

## Module I Session 1: Review of the Fourth Schedule of the Constitution

### KEY TAKEAWAYS

- ❖ THE FUNCTIONS FOR BOTH COUNTY AND NATIONAL GOVERNMENTS ARE SPELLED OUT IN THE FOURTH SCHEDULE OF THE CONSTITUTION AND THE TRANSITION AUTHORITY GAZETTE NOTICE 2013
- ❖ HOWEVER, THERE ARE STILL A NUMBER OF FUNCTIONS THAT ARE UNCLEAR AND THERE ARE DISAGREEMENTS AMONG STAKEHOLDERS ABOUT WHO IS SUPPOSED TO DO WHAT
- ❖ COUNTY AND NATIONAL GOVERNMENTS HAVE CONCURRENT/SHARED ROLES IN DIFFERENT SECTORS AND BOTH GOVERNMENTS HAVE A CONSTITUTIONAL DUTY TO COOPERATE WITH EACH OTHER IN CARRYING OUT THEIR ROLES AND RESPONSIBILITIES
- ❖ RESIDUAL FUNCTIONS NOT ASSIGNED TO ANY LEVEL EXPLICITLY BELONG TO THE NATIONAL GOVERNMENT
- ❖ PARLIAMENT HAS A ROLE IN CLARIFYING RESPONSIBILITIES OF THE TWO LEVELS OF GOVERNMENT THROUGH LEGISLATION
- ❖ BUDGET ADVOCACY, ANALYSIS AND REPORTING SHOULD TAKE INTO ACCOUNT THE ROLES AND RESPONSIBILITIES OF COUNTIES AND NATIONAL GOVERNMENT AND PUSH FOR FURTHER CLARIFICATION OF THE FUNCTIONS OF BOTH LEVELS OF GOVERNMENT

### TASK 1.1 ■ RESPONSIBILITIES OF NATIONAL GOVERNMENT AND COUNTIES

45 MINUTES

#### TASK OBJECTIVE

- ❖ UNDERSTANDING THE FUNCTIONS OF BOTH LEVELS OF GOVERNMENT ACCORDING TO THE CONSTITUTION AND OTHER STATUTORY DOCUMENTS

#### RESOURCES NEEDED

- ✓ Fourth Schedule of the Constitution of Kenya 2010 (Annex II below)

#### HOW TO RUN THE TASK

1. Explain that the 2010 Constitution's Fourth Schedule assigns functions to national and county governments.
2. Remember to indicate that some roles and responsibilities are concurrent (and the lines between the two are ambiguous), while in other cases it is simply unclear which level is responsible for a specific issue as it is not mentioned explicitly. This is inevitable, as a Constitution cannot fully specify all functions in a detailed fashion. That is why the Transition Authority was created and further legislation is ultimately necessary.
3. Refer participants to Task 1.1: Responsibilities of National Government and Counties (PM, p.9) and explain the task, which involves filling out a table.
4. Have participants break up into small groups of three to five individuals for this task. Ask the participants to answer the questions WITHOUT referring to the Constitution. The language used in the exercise is lifted directly from the Fourth Schedule, so if participants raise questions about the lack

of clarity of the language, remind them that it is not your language, but the official legal language. It is good to remember that official legal language can also have gaps.

5. Give the participants 10 minutes to work on the task.
6. Once the participants are done, have them gather back in plenary and review the answers by asking the participants to volunteer their responses. Discuss and correct as needed.

**Emphasize:** The answers are “provisional,” in the sense that this is the language in the Constitution of Kenya 2010, but in many if not most cases, it needs to be further defined. This usually comes up in discussion as participants will question some of the functions and whether they are actually national or county functions. The process of defining this was given to the now defunct Transition Authority.

**Note:** The facilitator should be prepared for many specific questions that cannot be anticipated in this section because they will be based on what participants have heard or seen, as opposed to what the constitution says. The notes (under task 1.2) below try to address some of the most common issues arising in practice when discussing the functions of government. While we believe these notes are fairly comprehensive, the situation on the ground is always changing and facilitators should investigate the degree to which the situation has changed in particular sectors as they prepare for trainings using these materials.

### BACKGROUND INFORMATION

- Refer to the Fourth Schedule of the Constitution of Kenya 2010 (Annex II).
- In general, if a particular area is not mentioned in the Fourth Schedule, and cannot be reasonably thought to be included in an area that is mentioned, the national government has the “residual” responsibility for it. However, much of the debate is about whether an area can be “reasonably” thought to be included in another area. For example, does the responsibility for pre-primary education at county level reasonably include hiring of pre-primary teachers or not? Generally, there are no easy answers to these questions, which is why legislation is often needed and some of these matters have gone to court for interpretation. (The background notes in the tasks below update the progress made in resolving some of these contentious areas)

### TASK 1.1 (QUESTIONS AND ANSWERS)

Question	Answer
1. Primary Education	National
2. Housing Policy	National
3. Ambulance Services	County
4. Courts	National
5. Pre- Primary Education	County
6. Housing	County

7. Wildlife Protection	National
8. Markets	County
9. Water and Sanitation	County
10. Agricultural Policy	National
11. Energy Policy	National
12. Control of Drugs	County
13. Health Policy	National
14. Public Road Transport	County
15. Police	National
16. Veterinary Services	County

**TASK 1.2 ■ A CLOSER LOOK AT FUNCTIONS ACCORDING TO THE FOURTH SCHEDULE**  
**30 MINUTES**

**TASK OBJECTIVE**

- ❖ **CRITICALLY LOOKING AT THE FUNCTIONS OF BOTH GOVERNMENTS AS PROVIDED FOR IN THE FOURTH SCHEDULE**

**RESOURCES NEEDED**

- ✓ The Fourth Schedule
- ✓ Relevant legislation (Annex of Documents )

**HOW TO RUN THIS TASK**

1. Ask the participants to read through the Fourth Schedule.
2. In groups of two or three, ask the participants to answer the questions provided for in Task 1.2 (PM, p.11).
3. Ask the participants to come back to plenary and have at least one group answer one of the task questions below.
4. Have a discussion on the matters arising and draw some pointers from the background notes below to enrich the discussion

In SUMMARY, the purpose of the discussion is to make the participants aware of the fact that there are some gaps and ambiguities in the Constitution, and that this is one of the reasons there must be a process of “unbundling functions” and assigning these functions to a level of government, even though the Fourth Schedule gives broad direction on who will do what.

## BACKGROUND INFORMATION

### NOTES ON APPROVED AND PENDING LEGISLATION IN VARIOUS SECTORS

#### A. EDUCATION SECTOR

##### Basic Education Act 2013

The approved Basic Education Act 2013 addresses some issues related to the division of functions, but also creates further confusion. The Act establishes a National Education Board (NEB) and County Education Boards (CEB). In spite of the name, the County Boards are “agents” of the National Education Board. There shall be on this Board a County Director of Education who, despite the title, is also an agent of the national government. The county has one seat on the County Education Board, which is given to the CEC Member for Education or their representative. By and large, the County Education Board is a national body with national representation.

Section 26 of the Act describes the role of the County as providing funds for infrastructure for ECD, childcare facilities, polytechnics, and so on. However, Section 28 mentions that the Cabinet Secretary, in consultation with the NEB and the CEB, will provide for establishment of pre-primary schools. This introduces confusion.

No mention is made of the teachers or staff who will work in these institutions. Section 26 indicates that national government may transfer the function of infrastructure for primary and secondary schools to counties, and may provide conditional grants for the same, but human resources are not mentioned. One interpretation of this is that human resources are with national government and they cannot be transferred.

Another area where confusion is created is in the appointment of Boards of Management (Sections 55 and 56). The Act says that these shall be appointed by the County Education Board (which as we saw, is a national agent) at every school, including pre-primary schools. These Boards will also (Section 63) be paid according to national government regulations. Why should the national government appoint the Boards at pre-primary level if this is a county function?

##### Basic Education Regulations, 2015

These regulations highlight how boards of management and heads of institution for both pre- primary, primary, secondary and adult education will be appointed. The TSC shall appoint and dissolve management boards on recommendation of the CEB. The CEB is required to constitute *ad hoc* committees to vet the suitability of nominees to school boards of management. The area Members of Parliament and chiefs shall form the national representation to these ad hoc committees. The other members will be drawn from the county government (County Director of Education, County Assembly Member and a representative of CEB) and other independent bodies/persons (institution sponsors, parents association representative and head of institution) Regulation 49 indicates that all persons to teach in basic education institutions of learning and training shall be required to have undertaken a training programme approved and recognized by the cabinet secretary and registered by TSC.

##### Basic Education Amendment Bill, 2014

This bill may correct some of the confusion we have seen in the original act. The CEB will still have the county commissioner and an additional member: the area Members of Parliament (Clause 4) who may attend the CEB meetings but will have no right to vote. The bill also proposes for constitution of sub-county education boards consisting of members appointed by the Cabinet Secretary for Education. These

sub-county boards will oversee youth polytechnics, pre-primary education at the sub-county level (Clause 5). It is unclear why these sub-county boards will be in charge of county functions yet they are constituted by a national government agent. The bill indicates that TSC will be responsible for assigning teachers to public institutions and training teachers for pre -primary education, child care facilities and home craft centers (Clause 6).

The bill intends to give additional functions to the board such as maintaining a databank. County governments will be responsible for development of infrastructure for institutions of basic education conducting pre-primary education and child care facilities. In essence, TSC will be in charge of assigning and training of all teachers and counties will be in charge of infrastructure. These two will have to coordinate with TSC in development projects to secure qualified personnel for their classrooms. This bill was passed by the National Assembly on 25/2/2016 and awaits Senate consideration.

The County Early Childhood Bill, 2014

This Senate Bill indicates that ECD teachers will be recruited by an ECD education recruitment committee: a body that draws members from the county government (Section 38). In addition, each county government will be responsible for remuneration of ECD teachers in public education centers (Section 36(3)). In this respect this bill contradicts the Basic Education Amendment Bill, 2014 (discussed above).

At some point the two houses of Parliament shall have to agree on which bill/provisions shall pass to avoid further contradictions and duplication of functions.

## **B. HEALTH SECTOR**

There are at least two bills that touch on the issue of functions in the health sector. The Health Bill 2015 and the Reproductive Health Bill 2014.

The Health Bill 2015. This bill is an improvement over the earlier Health Bill, 2014 that still left many gaps regarding devolved and national functions. The Health Bill, 2015 has a number of clauses touching on functions. In Clause 15(1) c, the national government is given responsibility to ensure access to emergency services and reproductive health care. It is not clear if this means that the national government must provide counties with funding to implement these functions (which are county functions, as per the TA Gazette Notice from 2013 August). This is implied by 15(1) p, which mentions ensuring adequate finances through “intergovernmental” mechanisms. However, Clause 49 suggests that national government will “implement” a “comprehensive programme” to address reproductive and maternal health (among other things). Similarly, implementation of environmental health programmes is mentioned, yet this was also devolved to counties via the Gazette Notice from August 2013.

Clause 24 of the bill indicates that devolution of management and development of health facilities shall be done progressively to county governments depending on the capacity of counties to undertake the functions. The First Schedule of the bill gives the much needed description how different hospitals are classified. This would put Level 5 (secondary) and Level 6 (Tertiary) hospitals under the national government as national referral hospitals, reversing the 2013 TA Gazette Notice which put Level 5 hospitals under counties. Under Clause 75, all specialists shall be treated as a national asset in order to sustain internship training and specialist services. These will be deployed to Level 5 and Level 6 hospitals.

Clause 20(g) gives the county the responsibility for procurement. Clause 37 clarifies how this will be done: procurement by both governments will be in line with the Public Procurement and Disposal Act and inter-governmental arrangements for 'medicine and medical products agreed upon will be from KEMSA as the primary provider'. Clause 37(3) of the bill provides that KEMSA may be the first call for procurement of health products at the county referral level. KEMSA must endeavor to have branches in all counties. This means that where KEMSA is unable to meet the demands of the county then the counties may source health products and technologies elsewhere.

The act also creates a state corporation to be known as the Health Professions Oversight Authority. One of the roles of this body is to facilitate redeployment, transfers and secondment of staff to the national and county government (Clause 78(7)). This will be done in consultation with the Public Service Commission, the County Public Service Board, the national ministry of health and county executive departments. This is for a transitional period (upon the expiry of ninety days from the date of publication of the Act), after which the health staff shall be deemed national government and county government staff respectively

The Reproductive Health Bill 2014, from the Senate, discusses health facilities. It guarantees that all health workers providing maternal and child health services shall operate in adequate facilities. Clause 23 suggests that this means every county should have a Level 5 hospital (these are regional hospitals currently, and would not exist in every county; there are 11 recognized facilities currently). Since Level 5 hospitals currently are a county function, and the existing conditional grant for them does not cover their full costs, the implication is that counties will be forced to build and maintain such facilities from their own resources. While the Bill leaves the health worker numbers to the discretion of the county, each facility is required under Clause 24 to have 5 ambulances, another "unfunded mandate" for counties (which are responsible for ambulance services). If both The Health Bill 2015 and The Reproductive Health Bill 2014 are passed they will contradict each other on the classification of hospitals. The former elevates Level 5 hospitals to national facilities, while the latter envisions expansion of Level 5 hospitals as county facilities.

### **C. AGRICULTURE SECTOR:**

The Agriculture, Fisheries and Food Act of 2013 is the main piece of legislation governing devolution within the agriculture sector. The Act establishes an Authority to take over the functions of a number of state corporations in the sector, listed below:

- (i) The Coconut Development Authority;
- (ii) The Kenya Sugar Board;
- (iii) The Tea Board of Kenya;
- (iv) The Coffee Board of Kenya;
- (v) The Horticultural Crops Development Authority;
- (vi) The Pyrethrum Board of Kenya;
- (vii) The Cotton Development Authority;
- (viii) The Sisal Board of Kenya;
- (ix) The Pests Control Products Board;
- (x) The Kenya Plant Health Inspectorate Service;

It is assumed by the act that these bodies do not perform any county functions as per the Constitution. But that is not entirely clear, given that these boards deal with crops, and crop husbandry is a county function. The act does not clarify the roles of counties in the sector beyond what is in the Constitution, and gives

them no role in the new authority, which is entirely national in terms of its focus, the members of its board, and the financing.

OTHER SECTORS (not included in the Participant Manual questions)

#### **D. WATER AND SANITATION**

While the Constitution refers to water and sanitation services as county functions, water protection and other related issues are national functions. Also, water is a shared resource across county boundaries so it cannot be fully managed by counties alone. There is a need for a regional body or some way of working across county boundaries.

The pending Water Bill 2014 does address itself to devolution in part, though it does not resolve the main issues in the sector. Under the proposed law, Water Service Boards (WSB) would continue as Water Works Development Boards (WWDB). These will take over all WSB assets once the law is passed. The role of these new boards will be similar to the WSBs. They will be national agencies funded nationally (Clause 63). They will continue to develop assets for the sector that will be passed on to others for use. The draft law recognizes that WWDBs will have to coordinate with counties, and therefore states that asset development should be based on county development plans. The Water Resources Regulatory Authority, a national government agency will be responsible for coordinating with “regional bodies” on regulation of water resources, though it is not clear what exactly this means.

Though the bill makes reference to cross county water service providers and the need for coordination at regional levels, it is not clear how this will be done (a WWDB will represent multiple counties, and asset development will have to deal with complex tradeoffs between the plans in one county and the plans in another county). It is not clear that a WWDB can actually make choices about asset development without consulting with counties. There is probably a need for deeper restructuring of these Boards to involve counties in decision-making.

#### **E. ROADS SECTOR**

There has been contention about the responsibility of county governments and national governments regarding roads. This has centered on defining county versus national roads and their management, development, rehabilitation and maintenance. Previously there was no clarity about Class C roads, though it had been recommended by the Senate that they be taken up by national government. State corporations Kenya Rural Roads Authority (KeRRA), Kenya National Highways Authority (KeNHA) and Kenya Urban Roads Authority (KURA) have long been in charge of national roads. Following a judgment by the high court<sup>1</sup> and a subsequent legal notice (2 of 2016), it is now clear that the county governments will be in charge of Class D, E, F and G (County Roads) and the national government is in charge of Class A, B and C (National Trunk Roads).

KENYA ROADS BILL, 2015: published in June 2015, this Bill once passed will provide further clarification over the classification of national trunk roads and county roads and management, development, rehabilitation and maintenance. Section 7 and 8 refer to Part A and B of the Bill’s First Schedule that extensively describe the various classifications of roads. National trunk roads which shall be under the

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<sup>1</sup> Council of County Governors v Attorney General & 4 others [2015] eKLR

supervision of two national government agencies will consist of primary and secondary trunk roads. Primary trunk roads include Class ‘S’ ‘A’ ‘B’ ‘H’ and ‘J’ and will be the responsibility of a new ‘Kenya National Highway Authority (KeNHA)’ (S.9) while secondary trunk roads which include Class ‘C’ and ‘D’ will be the responsibility of a new authority called Kenya National Secondary Roads Authority (S.12). The Bill provides for winding up of the current national agencies KeNHA, KERA and KURA. County governments will be required to establish County Road Agencies that will be responsible for the management, development and maintenance of county roads. (S.95). County Roads under Part B of the First Schedule are Class E, F, g, K, L, M, N and P. National roads may be managed by county governments and the Bill also envisions cost sharing of the roads function between the national and county governments (S.66). Notably, the Bill contradicts the legal notice 2 of 2016 as it proposes classification of Class D roads as national (secondary) roads while the legal notice stipulates that these will be county roads. This may be reviewed by Parliament in approving the Bill.

Note: the transfer of this function (and other functions) is not dependent on the passing of the legislation. Once gazettment of the transfer is done, the county governments may begin to manage the county roads. In the Judgment delivered on 11<sup>th</sup> December, 2015, the court ordered that the Attorney General should gazette the report of the Senate Sessional Committee on Devolved Government on the Appeals for Transfer of Functions to Counties as passed by the Senate on 17<sup>th</sup> April 2014 within 90 days (by March, 11) to allow 29 counties to exercise their mandate concerning county roads. The report indicates that class A, B and C should be classified as national roads and class D and E and unclassified roads should be classified as county roads. In that same judgment the court ordered that state corporations (KURA and KeNHA) should cease from transactions falling within the mandate and control of county governments.

## F. COURTS

COURTS: The Constitution of Kenya 2010 mentions Subordinate courts as Magistrate Courts and Kadhi courts and any other that may be established by an Act of Parliament. The Judicial Service Act does not establish any other Court. The Chief Justice in exercising his constitutional mandate recalled all municipal court staff and ordered that the cases therein be transferred to Magistrate courts under a separate registry on 18<sup>th</sup> November, 2014. These municipal courts were rendered obsolete upon passing of the new Constitution.

See

[https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKewjVl6S4wonMAhUHVxoKHfYFAB88QFggcMAA&url=http%3A%2F%2Fwww.judiciary.go.ke%2Fportal%2Fassets%2Ffilemanager\\_uploads%2FCJ%2520Speeches%2FChief%2520Justice%2520COG%2520Meeting%2520Remarks.pdf&usq=AFQjCNHySQC1hfYBiXuc17c\\_wvCAc2\\_amg&sig2=qCVSx4x2PfTrLg1\\_vy6ORA&bvm=bv.119408272,d.d2s](https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKewjVl6S4wonMAhUHVxoKHfYFAB88QFggcMAA&url=http%3A%2F%2Fwww.judiciary.go.ke%2Fportal%2Fassets%2Ffilemanager_uploads%2FCJ%2520Speeches%2FChief%2520Justice%2520COG%2520Meeting%2520Remarks.pdf&usq=AFQjCNHySQC1hfYBiXuc17c_wvCAc2_amg&sig2=qCVSx4x2PfTrLg1_vy6ORA&bvm=bv.119408272,d.d2s)

## G. FORESTS

In the pending Forest Conservation and Management Bill 2015, forests are classified into three: public (national government), community forest (county) and private forests (individuals). Overall, the Cabinet Secretary is responsible for developing national forest management guidelines for sustainable use of forests and forest resources in the country.

The national government is responsible for most functions through an established national body, the Kenya Forest Service. The Kenya Forest Service (KFS) will be managed by a board that has no representation from the county governments. The KFS will be responsible for management of the public forests, and will

be funded by the national government. Among its functions, the service will also, in collaboration with the county governments, assist the county governments to build capacity for forestry development on community and private land, and help produce the Forest Status Report and Resource Assessment Report which are to be released every two and five years, respectively. County governments will be responsible for drawing management plans with respect to forests in the county (Clause 46). The KFS in consultation with forest conservation committees will prepare management plans with respect to public forests, nature reserve and provisional forests (mismanaged community or private forests (Clause 34)).

The bill also establishes Kenya Forestry College to provide forestry education, vocational and technical training courses in conservation, management, sustainable utilization and protection of forests and allied natural resources (Clause 16). The college is in charge of developing training programmes from certificate to diploma level in forest management and utilization. There is no mention of where the staff of this college will come from, though the Kenya Forest Service Board can appoint a standing committee to supervise functioning of the college (Clause 17.4). Clause 15 also allows the Board to appoint other officers of the Service as needed, which could potentially include those of the college.

Forests are classified as public, community and private forests as described under Clause 29 of the bill and are registered by the KFS. Public forests include those held as trust land by the county governments excluding any public land vested in the county governments by the Constitution (Article 62(2)). While the national government through the KFS is in charge of all public forests (Clause 30), county governments only play a supervisory and advisory role to communities and private forest owners. County executive committee members shall supervise the implementation of national policies and prepare annual reports on the activities of the county around forest management. Counties can also get into joint management agreements with communities and individuals for management of community forests or private forests. The Service registers community forest and notifies county governments. County governments then can be sought for technical advice from communities on appropriate forestry practices and conservation. (S.31).

Are counties required to set aside funds for development of forests? From S.31 (4b) of the bill, it is implied that communities may apply to county governments to get loans from the Forest Conservation and Management Trust Fund. What this may mean is that the fund which seems to be a national fund (S.26) will be distributed to counties as grants. There are several drafting challenges with the bill (such as incorrect cross- referencing), making the bill difficult to comprehend. The National Assembly in debating the bill identified the problem and hopefully the act shall not have these editorial errors when passed. See the Hansard, Wednesday, 16<sup>th</sup> March, 2016(P.17) available at:

[https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&ved=0ahUKEwj2koTNRyRMAhUFMZoKHdfhCboQFggrMAI&url=http%3A%2F%2Fwww.parliament.go.ke%2Fthe-national-assembly%2Fhouse-business%2Fhansard%2Fitem%2Fdownload%2F2182\\_bc0d2ed6bfe3a7853a150d4c78725685&usg=AFQjCNHm0jqa8E11JiQsC76YOJ4lZHZaXg&sig2=ih9x-Tg678nQ7hBrNAZGIg&bvm=bv.119408272,d.bGs&cad=rja](https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&ved=0ahUKEwj2koTNRyRMAhUFMZoKHdfhCboQFggrMAI&url=http%3A%2F%2Fwww.parliament.go.ke%2Fthe-national-assembly%2Fhouse-business%2Fhansard%2Fitem%2Fdownload%2F2182_bc0d2ed6bfe3a7853a150d4c78725685&usg=AFQjCNHm0jqa8E11JiQsC76YOJ4lZHZaXg&sig2=ih9x-Tg678nQ7hBrNAZGIg&bvm=bv.119408272,d.bGs&cad=rja)

This bill was passed by the National Assembly on 17/3/2016 and is now with the Senate for consideration.

## H. SECURITY

SECURITY. The police and military are national functions, but counties are responsible for “control of drugs” and “pornography” according to the Constitution (Fourth Schedule). Moreover, it is evident that

national and county governments must work together in some way on security issues. The National Police Service Act 2011 tries to address this.

The County Policing Authority is detailed in Part 6 of the act. The authority comprises a combination of county government officials, national officers and citizen representatives. The membership includes the Governor, who shall be the chairperson, two members representing the County Assembly, six members from interest groups (business, women, etc.), and representatives from national security agencies. The governor may authorize the deputy governor to chair meetings in his absence.

The roles of the Authority include oversight of the county police, including performance against standards as well as the budget for the county forces. The authority prepares quarterly reports on its oversight that are sent to both national and county officials (including the IG, CS, and the Governor and Assembly). The authority is also responsible for implementation of community policing in each county, per Section 97.

The matter of budget oversight is unclear, since the budget for the county forces will be set at national level and oversight of the national budget should be provided by the National Assembly. It is not entirely clear that the budget for the National Police Service will even be organized by county. Finances of the service are discussed in Section 116, but the main units of the service mentioned are posts, outposts, stations and units, not counties (though the budget of the County Authority itself is mentioned).

The costs of the Authority's activities are to be met by the National Police Service and not the county (S.43 & 44).

([http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%2084#part\\_VI](http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%2084#part_VI)).

Beyond education, health, agriculture, water and roads sectors, there are a number of other issues that are unresolved by the Fourth Schedule:

- Wildlife protection: national function, but national parks are in counties and will require coordination.
- Veterinary services: veterinary services are a county function, but this excludes regulation of veterinary professionals and the issue of who trains them is not clear in the Constitution.
- The future of state corporations: The Constitution of Kenya 2010 implies that state corporations will be restructured like all other national bodies to be consistent with the Fourth Schedule, but this has not happened yet. So some state corporations will have to be restructured but may continue for some time. We have seen that there is legislation in the area of water and agriculture for example, which would partly address this, though we also saw that it may be unconstitutional. Other examples include: the National Housing Corporation and the Regional Development Authorities. The Report of the Presidential Taskforce on Parastatal Reform (October, 2013) recommended that most of these parastatals should be joint authorities with national and county representation. This report may be found in the annex of documents.

## TASK 1.2 (QUESTIONS AND ANSWERS)

**Q1 & 2** What are the national Government and county governments responsible for in the EDUCATION sector?

The Fourth Schedule:

➤ **COUNTY** governments are responsible for:

9. Pre-primary education, village polytechnics, home craft centres and childcare facilities

➤ **NATIONAL** government is responsible for:

15. Education policy, standards, curricula, examinations and the granting of university charters

16. Universities, tertiary educational institutions and other institutions of research and higher learning and primary schools, special education, secondary schools and special education institutions

**Q3** EDUCATION: Do the responsibilities listed above cover every activity/service in the education sector? Can you think of anything that's missing? If yes, indicate whether you think the national government or the county government would be responsible for it.

a) Who is responsible for hiring ECD teachers? **This matter went to court as TSC and unions wanted this to be centrally controlled, while counties believe they are in charge of ECD teachers and all other ECD functions. No judgment on this case has been published as of mid-2016. It has been reported that some county governments are now hiring these teachers. TSC and county governments have approached the courts to have the matter resolved. Hiring ECD teachers was temporarily stopped to await determination by the courts.** (<http://www.businessdailyafrica.com/Court-stops-counties-from-hiring-ECD-teachers/-/539546/2290776/-/cwu7e8z/-/index.html>)

It has been reported that TSC has since then issued an internal circular indicating that it will not be hiring ECD teachers (<http://educationnews.co.ke/?p=55>) and counties have continued to place advertisements to hire and are hiring ECD teachers (<http://www.hivisasa.com/kisumu/education/125676>). Note in their submission to court on another matter that TSC indicated 'the employment of ECD teachers, Adult Education Teachers are outside the legal mandate of TSC and are subject to other legislative frameworks.'

( Teachers Service Commission v Kenya National Union of Teachers (KNUT) & 3 others [2015] eKLR available at: <https://www.google.com/url?q=http://kenyalaw.org/caselaw/cases/view/110660/&sa=U&ved=0ahUKEwi5jbCssIjMAhVJyRQKHxkxCNgQFggFMAA&client=internal-uds-cse&usg=AFQjCNHRohco8NcoaYArnrwnVzhAWe5Zgw> )

Once the Basic Education Amendment Bill is passed then this matter will be decided to allow TSC to hire these teachers.

b) Who is responsible for setting the curricula of village polytechnics? **Curriculum development is a national function, but polytechnics are a county function. This might arguably be a shared responsibility.**

c) Who is responsible for training teachers? This seems likely to be a national function, but is it? And who trains ECD, village polytechnic teachers? **While the TSC Act and the Constitution (Article 237) give the mandate of registering, hiring, reviewing standards for education and training**

teachers to TSC, the Fourth Schedule gives the county governments the responsibility of pre- primary education, polytechnics, home craft centres and childcare facilities. We saw that some additional legislation seems to suggest that TSC will be responsible for training and placement.

**Q4 & 5** What are the national government and county governments responsible for in the HEALTH sector?

The Fourth Schedule

- **NATIONAL** government is responsible for:
  - 23. National referral health facilities
  - 28. Health Policy
  
- **COUNTY** governments are responsible for:
  - 2. County health services, including, in particular—
    - (a) county health facilities and pharmacies;
    - (b) ambulance services;
    - (c) promotion of primary health care;
    - (d) licensing and control of undertakings that sell food to the public;
    - (e) veterinary services (excluding regulation of the profession);
    - (f) cemeteries, funeral parlours and crematoria; and
    - (g) refuse removal, refuse dumps and solid waste disposal.
  
- In addition, **COUNTY** governments are responsible for:
  - 11b. water and sanitation services

**Q5** Do the responsibilities listed above cover every activity/service in the HEALTH sector? Can you think of anything that is missing? If yes, indicate whether you think the national government or the county government would be responsible for it.

- a) Who is responsible for provincial hospitals? **There was some tug of war on these hospitals but they were eventually devolved. However, it is an area of ongoing controversy how they will be funded (e.g., they currently receive conditional grants through the annual Division of Revenue, but these are not sufficient to fully fund them), given that they are actually regional institutions, rather than county specific. There is also continuing legislation, as we saw, to try and recentralize them. Issues around drugs, immunizations, HIV, etc. remain controversial, as we will see in the next exercise.**
- b) Is immunization a part of “primary health care” (devolved) or is it an unnamed responsibility and thus a residual role of the national governments? **Though this has not been classified in a policy document county governments have been undertaking this function and allocating funds to it. The Transition Authority gave immunization to counties as a function under primary health care, however, because a number of immunizations come via international institutions with contracts with the national government, this remains a complex area.**
- c) How are counties meant to procure drugs? Should they be procured centrally or by counties? **The KEMSA Act, 2013 indicates that this state corporation shall procure drugs and enter into partnership with county governments to procure, warehouse and distribute drugs and**

medical supplies to them (Section 3(3c)). According to the KEMSA business model, counties will order for drugs according to their needs, meeting the cost of the drugs as well as distribution. Most of the counties currently procure drugs through KEMSA, except in cases where KEMSA does not have what is required. Counties directly procure other supplies, for example lab reagents, where KEMSA does not have the needed supplies.

- d) Ambulance services: a county function, but there may be a need for ambulances for national referral hospitals which would then be owned and operated by national government.

**Q 7 & 8** What are the national government and county governments responsible for in the AGRICULTURE sector?

Fourth Schedule

- NATIONAL government is responsible for:

29. Agricultural policy

It also has some responsibilities for:

21. Land planning

22. Protection of the environment and natural resources

- COUNTY governments are responsible for:

1. Agriculture, including—

a) Crop and animal husbandry

b) Livestock sale yards

c) County abattoirs

d) Plant and animal disease control; and

e) Fisheries

They are also responsible for implementing:

10. National government policies on natural resources and environmental conservation

As we already saw under health, COUNTIES are also responsible for water and sanitation.

**Q9** Do the responsibilities listed under the Fourth Schedule above cover every activity/service in the AGRICULTURE sector? Can you think of anything that's missing? If yes, indicate whether you think the national government or the county government would be responsible for it. Does this cover all services in agriculture?

- a. Who is responsible for extension services? The Transition Authority Gazette, 2013 indicates that this is a county function. However, the national government continues to run a national extension program.
- b. Marketing of agricultural products? Section 6 of the Crops Act and section 4 of the Agriculture, Fisheries and Food Act, 2013 mandate the Agriculture, Fisheries and Food Authority the role of marketing and promotion of crops, but it is not clear that this should be a national function.
- c. Agricultural research? Institutions of research are a national function under the Constitution, but it is not clear if all research is done in such institutions. Agricultural and livestock research is a concurrent function of both levels of government according to the Agricultural and Livestock Research Act 2013. The Act indicates that the Kenya Agricultural and Livestock Research Organization should determine and advise on resource

requirements for agricultural research at both the national and county level. The Crops Act 2013 indicates that in promotion of scheduled crops the AFFA shall establish linkages with various governments for the conduct of studies and research designed to promote the production, marketing and processing of crops.

- d. Coordination of agricultural services where land crosses the border between multiple counties? Section 29 of the Agriculture, Fisheries and Food Authority Act, 2013 indicates that each county shall within its area of jurisdiction be responsible for agricultural matters as envisioned in the Fourth Schedule. This issue is therefore left to counties to negotiate.

#### FURTHER READING

- i. Lakin J and Kinuthia J, “First Do No Harm: Is Government Minding Our Health as it Devolves?” IBP Budget Brief #16, February 2013. Available at <http://internationalbudget.org/wp-content/uploads/brief16.pdf> (a few things have changed since the brief was published)
- ii. IBP Kenya et al, “Who’s In Charge? Devolution May Fail Without Clear Division of Roles,” April, 2013. Available at <http://internationalbudget.org/publications/whos-in-charge-devolution-may-fail-without-clear-division-of-roles/>
- iii. Republic of Kenya, Executive Office of the President, “Report of the Presidential Taskforce on Parastatal Reforms,” October 2013. Available at <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0ahUK Ewitj iMwIzMAhUL2hoKHAK1AcQQFggdMAA&url=http%3A%2F%2Fwww.cofek.co.ke%2FReport%2520of%2520The%2520Presidential%2520Task%2520force%2520on%2520Parastatal%2520Reforms.pdf&usg=AFQjCNEHfuUeqj9K-kbYJ oh1zsFeYkE-Q&sig2=3hULpsO6xiGKxpgXHi9pnQ&cad=rja>
- iv. Lakin, J. & Kinuthia, and J “Government Spending: How Much Money is tied up in State Corporations?” IBP Budget Brief <http://internationalbudget.org/wp-content/uploads/Budget-Brief-no-26-How-Much-Money-is-Tied-up-in-State-Corporations.pdf>

**TASK 1.3 ■ THE AUGUST 2013 GAZETTE NOTICE ON TRANSFER OF FUNCTIONS**  
**40 MINUTES**

**TASK OBJECTIVE**

- ❖ **ENHANCE UNDERSTANDING OF THE EXTENT TO WHICH THE TRANSITION AUTHORITY GAZETTE NOTICE 2013 CLARIFIES THE ROLES AND RESPONSIBILITIES OF COUNTY GOVERNMENTS**

**RESOURCES NEEDED**

- ✓ **Transition Authority Gazette Notice August 2013 (Annex III below)**

**HOW TO RUN THIS TASK**

1. This task is aimed at helping the participants move beyond the Fourth Schedule to see what has actually happened with the transfer of functions by asking to what extent the TA Gazette Notice from 2013 has addressed some of the confusion we saw in the previous sections.
2. Give an introduction about the Transition Authority and the gazette notice, explaining that it was the second gazette notice after the initial transfer in April.
3. Tell participants to refer to Annex III in their manuals (the August 2013 Transition Authority Gazette Notice on the transfer of functions)

**Note: Normally, we use a single county example because all counties are more or less the same. It is helpful to use Mombasa, however, because it has a few additional roles, such as Coast Provincial Hospital (Level 5 regional hospital) that other counties would not have. Any former provincial headquarters should have similar information. For this exercise, we will use Mombasa County TA gazette notice.**

4. Ask participants to review the gazette notice and then respond to the discussion question in small groups (PM, p.13).
5. Provide 30 minutes for reading the notice and discussing the question in small groups. If time is short this can be done in a guided plenary.

**Note: It is sometimes helpful to start with the health sector in the plenary discussion and then move to the other devolved functions because the health sector is the most concrete and people can recognize a number of specific activities (see background notes below for notes on the health sector)**

6. Facilitate a short plenary discussion to summarize the participants' reflections on what the gazette notice says about the three sectors.

**Note: one question that may arise with regard to the health sector is: Who has the mandate in the maternal health care scheme? See a discussion on this in the background notes below.**

## BACKGROUND INFORMATION

- Notes on the August, 2013 Transition Authority Gazette Notice.
  - ❖ The gazette notice was published in the Kenya Gazette in August 2013 by the Transition Authority, and it is an official transfer of most functions to all counties.
  - ❖ The gazette notice does clarify that certain functions belong to counties, but it does not explain why, nor does it clarify a number of other functions that are not mentioned and whether they belong to counties or national level. Some of the language is vague as to what was intended.

**Note:** The first legal notice on the transfer of functions was issued in February 2013 (Legal Notice 16 of 2013) the functions therein were to be transferred to county governments immediately after the first elections under the Constitution. See Annex IV below for the legal notice.

- As of March 4, 2016, the Transition Authority is defunct and its role has been taken up by the Intergovernmental Relations Technical Committee established under the Intergovernmental Relations Act, 2012.
- The Transition Authority did not complete its work but it made some attempt to regulate the transfer of functions.
- Notes on the Health Sector
  - ❖ Some of the key issues mentioned above, such as immunizations, are partly resolved by the notice.
  - ❖ However, the implications of the August gazette notice are frequently not clear. For example, HIV has been devolved in the notice, but it is unclear whether this entails direct procurement of ARVs. These have been in the past and are presently being procured through KEMSA. Counties then have to consider the implications for the funding of HIV services. If ARVs are a major cost of HIV services, but KEMSA is procuring the drugs (or they are being supplied by donors), the question then is where the budget for ARV procurement sit and who “controls” HIV services. This may also be asked about immunization. In a sense, these are shared functions, with KEMSA doing procurement on behalf of counties, while counties do have some control over how much they purchase from KEMSA. It is also not clear if the devolution of HIV means there is no room for a national HIV program, which has been an important factor in controlling the disease in other countries.
  - ❖ Maternal care: the national government introduced a conditional grant to pay for delivery fees at public facilities, but this was introduced without a clear policy or consultation with counties. Since it is a policy that relates to health care responsibilities of counties, this may introduce problems. For example, if the conditional grant is not sufficient to cover the full cost of eliminating user fees, are counties required to follow the policy? If so, this is what is known as an “unfunded mandate” (a requirement to do something without receiving adequate finance). There are estimates that the full cost of the free maternal care policy is more than the roughly Ksh 4 billion given to counties each year.
- Follow up to the August 2013 gazette notice.

The Gazette Notice has been followed up by other notices and decisions that have sought to clarify the functions of county governments. The Legal Notice No. 2 of 2016 (January, 2016) as read with the Legal Notice 22 of 2016 (February, 2016) (found in the annex of documents) has resolved various issues including:

- a) Classification of roads: Class C roads are the responsibility of the national government

The Roads Bill, 2015 if passed will provide further guidance on the distinct functions of the national and county government.

- b) Energy and electrification: this function is a concurrent function under the Fourth Schedule. The national government has the responsibility for ‘energy policy including electricity and gas reticulation and energy regulation; and the county governments planning and development, including ‘electricity and gas reticulation and energy regulation’. The Legal Notice gives a break down on what the functions of the county governments are. The function predominantly involves planning, regulation and licencing energy systems

The Energy Bill, 2015 provides for a list of functions of the county government. This list is similar to the one in the January Legal Notice.

- c) Libraries: The TA August Gazette Notice did not give much guidance on devolution of libraries except excluding the Kenya National Library Service from devolution. The Third Schedule of the January, 2016 notice provides for ‘distribution of libraries’ listing specific libraries across 27 counties.

The County Library Services Bill, 2015 (Senate Bill) will require establishment of libraries in all counties with county library development committees to manage the county libraries.

**Further unbundling is required for sectors such as the water sector to establish the role of county governments and how they should collaborate/coordinate with the national water agencies.**

### TASK 1.3

#### (QUESTIONS AND ANSWERS)

- *Does this notice help you to understand better what exactly is being transferred in the education, health, and agriculture sectors?*

Refer to background notes above tasks.

### FURTHER READINGS

- i. The full version of the Transfer of Functions legal notice, Kenya Gazette Supplement No. 116 9th August, 2013 available at:  
<http://www.transauthority.go.ke/images/publications/KENYA%20SUPPLEMENT%20NO.%20116.pdf>
- ii. TA Legal Notice on transfer of functions relating to Agricultural Training Centre or mechanization stations available at :  
<http://www.transauthority.go.ke/images/publications/LEGAL%20NOTICE%20NO.%2033.pdf>

**TASK 1.4 ■ INTERLUDE: AN APPLICATION**

**30 MINUTES**

**TASK OBJECTIVE:**

- ❖ **IDENTIFYING AVENUES FOR REPORTING ON AND ADVOCACY RELATING TO COUNTY AND NATIONAL FUNCTIONS**

**RESOURCES NEEDED**

- ✓ **The Nyeri Article**

**HOW TO RUN THIS TASK**

1. Refer participants to the Nyeri Article under Task 1.4 in their manuals (PM, p.14). Give them 5 minutes to read through the story.
2. Ask journalists/CSO to answer the 3 questions in the task using the story.
3. If working with journalists, discuss their answers and how the story could have been written differently.
4. If working with CSOs, discuss the answers given and what and how they would push their advocacy agenda.

## BACKGROUND INFORMATION

The national government has been providing for conditional allocations to 11 counties that host Level 5 hospitals across the country. This is provided for in the County Allocation of Revenue Act. The amount has fluctuated over the past three years.

**Table 1: Conditional Grants to Level 5 Hospitals (in Kes. millions)**

	Hospital	County	2013/14	2014/15	2015/16
1)	Coast Province General Hospital	Mombasa	414	210	403
2)	Garissa Provincial General Hospital	Garissa	184	112	360
3)	Embu Provincial General Hospital	Embu	260	185	193
4)	Machakos Level 5 Hospital	Machakos	109	157	304
5)	Nyeri Provincial General Hospital	Nyeri	382	198	369
6)	Thika Level 5 Hospital	Kiambu	368	88	330
7)	Nakuru Provincial General Hospital	Nakuru	600	3 18,	377
8)	Kakamega Provincial General Hospital	Kakamega	31 1	206	343
9)	New Nyanza Provincial General Hospital	Kisumu	396	249	339,
10)	Kisii Level 5 Hospital	Kisii	211	83	339
11)	Meru Level 5 Hospital	Meru	183,	64	244
	<b>Total</b>		<b>3,419</b>	<b>1,870</b>	<b>3,600</b>

## TASK (QUESTIONS AND ANSWERS)

### The Nyeri Article

Baby dies at Nyeri Provincial General Hospital after falling headlong from womb  
January 17, 2014

**A woman lost her baby while delivering at Nyeri Provincial Hospital due to what she terms as negligence by nurses. Charity Wanjiku, 27, said she was taken to hospital by her husband at midnight on Wednesday with severe labour pains. On admission in the labour ward, she alerted the nurses that the baby was due but they did not pay heed. “When the nurses ignored me I stood up due to the pain and that’s when the baby came out and fell head first onto the floor and later died,” she said.**

**Her husband, Mr. Peter Ndigirigi, said after his wife was admitted he went home, but his wife later called him to inform him of the baby’s death. On arrival at the hospital, he was intercepted by security officers who almost turned violent. “But one nurse was kind enough**

to explain calmly to me how our son died,” he said. The 29-year-old father of two daughters, aged 10 and 6, said he was really looking forward to the birth of a son.

The distraught father remarked: “I wonder if they are mistreating patients because maternity services are free.” Nyeri hospital medical superintendent Cyrus Njoroge said the hospital had six patients that night, some of whom needed emergency operation, and only four nurses. Mr. Njoroge said the nurses advised Ms. Wanjiku to lie down but she could not owing to severe labour pains. He attributed the tragedy to the severe shortage of nurses. The hospital has 250 but requires 600.

For journalists

1. What are the gaps/weaknesses they can identify in the story?
2. What possible angles could the story have taken that it didn't?
3. How could the journalists use information from the county budget, knowledge of county functions or county priorities to make it a stronger story?

Example of an issue to raise:

One of the grey areas in devolution of healthcare, is who is responsible for funding former Provincial General Hospitals. The story could examine who is funding the Nyeri hospital and whether the funding is adequate. If the hospital is relying on county funding, how much is it receiving from the county? If it is relying on national funding (through the national conditional grant for regional hospitals), how much is coming? Have there been delays in this funding reaching the hospital? Is it adequate?

For Civil Society Organisations

1. What possible advocacy agenda can you identify from this story?
2. To be sure that this is a good advocacy agenda, what additional information would you need? What additional analysis would you need to do?
3. Would this agenda target national government, county government or both? Why?

Example of an issue to raise:

A CSO might raise the issue of whether there is adequate staff at the provincial hospital. More information would be needed on number of staff on the payroll at the hospital versus standards and versus other facilities. One would want to be sure that there were not ghost staff, making it appear that there is adequate staff on the books, when they are not actually there.

Then you would need to know something about how much the county has allocated, how much it costs to run the hospital, how much was covered by the conditional grant from national government, and so on. Nyeri should have received some money from national government through the conditional grant. Was this received? Was it adequate? What else did the county put in? Has the county been able to recruit? And so on.

## FURTHER READINGS

For more on the issue of financing for these hospitals, see:

- i. KANCO, “Parliament Must Provide More Oversight of Conditional Grant to L5 Hospitals.” <http://www.internationalbudget.org/wp-content/uploads/KANCO-Brief-Parliament.pdf>
- ii. Jason Lakin, “Senate debates division of revenue, media ignores the whole thing, hospitals lose out,” May 14 2014.  
<http://www.theeastaffrican.co.ke/OpEd/comment/Senate-debates-revenue--media-ignores--hospitals-lose-out/-/434750/2332934/-/fd8qcjz/-/index.html>
- iii. Kamotho Waiganjo, “We must rethink the funding and place of Level 5 hospitals in Kenya,” March 1, 2015.  
<http://www.standardmedia.co.ke/article/2000153274/we-must-rethink-the-funding-and-place-of-level-5-hospitals-in-kenya>

## Annex II: The Fourth Schedule of the Constitution of Kenya, 2010

### FOURTH SCHEDULE (*Articles 185(2), 186(1) and 187(2)*)

#### Distribution of Functions between the National Government and the County Governments

##### PART 1—NATIONAL GOVERNMENT

1. Foreign affairs, foreign policy and international trade.
2. The use of international waters and water resources.
3. Immigration and citizenship.
4. The relationship between religion and state.
5. Language policy and the promotion of official and local languages.
6. National defence and the use of the national defence services.
7. Police services, including—
  - (a) the setting of standards of recruitment, training of police and use of police services;
  - (b) criminal law; and
  - (c) correctional services.
8. Courts.
9. National economic policy and planning.
10. Monetary policy, currency, banking (including central banking), the incorporation and regulation of banking, insurance and financial corporations.
11. National statistics and data on population, the economy and society generally.
12. Intellectual property rights.
13. Labour standards.
14. Consumer protection, including standards for social security and professional pension plans.
15. Education policy, standards, curricula, examinations and the granting of university charters.
16. Universities, tertiary educational institutions and other institutions of research and higher learning and primary schools, special education, secondary schools and special education institutions.
17. Promotion of sports and sports education.
18. Transport and communications, including, in particular—

- (a) road traffic;
  - (b) the construction and operation of national trunk roads;
  - (c) standards for the construction and maintenance of other roads by counties;
  - (d) railways;
  - (e) pipelines;
  - (f) marine navigation;
  - (g) civil aviation;
  - (h) space travel;
  - (i) postal services;
  - (j) telecommunications; and
  - (k) radio and television broadcasting.
19. National public works.
  20. Housing policy.
  21. General principles of land planning and the co-ordination of planning by the counties.
  22. Protection of the environment and natural resources with a view to establishing a durable and sustainable system of development, including, in particular—
    - (a) fishing, hunting and gathering;
    - (b) protection of animals and wildlife;
    - (c) water protection, securing sufficient residual water, hydraulic engineering and the safety of dams; and
    - (d) energy policy.
  23. National referral health facilities.
  24. Disaster management.
  25. Ancient and historical monuments of national importance.
  26. National elections.
  28. Health policy.
  29. Agricultural policy.
  30. Veterinary policy.
  31. Energy policy including electricity and gas reticulation and energy regulation.
  32. Capacity building and technical assistance to the counties.
  33. Public investment.
  34. National betting, casinos and other forms of gambling.
  35. Tourism policy and development.

##### PART 2—COUNTY GOVERNMENTS

The functions and powers of the county are—

1. Agriculture, including—
  - (a) crop and animal husbandry;
  - (b) livestock sale yards;
  - (c) county abattoirs;
  - (d) plant and animal disease control; and
  - (e) fisheries.

2. County health services, including, in particular—
  - (a) county health facilities and pharmacies;
  - (b) ambulance services;
  - (c) promotion of primary health care;
  - (d) licensing and control of undertakings that sell food to the public;
  - (e) veterinary services (excluding regulation of the profession);
  - (f) cemeteries, funeral parlours and crematoria; and
  - (g) refuse removal, refuse dumps and solid waste disposal.
3. Control of air pollution, noise pollution, other public nuisances and outdoor advertising.
4. Cultural activities, public entertainment and public amenities, including—
  - (a) betting, casinos and other forms of gambling;
  - (b) racing;
  - (c) liquor licensing;
  - (d) cinemas;
  - (e) video shows and hiring;
  - (f) libraries;
  - (g) museums;
  - (h) sports and cultural activities and facilities; and
  - (i) county parks, beaches and recreation facilities.
5. County transport, including—
  - (a) county roads;
  - (b) street lighting;
  - (c) traffic and parking;
  - (d) public road transport; and
  - (e) ferries and harbours, excluding the regulation of international and national shipping and matters related thereto.
6. Animal control and welfare, including—
  - (a) licensing of dogs; and
  - (b) facilities for the accommodation, care and burial of animals.
7. Trade development and regulation, including—
  - (a) markets;
  - (b) trade licences (excluding regulation of professions);
  - (c) fair trading practices;
  - (d) local tourism; and
  - (e) cooperative societies.
8. County planning and development, including—
  - (a) statistics;
  - (b) land survey and mapping;
  - (c) boundaries and fencing;
  - (d) housing; and
  - (e) electricity and gas reticulation and energy regulation.
9. Pre-primary education, village polytechnics, homecraft centres and childcare facilities.
10. Implementation of specific national government policies on natural resources and environmental conservation, including—
  - (a) soil and water conservation; and
  - (b) forestry.
11. County public works and services, including—
  - (a) storm water management systems in built-up areas; and
  - (b) water and sanitation services.
12. Fire fighting services and disaster management.
13. Control of drugs and pornography.
14. Ensuring and coordinating the participation of communities and locations in governance at the local level and assisting communities and locations to develop the administrative capacity for the effective exercise of the functions and powers and participation in governance at the local level.

## **Annex III: Transition Authority August, 2013 Gazette Notice**

**LEGAL NOTICE NO. 152  
THE CONSTITUTION OF KENYA  
THE TRANSITION TO DEVOLVED  
GOVERNMENTS ACT, 2012  
(No.1 of 2012)**

**TRANSFER OF FUNCTIONS  
PURSUANT TO** section 15 of the Sixth  
Schedule to the Constitution as read with  
sections 23 and 24 of the Transition to Devolved  
Governments Act, 2012 and further to the Legal  
Notice

No.16 of 2013, the Transition Authority approves  
the transfer of the functions specified in the  
Schedule to the county government of  
Mombasa, with effect from the 9<sup>th</sup> August, 2013:  
Provided that the responsibility for the  
personnel emoluments related to the discharge  
of the devolved functions shall be managed by  
the national government for a period not  
exceeding six months or as shall be agreed upon  
between the two levels of government,  
whichever comes first.

Legal Notice No. 134 of 2013 is revoked.

### **SCHEDULE**

#### **1. Agriculture:**

- (a) crop husbandry including—
- (i) provision of agricultural extension services or farmer advisory services;
  - (ii) development and implementation of programmes in the agricultural sector to address food security in the county;
  - (iii) construction of grain storage structures;
  - (iv) enforcement of regulations and standards on quality control of inputs, produce and products from the agricultural sector;
  - (v) availing farm inputs such as certified seeds, fertilizer and other planting materials, such as cassava cutting or potato vines, to farmers;
  - (vi) development of programmes to intervene on soil and water management and conservation of the natural resource base for agriculture;
  - (vii) promotion of market access for agricultural products;
  - (viii) provision of infrastructure to promote agricultural production and marketing as well as agroprocessing and value chains;
  - (ix) enhancing accessibility to affordable credit and insurance packages for farmers;
  - (x) management of agricultural training centers and agricultural mechanization stations:

Provided that the management of agricultural training centers and agricultural mechanization station shall be transferred after six months, to enable the requisite structures and mechanisms to be put in place by the Transition Authority;

- (xi) land development services such as construction of water pans for horticultural production for food security;
  - (xii) formulation and review of county specific policies;
  - (xiii) developing and enacting legislation and regulatory frameworks for county specific policies; and
  - (xiv) implementation of national and county specific policies and legislation;
- (b) animal husbandry including livestock extension services to deliver husbandry technologies to livestock farmers and pastoralists, through farm demonstrations, farmer field days, farmer field schools, agricultural shows, individual farm visits, farmer training courses (residential and non-residential), barazas, farmer tours, posters, brochures or leaf lets ;
- (c) plant and animal disease control including carrying out, coordinating and overseeing—
- (i) communal dipping and spraying operations and vaccination campaigns; and
  - (ii) control of plant pests, diseases and noxious weeds that are specific to counties; and
  - (d) fisheries including—
- (i) fisheries extension services;
  - (ii) up scaling sea weed, fin fish and crustacean culture;
  - (iii) county fish seed bulking units;
  - (iv) on-farm trials;
  - (v) fish health certification;
  - (vi) development and maintenance of fish landing stations and jetties, fish auction centers and fish landing fees;
  - (vii) demarcation of all fish breeding areas and fencing of fish landing stations;
  - (viii) fish trade licensing and fish movement permits;
  - (ix) collection of fish production statistics;
  - (x) enforcement of fisheries regulations and compliance with management measures;
  - (xi) implementation of fisheries policy, fisheries management measures and regulation and limiting access to fishing;
  - (xii) fisheries monitoring, control and surveillance; and
  - (xiii) zonation for aquaculture-county specific disease control.

#### **2. County health services:**

(a) county health facilities and pharmacies including—

(i) county health facilities including Coast Provincial General Hospital, county health services including county and sub-county hospitals, rural health centres, dispensaries, rural health training and demonstration centres. Rehabilitation and maintenance of county health facilities including maintenance of vehicles, medical equipment and machinery. Inspection and licensing of medical premises including reporting;

(ii) county health pharmacies including specifications, quantification, storage, distribution, dispensing and rational use of medical commodities:

Provided that until alternative intergovernmental arrangements are made, all counties shall procure medical commodities from the Kenya Medical Supplies Authority except where a particular commodity required by a county government is not available at the Kenya Medical Supplies Authority;

(b) ambulance services including emergency response and patient referral system;

(c) promotion of primary health care including health education, health promotion, community health services, reproductive health, child health, tuberculosis, HIV, malaria, school health program, environmental health, maternal health care, immunization, disease surveillance, outreach services, referral, nutrition, occupational safety, food and water quality and safety, disease screening, hygiene and sanitation, disease prevention and control, ophthalmic services, clinical services, rehabilitation, mental health, laboratory services, oral health, disaster preparedness and disease outbreak services. Planning and monitoring, health information system (data collection, collation, analysis and reporting), supportive supervision, patient and health facility records and inventories;

(d) licensing and control of undertakings that sell food to the public including food safety and control;

(e) veterinary services to carry out, coordinate and oversee veterinary services including clinical services, artificial insemination, and reproductive health management; but excluding regulation of the profession; and

(f) enforcement of waste management policies, standards and regulations; in particular —

(i) refuse removal (Garbage) including, provision of waste collection bins, segregation

of waste at source, licensing of waste transportation;

(ii) refuse dumps including zoning waste operational areas, conducting environmental impact assessment for the siting of dumps, fencing of dumps, controlling fires, monitoring waste characteristics and monitoring of waste water from the dumpsite (leachate); and

(iii) solid waste disposal including enforcement of national waste management policies, standards and laws with respect to landfilling, incineration with energy recovery, composting, recycling and operation of transfer stations.

3. Control of air pollution, noise pollution and other public nuisance including:

(a) control of noise pollution and other public nuisances;

(b) licensing for persons exceeding the permissible noise levels; and

(c) noise mapping and action plan development, excluding the implementation of nationally set ambient air quality standards.

4. Cultural services, public entertainment and public amenities:

(a) county betting, casinos and other forms of gambling;

(b) racing;

(c) cinemas;

(d) libraries excluding Kenya National Library Services; and

(e) museums.

5. County transport including:

(a) county roads including primary roads linking all sub-county head quarters and minor roads linking markets and administrative centers excluding roads being managed by Kenya Urban Roads Authority, Kenya Rural Roads Authority, Kenya Wildlife Service and Kenya Forest Service;

(b) mechanical and transport equipment shall be retained by the national government for a period of six months and the Transition Authority shall during that period develop modalities of sharing the mechanical and transport equipment;

(c) public road transport on licensing of public service vehicles operations; and

(d) ferries and harbors including development, maintenance and operations of ferries and harbors operating in inland lakes and waters.

6. Trade development and regulation:

(a) fair trading practices including—

(i) verification of weighing and measuring instruments;

(ii) inspection of weighing and measuring instruments and pre-packed goods;

(iii) investigation of complaints relating to unfair trade practices; and  
 (iv) prosecution of offences arising from unfair trade practices.

(b) co-operative societies—

(i) promotion of co-operative societies;  
 (ii) processing of application for registration;  
 (iii) inspections and investigations;  
 (iv) training needs assessment for co-operative movement;  
 (v) market information dissemination & advisory services;  
 (vi) banking inspections local Savings and Credit Cooperative Societies;  
 (vii) risk assessment in Savings and Credit Cooperative Societies;  
 (viii) investment advisory services;  
 (ix) co-ordination and monitoring of co-operative indemnity by co-operative leaders;  
 (x) promotion of co-operative ventures and innovations for local co-operatives;  
 (xi) carrying out certification audits;  
 (xii) carrying out continuous and compliance audits;  
 (xiii) co-operative advisory services;  
 (xiv) pre-cooperative education;  
 (xv) settlement of disputes (arbitration);and  
 (xvi) registration of co-operative societies audited accounts.

7. County planning and development:

(a) statistical services including—

(i) custodian of official statistics in the county;  
 (ii) maintenance of a comprehensive and reliable county socio-economic database;  
 (iii) quality assurance of statistical information;  
 (iv) collection and compilation of statistical information;  
 (v) analysis of statistical information;  
 (vi) publication and dissemination of statistical information for public use; and  
 (vii) coordination, monitoring and supervision of the county statistical system;

(b) boundaries and fencing including—

(i) determination of property boundaries;  
 (ii) solving of property boundary disputes;  
 (iii) showing of property boundaries;  
 (iv) ensuring fencing and development of properties; and  
 (v) finalization of surveying of administrative boundaries within the counties; and

(c) identification of the renewable energy sites for development— excluding identification and implementation of the rural electrification projects, management of the Rural Electrification Fund and development of isolated diesel stations, which shall be

transferred within the transition period as per the Rural Electrification Authority schedules.

8. Village polytechnics.

9. Implementation of specific national government policies on natural resources and environmental conservation:

(a) soil and water conservation—

(i) implementation of county specific water conservation and forestry policies through water resource users;

(ii) water pollution control; and

(iii) borehole site identification and drilling; and  
 (b) forestry including farm forest extension services, forests and game reserves formerly managed by local authorities excluding forests managed by Kenya Forest Service, National Water Towers and private forests.

10. County public works and services:

(a) Public works including designing, documentation, post contracting, project management of construction and maintenance of public buildings and other infrastructural services. Construction of footbridges; and  
 (b) water and sanitation services including rural water and sanitation services, provision of water and sanitation service in small and medium towns without formal service providers, water harvesting (specific to counties), urban water and sanitation services with formal service provision including water, sanitation and sewerage companies, excluding Water Service Water Services Regulatory Board and Water Resources

Management Authority.

11. Ensuring and coordinating the participation of communities and locations in governance at the local level and assisting communities and locations to develop the administrative capacity for the effective exercise of the functions and powers and participation in governance at the local level.

Dated the 9th August, 2013.

KINUTHIA WAMWANGI,

*Chairman,*

*Transition Authority.*

## **Annex IV: Transition Authority February, 2013 Legal Notice No. 16**

**THE TRANSITION TO DEVOLVED  
GOVERNMENT ACT (No. 1 of 2012)  
TRANSFERRED FUNCTIONS IN EXERCISE**  
of the powers conferred by section 23(1) of the  
Transition to Devolved Government Act, 2012, the  
Transition Authority identifies functions listed in  
the Schedule to be functions that may be  
transferred to county governments immediately  
after the first elections under the Constitution:  
Provided that:

- (a) these functions are in addition to the executive, legislative and financial functions provided through the establishment of the County Executive and County Assembly; and
- (b) the functions provided for under paragraph 2(a) of the Schedule are limited to health services being provided by the relevant municipalities of the specified counties in the said paragraph.

### **SCHEDULE**

#### **1. Agriculture:**

- (a) livestock sale yards;
- (b) county abattoirs/ slaughter house services.

#### **2. County Health Services:**

- (a) county health facilities and pharmacies (specific to Nairobi County, Kisumu County , Mombasa County, Nakuru County and Uasin Gishu County);
- (b) ambulance services ( specific to Nairobi, Kisumu, Mombasa, Nakuru, Uasin Gishu Counties);
- (c) cemeteries, Funeral Parlors/ Mortuary services and Crematoria Services;
- (d) refuse removal, refuse dumps and solid waste disposal.

#### **3. Control of outdoor advertising:**

#### **4. Cultural services, public entertainment and public amenities but limited to:**

- (a) betting services;
- (b) liquor licensing;
- (c) video shows and hiring;
- (d) sports and cultural activities and facilities;
- (e) county parks, beaches and recreation facilities.

#### **5. County Transport:**

- (a) access roads;
  - (b) street lighting;
  - (c) traffic and parking.
- 6. Animal control and Welfare:**
- (a) licensing of dogs;
  - (b) facilities for the accommodation, care and burial of animals
- 7. Trade development and regulations:**
- (a) markets;
  - (b) trade licensing (excluding regulation of professionals);
  - (c) local tourism.
- 8. County planning and development:**
- (a) land survey and mapping; and
  - (b) housing.
- 9. Pre-primary education, home-craft centre and childcare facilities.**
- 10. Implementation of specific national government policies on natural resources and environment conservation:**
- (a) protection of water springs;
  - (b) protection of wells and dams.
- 11. County public works and services specific to storm water management systems in built-up areas.**
- 12. Fire fighting services and disaster management.**
- 13. Control of drugs and pornography.**

**KINUTHIA WAMWANGI,**  
Chairman.