for the following advantages: It is simpler compared to other rating methods, encourages physical development in urban centres, discourages ownership of land for speculative purposes, amounts to be raised can be determined in advance and therefore brings certainty which is useful during the budgeting process.

Property rates are charges that relates to the ownership, occupation, or improvement of land or of land and buildings. Property rates may be based on landsite value, capital value or annual rental value.

Previously in Kenya, rates have been imposed on land only (Unimproved Site Value rating).[15] Rates in Kenya are paid by individual property owners, businesses and the government to the respective local authorities (read County governments) in which the property is located.

The main rationale for any property rates is to raise revenue for the provision of services by the local authorities (read County governments). This will enhance economic governance and help to alleviate poverty. It is therefore the taxpayer's belief that after payment of such property rates, there will be an enabling environment which will help in fostering economic and social development. This approach is hinged on the benefit principle. The benefit principle postulates that taxpayers ought to receive services for the rates that they pay.

However, Dr Tom Konyimbih, a tax expert from the University of Nairobi argues that apart from providing services such as garbage collection, street cleaning and sewerage, the other objective of charging property rates, is regulatory and social in nature. The implication of this is that land is rated to encourage effective use of the scarce resources and maximize on revenue collection. Taxes including property rates are also levied for economic stability, fair distribution of income, equitable allocation of resources.

Cases of rate payers objecting to payment of rates especially to the former Nairobi City Council was mainly due to the following reasons;

(a) Alleged arbitrary and illegal rate increase by the City Council;
(b) The City Council was not providing services to Nairobi residents and therefore they were not supposed to collect rates.

It is becoming difficult to impose, collect and administer rates in Kenya. This has been the case with a rate-payers association composing of Karen and Langata suburbs who challenged the Nairobi City Council from collecting rates from the Karen and Langata residents. They argued that the Nairobi City Council had not been providing services commensurate with the rates being levied.

A similar case by Kaputei Gardens Residents Association Case number JR 113 of 2014 is coming up for a hearing on May 19, 2015.
There are other alternative ways to increase revenue collected from rates without necessarily increasing the amount payable by individuals. Two of these measures are by preparing new and updated valuation rolls and by having a highly trained and efficient work force.

South Africa
In South Africa, rates are levied by municipalities in all provinces except in the metropolitan areas where the metropolitan local councils levy and collect property rates. On the other hand, National and provincial governments regulate how this property tax is charged, assessed, and collected.
Property tax in South Africa is levied on owners of immovable property. All land whether residential, commercial, industrial or agricultural and any improvement on it is rateable.

Hong Kong
Property rates in Hong Kong were originally used to pay the expenses for upholding and maintaining the police force (Police Rate). Between the period 1865-1875, other kinds of rates including the lighting rate, water rate and Fire brigade rate were introduced. These rates were being used in providing municipal services such as street lighting, water among other services. Until 1875, these rates were separately assessed although they were levied as one tax.

All properties are liable to rating assessment in Hong Kong. The rateable value is the estimated market rental value of the property at a designated date.
The unit of assessment for rating purposes in Hong Kong is a 'tenement,' which is defined in the Rating Ordinance of Hong Kong as;

"any land (including land covered with water) or any building, structure, or part thereof which is held or occupied as a distinct or separate tenancy or holding or under any license."

On the other hand, there have been calls for the introduction of differential rating in Hong Kong. Differential rating means that different rates percentages would be applied to different classes of properties. For example, higher rates percentage charges to properties of higher value.

Differential rating is being used by various countries. In Singapore, property rates are based on rental value of properties and a lower rate is charged for owner-occupied property. Property tax system in Canada is based assessed capital value of properties and tax rates may vary with different classes of property. The United Kingdom imposes council tax on occupiers of domestic properties based on assessed capital value.

Hong Kong's rating system based on annual rental value is simpler and is well understood by ratepayers.

County governments can explore some of these approaches in determining and imposing rates on property so along they maintain respect for the Constitution of Kenya 2010.

[15] Catherine Kariuki, Nicky Nzioki & Jennifer Murigu (2009) "A Review of the Training Needs for Revenue enhancement for local Authorities in Kenya," International Workshop on Spatial Information for Sustainable Management of Sustainable Management of Urban areas, FIG Commission 3 Workshop 2009, Mainz, Germany, 2-4 February 2009.

5. TAX ADMINISTRATION IN THE NATIONAL AND COUNTY GOVERNMENTS

The Constitution also envisages a tax administration system that ensures the tax burden is shared in a fairly manner. Tax administration by County governments in Kenya after the transition to evolved system of governance has raised issues on the role of the public finance system in promoting an equitable society. The Kenya Private Sector Alliance's (KEPSA's) report presented to Parliament in the 2010/2011 Fiscal Year states that the tax administration in Kenya is still tedious and the tax regime complex and broadcast.

Comparative studies show that tax administration especially in a developing country should be guided by the principles of equity, adequacy, simplicity and neutrality. County governments should draft their laws in full cognizance of the Adam Smith canons of taxation including the canon of equality or equity, the canon of certainty, the canon of convenience and the canon of economy.

1. Equality: the canon of equality means that a good tax system must be based on tax payer's ability to pay.
2. Equity: Article 201 of the Constitution of Kenya 2010 identifies equity as one of the principles of public finance in Kenya. It provides, inter alia, that the public finance system should promote an equitable society and in particular ensure that the burden of taxation is shared fairly. The principle of equity has two aspects including horizontal equity and vertical equity. Horizontal equity means individuals with the same level of wealth or in the same income bracket should pay the same rate. Vertical equity on the other hand means that wealthier persons or those in higher income bracket should pay higher tax rates. Equity as a principle that guides tax policy refers to fairness in taxation.
3. Neutrality: neutrality refers to efficiency in the taxation system.
4. Certainty: the canon of certainty means that tax payers should not be subjected to arbitrariness and discretion of tax officials. The principle requires that the terms of the amount, when and the place of payment must be made known to the tax subjects.
5. Convenience: the canon of convenience requires that every tax ought to be levied at the time or in the manner in which it is most likely to be convenient for the contributor to pay.
6. Economy: the canon of economy means that the cost of tax administration and collection should be the minimum possible both to the Government and the tax payers.

According to the tax analyst, Dr Attiya Waris, other principles of taxation include principles of:

(a) fiscal adequacy: adequacy in this sense refers to a tax system that is able to raise enough funds to pay for public services in a sustainable manner. Adequacy of a tax system is predicated on various factors such as predictability and elasticity. The other principles or canons are: simplicity, equality, certainty, convenience, and economical.
(b) buoyancy;
(c) flexibility;
(d) simplicity; and
(e) diversity.

In conclusion, Mr Njaramba Gichuki, a tax analyst, argues that issues relating to taxation especially property taxation in Kenya and other developing countries are valuation, assessment, collection and enforcement mechanisms. This in turn focuses attention to the need by policy makers to ensure that the County and National tax regime is premised on equity, adequacy, simplicity and neutrality.

5.1 The Role of Kenya Revenue Authority in Tax Administration in Counties

The Kenya Revenue Authority (KRA) is established by section 3 of the Kenya Revenue Authority (KRA) Act, Cap 469. Section 5 of the Kenya Revenue Act mandates the Authority to collect and receive all revenue for the government. One other function of the Kenya Revenue Authority is to facilitate economic stability through tax administration.

Formulation and promulgation of tax policy in Kenya is the domain of the Ministry of Finance (Treasury), while tax administration is vested in KRA.

The Public Finance Management Act 2012 at section 160 provides that County governments may appoint KRA to be a collector for County government revenue. It provides that "the County Executive Committee member for finance may authorise the Kenya Revenue Authority or appoint a collection agent to be a collector of County government revenue…." The general County governments' position is that they are able to manage their tax administration effectively without the need for KRA.

However, in the interim period, County government should consider using KRA before outsourcing this crucial role.

6. CONSTITUTIONAL IMPLEMENTATION AND COMPLIANCE OF COUNTY REVENUE LAWS IN KENYA

Constitutional implementation and application of the County revenue laws relates general and specific standards in the Constitution.

6.1. General Constitutional Principles and National Values in Kenya

The drafting of County revenue legislation must also be guided by the general constitutional values and principles under Article 10 and the principles of public finance under Article 201 of the Constitution.

Article 10(2) provides that the National values and principles of governance include:

(a) patriotism, National unity, sharing and devolution of power, the rule of law, democracy and participation of the people;
(b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;
(c) good governance, integrity, transparency and accountability; and
(d) sustainable development.

These constitutional values and principles have been further replicated in numerous parts of the Constitution including Chapter 11 on the Devolved Government and 12 on Public Finance.

The County revenue laws must comply with values and principles in substance in the drafting process. For example, the laws must be drafted in ways that promote National unity, social justice, transparency, accountability, and sustainable development.

Article 201 of the Constitution provides that laws on public finance including revenue laws must promote transparency, public participation, equity, prudent spending and clear financial management.

6.2 Basic Human Rights and Fundamental Freedoms

Any revenue law drafted in Kenya should be drafted in a way to promote and protect the basic human and fundamental rights provided for under Chapter Four of the Constitution. For instance, the right to fair administrative justice under Article 47, the freedom of access to information under Article 35, social economic rights under Article 43 and equality freedom from discrimination under Article 27 and right to property under Article 40, among others.

Kenyan courts have entertained a number of cases on social economic rights to the extent that these rights have been protected by the courts in relevant cases. An example is, Justice Mumbi Ngugi's decision on housing rights in Mitubell Welfare Society v. The Attorney-General where she upheld the right to housing of the petitioners whom the National Government had sought to evict from Mitumba Village on the outskirts of Nairobi near Wilson Airport.

The County revenue laws must also respect these economic and social rights anchored in the Constitution. It should be noted that undermining human rights results in people or businesses not being effectively able to participate or benefit from equitable or efficient revenue laws.

Article 2 of the Constitution of Kenya 2010 provides that the Constitution is the Supreme law of the Republic. It states:

"This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government."

The Constitution of Kenya 2010 forms the benchmark for the legality and applicability of all other laws in Kenya. These include statutes or Acts of Parliament; customary law; Islamic law; Hindu law; general rules of interNational law; interNational conventions, treaties, protocols and agreements; and bye-laws or other laws passed at the National and County level.

6.3. Sovereignty of the People and Public Participation in Kenya

This section of the document discusses sovereignty of the people of Kenya and public participation as a doctrine practised in Kenya. The two related aspects are addressed separately, independently but consecutively.

6.3.1. Sovereignty of the People of Kenya

Sovereignty is at the foundation of Kenya's constitutional framework. It is the claim to be the ultimate political authority, subject to no higher power as regards the making and enforcement of political decisions. Sovereignty has at least three meanings: First, sovereignty is the constitutive power including constitution making and constitutional amendment. Second, sovereignty is the power to elect, impeach or recall governors or rulers who make important decisions on County revenue laws, policies and administration. Third, sovereignty is the power to monitor and evaluate government, governors, rulers, administrators and governance and to hold them accountable, including on County revenue laws.

Article 1 of the Constitution of Kenya 2010 vests sovereign power in the people of Kenya. It is upon this article that the key principle of public participation is predicated.. The U.S. Supreme Court Justice Stephen Breyer has described the idea of a nation's sovereign authority as one that is shared among its people through the concept of "active liberty." He further argues that this kind of liberty refers not to the negative freedom from government coercion but to the freedom to participate actively and constantly in collective power. Public participation is also related to freedom of expression, media freedom and the right of access to information and in articles 33,34 and 35, respectively.

Article 33 of the Constitution of Kenya 2010 provides that the freedom of expression includes:
(a) freedom to seek, receive or impart information or ideas;
(b) freedom of artistic creativity; and
(c) academic freedom and freedom of scientific research.

Article 34 guarantees the freedom and independence of electronic, print and all other types of media. However, like the freedom of expression, media freedom does not extend to propaganda of war, incitement to violence, hate speech or advocacy for hatred. Article 35 provides that every citizen has the right to access information by the State. It also obligates the State to publish and publicise any important information affecting the nation.

6.3.2. Public Participation in Kenya

Article 10 of the Constitution of Kenya provides for public participation as one of the National values and principles of governance that binds all State organs, State officers, public officers and all persons.

In laying out the role of the County assembly, Article 196 provides that the County assembly should conduct its business in an open manner and must facilitate public participation and involvement in the legislative and other business of the assembly and its committees. It is the duty of the County governments to actively encourage its constituents or the public to contribute to any policy, legislation, program or project undertaken by the County governments. Public participation should provide input in the decision making stage and in the performance stage so as to sufficiently influence the outcome of the process.

Article 201 provides for public participation in matters of public finance. It provides that laws on public finance including revenue laws must promote transparency, public participation, equity, prudent spending and clear financial management.

In this context, Section 6 (6) of the County Government 2012 Act provides:

"In exercising its powers or performing any of its functions a County government shall ensure efficiency, effectiveness, inclusivity and participation of the people."

Section 87 of the County Government Act provides that citizen participation in County governments shall be based upon the following seven principles:

"(a) Timely access to information, data, documents, and other information relevant or related to policy formulation and implementation;

(b) reasonable access to the process of formulating and implementing policies, laws, and regulations, including the approval of development proposals, projects and budgets, the granting of permits and the establishment of specific performance standards;

(c) protection and promotion of the interest and rights of minorities, marginalized groups and communities and their access to relevant information;

(d) legal standing to interested or affected persons, organizations, and where pertinent, communities, to appeal from or, review decisions, or redress grievances, with particular emphasis on persons and traditionally marginalized communities, including women, the youth, and disadvantaged communities;

(e) reasonable balance in the roles and obligations of County governments and non-state actors in decision-making processes to promote shared responsibility and partnership, and to provide complementary authority and oversight;

(f) promotion of public-private partnerships, such as joint committees, technical teams, and citizen commissions, to encourage direct dialogue and concerted action on sustainable development; and

(g) recognition and promotion of the reciprocal roles of non-state actors' participation and governmental facilitation and oversight."

Section 91 of the Act provides for the establishment of modalities for public participation. The County governments are obligated to facilitate the establishment of structures for citizen participation including:

(a) The right to petition (section 88(1)): Citizens have a right to petition the County government on any matter under the responsibility of the County government.

(b) Access to information (section 96(1)): Every Kenyan citizen shall on request have access to information held by any County government or any unit or department thereof or any other State organ in accordance with Article 33, 34 and 35 of the Constitution.

(c) Establishment of Forum for consultation (section 137 (1)): As soon as practicable after the commencement of this Act, a County government shall establish a forum to be known as the County Budget and Economic Forum (CBEF).

The concept of public participation has evoked debate on its definition, elements, tenets and mode of application in the scholarly world. The debate has even spilled over to the courts. For example, the Kiambu Finance Act 2013 was challenged in Robert N. Gakuru & Others v. Governor Kiambu County and 3 Others Petition No. 532 of 2013 (hereinafter referred to as 'the Kiambu Case'). The argument was that the Act was unconstitutional for failing to meet the public participation criteria. In the judgement, Justice George V. Odunga stated that County governments ought to do "whatever is reasonable" to ensure as many of their constituents were involved in the decision making process. This is now effectively the test in establishing whether the public participation criterion has been met, i.e. governments must do whatever is reasonable to ensure they have met public participation criteria. He further stated that,

"I hold that it is the duty of the County Assembly in such circumstances to exhort its constituents to participate in the process of the enactment of such legislation by making use of as many fora as possible such as churches, mosques, temples, public barazas, National and vernacular radio broadcasting stations and other avenues where the public are known to converge to disseminate information with respect to the intended action."

Additionally, in meeting the obligations under public participation, the counties must ensure that the information is shared in a manner that allows the populace a reasonable time to peruse. Interested parties are entitled to a reasonable opportunity to participate in a manner which may influence legislative decisions.

The information shared must also be in a format and language that is easily comprehensible by ordinary members of the community. For example, the counties can borrow from the approach taken in UK where in releasing its Finance Bill. an accompanying document with explanatory notes on all provisions of the draft Finance Bill is also released.

It has been held in South Africa (Doctors for Life InterNational v. Speaker of the National Assembly and Others (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC)) and was propounded by Justice Odunga in the Kiambu case, that public participation is not a forum in which the public rubber stamp the will of the County executive and government. The public must be involved in all decisions and further still, the issues raised by the public must be considered and seen to have been considered. As such, the County governments must be seen to have taken all reasonable measures to respond to memoranda and even oral comments by the citizens whether individually or collectively.

However, it is worthy of note that it has been held that the courts should interpret the public participation obligations narrowly so as to uphold the separation of powers doctrine. One of the circumstances identified for court interference is, "there may be a case where the protection intended to be afforded by the Constitution cannot be provided by the courts unless they intervene at an earlier stage. For instance, the consequences of the offending provision may be immediate and irreversible and give rise to substantial damage or prejudice. If such an exceptional case should arise, the need to give full effect to the Constitution might require the courts to intervene before the Bill is enacted. In such a case parliamentary privilege must yield to the courts' duty to give the Constitution the overriding primacy which is its due."

As such, the enforcement of the public participation by the courts must also be exercised with caution.

In determining the scope of public participation conducted by County governments, the following established three principles are applied,

(a) the possibility of real influence in relation to the subject matter of the legislation;
(b) the formal involvement of citizens and workers organisations in the legislative process; and
(c) adequate publicity for the participatory process.

If any of these principles is derogated from, then it can be concluded that the principle of public participation has not been met.

It is noteworthy that public participation cannot be delegated to a single separate and independent institution at the County level. Establishing an independent County public agency will increase the layers in the bureaucracy at the County level leading to duplication, redundancy, delays, conflicts and increased cost.

The County revenue laws should also recognize and strengthen the institutions and fora to promote public participation and involvement. An example is the County Budget and Economic Forums established under the Public Finance Management Act 2012. The County Budget and Economic Forum shall is required to consist of:

(a) the Governor of the County who shall be the chairperson;
(b) other members of the County executive committee (CEC);
(c) a number of representatives, not being County public officers, equal to the number of executive committee members appointed by the Governor from persons nominated by organisations representing professionals, business, labour issues, women, persons with disabilities, the elderly and faith based groups at the County level.

6.3.3. The Public Participation Bills

Public participation should be conducted by the two arms of the County government separately so that the overarching doctrine of separation of powers is respected.

There are areas of Government where public participation is a compulsory constitutional requirement. For example, Article 196(1)(b) provides that a County assembly shall facilitate public participation and involvement in the legislative and other business of the assembly and its committees. This means that the County assembly cannot avoid the participation and involvement of the public in its business.

One of the main challenges for the County governments in meeting this requirement is the shortage of funds. Sometimes the bureaucratic processes at the National Treasury and the Commission for Revenue Allocation delay the release of funds for adequate public participation. In light of this, County governments should develop a Public Participation Plan and Strategy annually. The Plan should also indicate the feedback mechanism, methods of attendees mobilization, information dissemination, modes of participation and the projected timelines.

The Public Participation Plan and Strategy should then highlight projected areas of conducting public participation and the projected cost estimates. The Public Participation Plan and Strategy should then be used to populate the County Government budget. This approach shall cure the problem of funds shortage in conducting public participation.

Public participation should be approached in two ways: Qualitative and quantitative.

1. Qualitative public participation: This approach ensures that the targeted groups of stakeholders are adequately involved. For successful qualitative public participation, the counties have to invest in County-wide stakeholder mapping. This approach to public participation tends to be more efficient in terms of cost and outcome. It may work best where the subject of discussion specifically affects a certain group of people.
2. Quantitative public participation: This approach involves mass mobilization of persons in the County without any specific criteria. This approach ensures massive feedback from the people. It may be unproductive because of difficulty in controlling such huge masses and the fact that not all persons may understand the subject matter.

It is noteworthy that public participation is not a rubber-stamping process by the public. As such, a proper public participation law should ensure that there is a proper mechanism for giving feedback to the public showing that their views were considered. Interestingly, the County executive and the County assembly may deviate from the suggestions of the participants but only with good reason and justification. This position was adopted by Justice Odunga in Robert N. Gakuru & Others v. Governor Kiambu County & 3 Others.

7. KENYA'S INTERNATIONAL OBLIGATIONS IN MAKING COUNTY REVENUE LEGISLATION

Article 2 (6) of the Constitution provides that "any treaty or convention ratified by Kenya shall form part of the law of Kenya under the Constitution." The import of Article 2 (6) is that ratified treaties become part of Kenyan law immediately after ratification.

7.1. InterNational Trade and Integration Agreements under the World Trade Organisation (WTO) and East African Community (EAC) County governments are required under section 132 of the Public Finance Management Act to take into account the taxation and other tariff agreements and obligations that Kenya has ratified. These include taxation and tariff agreements under the East African Community Treaty. while adopting or reviewing County revenue raising measures.

Kenya has ratified a number of treaties that impact on trade and the economy generally. Those discussed below include:

(a) Commitments under the World Trade Organisation (WTO). (b) Commitments under the East African Community (EAC).
National County

7.3. East African Community Treaty, 1999

The EAC treaty was signed in 1999 and subsequently came into force on July 7, 2000. The EAC Treaty establishes the East African Community which is made up of five Partner States namely Kenya, Uganda, Tanzania, Rwanda and Burundi. The EAC Treaty lays the framework for further integration in the Community including formation of the EAC Customs Union, EAC Common Market and finally the EAC Political Federation. Article 8(1) of the Treaty requires the Partner States to plan and direct their policies and resources with a view to creating conditions favourable for the development and achievement of the objectives of the Community and the implementation of the provisions of this Treaty.

The State is under an obligation not to do any act contrary to the provisions of the EAC Treaty. The EAC Treaty established an institutional framework for the implementation of the Treaty provisions including the Summit, the Council, the Co -ordination Committee, Sectoral Committees, the East African Court of Justice, the East African Legislative Assembly, and the Secretariat.

County governments are required under section 132 of the Public Finance Management Act to take into account the taxation and other tariff agreements and obligations that Kenya has ratified

7.4. East African Community Customs Union Protocol, 2005

Kenya signed the EAC Customs Union on March 2, 2004. The EAC-CUP was created pursuant to Article 75 of the EAC Treaty which provides for the progressive establishment of a customs union. Under the EAC Treaty, the Member States are required to remove all the existing non- tariff barriers on the importation into their territory of goods originating from the other Partner States and thereafter to refrain from imposing any further non- tariff barriers.

Article 15 of the East African Community CUP requires Partner States to implement the principle of National treatment. It provides that Partner States should not:

(a) enact legislation or apply administrative measures which directly or indirectly discriminate against the same or like products of other Partner States; or
(b) impose on each other's products any internal taxation of such a nature as to afford indirect protection to other products.

County governments should avoid passing any revenue or related legislation that discriminates against goods from any EAC Partner State as that would be a direct violation of Article 2 of the Constitution and the supporting legislation such as the Treaty Making and Ratification Act No. 45 of 2012.

In a bid to promote intra-Community trade, the EAC CUP calls on the Partner States to implement measure of trade facilitation. For instance, Article 6 provides that States should initiate trade facilitation by, inter alia, adopting common standards of trade documentation and procedures within the Community where interNational requirements do not suit the conditions prevailing among the Partner State. In this regard, it is recommended that Kenya and other Partner States should make arrangements in ensuring standardization and harmonisation of trade documents. For instance, inspection reports, permits and licences from the Partner States can become recognized in Kenya both by the National and County Governments. This would ease trade within Community. Kenya would also stand to benefit heavily because it is the leading exporter within the region.

The Protocol also provides for common safety measures for regulating the importation of goods from third parties such as phyto-sanitary requirements and food standards. The implementation of some of these provisions of the EAC CUP within the devolved system in Kenya is a complex endeavour. The implementation of the EAC CUP can be challenged when the counties make laws that affect the provisions of the EAC Customs Union Protocol.

7.5. East African Community Common Market Protocol, 2010

Articles 76 and 104 of the EAC Treaty provide for the creation of a common market within the community to facilitate trade in goods and services. Towards the EAC Treaty vision of trade liberalization, the EAC Common Market Protocol (EAC CMP) provides for the following seven rights and freedoms in regional trade:

(a) the free movement of goods; (b) the free movement of persons; (c) the free movement of labour; (d) the right of establishment;
(e) the right of residence;
(f) the free movement of services; and
(g) the free movement of capital.

According to an application of Article 2(6) of the Constitution of Kenya 2010, the EAC CMP is also a part of the laws of Kenya. Further, in light of the fact that County Governments do not have a mandate over interNational trade, then the County Governments should refrain from making any laws that inhibit any of the seven rights and freedoms above. However, it is noteworthy that the implementation of these provisions is to be progressive.

8. FIDELITY TO THE ESTABLISHED LEGISLATIVE AND POLICY FRAMEWORK

The Constitution of Kenya is implemented by all the enabling statutes and further supported by National policy, visions and goals. In this regard, the County revenue legislation drafted by the County must also comply with the existing and relevant statutes and policies. Some of the core statutes that embody public finance and revenue policies include the Public Finance Management Act, 2012, County Governments Act, 2012, the Transition to Devolved Government Act, 2012, Urban Areas and Cities Act, 2011, County Allocation of Revenue Act, Division of Revenue Act, and the Finance Act. The Public Procurement and Disposal Act Cap 412A needs to be reviewed to address the administration of County revenue laws.

The County revenue legislation should also be enacted within the remit of the existing National tax policy. Article 209(5) of the Constitution of Kenya 2010 provides that the taxation and other revenue-raising powers of a County should not be exercised in a way that prejudices National economic policies, economic activities across County boundaries or the National mobility of goods, services, capital or labour. In light of this constitutional limitation on County revenue- raising powers, County revenue legislation should respect the existing National policy of the respective economic areas. For instance, the National Tourism Policy, the National Food and Nutrition Security Policy, Kenya National Health Policy, and the National Land Policy, among others.

The Public Finance Management Act, 2012 at section 132 requires County Assemblies to take into account the following factors while considering revenue recommendations from the County Excecutive:

1. take into account the principles of equity, certainty and ease of collection;
2. consider the impact of the proposed changes on the composition of tax revenue with reference to direct and indirect taxes;
3. consider domestic, regional and interNational tax trends;
4. consider the impact on development, investment, employment and economic growth; and
5. take into account the taxation and other tariff agreements and obligations that Kenya has ratified, including taxation and tariff agreements under the East African Community Treaty.

Public policy is now part of the constitutional process, unlike under the 1969 Constitution. Counties should thus interpret National policy, or develop and review appropriate County revenue policies before enacting legislation. This policy framework will assist and facilitate Counties to legislate, draft and enact good revenue raising measure laws.

8.1. Kenya's Vision 2030

Kenya's Vision 2030 Kenya's Vision 2030 forms the primary basis for evaluation of Kenya's National economic policy and promots community empowerment through increased efficiency and impact of devolved funds. It is proposed that this can be achieved by increasing the amount, efficiency and impact of devolved funds and by increasing public participation and voice of the poorest members of local communities so that development issues of concern to such members can be channeled into public policy.

Vision 2030 anchors three key pillars, namely; the economic pillar, the social pillar and the political pillar. Given that all of Kenya's policies are to be is informed by Kenya's Vision 2030, it is of utmost significance that Kenya's County revenue legislation be drafted in ways that implement and promote Vision 2030.

The County revenue legislation should also be drafted in a way to: (a) strengthen the legal framework for ethics and integrity;
(b) promote results-based management within the public service;
(c) encourage public access to information and data;
(d) introduce civilian oversight around the key legal, justice and security institutions; and
(e) strengthen Parliament's legislative oversight capacity.

National 8.2. Tariffs and Pricing Policy

The Constitution provides that the National and County governments may impose charges for services. Tariffs and pricing of public services by the National and County government fall within the remit of this provision. Section 20 of the County Government Act on the tariffs and pricing policy is in furtherance and implementation of the constitutional principles undergirded under Article 201 of the Constitution of Kenya 2010.

The County Governments Act requires the County governments or any agency delivering services in the County to adopt and implement a tariff and pricing policy for the provision of public services.

The tariffs and pricing policy to be adopted by the various County governments or any agency delivering services in the County should be guided by the principles of equity, proportionality, resources and financial sustainability. A County tariff policy is the more scientific, rational, efficient, reasonable and equitable way of designing, enacting and implementing County revenue laws. Such a policy will also guide administrators and courts in determining the equity or reasonableness of the fees, charges, duties and other revenue services. This also relates to rationalization of taxes and related charges. A board of a city or municipality under the Urban Areas and Cities Act may settle and implement tariff, rates and tax and debt collection policies as delegated by the County government. It is therefore necessary that tariffs and pricing policy for services rendered by institutions such as Waterworks Development Boards should be guided by such principles.

In discussing the Water Bill, 2014, the Committee on Environment and Natural Resources of the National Assembly recommended that a National regulatory body should have the function of tariff setting. The committee has proposed the amendment section 120(1) of the County Government Act and sections 20 and 21 of the Urban Areas and Cities Act, which give the role of tariff determination to counties. There is need for intergovernmental consultation on the constitutionality and implementation of this proposal

9. ECONOMIC AND SOCIAL CONSIDERATIONS IN DRAFTING OF COUNTY REVENUE LEGISLATION

A policy is a plan of action agreed or chosen by a political party. A policy can also be a government statement of intent to carry out an activity. It is a principle that one believes in that influences how they behave. The Government spells out the policy and the period for the policy. Government policy is therefore the basic principles in which a Government is guided by. They act as directives and pointers on what action or procedure is to be taken in order to achieve a set or set goals. Policy may be National or

County; economic or revenue; explicit or implicit; sectoral or generic; framework or specific; and short term, medium term or long term, among others.

The Constitution in the fourth schedule has given all National policy functions to National government. However, Counties are also required to develop policies that are aligned to National policies of the former County.

Some of the sources of revenue for Kenya include agriculture, health, tourism, trade, manufacturing, and mining, among others. It is worth noting that the National Government is in charge of the National economic policy and planning which has a direct impact and on the economic activities at the County and inter-County levels. The National Government is also in charge of health policy, agricultural policy; National betting, casinos and other forms of gambling; and tourism policy and development. In light of this constitutional division of functions between the two levels of government, any laws drafted by either level of government, especially the County governments, must be drafted in light of the existing policies on such matters.

Different Counties across Kenya have different primary sources of revenue. For example, Mombasa County chiefly depends on tourism and entertainment while counties in rural areas depend on agriculture and trade.

9.1. Tourism

The Fourth Schedule of the Constitution provides that the tourism policy and development are functions of the National Government. The County Governments are tasked with trade development and regulation, including local tourism.

The Tourism Act, 2011 requires the relevant Minister to formulate and publish a National Tourism Strategy (NTS) at least once every five years. The NTS prescribes the manner in which the tourism sector shall be developed, marketed and regulated. Section 3(2) of the Tourism Act 2011 provides that the NTS should also reflect regional co-operation and common approaches in tourism development, marketing and regulation. The NTS is also to establish measures necessary to ensure equitable sharing of benefits in the tourism sector.

The National Tourism Strategy 2013-2018 identified the following five areas that need to be addressed in order to improve the performance of the tourism sector:

1. the need to have an effective product development and deployment approach;
2. the need to enhance the marketing of Kenyan tourism products;
3. the need to address inadequate financing and improve the investment environment;
4. the need to be more scientific through research and information management; and
5. the need to focus on human capital, legal, policy and institutional framework;

The County revenue legislation should be geared towards achieving these goals listed in the National Tourism Strategy 2013-2018.

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The Tourism Act ought to be amended in light of the fact that local tourism is now a devolved function of the County governments.

The Kenya Tourism Board (KTB) plans to promote and enhance domestic tourism in Kenya by partnering with County governments. The County governments are encouraged to undertake to promote domestic tourism and invest in tourism in terms of infrastructure, services and provision including advertisements.

The Catering and Tourism Development Levy Trustee
The Catering Levy Trustees, the pre-cursor to CTDLT, was established in 1972. In 1997, the name changed to accommodate a new mandate. Its function is to control and administer the levy fund. Its mandate has been extended to establish and set standards for training institutions. Soon after independence, the Government integrated the development of tourism into the overall National plan for he country's economic development. A key ingredient lacking at the time was a qualified human resource.

The trustees collect, control and administer the training and tourism development levy fund and establish and develop National standards for skills required in tourism. This is clearly a function that falls under National Government as it touches on training and ensuring a particular standard in the whole country.

There is debate on the measures needed to revamp local tourism. There have been proposals including exemption from VAT Act, 2013 on air ticketing services supplied by travel agents as well as payment of all income tax related refunds owed to tourism industry players by the Kenya Revenue Authority (KRA). The National government urged the County governments to reallocate all their foreign travel budgets to domestic travels in order to spur growth of domestic tourism and sustain employment.

It is prudent that counties continue to review the constitutionality, legality, and policy, as well as efficacy, equity or effectiveness of these statements and directives. Some argue that legislation is needed to rationalize and legalise such directives from the National Government. Others oppose such directives or measures.

Counties around the same region should try to harmonise their charges on tourism-related activities to reduce multiplicity of similar charges across counties sharing boundaries. For example, counties in the coastal region can harmonise and approximate their charges related to tourism.

The following laws under tourism require to be aligned with the constitution since most of them touch country functions.

1. Kenya Association of Hotelkeepers and Caterers (KAHC)
2. State Corporations Kenya Tourist Development Corporation (KTDC)
3. Kenya Association of Travel Agents (KATA)
4. The Ministry of Tourism – Marketing Kenya
5. Kenya Utalii College
6. Kenya Association of Tour Operators (KATO))
7. Hotel and Restaurants Authority (HRA)
8. KWS
9. Wildlife Clubs of Kenya (WCK)
10. Eco-Tourism in Kenya

9.2. County Revenue Laws Regulating Business and Trade (including gambling) Activities

The following three statutes are relevant to County revenue laws that govern business and trade activities within the counties:-

a) The National Agribusiness Strategy,
b) Betting, Lotteries and Gaming Act, Cap 131;
c) Central Bank of Kenya Act, Cap 491.

Equally relevant is the policy instrument entitled National Agribusiness Strategy, 2012. These are discussed and analysed briefly below.

9.2.1. The National Agribusiness Strategy, 2012

The National Agribusiness Strategy was developed by the National Agribusiness Task Force. The strategy identified agriculture as a key driver in achieving economic growth for Kenya. The strategy highlighted agribusiness, which refers to all businesses involved in agricultural production, as an important factor in the attainment and promotion the economic growth in Kenya. The businesses involved in the agricultural production include farming and contract farming, supply of seeds, agrichemicals, farm machinery, wholesale and distribution, processing, marketing and retail sales.

Among the objectives of the strategy include the removal of barriers to trade and to create incentives for the private sector to invest in agribusiness and related business opportunities; to invest public resources in order to stimulate growth in agribusiness and to encourage institutional frameworks. There are priorities set to be achieved in the growth of agribusiness in Kenya and these priorities have been tailored to achieve the objectives to be outlined in the strategy. These priorities target the promotion of agribusiness and as such are relevant in the enactment of County revenue laws.

The County revenue laws that are to be enacted should take into account the following five principles:

(a) the establishment of systems for quality assurance and specific non-derogable standards for agricultural produce;
(b) improving public participation in decision making and policy formulation at a County level;
(c) removal any disincentives for trade and export of agricultural produce;
(d) providing an enabling environment for the creation of brand awareness domestically and interNationally in a bid to promote locally produced agricultural produce; and
(e) promotion of research into value addition and means of improving productivity within the agribusiness sector.

9.2.2. Betting, Lotteries and Gaming

The Betting, Lotteries and Gaming Act of 1991 was enacted to provide for the control and licensing of betting and gambling premises; for the imposition and recovery of a tax on betting and gaming; for authorizing public lotteries; and for connected purposes.

The essence of the Act is to regulate betting and the premises where such commercial activities take place, and eradicating illegal gambling activities in Kenya. The Act defines the various terminologies used in betting and gambling among which include what amounts to gaming, gaming premises, licensed gaming premises, and lottery, among other terms.

Most importantly, the Act establishes the Betting Control and Licensing Board mandated to issue licences and permits in accordance with the Betting, Lotteries and Gaming Act. The licence issued by the Board states the location and extent of the premises where the gambling activities will take place. This has been the position of the law regarding betting and gambling until the adaptation of the Constitution of Kenya, 2010 and the operationalization of devolution as provided for under the Constitution.

The Fourth Schedule assigns the regulation of betting, casinos and other forms of gambling to the National Government, as per section 34 of Part 1 and to the County governments, as per section 4 of Part 2. There is an overlap in the roles to be played by the National and County governments regarding the regulation of betting, casinos and other forms of gambling. At first instance, the Fourth Schedule grants both the National and County governments the constitutional power and mandate to levy charges and licences on all betting, casinos and other forms of gambling. Betting and gambling is therefore a concurrent function for both levels of government. NationalThis discussion should continue in IBEC for both levels of government to negotiate and agree how to regulate this function.

9.2.4. Central Bank Act, Cap 491

The Central Bank of Kenya is primarily mandated to formulate and implement monetary policies directed to achieving and maintaining stability in the general level of prices. In exercising its mandate, the Central Bank of Kenya affects the running of businesses at the National and County levels. This calls for the drafting of County revenue laws that are in tandem with the National economic policies of the State as provided under and by the Central Bank of Kenya. There are proposed amendments to the Central Bank Act in a bid to enable members of the public to participate in Government securities through electronic means and lower denominations.

Pursuant to the Central Bank Act, County revenue laws should therefore be drafted to:
(a) ensure that there is no interference with the market forces so as to maintain the market structure.
(b) ensure the implementation and adoption of the policies set out by the Central Bank which promote business in Kenya.

County governments can also adopt the use of electronic means as adopted by the Central Bank of Kenya so to promote the collection and administration of revenue. In this regard, CRA has released official guidelines and supporting the Counties automate their revenue management.

9.3. Mining and Natural Resources

There are currently policy and legislative proposals aimed at aligning current laws on natural resources to the new Constitution and the devolved system of governance. These are the Minerals and Mining Policy 2013; the Mining Bill, 2014; the Natural Resources (Benefit Sharing) Bill, 2014; the Energy Policy 2014; the Petroleum (Exploration, Development and Production) Bill, 2014; and the Natural Resources (Benefit Sharing) Bill 2014.

All the above emerging policies and Bills provide for sharing of revenue among the National Government, County governments and communities. It is therefore noteworthy that this shall be a major source of revenue for County governments once policy and legislative reforms on mining and natural resources are finalised.

9.3.1. Laws on Natural Resources and Implications for County Governments

The current mining regime undermines the counties' ability to enact mining laws to be applied in their counties in terms of fees and taxes. This is partly because the National legislation, bills and policies assume that all minerals and mineral resources belong to the State.

It is Parliament that is tasked with enacting legislation dealing with mining and natural resources. Under Article 93(1) the Parliament of Kenya consists of the National Assembly and the Senate. It follows therefore that County's interests with regards to mining and mineral resources within their locality will be represented by Senate at the National level. To ensure effective representation of the Kenya's interest, the Senate should liaise with the County government.

The aspect of benefit sharing will have to characterise the operationalization of the mining regime in Kenya. Article 66(2) of the Constitution attests to this. It provides that Parliament is to enact legislation ensuring that investments in property benefit local communities and their economies.

According to the principles of benefit sharing, the benefits accruing from the extraction of natural resources are to be shared with the local people resident where the mineral is being excavated. The benefits could be two-fold: Monetary and/or non-monetary. Monetary benefits accrue where the residents get benefits accruing from mining though the imposition of taxes on mining activities by mining companies. Non- monetary involve a process where the project benefits are integrated into the local development strategies.

The proposed benefit sharing law should develop an equitable benefit sharing formula (BSF). The BSF formula should have two basic mutually inclusive elements:

(a) General and legal principles of benefit sharing. These principles predicate the drawing up of a proper benefit sharing scheme. The benefit sharing formula should be in accordance with Article 10 on National principles and values; and the principles of public finance under Article 201. Article 201(c) provides that the benefit and burdens of the use of resources and public borrowing should be share equitably between present and future generations.

(b) A mathematical formula, usually in the form of fractions or ratios. The ratios indicate with precision the quantity of benefits to be shared among the interested groups. In the Kenyan context, the mathematical benefit sharing formula ratio should be between the National Government and the County Governments.

Benefit sharing has not been addressed to protect the interests of individuals (as land owners), communities, counties, and the National interests. And now, Senate has gone to the Supreme Court to contest the constitutionality of the Act and 30 other Bills and Acts which Senate claims will determine how resources will be shared between National and County governments.
Another pertinent issue that arises is the coordination of the activities of the various institutions under the National Government charged with mining, within the County level. There needs to be a clear structure on how the National Government will liaise with the County governments to ensure the proper management and regulation of mining and natural resources, as well as the collection of revenue accruing from mining processes. The County Benefit Sharing Committee (CBSC) as proposed by the Benefit Sharing Bill, 2014 and whose mandate includes monitoring implementation projects by a mining corporation could go a long way in not only ensuring that such liaison and coordination is achieved but that also counties' participation in mining processes in their environs is guaranteed.

9.3.2. County Government imposing taxes on mining activities

Counties from the Coastal part of Kenya are proposing to impose new taxes on exploitation of minerals, oil and gas. An example is the imposition of cess on titanium by Kwale County. This is unconstitutional and County government should lobby for Senate to pass legislation for tax on Cess.

The National government is opposed to this plan arguing that it will scare away investors. The Counties on the other hand want more revenue arising from the exploitation of these minerals in order to improve services and create jobs. Some argue that mining is a responsibility of the National Government as provided in the Fourth Schedule of the Constitution and therefore is not devolved to the Counties. This is a matter requires a lot of consultation between the two levels of government.

9.4. County Revenue Laws on Agriculture and Livestock

Agriculture remains one of the most important economic activities in Kenya. The structures and growth rate of the agricultural sector is strongly affected by taxing and pricing policies. This is a County function and County should pass legislation for revenue management in this function and National legislation shall be overtaken by events.

9.4.1. Agricultural Produce Cess (APC)

Cess on agricultural produce was initially collected under section 201 of the repealed Local Government Act, Cap 265; and the repealed Agriculture Act at section 192A. Local governments were empowered to impose a cess on any kind on agricultural produce, and the cess was to form part of the local authority's revenue. This, in essence, was an imposition of a levy on agricultural produce.

For a long time, farmers have objected to APC because it was discriminatory and it did not affect all taxpayers. Farmers who would produce coffee or other crops on which cess was levied had to pay other taxes which were assessed out of the sales of the same crops on which they had already paid cess.

The constitutionality and legality of cess was determined in the case of Cereal Growers Association & Hugo Wood v. County Government of Narok, County Government of Nairobi, County Government of Nyeri & 8 others. The matter in question was the constitutionality and legality of imposition of and levying of agricultural produce cess and related taxes. The petitioners in the case also sought an advisory opinion on the legal mechanisms to prevent double taxation upon levying of agricultural produce cess.

The findings of the court on the matter were that it was unconstitutional for the County governments to impose and levy agricultural cess and related tax without supporting legal framework.

The Judge issued an order prohibiting the county governments mentioned in the petition from levying agricultural produce cess or related tax until they enact a legal framework. The judgement was signed on September 11, 2014 and read out on October 13, 2014 at a time when these County revenue and related issues were keenly debated.

According to the case, it is unconstitutional and illegal for a county government to impose agricultural produce cess without supporting legislative framework. Counties should lobby the Senate so as to pass legislation allowing them to charge cess as a tax. Otherwise, they should structure cess in a manner that it is a fee or charge for facilitating service provision in the county.

9.4.2. County levies on crops under the Crops Act 2013

As already indicated, there is place a new legislation on crops in Kenya. The Crops Act of 2013 embodies provisions on levying fees with respect to crops.

Section 17(2) of the Act provides:

"A county government may, pursuant to the Fourth Schedule of the Constitution, impose fees for -

(a) development of agricultural crops within the County;
(b) development and regulation of scheduled crop markets within the County;
(c) issuance of trade licences to any person trading in scheduled crops within the County; and
(d) issuance of licences for cooperative societies dealing with scheduled crops within the County."

Section 17(3) provides that "the fees imposed by a County government under subsection (2) shall not in any way prejudice National economic policies, economic activities across County boundaries or National mobility of goods, services, capital."

Scheduled Crops are those listed under first schedule of the Crops Act 2013. County levies on crops should therefore be modelled in a manner that is not unfair to the farmer and at the same time does not affect the National economic policies especially on exports.

However, the Crops Act uses the term "development of agricultural crops." It is arguable that this does not in any way exclude County governments from levying appropriate fees on agricultural produce.

This constitutional and legislative policy paper proposes that County Revenue Acts should be enacted to provide for the imposition of agricultural produce cess within the County, pursuant to Judge Lenaola decision discussed above. Section 17 of the Crops Act 2013 should also guide the enactment of the laws to impose appropriate levies within the context of the Crops Act at the County level. Effectively, this will allow for the application of section 23 of the County Government Public Finance Management Transition Act.

The county revenue acts should provide for the basis of imposition of agricultural produce cess to be on value addition. This would reduce or eliminate double taxation and only the final consumer would bear the cost of taxation.

Hence Nairobi City County, for example, would charge cess on agricultural produce from a County where there is value addition to the agricultural produce. In order to deal with arbitrary charges by counties on goods and services on transit through the counties, we recommend the formation of an independent regulatory agency to oversee the imposition of rates across counties. This system has been applied and used in the USA where they created the Surface Transportation Board as an economic regulatory agency to oversee structural, financial and operational matters across states.

[18] Government of Kenya, Session Paper No. 2, National Livestock Policy of 2008, Government Printer, Nairobi.
[19] National Livestock Policy, Session Paper No.2 of 2008.

9.4.3. Livestock cess and levies

The functions and powers of the County government in the agriculture sector include livestock sale yards and County abattoirs. Counties own the markets where various livestock transactions are carried out. Therefore, the County is responsible for charging cess on livestock to the owners of the animals and to issue licenses to traders. The County government is in charge of ensuring animals sold and slaughtered are in good health, cess is collected by the authorized body and is further charged with the role of ensuring there is a ready and suitable market for the livestock and its products.

Livestock administration has contributed greatly to the growth of the economy of Kenya. As a devolved function, livestock is an additional source of revenue for the County governments especially with regards the livestock sale yards and County abattoirs.

There is in place a National Livestock Policy that addresses a wide range of issues within the livestock subsectors. The livestock subsectors include the dairy industry, beef production, sheep and goats, camel production, the pig industry, apiculture, rabbit production and the poultry industry. Stakeholders in the livestock sector are livestock owners, the county government and other relevant bodies.

The main objective of the livestock policy is to advance livestock management systems for sustainable development of the livestock industry. The institutional framework on the management of livestock including collection of livestock cess will be the role of each County. Counties should move swiftly and enact legislation to ensure that revenue from this devolved function is administered in the county. In this paper the main focus is on livestock sale yards and County abattoirs.

9.4.3.1. County Abattoirs

Abattoirs fall under county functions for which counties have to offer services to users. These fees should be rationalized under the county tariff and pricing policy pursuant to section 120 of the County Governments Act, 2010.

The County abattoirs are to be managed by the County government. All abattoirs are to operate under County abattoir regulations. For example, regulations on adequate sanitary facilities. The animals to be delivered to the abattoir are required to rest for a minimum of 24 hours before they are slaughtered. This will allow the inspectors to inspect the animals for any diseases or physical injuries before they are slaughtered.[20]The animals are thereafter to be slaughtered and processed ready to be sold. The County government is to ensure the meat is of good quality through the inspection process and that hygiene is maintained.

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The county government may charge cess on the livestock brought for slaughter to the abattoirs at the abattoir and will charge further cess once the meat is ready for the market at the exit point. The owner of the abattoir is only to be charged licence fees for operating the abattoir.

By law, processing plants and therefore processed meat is an addition to slaughtering animals.[21] There are abattoirs that are already operational in various counties. The Kenya Meat Commission (KMC) has an operational abattoir including two export abattoirs at Athi River and Mombasa. Some abattoirs are privately owned Farmers Choice and Alpha Meats, among others. Privately owned abattoirs are to remain subject to the trade licensing by the relevant County authorities. Frequent inspections should be conducted to ensure compliance with health and other standards. County abattoirs can also charge fees for the premises as earlier suggested.

9.4.3.2. Livestock Sale Yards

County livestock sale yards are to be managed by the county government. The livestock sale yards serve as the market where the animals are assembled for inspection before they are sold. The cess to be charged on livestock will be based on the number of livestock. For example, for every ten cows sold, livestock cess is levied.

Sale yards may be owned by the County or privately. The licence to manage the sale yards will be issued to the sale yard owners. The owners of livestock are required to pay cess on the animals that are sold in the sale yards. Cess is paid to the livestock owners who should remit it to the arm of the County government in charge of collecting revenue. Like the County abattoirs, livestock sale yards are also subject to fees for services and County trade licensing laws.

9.5. Health services in Kenya

Under the Fourth Schedule on the distribution of functions between the National and County Governments some functions are exclusive to either level of government. According to the Kenya Health Policy, health services are divided thus:

[20] ibid.

[21] End market analysis of Kenyan livestock and meat, USAID, March 2012.

National Government	County Government
Health policy	County health facilities and pharmacies
Financing	Ambulance services
National referral hospitals	Promotion of primary health care
Quality assurance and standards	Licensing and control of agencies that sell food to the public
Health information, communication and Technology	Disease surveillance and response
National public health laboratories	Veterinary services (excluding regulation of veterinary professionals)
Public-private partnerships	Cemeteries, funeral homes, crematoria, refuse dumps, solid waste disposal
Monitoring and evaluation	Control of drugs of abuse and pornography
Planning and budgeting for National health Services	Disaster management
Services provided by Kenya Medical Supplies Agency (KEMSA), National Hospital Insurance Fund (NHIF), Kenya Medical Training College (KMTC) and Kenya Medical Research Institute (KEMRI)	Public health and sanitation
Ports, borders and trans-boundary areas	County health facilities and pharmacies
Major disease control (malaria, TB, leprosy)	Promotion of primary health care

The complex mix of devolution and the delivery of health services between the two levels of governments has further been organised into what is commonly referred to as the four-tier system:

(a) Community health services comprise community units in the County;
(b) Primary care services which comprise all level 2 (dispensary) and 3 (Health Centres) facilities, including those managed by non-state actors;
(c) County referral services which comprise all level 4 (primary) hospitals and services, and former district hospitals in the County in the County, including those managed for non- state actors;
(d) National referral services (Level 5 Hospitals) which is comprised of highly specialized services and includes all tertiary referral facilities. They include former Provincial General Hospitals, and National level Semi-Autonomous Agencies.

The Kenya Health Policy (KHP) indicates that the national government is only in charge of National referral services. The KHP also envisages the County Health Department (CHD) which is to establish and facilitate an institutional management structure to coordinate and manage delivery of the health mandate at the County level. One of the roles of the CHD is to provide a legal framework for lending arrangements and to facilitate loan repayments and fees for use of assets by licensed health service providers.

However, it should be noted that the National government should not commandeer County governments on areas specifically allocated to counties under Part 2 of the Fourth Schedule. In light of this fact, County governments can choose to legislate on the structure, framework and mode of administration over County health services under Part 2 of the Fourth Schedule of the Constitution.

Counties are responsible for three levels of care including community health services, primary care services and County referral services. County Governments can therefore charge fees for health services rendered in the County health facilities pursuant to Article 209(4) of the Constitution of Kenya (read with the Fourth Schedule) and section 120 of the County Government Act on a tariff and pricing policy. However, as a basic service to the county residents, Counties should move towards free primary healthcare as envisaged by the Constitution in terms of service delivery.

10. CROSS COUNTY TRADE DISPUTES AND RESOLUTION IN KENYA

Trade disputes arising from activities of county governments, especially on charging of revenue by counties should be dealt with by an appropriate body. As it stands, it is not clear how decisions on inter-county trade systems are to be made and how the disputes arising from these are to be dealt with. There are three organs which are directly connected with counties and whose positions can be revisited and reviewed to fill this gap.

10.1. The Intergovernmental Budget and Economic Council (IBEC)

The Intergovernmental Budget and Economic Council (IBEC) is established under section 187 of the Public Finance Management Act 2012. It is composed of:

(a) the Deputy President of the Republic of Kenya as the Chairperson, currently Mr William S. Ruto;

(b) the relevant Cabinet Secretary. For the purposes of the Public Finance Management Act, Cabinet Secretary means the Cabinet Secretary for Finance, currently Mr. Henry Rotich;

(c) a representative of the Parliamentary Service Commission;

(d) a representative of the Judicial Service Commission; the Chairperson of the Commission on Revenue Allocation or a person designated by the Chairperson; (e) the Chairperson of the Council of County Governors, currently Mr Isaac Rutto; (f) every County Executive Committee member for finance; and

(g) the Cabinet Secretary responsible for intergovernmental relations. This refers to the Cabinet Secretary for devolution and planning, Ms Anne Waiguru.

The purpose of the IBEC under section 187(2) of the PFM Act is to provide a forum for consultation and cooperation between the National government and County governments on:

(a) the contents of the Budget Policy Statement, the Budget Review and Outlook Paper and the Medium-Term Debt Management Strategy;

(b) matters relating to budgeting, the economy and financial management and integrated development at the National and county level;

(c) matters relating to borrowing and the framework for National government loan guarantees, criteria for guarantees and eligibility for guarantees;

(d) agree on the schedule for the disbursement of available cash from the Consolidated Fund on the basis of cash flow projections;

(e) any proposed legislation or policy which has a financial implication for the counties, or for any specific county or counties; any proposed regulations to this Act; and

(f) recommendations on the equitable distribution of revenue between the National and county governments and amongst the county governments as provided in section 190; and

(g) any other matter which the Deputy President in consultation with other Council members may decide.

In line with its mandate IBEC has been able to provide a consultative forum for the National and county governments to agree, for instance, on reducing unnecessary foreign trips. This has cut down expensive Government spending and wastage. In providing a consultative forum for the national and county government, the IBEC serves to avert possible conflicts between the two levels of government.

There is need though to ensure that IBEC is properly facilitated in order to carry out its functions effectively.

10.2. Council of Governors

The Council of Governors is established under Section 19 of the Intergovernmental Relations Act, 2012.

10.2.1. Functions of the Council

Section 20 (1) of the Act provides that the Council of Governors shall provide a forum for:

(a) consultation amongst county governments;

(b) sharing of information on the performance of the counties in the execution of their functions with the objective of learning and promotion of best practice and where necessary, initiating preventive or corrective action;

(c) considering matters of common interest to county governments;

(d) dispute resolution between counties within the framework provided under this Act; (e) facilitating capacity building for governors;

(f) receiving reports and monitoring the implementation of inter-county agreements on inter- county projects;

(g) consideration of matters referred to the Council by a member of the public;

(h) consideration of reports from other intergovernmental forums on matters affecting National and county interests or relating to the performance of counties.

The Intergovernmental Relations Act further provides under section 20 (2) and (3) that the Council shall have powers to establish other intergovernmental forums including inter-city and municipality forums as well as establish sectoral working groups or committees for the better carrying out of its functions.

The Council of Governors has availed a forum for dialogue and deliberation among governors from various counties as well as between the counties and the National government. But Kenya is yet to witness the Council of Governors take an active role in dispute resolution.

10.3 Intergovernmental Coordinating Summit

The basis for the structure for intergovernmental relations under the devolved system of governance is Articles 6 and 189 of the Constitution

The Constitution envisages a situation where the two levels of government conducts their mutual relations on the basis of consultation and cooperation.

The Intergovernmental Relations Act, 2012 creates the national and county government Coordinating Summit and the Council of Governors to provide forums for exchange of information and also help to coordinate policies and enhance the capacity of the devolved structures.

The council of governors is a forum for county governors and dispute resolution is one of its key functions. The Council is also mandated to consider matters of common interest to county governments and monitor the inter-county agreements, among other functions.

These intergovernmental forums will therefore be important in resolution of intergovernmental disputes such as sharing of resources, cross county trade disputes, and issues arising out of agreements between the National Government and a county government, or amongst county governments.

Cross-county disputes between county governments have been witnessed. These include disputes between Meru and Isiolo counties due to the Lamu Port and South Sudan-Ethiopia Transport (Lapsset) corridor project which is expected to pass through the two counties. The two counties lay claims to disputed areas on their borders. A dispute has also been witnessed between Kitui and Tana River counties; Turkana and West Pokot over the River Turkwel and the hydro-electric power project.

These intergovernmental forums will therefore be important in resolution of intergovernmental disputes such as sharing of resources, and cross county trade disputes. There are also issues arising out of agreements between the national government and a county government or amongst county governments.

In resolving disputes, the intergovernmental structures are mandated to apply and exhaust the mechanisms for alternative dispute resolution (ADR) provided under the Act or any other legislation before resorting to judicial proceedings.

However, it is important to note that the Summit and the council of governors are political organs and they may be vulnerable to vested political interests. It lacks technical expertise on certain matters and this may impact negatively on their roles to safeguard devolution.

10.4. Challenges and proposals on cross County disputes

Apparently, decisions of the Council of County Governors do not have legal force. Most of the Council's functions are generally deliberations and debates on general issues. It is therefore recommended that the Intergovernmental Relations Act, 2012 should be amended to give the council's resolutions a legal force. The Council can then handle trade disputes arising out of inter-county trading activities and give legally enforceable decisions.

The Council of Governors Council is also political in nature. It is comprised of Governors who are the elected CEOs of their respective counties and their executive duties are largely based on and affected by political factors. On the other hand, the Intergovernmental Budget and Economic Council is a less political organ whose membership is drawn from different organs of government.

The interests of the National Government as well as those of County Governments are well represented at the IBEC. It can therefore be argued that IBEC is better suited to handle trade disputes between and among counties.

10.5. Can a county law override a national law?

This issue relates to the conflict of laws of the National government and County governments. Article 6 and Chapter 11 of the Constitution state that both the National Government and County Governments must consult and co-operate with each other. Where there is a conflict of laws, one of two scenarios will apply: First, if the National legislation sets the essential standards for the whole country, the National law will be binding and will override the County law. Second, where the conflict concerns a matter that Counties are responsible for, for instance the functions of the County Government as listed in the Fourth Schedule, the County law will be binding and controlling.

Article 191 of the Constitution has provisions that apply to conflicts between National and County legislation. It provides in Article 191(2) that National legislation prevails over County legislation if:

(a) the National legislation applies uniformly throughout Kenya and any of the conditions specified in clause (3) of the Article is satisfied; or
(b) the National legislation is aimed at preventing unreasonable action by a County that is prejudicial to the economic, health or security interests of Kenya or another County or that impedes the implementation of National economic policy.

The conditions referred to in clause (2) (a) are:

(a) the national legislation provides for a matter that cannot be regulated effectively by legislation enacted by the individual counties;

(b) the National legislation provides for a matter that, to be dealt with effectively, requires uniformity across the nation, and the national legislation provides that uniformity by establishing: (i) norms and standards; or (ii) national policies; or

(c) the national legislation is necessary for:

1. the maintenance of National security;
2. the maintenance of economic unity;
3. the protection of the common market in respect of the mobility of goods, services, capital and labour;
4. the promotion of economic activities across County boundaries;
5. the promotion of equal opportunity or equal access to government services;
6. the protection of the environment.

Article 191 (4) provides that County legislation prevails over National legislation if neither of the circumstances contemplated in clause (2) above apply.

10.5.1. Can a County law alter a fee that is specified in a valid National law?

The foregoing conflict rules apply only where it is a matter of concurrent jurisdiction, or where the matter belongs to the County Government's mandate. Where the matter belongs to the exclusive jurisdiction of the National Government or it is not assigned (is a residual matter) the County cannot review or alter the National law.

10.5.2. Duplication of charges by counties when imposing taxes and licences

There is need to harmonise the regime of taxes and charges between the National Government and the 47 County governments, on the one hand and among the County governments on the other hand. The National government should come up with a National Tax Policy that will guide this country on the way forward on matters touching tax.

(a) Imposition of taxes by counties depends on the subject matter. If these are taxes or licence fees related to a matter categorized to be under the function of the County Government, then the purported duplication arises from a mistake by the National Government. Where a function is expressly stated to be a County government function, the National government should not impose taxes. However, we appreciate the fact that existing legislation that establishes some of the bodies that charge these levies existed before devolution. National government needs to look at the bodies created pre-devolution and align them to the constitution 2010.

Some fees imposed by counties that are already fixed under National laws, are:-

- the Public Health Act Cap 242 and,
- the Physical Planning Act Cap 286.

Under the Fourth Schedule, County planning and development is a function of the County Governments. However, the Physical Planning Act is a National legislation that was enacted with specific provisions on physical planning applicable to the whole country. It sets a general planning standard for the country. It can therefore be argued that the provisions in the Physical Planning Act as enacted presently, can override County government legislation on cross-County physical planning. Counties are required to pass county specific legislation so that they can effectively perform this function.

(b) County v. County

County laws do not have an extra-County effect. A County can therefore impose taxes only within its geographical jurisdiction. Where licence fees for a particular business are required to be charged by a County, and the business involves a number of counties, it is recommended that the concerned County governments can form clusters and enact legislation that applies to that cluster. But each County must enact its own laws even if they are identical. This shall minimize chances of duplicate imposition of taxes or license charges.

10.6. Inter-County Water Resources

Article 62 of the Constitution provides that public land includes all rivers, lakes and other water bodies as defined by an Act of Parliament. Section 2 of the Water Act, 2012 defines a water resource to mean any lake, pond, swamp, marsh, stream, watercourse, estuary, aquifer, artesian basin or other body of flowing or standing water, whether above or below the ground. According to the Constitution and the Water Act, 2002 and the Water Bill, 2014, all water resources vest in the National Government.[24] This is in accordance with the public trust doctrine that provides that the state should hold natural resources in trust for the benefit of citizens. This is because of the importance of the resources. Thus no single person should have the right to monopolise the access and use of the resources. The definitions mentioned above do not expressly categorise these resources as private or public resources.

[24] Section 3 of the Water Act 2002.

However, if a person creates an artificial water resource such as an artificial dam, well or channel on private land, the resource are is considered to be a water resource of the County. This is because they are artificial.[25]This is also consistent with the right to private property provided for in article 40 of the Constitution.

According to the Water Act 2002, water resources vest in the National government and are managed by the Water Resource Management Authority (WRMA). In light of devolution, there are certain changes with regard to the management and regulation of water resources. The functions of the National Government are provided in Part 1 of the Fourth Schedule of the Constitution. They include: the use of international waters and water resources; National public works; protection of the environment and natural resources; and capacity building and technical assistance to the counties among others. The devolved functions with regard to water resource management include implementation of specific National government policies on water conservation and County public works and services.

According the Water Bill 2014, the Water Resource Management Authority (WRMA) is the National Government's agent and undertakes the performance of the functions of water resource management on behalf of the National Government. The management functions include receiving water permit applications for water abstraction, water use and recharge and determining, issuing, varying water permits; and enforcing the conditions of those permits, permit fees and water use charges, among others. The main function of County governments is with regard to water services provision. The County government could either establish or appoint a water services provider which shall provide water services within the County. These may be licensed to develop County assets for water services provision. In light of the aforementioned, County governments do not have a mandate to charge any user for the usage of any water resources only for their water services.

With regards to benefit sharing, there is a proposed Bill to establish a system of benefit sharing in resource exploitation between resource exploiters, the National Government, County governments and local communities. The Draft Natural Resources Benefit Sharing Bill, 2014 establishes the Natural Resources Benefits Sharing Authority which is to be mandated to facilitate and oversee benefit sharing between the communities, organizations, County and National Governments. The Bill is applicable to forest and water resources among other natural resources. The Bill further provides for the benefit sharing ratios (60:40) between the National and County Governments. This is with regard to proceeds from exploitation of the resources situated in the County by an exploiting organization. There is no provision for benefit sharing between National and County Governments with regard to the use and management of natural resources that vest in the National government by the National authorities.

[25] Albert Mumma (2005) "Kenya's New Water Law: An Analysis of Implications for the Rural Poor," International Workshop on African Water Laws: Plural Legislative Frameworks for Rural Water Management in Africa, 25/28 January 2005, Johannesburg, South Africa, B. van Koppen, J. Bu." In: Kenya J. Sci. and Tech. (B) vol. 7 (1) 23-28, Departmental seminar; 2005. https://www.google.com/url?sa=t&rct=-j&q=&esrc=s&source=web&cd=2&cad=rja&uact=8&ved=0CCMQFjAB&url=http%3A%2F%2Fwww.iwmi.cgiar.org%2FPublications%2FCA-BI_Publications%2FCA_CABI_Series%2FCommunity_Law%2Fprotected%2FCh%252010.pdf&ei=3LMeVZ3SJcWBU-HOgeAE&usg=AFQ-jCNFlh8n8_dU0XNQBuSy2Vw87J7fw_A&sig2=hg_D-_a5M-edFJRBBB0Yqg (accessed 3/4/2015).

Article 62 of the Constitution 2010 lists the categories of public land that vest in the County government and those that vest in the National government. From a reading of the article, natural resources vest in the National Government. Some argue that County governments should therefore have no claim over such resources on the basis that they are geographically located in the County. This matter requires appropriate intergovernmental consultations. However, on the levying of trade/business licenses and property rates, the County government has the final say. In addition, the Counties are encouraged to enter into social contracts that requires the companies to commit funds to social amenities within the county.

10.6.1. The role of the National Land Commission

The National Land Commission is the body tasked with the administration and management of public land. Section 10 of the Land Act provides that;

"the commission shall prescribe guidelines for the management of public land by all public agencies, statutory bodies and state corporations in actual occupation or use of public land."

Section 5 of the National Land Commission Act states that the National Land Commission is to ensure that public land and land under the management of designated state agencies are sustainably managed for their intended purpose and for future generations. It is therefore important that the statutory corporations mandated with the regulation of water resources work with the National Land Commission. Section 10 of the Water Bill 2014 proposes that the Water Services Regulatory Authority shall regulate the management and use of water resources in consultation with the National Land Commission.

10.6.2. The place of Water Service Boards

Section 51 of the Water Act provides for the establishment of water boards which are responsible for the efficient and economical provision of water services authorized by the license. The functions of water boards are to: purchase, lease or acquire land, premises, plant, equipment and facilities necessary for the water services provision. They are mandated to license water service providers for the delivery of these services.

However, according to the Fourth Schedule of the Constitution, these functions have been allocated to the County governments. There are legislative reforms in the water sector through the Water Bill, 2014.

However, the bill is yet to be enacted. In the meantime, County governments could work with the existing water service institutional framework in accordance with section 118 of the County Government Act. The section provides that counties "may enter into agreements with the National government, another County or an agency of the National government, to provide or receive any service that each County participating in the agreement is empowered to provide or receive within its own jurisdiction."

10.7 Forests

The Forest Act 2005 provides for three types of forests; state forests, local authority forests, and private forests.[35] The ownership of state forests vests in the Kenya Forest Service (KFS) whereas the ownership of local authority forests vested in the local authorities. State forests are all forests other than primary and local authority forests. Local authority forests were forests situated on trust lands, or arboretums, parks and miniforests established under section 30 of the Forest Act 2005 and any other forest created pursuant to the provisions of the Act. The management of the state forests is carried out by the Kenya Forest Service. This includes the licensing of the use of the forests and collection of all revenue and charges due to the Government in regard to forest resources, produce and services. Management of local authority forests was a function of the local authorities or any other agency that had entered into a forest management agreement with the local authority.

However, the Constitution of Kenya 2010 and the National Forest Policy 2014 categorise forests as follows: public, community and private forests.[36]Public forests are established under Article 62 of the Constitution and include all Government forests. The National Forest Policy 2014 defines public forests as all forests on public land; forestland lawfully held, used or occupied by any State organ; forestland transferred to the State by way of sale, reversion or surrender and forestland in respect of which no individual or community ownership can be established by any legal process. Article 63 of the Constitution provides for community forests. The National Forest Policy 2014 defines community forests as forestland that is lawfully held, managed or used by specific communities; forestland lawfully held as trust land by the County governments; ancestral forest land traditionally occupied by hunter-gatherer communities and any other forest that set aside as a community forest by the respective County Government.

The constitutional changes especially with the introduction of devolution necessitated changes in this legislation. Currently, there is a Forest Conservation and Management Bill 2014. Clause 32 and 33 of the Bill provide that all public forests in Kenya are vested in the Kenya Forest Service and all community forests vest in the County governments subject to the rights of the users. The Bill further provides for the establishment of the Kenya Forest Service to conserve, protect and manage all public forests. The County governments have the mandate to protect and manage all forests and woodlands under its jurisdiction.[37] With regards to licensing and trade in the utilization of forests and forests products, the Service or the County Department responsible for forestry are mandated to issue authorisations for forestry activities in form of a permit, timber licence, special-use licence, contract, joint management agreement, and concession agreement. There is need for more discussions and guidance with the policy makers and relevant authorities on some controversial aspects of utilization such timber which is currently a very controversial issue. IBEC needs to resolve this conflict as it arises.

35 Section 2 of the Forest Act 2005.
36 Ministry of Environment, Water and Natural Resources (2014) National Forest Policy 2014,Government Press, Nairobi, at 13.
37 Section 34 of the Forest Conservation and Amendment bill 2014.

10.8. Application of Alternative Dispute Resolution Mechanisms in Cross County trade disputes

Chapter 15 of the Constitution of Kenya provides for the creation of Commissions and Independent Offices. The Commission on Administrative Justice (Office of the Ombudsman) is a Constitutional Commission created by the Commission on Administrative Act. The Act seeks to restructure the Kenya National Human Rights and Equality Commission on Administrative justice pursuant to Article 59(4) of the Constitution.

Governments at each level and the different governments at the County assembly are required by the Constitution to cooperate in the performance of functions and the exercise of powers. In the event a dispute arises between the governments, the Constitution provides that all reasonable effort be applied to settle the dispute. These efforts are to include the use of ADR to settle any inter-governmental disputes. Such intergovernmental disputes include inter-County disputes and citizens against County disputes.

10.8.1. The Commission on Administrative Justice

Chapter 15 of the Constitution of Kenya provides for the creation of Commissions and Independent Offices. The Commission on Administrative Justice (Office of the Ombudsman) is a Constitutional Commission created by the Commission on Administrative Act. The Act seeks to restructure the Kenya National Human Rights and Equality Commission on Administrative justice pursuant to Article 59(4) of the Constitution.

While the CAJ is a Constitutional Commission, it has been mandated with an administrative duty and to carry out administrative action. It is mandated to enforce administrative justice in the public sector by addressing maladministration through effective complaints handling and ADR; promoting good governance and efficient public service delivery by enforcing the right to fair administrative action; and investigating abuse of power, manifest injustice and unlawful, oppressive, unfair or unresponsive official conduct. This is in line with Articles 10, 47, 48, 50, and 232 as well as Chapter Six of the Constitution. In addition the CAJ has a constitutional mandate to safeguard public interest by promoting constitutionalism, securing the observance of principles and democracy and protecting the sovereignty of the people of Kenya.

The CAJ plays an important role in ensuring that there are checks and balances in the administrative system. Article 59(2)(h) of the Constitution gives the CAJ powers to investigate any conduct in state affairs in any sphere of the government. Section 8(b) of the CAJ Act gives the CAJ power also to investigate misbehavior in public officers, vet public officers to ensure their eligibility for public office. The Commission is also tasked with the role to resolve any matter brought before it by conciliation, mediation, or negotiation. [40]

40 ibid.

Governments should work with the Commission on Administrative Justice (CAJ) to ensure fair administrative action and address complaints of abuse of power, unfair treatment, manifest injustices, or unlawful, oppressive unfair or unresponsive official conduct.

10.8.2. The Role of the Senate in Dispute Resolution

The Senate is established by Article 93 of the Constitution of Kenya. It is mandated to represent the counties and their governments. As such the Senate plays an important role in ensuring the concerns of counties are well catered for. The Senate is mandated by Article 96(3) to determine and oversee the allocation of National revenue among counties. The Senate is to then provide a consultative forum for the 47 County governments and the National Government on matters of revenue and finances. As such, the Senate is involved in facilitating smooth allocation and division of revenue between the National and County governments to avoid dispute.

The Senate provides an avenue for negotiations between the County governments and National Government. The Senate does not have a specific role to play with regards to cross County trade dispute resolution. The Senate simply provides for dispute resolution between the National and County governments on allocation of revenue to the counties.

11. CONCLUSION, FINDINGS AND RECOMMENDATIONS ON CONSTITUTIONAL AND POLICY FRAMEWORK ON COUNTY REVENUE LAWS

The Constitution of Kenya allows County governments to raise revenue under Article 209 within the constitutional guidelines and limits. Specifically, County governments are allowed to impose property rates, entertainment rates and any other tax authorized by an Act of Parliament. Further, the Fourth Schedule of the Constitution provides an extensive list on the division of functions between the two levels of government. Effectively, County governments can only regulate those functions listed under Part 2 of the Fourth Schedule. Even so, cases of conflict or concurrent jurisdiction are guided by Article 191 of the Constitution. In exercising its revenue imposition and collection function, County governments should be guided by constitutional principles, the existing legislative framework, the National economic policy and strategies; and business friendliness. This document provides a guideline on how County governments can legally exercise their revenue collection mandate.

11.1. Conclusion

This policy document has been prepared to act as a guide for County revenue legislation. This document focuses on constitutional, legal and other considerations in the drafting of County revenue legislation. This policy document analyses the constitutional provisions and other legal considerations towards highlighting the County governments' roles and position in the exercise of their revenue raising power and mandate. This study highlights the superiority and centrality of the Constitution of Kenya 2010 in the exercise powers and the undertaking of functions of either level of government. In light of this, this policy document reiterates Articles 2's stipulation that any law passed by either the National or County Government that is inconsistent with the Constitution is null and void to the extent of the inconsistency.

This policy document instructs that the exercise of the constitutional mandate of the County Governments in raising revenue should be guided by the relevant enabling County revenue legislation. This policy document also expounds on the constitutional principles and values that should instruct the exercise of any constitutional power and mandate. For instance, special attention has been laid on the overarching principle of public participation in the exercise of governmental mandate, including the passing of revenue legislation. In light of this conclusion, it must be noted that all relevant stakeholders should be involved in the passing of any law that affects their constitutional rights under Chapter 4 of the Constitution of Kenya 2010.

11.2. Summary of findings

This study has found that most counties continue to impose and collect revenue from the citizenry without proper enabling legislation. For example, some counties continue to collect agricultural produce cess even though they do not have the relevant revenue law. Other counties also continue to impose and collect rates on property despite not having the law on rating and property valuation.

This study has found that there is a dire need to appraise the members of County assemblies and County executive on the compliance with the Constitution, governance and especially making and administration of County revenue laws.

Specific findings of this research include the following:

(a) That there was a need for the creation of a proper public participation law which would set out the relevant structures, mechanisms and criteria for stakeholder involvement.
(b) That counties lack capacity on in the creation of revenue laws and the in the subsequent implementation especially in skills.
(c) That there was apparent and real conflict between the roles of the two levels of government especially due to the interference and dominant attitude of National Government in encroaching on County functions.
(d) That the distribution of functions of powers and functions between the two levels of government is unclear especially on concurrent powers and functions.
(e) That all counties and particularly border counties should consider and respect Kenya's obligations under international law and transnational legal process (TLP). This is in spite of the fact that some of these obligations have a direct impact on County revenue imposition, collection and administration.

11.3. Recommendations

Specific recommendations and proposals on issues raised in this research, policy and legislative drafting process have been made under the relevant parts of this policy document where the issues are conceptualized, problematised, analysed and contextualised or discussed. However, the general recommendations and proposals are:

a. That all County laws should be based on existing policy. Unlike before, the Constitution identifies and places weight on the centrality of policy in governmental administration and in the making of legislation. As such some scholars have concluded that policy matters are now core constitutional matters in Kenya.
b. That all County revenue raising mechanisms must be based on specific legislation. Consequently, all counties must pass the relevant revenue laws to act as the basis upon which they impose, collect and administer revenue.
c. That County Governments should pass a law on public participation to implement the constitutional requirement on public involvement in matters that affect them.
d. That all Counties should pass and adopt a tariff and pricing policy that shall rationalize the fees charged for services rendered by the County governments.
e. That county governments should consider Kenya's National economic policy on all the sectors, and the foregoing proposals, before passing County revenue legislation.

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