

Constitution review from an EFA perspective: a critical analysis

Foreword: This overview of Kenya's draft Constitution seeks to establish to what degree this new text can facilitate the struggle for a rights based approach to quality education for all Kenyans within the framework of the Dakar goals. As such, it does not intend to comment on the entire range of fields covered by this constitution, but limits itself to themes directly related to education or which are liable to have a significant impact on equitable access to quality public services or civil society participation. Finally, this analysis focuses mainly on the gaps, flaws and deficiencies, as seen by the author, without mentioning some of the many very positive aspects this new text brings. It can therefore not be taken as an objective assessment of the draft Constitution's overall quality.

Contents

1° Education: general education specific issues, access to formal and non-formal education, children's rights, teachers.

2° Decentralization & education: Distribution of powers between devolved governments in the educational field (section 3° also deals with decentralization in the fiscal field)

3° Finances/Tax/Budget: tax base, revenue sharing and equity

4° Participation: Civil society and Community participation, decentralized participation, Public access to media

5° Rights: Implementation of rights, legal action (justiciability), language and minority rights, compliance and reporting at international level, education in detention

Annexe: compilation of contextualised articles and other relevant extracts grouped by theme (Education, Decentralisation, Finances/taxes/Budget, Participation, Citizenship, Rights, Children, Minorities, Language, Justiciability, Equity)

1° Education

- **General**

While the right to education is underlined in general terms, the manner in which the constitution will help the state and legislative powers to enforce the related rights is not always clearly defined. Article **63**. (1) states that « Every person has the right to education. » but the concrete measures to ensure that right « for all » are never specified. No mention is made at any point of the right to ongoing education (the only mention of life long-learning is stated as part of the citizen's « responsibility » Chap. 4 art. 24 1 j) or the state's obligation to provide access to literacy programmes, for example. Some additional references to education rights and the states' obligations to ensure access to education are mentioned concerning specific segments of the population.

- For « persons with disabilities » (art. 43 (2) (b)) but also without any specific measures to ensure that right.
- For « minorities and marginalized groups » there is mention that « The State shall take legislative and other measures to put in place affirmative action programmes designed to benefit minorities and marginalized groups. Art. 44. (2) ». It is also stated that they « are accorded special opportunities in the educational field ». This process of defining the method by which the state will fulfil its obligations could therefore easily be reproduced and extended to other segments of the population: i.e. girls, nomadic, with disabilities, etc...

- **Children**

As stated in the text on several occasions, children should benefit from a special and specific attention concerning their right to education. In terms of the State's « duty to educate children Art. 41 (2) », this is usually demonstrated by constitutional provisions defining the obligation

to provide them with « free and compulsory education ».

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The first problem, however, is that although art. 41 6 c, states that « every child has a right to free and compulsory basic education », basic education is never defined. Furthermore, when we come to the implementation of that right, mention is made of « a programme to implement the right of every child to free and compulsory pre-primary and primary education. (Art. 63 2)» (access to post-primary education is announced but in a very progressive fashion: « The State shall take measures to make secondary and post-secondary education progressively available and accessible.. (Art. 63 3) » In other words, basic education is reduced to an undetermined number of years of pre-primary and primary, which, depending on the current educational system, can mean that children are only guaranteed a short period of formal schooling and not lower secondary, for example. At the very least, there is a need for harmonization between these two sections, preferably in a way that clarifies and expands these rights.

This problem of definition is further complicated by the fact that there is no reference to age limits that can sometimes help to clear to whom free & compulsory education applies. The constitution's definition section simply states that child means « an individual who has not attained the age of eighteen years; ». As there is no mention of an official « school leaving-age », one would hope to find some constitutional indication concerning the minimum age of employment as this has also been used as school/professional life boundary as well as a legislative process to move towards the elimination of child labour. However, the only reference to children's labour is art. 41 6 e which simply states that they « be protected from all forms of exploitation and any work that is likely to be hazardous or adverse to the child's welfare; ». Although Kenya has ratified ILO convention N°138 which specifies 15 as the minimum age of employment, stating age limits regarding schooling and labour would certainly strengthen children's' constitutional rights to education.

- **Teachers**

Chapter 16 (The public service), Part 1 art. 277, provides that teacher registration, recruitment, management, deployment, policy and standards setting for education and training shall be administered by a « Teachers Service Commission ». This responsibility includes (ii)

the task to « assign teachers employed by the Commission for service in any public school and other institutions » even in those falling under the authority of the devolved governments, i.e.: pre-primary centres managed by the County Governments. The existence of a central authority has the potential to strengthen harmonization of national standards and equal opportunities for access to trained teachers throughout Kenya. Interaction with devolved authorities however, especially at pre-primary level, would benefit from further clarification of responsibilities. The interaction between the MoE and this independent Commission will also be challenging with potential conflict points regarding policy and recruitment issues which concern much more than just Teachers but deeply affect the State's capacity to address the right to quality education for all Kenyans

Also, while the description of the Teachers Service Commission specifically mentions the registration of « trained » teachers as well as the review of « training standards », their attributions do not include responsibility over pre-service Teacher Training institutions. In fact, there is no mention of any such training centres throughout the Constitution. Considering the important role these institutions play in the educational system, this omission should be corrected. Existing Teachers' Advisory Centres (TAC) and other relevant support and training structures should be included as part of the Teachers service Commissions' attributions and added in the list of educational institutions under direct authority of the National Government as defined by section 16 of the Fourth Schedule (see below for current institutions)

2° Education and Decentralization

The Fourth Schedule determines the distribution of functions between the central government and the devolved authorities. Concerning education, the « national Government » is entrusted with « Education policy, standards, curricula, examinations and the granting of university charters. (Section 15.) » and « Universities, tertiary educational institutions and other institutions of research and higher learning and primary schools, special education, secondary schools and special education institutions (Part 1 section 16.) ». County Governments have responsibility for. « Education at pre-primary, education, village polytechnics, homecraft centres and childcare facilities. (Part 3 section 9) ». This basically means that the central government is in charge of all educational infrastructures with the exception of ECCE as well as some non-formal local structures. The wording of section 9 would need to be revised

however, so as to avoid any overlapping, by simply stating pre-primary education and removing the repeat of the word « education ».

Once again, there is no mention here of any centres or programmes specifically dealing with youth and adult learning or literacy whether at central or devolved level.

As the pre-primary education infrastructures are very poorly and unequally developed at the regional and county levels, the financial responsibility for this will probably weigh heavily and depend on their capacity to develop a sufficient tax base. This aspect is further addressed below in the section concerning taxes

3° Finances/taxes/Budget

Several sections of the constitution are devoted to the crucial issue of developing an equitable tax base and ensuring the sharing of the devolved governments' shares of national funds. This is of course directly linked to the responsibilities and taxation powers shared between the central and local governments. However, the text delivers some conflicting messages, which could have serious implications concerning equal access to quality education throughout Kenya.

In Chapter 6 « The bill of rights » art. 29 5 b, as well as in other sections of the constitution, it is stated that equal access to public services is a « State obligation » in order to ensure the widest possible enjoyment of the declared rights. However, art. 247 4 of Chapter 15 « Public Finance part 2 Taxation powers and revenue sharing » states that « There is no obligation on the national government to compensate a devolved government that does not raise revenue commensurate with its fiscal capacity and tax base. » This has serious implications for those regions and counties with a weak fiscal capacity and tax base. Although, art. 248 does mention the need to « take into account » economic disparities and necessary financial equalisation, this is subjected to art. 247 above instead of being defined as an overriding priority. It is therefore in contradiction with the « National values, principles and goals (Chap 3 Art. 13) » which include « (m) commitment to social justice and the realization of the rights of the people to basic needs...; & « (o) elimination of disparities in development between the

various parts of Kenya, and sectors of society; »

Counties faced with narrow tax bases and insufficient national revenue sharing would have little other alternative than to introduce new taxes or raise the level of the existing ones. Paragraph (a) of the 5th Schedule (Part 2 - taxation powers of counties) provides that the primary method to raise taxes for county governments should be « flat rate surcharges on the tax bases of any tax, levy or duty that is imposed by national legislation ». Expanding the tax base in this manner instead of focusing on progressive taxation systems would put an extra burden on the poor who would be likely to pay a disproportionate amount for access to services.

3° Participation

Recognition of the role of Civil Society is underlined in two separate articles of the constitution (Chapter 3 art. 13 2 g for ensuring accountability of government; and Chapter 5 art 30. 4 for the promotion and protection linked to the Bill of Rights) and includes a government pledge to facilitate it's participatory role.

Art. 53 4 further states that « The State shall take legislative measures and adopt policies to promote civil society participation in decision-making and in the management of public affairs at all levels of government. »

However, any reference to civil society is dropped in all subsequent articles related to governance and policy making issues and replaced by the terms « public or community participation ». Furthermore, past the more general declarations of « promoting » or « encouraging » participation, only county governments are given the explicit task of concretely « Ensuring and co-ordinating 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 powers and functions and participation in governance at the local level. (Fourth Schedule Part 3 section 14.) » To guarantee that this « effective exercise » of participation be fair, representative and democratic requires serious efforts from the county governments in terms of facilitation,

capacity building and outreach, which could prove overwhelming without serious national backing and inputs. Civil society organisations could be mentioned here as necessary partners to build and strengthen the local capacity for meaningful and representative community participation.

On the educational field, the importance of civil society and community participation in School Management Committees, PTAS etc could also be stressed through explicit mention in section 14.

Finally, in addition to articles 51 and 52 guaranteeing the Freedom of the media and access to information, an additional article could be included guaranteeing Community/public access to government media. This would ensure that specific channels or a reserved proportion of media space be reserved to communities and/or civil society organisation, for example to help Kenyan citizens fulfil the life long learning education obligations listed in this constitution Chapter 4 **24.** (1) « All citizens have the responsibility to (j) develop their abilities through acquisition of knowledge, continuous learning and the development of skills » as well as the Government's commitment to « conduct and facilitate civic education on this Constitution. » (7th Schedule, section 25)

4° Rights

- **Implementation of rights**

When reviewing the Constitutional dispositions guaranteeing the application of the Bill of rights, the articles providing for exceptions, « pragmatic » progressive/gradual implementations or arbitrations due to a lack of resources deserve a special attention. Art. 29 5 of Chap. 6 outlines the principles which must guide any government or judicial authority reviewing claims made by the State that it does not have the resources to implement a right (including the right to education). The first two principles serve as positive guidelines strengthening the objective of equal enjoyment of those fundamental rights and limiting the state's capacity to arbitrarily deprive enjoyment of rights on the basis of supposedly limited resources.

« (a) it is the responsibility of the State to show that the resources are not available;
(b) in allocating resources, the State has an obligation to give priority to ensuring the widest possible enjoyment of the right or fundamental freedom having regard to prevailing circumstances, including the vulnerability of particular groups or individuals; »

The third and last provision of art. 29 is much more obscure however, stating that « (c) a court, tribunal, the Human Rights and Gender Commission or other authority may not interfere with a decision by a State organ concerning the allocation of available resources, solely on the basis that it would have reached a different conclusion. ». This seems to imply that any decision concerning resource allocation by a State's organ cannot be reviewed or contested by courts or, for example by the Human Rights and Gender Commission. If this is the case, this section seriously limits the subsequent articles relating to the division of powers as well as those dealing with the right to take action for non implementation of rights (justiciability) as provided in art. 31 & 32: « (2) a person... has the right to complain to the Human Rights and Gender Commission, and to institute court proceedings, alleging that a right or fundamental freedom set out in the Bill of Rights has been denied, violated, infringed or threatened. (3) In any matter brought before it under Article 31, a court may grant appropriate relief, including— (e) an order of compensation against the State or any person responsible for the violation of a right or fundamental freedom; »

- **Languages**

According to Chapter 2, describing the fundamental characteristics of the Kenyan Republic, the State has an obligation towards protecting, preserving and developing the diversity of cultures, religions and languages. On this last issue Art. 9 declares that “The State shall respect, promote and protect the diversity of language of the people of Kenya and shall promote the development and use of indigenous languages and sign language. ». Furthermore, part 2 of the Bill of rights strongly entrenches the right to use minority languages as well as to participate within one's own specific cultural environment. Art. 68 1 & 2 states:

« (1) Every person has the right to use the language, and to participate in the cultural life, of that person's choice.

(2) A person belonging to a cultural or linguistic community shall not be denied the right,

with other members of that community to—

(a) enjoy that person's culture and use that person's language »

Unfortunately, the Constitution stops short of any provision indicating exactly how the State intends to actively defend and promote minority cultures and languages. One could have expected that language and culture rights be integrated in the state's educational mission, via articles promoting integration of minority cultures and languages inside the education system or through development of alternative bilingual curricula, as well as specific teacher training.

Following the examples taken in many countries marked by cultural and linguistic diversity and the need to preserve minority rights, the Constitution could also move one step further, through the adoption of a specific article demonstrating the State's will to defend linguistic diversity through its educational offer. One such article could read:

« to make available pre-school (or a substantial part of) and/or primary (or a substantial part of) education in the relevant regional or minority languages »

Such national level education programmes requirement would be in line with the Constitutions' Fourth Schedule (Distribution of functions between the national government and the devolved governments Part 1, section 5) stating that « language policy and promotion of official and local languages » is the sole responsibility of the National Government.

- **Compliance and reporting at international level**

Several articles of the Bill detailing rights and freedoms (Children, refugees, detainees...) incorporate the need for the State to take legislative and other measures to respect & implement provisions of international instruments pertaining to these issues. This effort for compliance and reporting with regional and international standards (including conventions, etc) should be extended to all fundamental rights covered by international monitoring instruments. This should be particularly true of those rights that do not automatically benefit from the additional prerogatives given by art. 30 (which only cover art. 61 to 66 of the Bill of rights: social security, health, education, housing, food & water), that is to say rights and fundamental freedoms which are a) not described as State obligations for their

implementation and b) not required to be the subject of international monitoring or reporting. This is, for example, the case of art. 60 focusing on Labour relations, which would be strengthened by an additional paragraph incorporating the State's pledge to respect its international obligations (including ratified ILO convention) and develop parliamentary reporting procedures.

- **Education in detention**

Neither the section concerning children (Art. 41) nor the one dealing with the rights of persons held in custody (Art. 74) mentions any right to education for detainees. The right to education, in particular for children held in detention, should be clearly underlined and stressed by inserting an additional proviso to paragraph (i): « not be arrested or detained except as a measure of last resort, and, when arrested or detained, to be treated in a manner that promotes the child's dignity and self-worth and pays attention to the child's rights, including but not limited to the right to—

(i) be detained only for the shortest appropriate period;

(ii) be kept separate from adults in custody;

(iii) be accorded legal assistance by the State; and

(iv) be treated in a manner, and be kept in conditions, that take account of the child's disability, if any, gender and age; »

This could read: (v) learning opportunities covering at least the basic compulsory curriculum, delivered by authorities in charge of public education to those sentenced or in remand.

Annexe

Education

Definitions

311. In this Constitution, unless the context otherwise requires—

“adult” means an individual who has attained the age of eighteen years;

“child” means an individual who has not attained the age of eighteen years;

“youth” means an the collectivity of all individual who in the Republic each of whom—

(a) has attained the age of eighteen years; and

(b) has not attained the age of thirty-five years.

Children

41

(2) It is the duty of parents, the family, society and the State to nurture, protect and educate children.

(6) Every child has a right to—

(c) free and compulsory basic education;

Persons living with disabilities

43

(2) Persons with disabilities have a right to—

(b) have access to education

Minorities and marginalized groups

44.

(2) The State shall take legislative and other measures to put in place affirmative action programmes designed to benefit minorities and marginalized groups.

(3) The measures referred to in clause (2) shall include measures to ensure that minorities and marginalized groups—

(b) are accorded special opportunities in the educational and economic fields;

Education

63. (1) Every person has the right to education.

(2) The State shall institute a programme to implement the right of every child to free and compulsory pre-primary and primary education and in so doing shall pay particular attention to children with special needs.

(3) The State shall take measures to make secondary and post-secondary education progressively available and accessible.

Part 2—Teachers Service Commission (!!! two part twos by the way) Teachers Service Commission

- 277.** (1) There is established the Teachers Service Commission.
(2) The functions of the Teachers Service Commission shall be—
(a) to register trained teachers; and
(b) despite Article 275 to—
(i) recruit and employ registered teachers;
(ii) assign teachers employed by the Commission for service in any public school and other institutions;
(iii) promote and transfer teachers;
(iv) exercise disciplinary control over teachers;
(v) terminate the employment of teachers; and
(vi) perform any other functions conferred on the Commission by an Act of Parliament.
(3) The Commission shall keep under review the standards of education and training of persons entering the teaching service and the supply of teachers and shall advise the national government on matters relating to the teaching profession.

FOURTH SCHEDULE

(Article 228(1))

DISTRIBUTION OF FUNCTIONS BETWEEN THE NATIONAL GOVERNMENT AND THE DEVOLVED GOVERNMENTS

Part 1 – National Government

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.

Part 3—County Governments

9. Education at pre-primary, education, village polytechnics, homecraft centres and childcare facilities.

Decentralisation

CHAPTER FOURTEEN DEVOLVED GOVERNMENT

Part 1—Objects and principles of devolved government

Objects of devolution

- (f) promote social and economic development and the provision of proximate, easily-accessed services throughout Kenya;
(i) promote the participation of the people in the making of decisions affecting them; and

Part 2—Regional governments

Regional governments

215.

(4) Despite Article 228 and the Fourth Schedule, an Act of Parliament shall provide for taxation powers for the government of the Nairobi Metropolitan Region.

Part 3—County governments

Urban areas

226. (1) National legislation shall provide for the governance and management of urban areas.

(2) Legislation made under clause (1)—

(iii) provide for participation in the governance of urban areas and cities by residents; and

Part 4—Powers and functions of devolved governments

Powers and functions

228. (1) Except as otherwise provided by this Constitution, the powers and functions of the national government and the devolved governments are as set out in the Fourth Schedule.

(2) A function that is conferred on more than one level of government is a function within the concurrent jurisdiction of each of those levels of government.

(3) A function not assigned by this Constitution or by legislation to a region or county is a function of the national government.

(4) Despite clause (1), and subject to this Constitution, the national government is not precluded from legislating for the Republic on any matter.

Part 6—Relationship between governments

Co-operation between governments at different levels

Conflict of laws

232. (1) This Article applies to conflicts between legislation in relation to matters falling within the concurrent jurisdiction of the various levels of government.

(2) National legislation prevails over regional and county legislation if –

(a) the national legislation applies uniformly throughout Kenya and any of the conditions specified in clause (3) is satisfied; or

(b) the national legislation is aimed at preventing unreasonable action by a region or county that—

(i) is prejudicial to the economic health or security interests of another region or county or of Kenya as a whole; or

(ii) impedes the implementation of national economic policy.

(3) The conditions mentioned in clause (2)(a) are—

(c) the national legislation is necessary for—

(v) the promotion of equal opportunity or equal access to government services; or

CHAPTER FIFTEEN

PUBLIC FINANCE

Part 2—Taxation powers and revenue sharing.

Devolved governments' shares of national funds

247.

(3) Additional revenue raised by a devolved government may not be deducted from its share of revenue raised nationally, or from other allocations made to it out of national government revenue.

(4) There is no obligation on the national government to compensate a devolved government that does not raise revenue commensurate with its fiscal capacity and tax base.

Legislation

248. (1) Subject to Articles 246(1) and 247, Parliament shall by legislation regulate the taxation and other revenue raising powers of devolved governments, and the sharing of revenue and making of grants to devolved governments.

(3) The legislation referred to in clause (1), shall take into account —

(d) the need to ensure that the regions and counties are able to provide basic services and perform functions allocated to them;

(g) economic disparities within and among the regions and the need for financial equalisation;

FOURTH SCHEDULE

(Article 228(1))

DISTRIBUTION OF FUNCTIONS BETWEEN THE NATIONAL GOVERNMENT AND THE DEVOLVED GOVERNMENTS

Part 1 – National Government

5. Language policy and the promotion of official and local languages.

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.

Part 3—County Governments

The powers and functions of the county are—

9. Education at pre-primary, education, village polytechnics, homecraft centres and childcare facilities.

14. Ensuring and co-ordinating 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 powers and functions and participation in governance at the local level.

FIFTH SCHEDULE

(Article 246)

TAXATION POWERS

Part 2 – Taxation Powers of Counties

A county government may raise, by way of taxes, duties, surcharges, fees, levies and charges—

(a) flat rate surcharges on the tax bases of any tax, levy or duty that is imposed by national legislation other than the tax bases of corporate income tax, value added tax and customs and excise;

Finances/taxes/Budget

CHAPTER SIX

THE BILL OF RIGHTS

Part 1—General provisions relating to the Bill of Rights

Application of the Bill of Rights

29.

(5) When applying any right under Articles 61 to 66, if the State claims that it does not have the resources to implement the right, a State organ, court, tribunal, the Human Rights and Gender Commission or other authority shall be guided by the following principles—

(b) in allocating resources, the State has an obligation to give priority to ensuring the widest possible enjoyment of the right or fundamental freedom having regard to prevailing circumstances, including the vulnerability of particular groups or individuals; and

Part 2—Regional governments

Regional governments

215.

(4) Despite Article 228 and the Fourth Schedule, an Act of Parliament shall provide for taxation powers for the government of the Nairobi Metropolitan Region.

CHAPTER FIFTEEN

PUBLIC FINANCE

Part 2—Taxation powers and revenue sharing.

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(3) Additional revenue raised by a devolved government may not be deducted from its share of revenue raised nationally, or from other allocations made to it out of national government revenue.

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- (3) The legislation referred to in clause (1), shall take into account —
- (d) the need to ensure that the regions and counties are able to provide basic services and perform functions allocated to them;
- (g) economic disparities within and among the regions and the need for financial equalisation;

FIFTH SCHEDULE

(Article 246)

TAXATION POWERS

182

Part 2 – Taxation Powers of Counties

A county government may raise, by way of taxes, duties, surcharges, fees, levies and charges—

- (a) flat rate surcharges on the tax bases of any tax, levy or duty that is imposed by national legislation other than the tax bases of corporate income tax, value added tax and customs and excise;

Participation

CHAPTER THREE

NATIONAL VALUES, PRINCIPLES AND GOALS

National values, principles and goals

13.

- (2) The national values, principles and goals include—
- (c) promotion of the participation of the people in public affairs and the sharing and devolution of power;
- (d) ensuring open and transparent government and accountability of State officers, public officers, State organs and other public authorities;
- (g) recognition of the role of civil society in governance and facilitation of its role in ensuring the accountability of government;
- (i) ensuring full participation of women, persons with disabilities, marginalized communities and all other citizens in the political, social and economic life of the nation;

Implementation of rights and fundamental freedoms

30.

- (4) The State shall recognize and facilitate the role of civil society in the

promotion and protection of the rights and fundamental freedoms in the Bill of Rights.

Freedom of association

53.

(4) The State shall take legislative measures and adopt policies to promote civil society participation in decision-making and in the management of public affairs at all levels of government.

(5) Any legislation that requires registration of civil society organizations shall provide that—

(b) registration shall be in the hands of a body that is independent of government or any other form of political control;

CHAPTER EIGHT

ENVIRONMENT AND NATURAL RESOURCES

Principles and obligations in relation to the environment

87. The State shall—

(k) encourage public participation in the management, protection and conservation of the environment.

Conservation of the environment

89.

(c) encourage public participation;

CHAPTER FOURTEEN

DEVOLVED GOVERNMENT

Part 1—Objects and principles of devolved government

Objects of devolution

(f) promote social and economic development and the provision of proximate, easily-accessed services throughout Kenya;

(i) promote the participation of the people in the making of decisions affecting them; and

Part 3—County governments

Urban areas

226. (1) National legislation shall provide for the governance and management of urban areas.

(2) Legislation made under clause (1)—

(iii) provide for participation in the governance of urban areas and cities by residents; and

Part 1—Public Service

Values and principles of public service

The values and principles of public service include—

(d) encouragement of people to participate in the process of policy making;

FOURTH SCHEDULE

(Article 228(1))

DISTRIBUTION OF FUNCTIONS BETWEEN THE NATIONAL GOVERNMENT AND THE DEVOLVED GOVERNMENTS

Part 3—County Governments

The powers and functions of the county are—

14. Ensuring and co-ordinating 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 powers and functions and participation in governance at the local level.

51 Freedom of the media

52 Access to information

!!!!Community/public access to media

Citizenship

CHAPTER FOUR

CITIZENSHIP

Responsibilities of a citizen

24. (1) All citizens have the responsibility to—

(j) develop their abilities through acquisition of knowledge, continuous learning and the development of skills;

CHAPTER FIVE

CULTURE

Responsibility of the State in respect of culture

27. The State shall—

(c) promote—

(i) research and an education policy that enhances culture and cultural values and enables the people to develop strong moral, ethical and spiritual foundations;

CHAPTER TEN

REPRESENTATION OF THE PEOPLE

Part 2—Independent Electoral and Boundaries Commission and delimitation of electoral units

Independent Electoral and Boundaries Commission

112. (1) There is established the Independent Electoral and Boundaries Commission.

(2) The Commission is responsible for the promotion of free and fair elections and referenda and in particular for—

(i) the promotion of voter education and a culture of democracy;

Part 3—Political Parties

Basic requirements for political parties

Application of the Fund

119. (1) The purpose of the Political Parties Fund is to provide financial support to registered political parties.

(5) Money allocated to a political party from the Fund shall be used by the party—

(b) for the organization of civic education on democracy, this Constitution and electoral processes; and

SEVENTH SCHEDULE

(Article 312)

TRANSITIONAL AND CONSEQUENTIAL PROVISIONS

Civic education

25. From the effective date, the Government shall, through its relevant organs, conduct and facilitate civic education on this Constitution to the people of Kenya, in the national languages and in their local languages.

Rights

Definitions

311. In this Constitution, unless the context otherwise requires—

“adult” means an individual who has attained the age of eighteen years;

“child” means an individual who has not attained the age of eighteen years;

“youth” means an the collectivity of all individual who in the Republic each of whom—

(a) has attained the age of eighteen years; and

(b) has not attained the age of thirty-five years.

Implémentation of rights and fundamental freedoms

30.

(2) The State shall take legislative, policy and other measures to achieve the progressive realisation of the rights guaranteed under Articles 61 to 66.

(6) The State shall enact and implement legislation to facilitate the fulfilment of its international obligations in respect of human rights and fundamental freedoms and shall—

(a) report on time to international human rights bodies on the implementation of human rights treaties and other instruments;

(b) publish reports intended for submission by the State to international human rights bodies for a reasonable period and facilitate public discussion and debate and participation of civil society before the reports are revised and submitted.

(7) The State shall disseminate to the public the General Comments and

Recommendations of international human rights bodies relating to the implementation of its international obligations.

(8) The national government shall make a statement to Parliament on whether and how it intends to implement those recommendations.

60.

Labour relations

!!!Compliance with international law

Children

CHAPTER THREE

NATIONAL VALUES, PRINCIPLES AND GOALS

National values, principles and goals

13.

(2) The national values, principles and goals include—

(l) recognizing the special responsibilities that the State, society and parents owe to children, and upholding the family and the institution of marriage;

Part 2 –Rights and fundamental freedoms

Definitions

311. In this Constitution, unless the context otherwise requires—

“adult” means an individual who has attained the age of eighteen years;

“child” means an individual who has not attained the age of eighteen years;

“youth” means an the collectivity of all individual who in the Republic each of whom—

(a) has attained the age of eighteen years; and

(b) has not attained the age of thirty-five years.

Children

41. (1) Children hold a special place in society.

(2) It is the duty of parents, the family, society and the State to nurture, protect and educate children.

(3) All children, whether born within or outside wedlock, are equal before the law and have equal rights under this Constitution.

(4) A child’s best interests shall be of paramount importance in every matter concerning the child.

(5) A child’s mother and father, whether married to each other or not, have an equal responsibility to protect and provide for the child.

(6) Every child has a right to—

(a) a name and a nationality from birth and to have their birth registered;

(b) parental care, or appropriate alternative care when separated from its parents;

(c) free and compulsory basic education;

(d) be protected from discrimination, harmful cultural rites and practices, exploitation, neglect or abuse;

(e) be protected from all forms of exploitation and any work that is

- likely to be hazardous or adverse to the child's welfare;
- (f) adequate nutrition, shelter, basic health care services and social services;
 - (g) not to be subjected to violence or to be treated or punished in a cruel, inhuman or degrading manner in schools and other institutions responsible for the care of children;
 - (h) not take part in hostilities or be recruited into armed conflicts and be protected from situations of armed conflict;
 - (i) not be arrested or detained except as a measure of last resort, and, when arrested or detained, to be treated in a manner that promotes the child's dignity and self-worth and pays attention to the child's rights, including but not limited to the right to—
 - (i) be detained only for the shortest appropriate period;
 - (ii) be kept separate from adults in custody;
 - (iii) be accorded legal assistance by the State; and
 - (iv) be treated in a manner, and be kept in conditions, that take account of the child's disability, if any, gender and age;
 - (j) have an advocate assigned to the child by the State and at State expense in proceedings affecting the child, other than those contemplated in paragraph (k) if injustice would otherwise result;
 - (k) know of decisions affecting the child, express an opinion and have that opinion taken into account, taking into consideration the age and maturity of the child and the nature of the decision.
- (7) Children with special needs are entitled to the special protection of the State and society.
- (8) The state shall take legislative and other measures to implement the provisions of this Constitution and of international instruments and standards on the rights of the child.

Minorities

CHAPTER THREE NATIONAL VALUES, PRINCIPLES AND GOALS National values, principles and goals

13.

- (2) The national values, principles and goals include—
- (b) recognition of the diversity of the people and promotion and protection of their cultures;

Implementation of rights and fundamental freedoms

30.

- (5) All State organs and all public officers have the responsibility to understand, and equip themselves to deal with, the needs of special groups within society including women, older members of society, persons with disabilities, children, youth and members of minority and marginalized communities and of particular ethnic, religious and cultural communities.

Persons living with disabilities

43.

- (2) Persons with disabilities have a right to—
(b) have access to education and to institutions and facilities for persons with disabilities that are as integrated into society as a whole as is compatible with the interests of those persons;

Minorities and marginalized groups

44.

- (2) The State shall take legislative and other measures to put in place affirmative action programmes designed to benefit minorities and marginalized groups.
(3) The measures referred to in clause (2) shall include measures to ensure that minorities and marginalized groups—
(a) participate and are fully represented in governance and in all other spheres of national life;
(b) are accorded special opportunities in the educational and economic fields;

Freedom of conscience, religion, belief and opinion

49.

- (3) Every religious community is entitled to establish and run places of education at its own expense and to provide religious instruction for persons of that community in the course of providing the education.
(4) Religious observances and religious instruction may be conducted at State or State-aided institutions, if—
(a) they are conducted on an equitable basis; and
(b) attendance at such observances or religious instruction is voluntary.
(6) A person shall not be compelled—
(c) to receive religious instruction or to take part in or attend a religious ceremony or to observe a day of rest or other observance that relates to a religion that is not that person's religion;

74.

Rights of persons held in custody

!!! Explicit ref to education

Language

Languages and modes of communication

9.

- (3) The State shall respect, promote and protect the diversity of language of the people of Kenya and shall promote the development and use of indigenous languages and sign language.

Language and culture

- 68.** (1) Every person has the right to use the language, and to participate in the cultural life, of that person's choice.
(2) A person belonging to a cultural or linguistic community shall not be denied the right, with other members of that community to—
(a) enjoy that person's culture and use that person's language; or

(b) form, join and maintain cultural and linguistic associations and other organs of civil society.

(3) A person shall not compel another person to perform, observe or undergo any cultural practice or rite.

FOURTH SCHEDULE

(Article 228(1))

DISTRIBUTION OF FUNCTIONS BETWEEN THE NATIONAL GOVERNMENT AND THE DEVOLVED GOVERNMENTS

Part 1 – National Government

5. Language policy and the promotion of official and local languages.

Justiciability

Supremacy of the Constitution

2.

(5) A person, or a group of persons, may bring an action in the appropriate court for a declaration that any law, act or omission is inconsistent with, or is in contravention of, this Constitution.

CHAPTER SIX

THE BILL OF RIGHTS

Part 1—General provisions relating to the Bill of Rights

Application of the Bill of Rights

29.

(5) When applying any right under Articles 61 to 66, if the State claims that it does not have the resources to implement the right, a State organ, court, tribunal, the Human Rights and Gender Commission or other authority shall be guided by the following principles—

(a) it is the responsibility of the State to show that the resources are not available;

(c) a court, tribunal, the Human Rights and Gender Commission or other authority may not interfere with a decision by a State organ concerning the allocation of available resources, solely on the basis that it would have reached a different conclusion.

Enforcement of the Bill of Rights

31. (1) A person referred to in clause (2) has the right to complain to the Human Rights and Gender Commission, and to institute court proceedings, alleging that a right or fundamental freedom set out in the Bill of Rights has been denied, violated, infringed or threatened.

Authority of the court to uphold and enforce the Bill of Rights

32.

(3) In any matter brought before it under Article 31, a court may grant appropriate relief, including—

(e) an order of compensation against the State or any person responsible for the violation of a right or fundamental freedom;

and

CHAPTER ELEVEN THE LEGISLATURE

Right to petition Parliament

142. (1) Every person has a right to petition Parliament to enact, amend or repeal any legislation.

(2) Parliament shall make provision for the procedure for the exercise of this right.

Equity

CHAPTER THREE NATIONAL VALUES, PRINCIPLES AND GOALS

National values, principles and goals

13.

(2) The national values, principles and goals include—

(m) commitment to social justice and the realization of the rights of the people to basic needs and to a secure environment;

(o) elimination of disparities in development between the various parts of Kenya, and sectors of society;

CHAPTER FOURTEEN DEVOLVED GOVERNMENT

Part 1—Objects and principles of devolved government

Objects of devolution

(f) promote social and economic development and the provision of proximate, easily-accessed services throughout Kenya;

Conflict of laws

232. (1) This Article applies to conflicts between legislation in relation to matters falling within the concurrent jurisdiction of the various levels of government.

(2) National legislation prevails over regional and county legislation if –

(a) the national legislation applies uniformly throughout Kenya and any of the conditions specified in clause (3) is satisfied; or

(b) the national legislation is aimed at preventing unreasonable action by a region or county that—

(i) is prejudicial to the economic health or security interests of another region or county or of Kenya as a whole; or

(ii) impedes the implementation of national economic policy.

(3) The conditions mentioned in clause (2)(a) are—

(c) the national legislation is necessary for—

(v) the promotion of equal opportunity or equal access to government services;

CHAPTER FIFTEEN PUBLIC FINANCE

Part 2—Taxation powers and revenue sharing.

Devolved governments' shares of national funds 247.

(3) Additional revenue raised by a devolved government may not be deducted from its share of revenue raised nationally, or from other allocations made to it out of national government revenue.

(4) There is no obligation on the national government to compensate a devolved government that does not raise revenue commensurate with its fiscal capacity and tax base.

Legislation

248. (1) Subject to Articles 246(1) and 247, Parliament shall by legislation regulate the taxation and other revenue raising powers of devolved governments, and the sharing of revenue and making of grants to devolved governments.

(3) The legislation referred to in clause (1), shall take into account —

(d) the need to ensure that the regions and counties are able to provide basic services and perform functions allocated to them;

(g) economic disparities within and among the regions and the need for financial equalisation;

Part 1—Public Service

Values and principles of public service

The values and principles of public service include—

(c) effective, impartial, fair and equitable provision of services;

FIFTH SCHEDULE

(Article 246)

TAXATION POWERS

182

Part 2 – Taxation Powers of Counties

A county government may raise, by way of taxes, duties, surcharges, fees, levies and charges—

(a) flat rate surcharges on the tax bases of any tax, levy or duty that is imposed by national legislation other than the tax bases of corporate income tax, value added tax and customs and excise;