

Devolution and education law and policy in Kenya

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Preliminaries

List of Abbreviations and Acronyms

AIDS	Acquired Immune Deficiency Syndrome
BEA	Basic Education Act 2012
BOM	Board of Management
CEB	County Education Board
CIESK	Commission of Inquiry into the Education System of Kenya
CS	Cabinet Secretary
FPE	Free Primary Education
FSE	Free Secondary Education
ICESCR	International Convention on Economic, Social and Cultural Rights
ISCED	International Standard Classification of Education
KANU	Kenya African National Union
KHRC	Kenya Human Rights Commission
KICD	Kenya Institute of Curriculum Development
KNEC	Kenya National Examinations Council
KNUT	Kenya National Union of Teachers
KUPPET	Kenya Union of Post Primary Education Teachers
NCEOP	National Committee on Educational Objectives and Policies
NEB	National Education Board
SNE	Special Needs Education
TIVET	Technical Industrial Vocational Education and Training
TSC	Teachers Service Commission
UK	United Kingdom

UNESCO United Nations Educational, Scientific and Cultural Organization

US United States

List of Constitutions

Constitution of Kenya, 1963 (Independence Constitution)

Constitution of Kenya Act No. 5 1969 (as amended)

Constitution of Kenya 2010

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

National Accord and Reconciliation Act, 2008 (NARA)

Constitution of the United States of America 1787; Declaration of Independence 1776

Constitutional Instruments of the United Kingdom

Act of Settlement 1701 (UK)

Act of Union 1707

Bill of Rights 1698 (UK)

Magna Carta 1215 (The Great Charter) (UK)

Petition of Right 1628

Human Rights Act 1998

Instruments devolving power to Scotland and Wales (1998)

German Basic Law (as amended) 3/10/1990 (as amended up to 20/12/1993)

Constitution of China 1982 (updated 22/3/2004)

Constitution of South Africa 1996 (cf. Interim Constitution 1994)

Constitution of the Federal Republic of Nigeria 1999

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

Constitution of Egypt (amended 2011)

Constitution of Ivory Coast

Grand Coalition Instruments (UK, Germany, Kenya)

Statutes [including on devolution and education]

Basic Education Act, No 12 of 2013
County Governments Act, 2012
Intergovernmental Relations Act, 2012
Kenya Institute of Curriculum Development Act, 2013
Kenya National Examinations Council Act, 2012
Kenya School of Law Act, No 26 of 2012
Legal Education Act, 2012
National Cohesion and Integration Act, 2008
Science, Technology and Innovation Act, No 28 of 2013
Teachers Service Commission Act 2012
Technical Vocational Education Training Act 2013
Transition to Devolved Government Act 2012
Universities Act, No 42 of 2012

Repealed education statutes

Kenyatta University Act, Cap 210C
Moi University Act, Cap 210A
Universities Act, Cap 210B
University of Nairobi Act, 1985

Rules and regulations of Devolution and Education

Legal Notice No. 120 of 2010 on Kenya Institute of Education (KIE)

Legal Notices 534 of 1997 on Teachers Service Commission (Remuneration of Teachers) Order

Cases

John Kabui Mwai & 3 Others v. Kenya National Examinations Council & 2 Others [2011] eKLR.

Regents of the University of California v. Bakke 985 S. Ct. 2733 (1978).

Case on access to the public Nairobi City Council schools by children living with HIV/AIDs (brought by Chambers of Justice).

Senate's case on advisory opinion 2013 (Sam Kiplagat (2013) "Senators go to court over Division of Revenue Act," *The Star* (Nairobi), Friday, June 14, 2013, at <http://www.the->

star.co.ke/news/article-124268/senators-go-court-over-division-revenue-act#sthash.Hr3Bcnxy.dpuf (accessed 1/10/2013).

Case on uniform – freedom conscience includes wearing of hijab to school

Republic v. Head Teacher, Kenya High School Exparte SMY (a minor suing through her mother and next friend A B) [2012] eKLR.

Elizabeth Wainaina and Others v. The Board of Governors of Pangani Girls High School Miscellaneous Civil Case Number 818 of 1992.

Green Hand Organisation v. Republic of Kenya... (Limo, Lucianne (2013) “Green Hand Organization moves to court to stop free laptop for schools project,” *The Standard Online* on Thursday, May 30, 2013, at http://www.standardmedia.co.ke/?articleID=2000084818&story_title=ngo-in-court-to-stop-laptop-project (accessed 26/6/2013); unavailable;- case dropped).

Gratz v. Bollinger 539 US 244 (2003)

Grutter v. Bollinger, 539 US 306 (2003)

Devolution and education law and policy in Kenya

Prof Ben Sihanya, JSD (Stanford)¹

1. Introducing devolution in education policy and law

This paper examines the juridical or legal and policy framework on devolution and education. I analyze how the constitutional promise of devolution is being operationalised in the education sector. I trace the developments proposed and implemented in education with the aim of reviewing the extent and effect of these recommendations. I note that the Constitution 2010, Session Paper No 1 of 2005 and recent reforms in education law have played a significant role in the conceptualization and operationalisation of decentralization or devolution of education services.

I seek to address or test three interrelated research questions, hypotheses or assumptions: First, the constitutional promise of devolution is ambitious is achievable in the education sector in Kenya as long as the national or *central* government observes fidelity to the Constitution. Second, the politicisation of education has the quality of education services. Misplaced objectives and priorities are compromising equity, standards, relevance and quality in education. Third, devolution in the education sector is threatened by the central Government² and that the institutions established by statute lack the appropriate powers and resources to deliver educational services at the county level.

Significantly, the Constitution of Kenya 2010 makes the governance of education a largely a national responsibility. This is manifested in the national Government's interpretation of the Fourth Schedule to the effect that the county governments are only left with the management of lower levels of education.³ This paper argues that the expectation of devolution of services in Chapter 11 and other provisions of the Constitution do not match the division of powers and functions in the Fourth Schedule. This paper analyses the role and effectiveness of legislative

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² There are two levels of Government: the national and county under Chapter and other provisions of the Constitution and the relevant devolution, education and others. I refer to *central* because of the strong Central(isation) logic, components, and policies that dominate the "national" Government.

³ The Fourth Schedule to the Constitution is entitled "Distribution of functions between the National and the County Governments." The Schedule elaborates Arts 185(2), 186(1) and 187(2).

powers and functions of both levels of governance in actualising the provision of education services.

I also examine the legal framework on the provision of education to match specific goals of the national and county governments as well as the personal needs of the students or pupils and their parents. In this context, I discuss the measures made to meet the needs of learners with special needs, including persons with disabilities (PWDs). I postulate that for better provision of quality education, the focus should also be placed on other stakeholders in education including teachers, curriculum developers and other administrators and officers in the Ministry of Education, in county governments, in the private sector, in the academy, and in civil society organizations (CSOs).

Significantly, I examine education as a right guaranteed in the Bill of Rights (Chapter Four) of the Constitution. There are also obligations and duties imposed on the national Government and county governments, the learners, parents, guardians family generally in the realization of the right to education. These are partly to implement the international obligations of the Kenyan state for the realization of the right to education. Finally, I make proposals on how the provision of education services can be improved within the framework of the devolved government.

The methodology – including the conceptual and theoretical framework – that undergirds the formulation, implementation, monitoring and evaluation as well as the study of policy on education, training and research (ETR) is evolving. That methodology is largely based on Sessional Paper No. 1 of 2005 on *Policy Framework for Education, Training and Research in Kenya in the 21st Century*.⁴ And devolution which is clarified under the Constitution of Kenya 2010, is important in realizing ETR. The challenge is that research, innovation, intellectual property and mentoring are yet to be integrated sufficiently into Kenya’s policy and laws on education and (decentralized) governance.

This study focuses on how devolution relates to education and policy law in Kenya. Devolution is “the transfer of decision-making capacity from higher levels in an organization to lower levels. It is about who is best placed in an organization to make decisions.”⁵ Another definition of devolution used commonly is that it is the transfer of governance responsibility for specified functions to sub-national levels, either publicly or privately owned, that are largely outside the direct control of the central government.⁶ The focus is on power, functions, resources and service delivery. A major question in Kenya is how the national and county governments relate in terms of educational services.

⁴ Granted that new proposals have been made recently, Sessional Paper No. 1 of 2005 is still influential, especially on methodology as we discuss below.

⁵ Oxford Online Dictionaries, at <http://oxforddictionaries.com/definition/english/devolution> (accessed 14/4/2013).

⁶ Ian Ferguson & Cherukat Chardasekharan (2004) “Paths and pitfalls of decentralisation for sustainable forest management: experiences of the Asia-Pacific region,” Chapter in Colfer & Capistrano (2004) (eds) *A New Vision for the State: And How it is Working out in Forests*, CIFOR, Bogor.

1.1. Methodology and implementation framework on ETRIM in Kenya

As already indicated a holistic approach to education requires addressing education training, research, innovation and mentoring (ETRIM), as well as intellectual property (IP). Kenya's framework and methodology on the policy – hence law – on education, training and research is largely founded on Sessional Paper No. 1 of 2005 on *Policy Framework for Education, Training and Research*. The late Prof George Saitoti presided over its drafting when he was Minister for Education, Science and Technology.⁷

This consolidated and clarified a long tradition of policy proposals or experiments beginning with the first post-independence intervention, the S.H. Ominde Report on Education (1964).⁸ Sessional Paper No. 1 informed the recent legal, regulatory and administrative reforms under the leadership of the late Mr Mutula Kilonzo,⁹ Prof Hellen Sambili and Prof Margaret Kamar.¹⁰

The Constitution and devolution laws have been very helpful in this regard. The relevant education laws that embody these reforms include the Basic Education Act, 2013, Universities Act, 2012, Kenya National Examinations Council Act, 2012, Kenya Institute of Curriculum Development Act, 2012, Technical Vocational Education Training Act, 2013, and the Teachers Service Commission Act, 2012, among others.¹¹

How does Sessional Paper No. 1 of 2005 on *Policy Framework for Education, Training and Research* conceptualize and operationalize education policy, law, administration and service delivery? The Sessional Paper takes a five pronged approach. First, access and equity include ethnic, regional and gender equity. For instance, how do girls and women fare in accessing education? Increasingly, special needs education (SNE) requires equity for persons with

⁷ I refer to this as this as the “Saitoti methodology.” The Ministry was later split into Ministry of Education and ministry of Higher Education, Science and technology. Cf. Joseph Ngure & Tom Matoke (2004) “Split education ministry, says don,” at <http://allafrica.com/stories/200408090452.html> (accessed 20/7/2013); Mariana Cifuentes (2011) “Two tales of innovation: The Kenya Education Reform,” at https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=30&cad=rja&ved=0CG8QFjAJOBQ&url=http%3A%2F%2Fhum.ttu.ee%2Ffailid%2FHKAC%25202011%2FHKAC_Cifuentes.pdf&ei=vHvtUdDwElaVswa6rCIDQ&usg=AFQjCNHAAmv-CZlvtM9V4jFMO30g33oQ6A&sig2=U17cZj9vHhOvcM17cPituw&bvm=bv.49478099,d.Yms (accessed 22/7/2013).

⁸ Republic of Kenya (1964) *Kenya Education Commission Report*, Government Printers, Nairobi (S. H. Ominde Report).

⁹ The late Mr Mutula Kilonzo presided over the long overdue education reforms after leading fundamental reforms to implement the Constitution 2010 through the Ministry of Justice, National Cohesion and Constitutional Affairs. I refer to the product and process of fast tracking relevant education laws as the “Mutula legacy.”

¹⁰ Prof Sambili was the acting Ministry of Higher Education Science and Technology (MOHEST) at some part the time of the relevant recent reforms. Prof Margaret Kamar was later appointed Minister of Higher Education Science and Technology (MOHEST) during this period.

¹¹ There are numerous other laws that impact education including laws on research, science, technology and innovation, seeds and plant varieties as well as employment and other laws.

disability as well as talented and gifted pupils or students. Does equity mean equality or equitable access?

Second, quality, standards and relevance are crucial. However, even after the Ominde Report of 1964,¹² the Government has focused on quantity instead of quality. There is a problem of relevance, for example, the education system at pre-primary, primary, secondary, tertiary and even university levels do not capture some key competencies under the framework of skills, knowledge, attitude and values, and innovation (SKAVI). Lifelong learning and life-skills are hardly integrated or emphasized. The focus seems to be on some aspects of the 3Rs (reading, writing and arithmetic) or literacy and numeracy. Moreover, the curriculum places a great premium on terminal exams, not formative assessment.

Additionally, some polytechnics and numerous institutions of science and technology or technical training institutes and institutes of technology have been converted into universities, university colleges or university campuses. This has further constrained the training of artisans and technicians.¹³ It is important that the learners are weaned into the world of work.¹⁴

Third, management and the governance of education relate to the administration of human, financial and technical resources. These include management and governance at the national, county and institutional levels. Hence the roles of Cabinet Secretary, Principal Secretary and Director General; county governor, the relevant county executive member (CEM) and county assembly; as well as Board of Management (BOM), principals and head teacher.

Fourth, financing education includes raising revenue and planning or prioritising its use, as well as ensuring equity and efficiency on how the funds are actually spent. The national or central Government has the primary responsibility under the Constitution to finance education. Articles 43 and 53 stipulate that every person has the right to education; and that children have the right to free and compulsory basic education, respectively. This is also based on the fact that people pay taxes for services (Chapters 12 & 13 of the Constitution).

Significantly security,¹⁵ education¹⁶ and health¹⁷ are some of the main sectors that influence competitiveness, development, welfare and survival of a state, a county, a people or an

¹² Ominde Report, *ibid*.

¹³ Ben Sihanya (2009) "Intellectual property and mentoring for innovation and industrialization in Kenya," *Law Society of Kenya Journal*, Vol. 5, 2009 No. 1, pp. 29-57. See also David Mugwe (2012) "Upgrade of polytechnics to universities faulted at talks," *Business Daily*, Thursday, June 27, 2013, at <http://www.businessdailyafrica.com/Corporate-News/Upgrade-of-polytechnics-to-universities-faulted-at-talks/-/539550/1480472/-/3gt2luz/-/index.html> (accessed 19/6/2013).

¹⁴ Ben Sihanya (2008) "Intellectual property and mentoring for innovation and industrialization in Kenya," Vol. 4 Issue 1, *University of Nairobi Law Journal*, 2008, pp. 20-46.

¹⁵ Under Art. 29 of the Constitution, security as a right. And Max Weber among other scholars argue that security of the person is the *raison d'être* of government.

individual. Most developed countries like the US, UK, and Germany offer free or subsidised education from pre-primary through tertiary and university.¹⁸ Kenya must invest in sustaining education, health and security at all levels. The Government must prioritize expenditure for and in education under Article 21 (2) of the Constitution, among others.¹⁹

Fifth, legal issues in education include fidelity in constitutional implementation as well as legislative, regulatory, policy and administrative reform. The Constitution and the education laws provide a framework. The challenge now is to discuss and pass appropriate rules, regulations, policies and administrative procedures on the foregoing parameters of education, training, research, innovation and mentoring.²⁰

Some laws on or relevant to education need to be reviewed even though they were enacted under the 2010 Constitution. This is mainly because some of the post-2010 laws did not keep fidelity with the Constitution. These include challenges under the Basic Education Act, 2013, the contentious and unconstitutional appointment and deployment of provincial or regional and county commissioners, and the deployment of national Government officials to county governments.

1.2 Methodological challenges in devolving education services

Remarkably, there are gaps in the methodology or framework used in implementing and studying education law and policy. First, the Constitution has brought about new challenges and phenomena including devolution. These were not clear in 2005 when the Sessional Paper was adopted.²¹ Moreover, there is insufficient attention to priorities among various sectors and in education itself.²² Third, some subsectors or parameters that would make education meaningful have not been sufficiently integrated. These include components of skills, knowledge, attitudes, values and innovation (SKAVI) like training, research, innovation, mentoring and intellectual property (IP).²³

¹⁶ Education is understood in the broad sense of functional literacy and includes valuable, useful and competent skills, knowledge, attitudes, values and innovation. Education helps address the rule of law, human rights and constitutionalism so that the people have a realistic chance and knowing and complying with the law. This then removes the following legal tenet a category of cliché ignorance of the law is no defence (*ignorantia juris non excusat*).

¹⁷ See Article 43. Health includes prescription of life and wellness without which the government is meaningless.

¹⁸ Maha Shuayb & Sharon O'Donnell (2008) "Aims and values in primary education: England and other countries," *Primary Review Research Survey* (1/2), Cambridge: University of Cambridge Faculty of Education.

¹⁹ Charles Sotz (2011) "What does Kenya's new constitution say about education," at <http://www.strathmore.edu/News.php?NewsID=521> (accessed 20/7/2013).

²⁰ See Ben Sihanya (2013) "Public participation and public interest lawyering under the Kenyan Constitution: theory, process and reforms," Vol 9 (1) *Law Society of Kenya Journal* 1–32.

²¹ See the Introduction, above.

²² An example in current debate is laptops for std 1 pupils vs computer labs or digital content for std 1–8, form I–IV, tertiary or university students laptops, teacher training, deployment and welfare.

²³ See Ben Sihanya (forthcoming) *Education Law and Policy in Kenya, op. cit.*

Fourth, is there a right to provide tuition to students or pupils outside the scheduled class hours? Do they have the right? Do the teachers or tutors have a duty or right, especially in light of a crowded and exam oriented curriculum? Moreover, there are subjects like social studies in the primary school curriculum which are not sufficiently conceptualised; they are not coherent. If there are rights or duties, what is the role of the national and county government in this regard?²⁴

Fifth, what is the function of the national or central Government and the county governments in faith-based schools? Historically, and especially in post-colonial Kenya, education was provided by the central Government, some local authorities and religious organisations including Christian, Islamic and Hindu organizations. Some got free land from the community or the Government. How is the land question to be addressed in the context of devolution, and quality education is partially discussed below.

Sixth, there is debate that strict delineation of pupils or students on the basis of public or private schools should be avoided. And that more investment should be injected into public education and health. There is need to develop clearer criteria or policies for the establishment of private and public schools as well as the issue of funding to these schools.²⁵

Seventh, what level of government bears key responsibility for infrastructure development: county or national Government? Some argue that the county government should take leadership in infrastructure development for schools. Who owns or controls the trust or community land? It is also argued that the national Government should formulate the policies and regulations and coordinate the establishment of such schools, including through conditional and non-conditional funds.

Partnerships should be developed between the central Government and the county governments, on the one hand, and other organisations, as well as between private and public schools.²⁶

1.3 Governance, development and education in Kenya

Education, training, research, innovation and mentoring (ETRIM) play a central role in development and have been identified as a “fifth” factor of production; the other four being land, labour, capital and entrepreneurship. The Constitution of Kenya 2010 and Vision 2030 place great emphasis on the role of education in development. Thus education has to be given the right focus in terms of planning and resource allocation at the national, county, institutional and household levels.

²⁴ Cf. Esther T. Van Kerken (2003) “Labour law in for the education sector,” Chapter 9 in IJ Oosthuizen (ed) (2003) *Aspects of Education Law*, Van Schaik, Pretoria, 130-179.

²⁵ Melinda Coetzee (2002) *Getting and Keeping Your Accreditation*, Van Schaik, Pretoria.

²⁶ Cf. Lavington Primary School and Lavington United Church Primary School. Public Private Partnerships (PPP) require a legal framework. The Constitution 2010 and Vision 2030 provide a good basis.

Devolution remains one of the great strides of reform ushered in by the Constitution of Kenya 2010. Some have argued that were devolution as stipulated in the 2010 Constitution to fail, then it can be said that the Constitution shall have failed. These views are expressed by citizens and scholars and practitioners who view devolution as one of the greatest initiatives brought by the promulgation of the Constitution of Kenya 2010.²⁷

Devolution of functions under the Constitution focuses on three key parameters or approaches: the exclusive powers or functions of the national Government; the exclusive power or functions of the county government; and residual power or functions whereby the Constitution is silent and does not assign the functions.²⁸ Thus components of the devolution of functions covers the areas in which the national Government overrides the county government such as national defence and foreign policy; exclusive educational functions of the county governments; the concurrent functions of the national and county governments; functions which are not assigned to the national or county government²⁹ and the general relationship between the national and county governments.

Thus devolution is covered under Chapter 11 and by almost all chapters of the Constitution of Kenya 2010. The powers and functions of the two levels of Government are listed in the Fourth Schedule.³⁰ It is the Constitution's and the Kenyan people's legitimate expectation that the division of functions powers and will provide the opportunity to address the development challenges through interdependence, consultation, cooperation and collaboration (Articles 189, 194, 195).

Significantly, the goal at independence in 1963 was to eradicate illiteracy (*ujinga*), disease (*ugonjwa*) and poverty (*umasikini*) as discussed in Sessional Paper Number 10 of 1965 on *African Socialism and its Application to Planning in Kenya*.³¹ There was also the need to

²⁷ Yash Ghai & Jill Cottrell Ghai (2011) "The promise and the risks of devolution," at <http://softkenya.com/constitution/the-promise-and-the-risks-of-devolution/> (accessed 26/6/2013). See also Peter Kagwanja (2010) "Uhuru at last! The new Constitution and the birth of the Second Republic," at <http://softkenya.com/constitution/prof-peter-kagwanja-uhuru-at-last-the-new-constitution-and-the-birth-of-the-second-republic/> (accessed 25/6/2012).

²⁸ The Fourth Schedule to the Constitution is the main framework for such assignment. Allocation of functions is largely a matter of interpretation of the entire Constitution, the Fourth Schedule, and the "devolution laws." Residual functions are deemed to be reserved for the national Government because it was the extant Government at the (re-) founding or reconstruction of Kenya in 2010. See Art 186(3) on residual functions.

²⁹ Under the Constitution, the last category belongs to the national government.

³⁰ See Annex 2 on Distribution of Education functions between the National government and the county Governments (under the Fourth Schedule to the Constitution of Kenya 2010).

³¹ Republic of Kenya (1965) Sessional Paper Number 10 of 1965 on *African Socialism and its Application to Planning in Kenya*, Government Press, Nairobi.

consolidate national unity which the struggle for independence had nurtured but which prospectors for and entrepreneurs of independence compromised.³²

Numerous efforts have been directed towards reforming education in a bid to improve the provision of education, training, research and related services in Kenya. These include the daily routine of the relevant education officials; task forces, commissions, or working parties and committees on education ranging from the Ominde's Education Commission (1964) the Task Force to Realign the Education Sector to the Constitution of Kenya 2010.³³ Of concern is the fact that most of these reports have not been implemented fully or at all. This is mainly because some recommended policy measures that were termed impractical or expensive. Some proposals questioned the roles of gate keeper, for instance, the creation of other centres of power that would reduce or rationalise the powers of the central Government technocrats and bureaucrats.³⁴ Or the right-based approach threatened rent-seeking opportunities.

1.4 The right to education in Kenya's constitutional framework

In Kenya and other States, basic education is to be addressed through a human rights and related perspectives. The right to education is a multi-faceted right that has at least two dimensions that need to be fulfilled: First, there is the right to the relevant opportunities, in quantitative terms quantitative (for everyone). Second, there is the qualitative right to education. This addresses what education, for how long, provided by whom and for whom. It also leads to full development of the human

³² E.S. Atieno Odhiambo (2004) "Hegemonic enterprises and instrumentalities of survival: Ethnicity and democracy in Kenya," in Bruce Berman, Dickson Eyoh & Will Kymlicka (eds) *Ethnicity & Democracy in Africa*, Oxford: James Currey, pp.167-182; E.S. Atieno Odhiambo (2003) "*Matunda ya Uhuru*, Fruits of Independence: Seven theses on nationalism in Kenya," in E.S. Atieno Odhiambo & John Lonsdale (2003) *Mau Mau and Nationhood: Arms, Authority, and Narration*, Ohio University Press, Ohio, pp. 37-46. James Currey, Oxford; EAEP, Nairobi; & Ohio U. Press, Athens 37-45 (Chap 20; Peter Anyang' Nyong'o (1989) "State and society in Kenya: The disintegration of the nationalist coalitions and the rise of presidential authoritarianism 1963-78," 88 (351) *African Affairs* 229-251. See also Keith Kyle (1997) "The politics of the independence of Kenya," 11:4 *Contemporary British History* 42-65. Cf. Hilda Nissimi (2001) "Illusions of world power in Kenya: Strategy, decolonization, and the British base, 1946-1961," 23:4 *The International History Review*, 824-846.

³³ Report by the Task Force on the Re-Alignment of the Education Sector to Vision 2030 and the Constitution of Kenya 2011, at https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&ved=0CDUQFjAA&url=http%3A%2F%2Fwww.vision2030.go.ke%2Fcms%2Fvds%2FTask_Force_Final_Report_Feb_20123.pdf&ei=IjnMUBOPLMen0QXD9oGwCg&usq=AFQjCNGiQMv8b4oEcKgtBbyAIgbdcMkk2w&sig2=5NPgEF_X7KmyE9zUTKQ31Q&bvm=bv.48572450,d.d2k (accessed 26/6/2013). Ministry of Education website, at <http://www.education.go.ke/ShowPage.aspx?department=1&id=1164> (accessed 26/6/2010).

³⁴ In 1964, there was the Prof S.H. Ominde Commission; in 1976, there was the National Committee on Educational Objectives and Policies led by Mr Peter Gachathi; in 1981, the Presidential Working Party on the Second University in Kenya led by Prof Collins B. Mackay; in 1988 the Presidential Working Party on Education and Manpower Training for the Next Decade and Beyond led by Mr James Kamunge; in 1999, there was the Commission of Inquiry into the Education System of Kenya led by Dr Davy Koech. Others include 2006-08: Task Force to Harmonise ETR (Kamunge; current author was Vice-Chair); Eddah Gachukia: *Taskforce on the Implementation of Free Primary Education in Kenya* (2003); Kabiru Kinyanjui: *Transformation of University Education in Kenya* (2007); and Douglas Odhiambo: *Realigning Education to the Constitution and Vision 2030* (2012).

personality fundamental to the fulfilment of other rights, freedom and the maintenance of peace.³⁵

As indicated the right to education is a right to all under article 43. The UNESCO Convention against Discrimination in Education 1960 imposes an even higher obligation on the state to ensure that basic and higher education are offered without any discrimination. This position has been buttressed in the Kenyan Constitution.³⁶

The Constitution of Kenya 2010 adopts a (human) rights based approach to education. The right to education is dealt with in through at least three approaches.

First, under Article 2(5) and (6) Kenya must implement commitments under international law such as general rules of international law, and international agreements, conventions or treaties. Article 2 enacts the doctrine of *pacta sunt servanda*: agreements which are (freely) entered into should be served (or obeyed) (in good faith). These include the Universal Declaration of Human Rights (UDHR), 1948, International Convention on Economic, Social and Cultural Rights, 1966 and numerous instruments under the UN Educational Scientific and Cultural Organisation (UNESCO).

Second, Article 43 addresses the universal right to education for all. Article 43(1)(f) provides that: “Every *person* has the *right to education*.”³⁷ This means adults and children of all tribes and races and whether able-bodied or differently abled or persons with disability (PWD). What of foreigners in Kenya?

Third, Article 53 provides for children’s right to free and compulsory basic education.³⁸

These provisions of the Bill of Rights (Chapter Four) provide for the right to education as one of the socio-economic rights.³⁹ The right under Article 43 (1) (f) is not textually limited to citizens or children but to all in Kenya. Some argue that this may be interpreted in terms of access to existing facilities, and subject to various reasonable charges even where such charges discriminate against non-Kenyans.⁴⁰

³⁵ Education should not be equivalent to schooling.

³⁶ Article 10(2)(b) (on national values and principles of governance that focus on social justice, inclusiveness, equity, human rights non-discrimination and protection of the marginalized); Article 27 (on equal protection or non-discrimination). Cf. Article 43(1)(f) “every person has the right to education.”

³⁷ My emphasis.

³⁸ Who is a child? Article 260; Section 2 of Children Act. What is free? Compulsory?

³⁹ See Chapter Four (Articles 43 & 53).

⁴⁰ Cf. Articles 21 & 24.

Discrimination may not be legitimately practised on the basis of county (as opposed to country) of origin because Kenya is not a federal state.⁴¹ Thus the quota system applied in national schools, and which has favoured the ex-Central province and Nairobi counties or districts in which the schools are located, is and has been unconstitutional and constitutionally suspect.⁴²

Article 53 of the Constitution further recognizes the right of every child to free and compulsory basic education. According to the International Standard Classification of Education (ISCE) of the United Nations Education, Scientific and Cultural Organization (UNESCO), basic education refers to education up to the secondary level. This delimitation by UNESCO has been enacted under the Basic Education Act, 2013⁴³ where basic education is defined as:

“the educational programmes offered and imparted to a person in an institution of basic education and includes adult education and education offered in pre-primary educational institutions and centres.”

2. National and international obligations in education under the devolved structure

The national Government and its three arms are the main agencies tasked with domesticating and implementing norms under international law.⁴⁴ County governments must also implement such laws, norms or policies through legislation, policy or administrative measures.

2.1. National obligations in education

Kenya can best meet its obligations by adherence to the national and international standards on education. The national standards are embodied in the Constitution 2010, the statutes, rules and regulations, as well as policies on education, training, science, technology, innovation and intellectual property (IP). Most of these require review in light of the Constitution of Kenya 2010.

The international standards on education, training, research and related matters include agreements, conventions and treaties that Kenya has ratified as well as the general rules of international law (Arts 2(6)&(5)). The task includes alignment of Kenya’s education policy to the following three instruments, among others: the Universal Declaration of Human Rights,

⁴¹ Former President Mwai Kibaki to (2002-13) controversially emphasized that Kenya is a unitary state. Cf. Ben Sihanya (forthcoming 2013) *Presidentialism and Administrative Bureaucracy: 1963-2013*, Innovative Lawyering & Sihanya Mentoring, Nairobi & Siaya.

⁴² See Art 27 of the Constitution of Kenya 2010; s. 82 of 1969 Constitution. See also submissions in *John Kabui Mwai & 3 Others v Kenya National Examination Council & 2 Others* [2011] eKLR. Cf. Nonso Ndumanya (2011) “Kenya: Quota system in education sector should be discarded,” on in *The Business Daily* (Nairobi) Thursday, 5/2/2011, at <http://ngonewsafrika.org/archives/6516> (accessed 27/9/2013). Cf. *Regents of the University of California v. Bakke* 985 Ct.2733 (1978); *Gratz v. Bollinger* 539 U.S. 244 (2003) & *Grutter v. Bollinger*, 539 U.S. 306 (2003) (on affirmative action in university administration).

⁴³ Basic Education Act No 14 of 2013.

⁴⁴ Arts 2(5), (6) (on international law in Kenya); Arts 93-6 (role of National Assembly and Senate); Arts. 129-135 (on executive powers and processed of exercising executive authority); Arts. 159-173 (on judicial authority, the legal system and the judicial function).

1948, International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966, and the International Standard Classification of Education (ISCED) of the United Nations Educational, Scientific and Cultural Organization (UNESCO).⁴⁵

Thus far, Kenya's classification of education conforms to the ISCED 2011 classification of basic education that extends up to secondary school, and including adult basic education and pre-primary education.⁴⁶ Kenyan pupils have various options in education, some of which are un- or under-regulated by the Kenya Government. These include a largely unregulated pre-school system:⁴⁷ the 8-4-4 Government system of 8 years in primary, 4 years in both the secondary and university levels. The tertiary component in the 8-4-4 system is largely un-or under- regulated. The foreign curricula implemented in Kenya includes the international General Certificate of Secondary Education (IGCSE) and the International Baccalaureate (IB).⁴⁸

2.2. International commitments in education

Article 13 of the International Convention on Economic, Social and Cultural Rights (ICESCR), 1966 provides for a right to education for everyone.⁴⁹ Further, the Convention provides that primary education shall be compulsory and free for all and that secondary education shall be made generally available to all.

The state is the main duty bearer with respect to the right to education. How can the Kenyan State meet her national, international, regional, sub-regional and other transnational

⁴⁵ UNESCO International Standard Classification of Education (ISCED 2011); cf. HWO Okoth Ogendo (1975) "National implementation of international responsibility: some thoughts on human rights in Africa," *East African Law Journal* 10.

⁴⁶ Section 2 of Basic Education Act 2013. See also Republic of Kenya (2005) Sessional Paper No 1 of 2005 on *A Policy Framework for Education, Training and Research*, *op. cit.*, at 35.

⁴⁷ International Labour Office (2012) *Right beginnings: Early childhood education and educators: Global Dialogue Forum on Conditions of Personnel in Early Childhood Education*, Geneva, 22–23 February 2012/International Labour Office, Sectoral Activities Department. Geneva, ILO, 2012. See also Department for International Development (1999) "Strengthening Primary Education in Kenya," at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/67971/ev627s.pdf (accessed 20/7/2013). Cf. Chris Wosyanju (2009) "The System of Education in Kenya," at <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&ved=0CD8QFjAA&url=http%3A%2F%2Finternational.iupui.edu%2Fkenya%2Fresources%2Feducation-in-Kenya.pdf&ei=F5PrUbnsLoXYtQag7oGYBQ&usg=AFQjCNHXXOszuixRuJAPR3QRosWMy3-4GQ&sig2=B-7gs5UBspfjB84gC9mQ6g&bvm=bv.49478099,d.Yms> (accessed 20/7/2013).

⁴⁸ International Baccalaureate Organisation website, at <http://www.ibo.org/country/KE/> (accessed 13/7/2013).

⁴⁹ Klaus Dieter Beiter (2006) *The Protection of the Right to Education by International Law: Including a Systematic Analysis of Article 13 of the International Covenant on Economic, Social and Cultural Rights*, Martinus Nijhoff Publishers, Leiden. See also Audrey Chapman & Sage Russell (eds) (2002) *Core Obligations: Building a Framework for Economic, Social and Cultural Rights*, Intersentia nv, Antwerp.

responsibilities in education? Kenya is a member of the international community, including the UN, the African Union (AU), the Commonwealth and the East African Community (EAC).⁵⁰

Under Article 2 of the Constitution, Kenya has a duty to implement commitments it has entered into under international law. These include the United Nations Educational and Scientific and Cultural Organisation (UNESCO). Under UNESCO, basic education lasts for at least 12 years as indicated. This is primary and secondary education in Kenyan terms and under Article 14 of the ICESR 1966.

Questions arise regarding the concept of “free” education. What is the definition of “free” education? And what aspects of education are considered free? Some of the main cost centres are infrastructure (including classrooms, libraries, workshops, labs and toilets; tuition fees, curriculum support or teaching and learning materials (textbooks, journals,...); teaching aids (chalk, LCD projectors...); uniforms, sanitary towels (for female pupils); and even food in arid and semi-arid lands (ASALs) as well as in poorer sectors.⁵¹

The 1988 Working Party on Education and Manpower Training for the Next Decade and Beyond (Kamunge report) emphasised cost sharing. In fact it was cost transfer from the State to users and parents or guardians in education and health, among others.⁵² And the Report of the Task Force on the Implementation of Free Primary Education in Kenya (Eddah Gachukia Committee of 2003) recommended Government funding education at KES 1020 per pupil in primary schools.⁵³ The funding only focuses on free tuition. Why? Some policy makers argue that access should be facilitated through a day school policy as the norm. But this undermines equity, equality and the

⁵⁰ EAC Member States are Kenya, Uganda, Tanzania, Rwanda and Burundi. EAC is pursuing some important education law and policies. See Ben Sihanya (2012) “Paper 4: Practical Implementation of Annex VI to the East African Community Common Market (Mutual Recognition of Academic and Professional Qualifications) Regulations 2011,” in Republic of Kenya (2012) *Report on Support in Trade Negotiations for Professional Regulatory Bodies and Professional Associations*, Government Printers, Nairobi, pp 79-90.

⁵¹ ASALS are largely in Northern Kenya, Southern Rift Valley, and Coastal Kenya. ASALs are expanding because of marginalisation and climate change.

⁵² Report of the Kenya Government (1988) *Report of the Presidential Working Party on Education and Manpower Training for the Next Decade and Beyond*, Government Printer, Nairobi (Kamunge report).

⁵³ World Bank (2009) *Abolishing School Fees in Africa: Lessons Learned from Ethiopia, Ghana, Kenya, Malawi and Mozambique*, World Bank Publications, World Bank, Washington, DC, 132. See also Njora Hungi (2011) “Quality of Primary School Inputs in Kenya,” Policy Brief Number 2 under the auspices of Southern and Eastern African Consortium for Monitoring Educational Quality. Cf. D.N. Sifuna (2005) “The illusion of universal free primary education in Kenya,” *Wajibu*, 20(4) at http://africa.peacelink.org/wajibu/indices/index_1581.html (accessed 5/5/2010).

integration guaranteed under the Constitution and the Basic Education Act 2013. Pupils and students from far away cannot access day schools.⁵⁴

Compulsory basic education means every child is required to receive education. It is mandatory. Who has the right? the duty? The pupils have the right and duty (to attend school); the state has the power and duty (to provide appropriate facilities); and the family and guardians (to facilitate attendance). Of course teachers have the duty to teach and the right to an income and appropriate facilities.

Compulsory education also addresses disciplinary measures such as suspension or expulsion.⁵⁵ A pupil should not be expelled from school because expulsion or exclusion would negate the right to free and compulsory education under Article 53. One of the main problems created by the “no expulsion” perspective is the absence of proper avenues for tackling disciplinary cases that ordinarily led to expulsion. The 1969 Constitution was silent on the right to education and on expulsion. Section 5 of the Education (School Discipline) Regulations under the Education Act 1968, Cap 211 (repealed) empowered the Director of education to exclude or expel pupils or students in appropriate circumstances. Expulsion decisions are to be made by the Cabinet Secretary.⁵⁶

The Basic Education Act (BEA) 2013 places a higher requirement on the Government. This is because under the BEA, 2013 basic education includes secondary school education. And basic education shall be free and compulsory.⁵⁷ Therefore, there is an extra burden on the Kenya Government to make secondary education free and compulsory. This is beyond the standards provided by the ICESCR 1966 that limits it to primary education.

However, under Article 21(2) of the Constitution of Kenya 2010 the realisation of the right to education is subject to progressive realisation depending on the resources available to the Government at a point in time. The Governance will be judged in terms of the legislative policy and administrative measures it takes.⁵⁸ And at least two matters may be scrutinised under Article 21(2): First, priorities in funding national or *central* Government programmes. And second,

⁵⁴ Cf Basic Education Act, 2013 (on integration in basic education); National Cohesion and Integration Act, No. 12 of 2008.

⁵⁵ The Education Act 1968, Cap 211 (repealed) called it exclusion and vested the power in the Director.

⁵⁶ Under the Education Act 1968, it was Directors.

⁵⁷ Article 43 and 53 of the Constitution as read with section 2 of the Basic Education Act, 2013.

⁵⁸ Forum for Children Rights in Kenya (2011) “The Government’s obligations in fulfilling the right to basic education,” at <http://ffcrk.org/editors-choice/92-the-governments-obligations-in-fulfilling-the-right-to-basic-education.html> (accessed 21/7/2013).

allocations and disbursements to secure equitable distribution as well as equalisation in the interest of the people and county government.⁵⁹

3. Devolution of education services in Kenya

The devolved government structure is required to work to vindicate the Constitution's guarantee of (quality) education to the citizens. Devolution encompasses citizen participation⁶⁰ and the principle of subsidiarity⁶¹ as major tenets. Citizen participation may be made real by the creation and facilitation of the County Education Board (CEB) to vindicate the principle of subsidiarity.⁶² The principle of subsidiarity requires that decision making and implementation are to be effected by the level of government closest to the individual citizen.

However, the Constitution of Kenya 2010 recognises that not all services are appropriate for devolution as this may not result in the most equitable or efficient delivery of public services. According to some, that explains why education standards and policy is largely left to the control of the central Government. And important aspects of implementation are left to the 47 county governments.⁶³

County governments can perform the functions assigned to them and impart in young people meaningful skills, knowledge, attitudes, values and innovation (SKAVI) that can make the pupils or students useful in the local, national and transnational economy. County governments can also use their resources to get young people trained at the youth polytechnics and related institutions of technical industrial vocational education and training (TIVET) to the local and national industries or social economy. They may give appropriate incentives to companies that further these youth's training.

The devolution of the functions should follow the Constitution. Reports on finances, statistics and other pertinent issues should be shared with the Cabinet Secretary. There should be

⁵⁹ Cf. Wachira Maina (2013) "Shallow understanding of problems devolution was to solve could lead to its failure," *The EastAfrican*, Saturday, September 28, 2013, at <http://mobile.theeastafican.co.ke/News/Why-devolution-will-not-end-inequality-in-Kenya/-/433842/2010884/-/format/xhtml/-/ur5dst/-/index.html> (accessed 1/10/2013).

⁶⁰ Sihanya (2013) "Public participation and public interest lawyering under the Kenyan Constitution: theory, process and reforms," Vol 9 (1) *Law Society of Kenya Journal*, *op. cit.*

⁶¹ Robert K. Vischer (2001) "Subsidiarity as a Principle of Governance: Beyond Devolution," Vol 35, No 1 *Indiana Law Review* pp.104-142. See also Kevin Morgan (2001) "A Europe of the Regions? The Multi-Level Polity: Subsidiarity in the European Union: Part IV "Dilemmas: The Challenge of Subsidiarity," at http://www.devolution.ac.uk/EU_Regions_4_2.htm (accessed 1/5/2013).

⁶² Cf. Sihanya (2013) "Public participation and public interest lawyering under the Kenyan Constitution: theory, process and reforms," Vol 9 (1) *Law Society of Kenya Journal* 1-32, *ibid.*

⁶³ See shareholder and other perspectives during the work of the Task Force to Align Education to the Constitution and Vision 2030 (2011-13). This writer was a member and Chair of the Draft Education Bills Drafting Committee. Fourth Schedule Constitution of Kenya 2010.

appropriate fora for officials of county and central or national Government to consult on education.

There is need for a county educational organ in relation to the quality assurance function as well as management and governance. Quality assurance is a function of the national Government, the county governments and institutions. This is because quality assurance and management are issues of policy and implementation under the Fourth Schedule. And quality assurance and management relate to internal operations as well as external oversight.⁶⁴ Thus quality assurance takes place at the following levels: institutions, district, county and national.

The Jubilee Government of President Uhuru Kenya (Kenyatta plus) have insisted that they will spend between 15 to 53 billion KES to buy laptops for standard I pupils.⁶⁵ There are problems associated with the proposed laptops for 2014 Standard I pupils. There are priorities in security, education and health, as well as other (social) sectors.⁶⁶ Chapters Four (on the Bill of Rights), Twelve (Public Finance) and Article 21 (Implementation of rights and fundamental freedoms) provide for how prioritization may be addressed. Some of the key parameters include finances to run the education, training, research and innovation (ETRI) system equally and equitably; infrastructure development and improvement;⁶⁷ equipment for ETRI; and providing incentives for human resources to run ETRI to secure standards, quality and relevance. And Arts 10, 38, 118 and Arts. 201-05 address the question of public participation in policy making, legislation, and implementation.

Remarkably, the laptops were essentially a footnote in the Jubilee manifesto. It has not been subjected to inclusive policy and legislative debate with the relevant stakeholders including the parents of the purported beneficiaries, the experts in ETRI, or the educators who will be required to use the laptops as teaching and learning aids.

⁶⁴ ISO, Performance Contracting (PC) and Results Based Management (RBM), including Rapid Result Initiative (RRI) have internal and external components.

⁶⁵ *The Star* reported that the laptops may have been procured technically. Felix Olick (2013) "Laptop project is unstoppable, says Uhuru, Ruto," *The Standard* on 13/7/2013, at https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&ved=0CCwQFjAA&url=http%3A%2F%2Fwww.standardmedia.co.ke%2F%3FarticleID%3D2000088261%26story_title%3DKenya%3A%2520Laptop%2520project%2520is%2520unstoppable%2C%2520say%2520Uhuru%2C%2520Ruto&ei=5p3tUaq1H5Sk0AXbsoGoDg&usg=AFQjCNEohhAL41_0sFHnDIniWlrcEFQruw&sig2=ZOBLRdzlhXGHpcdD29c6eg&bvm=bv.49478099,d.d2k (accessed 22/7/2013). Kenyatta plus or K+ controls The National Alliance (TNA) party. William Ruto of the United Republic Party (URP) is the Deputy President.

⁶⁶ Lucianne Limo (2013) "Green Hand Organization moves to court to stop free laptop for schools project," *The Standards Online* on Thursday, May 30, 2013 at http://www.standardmedia.co.ke/?articleID=2000084818&story_title=ngo-in-court-to-stop-laptop-project (accessed 26/6/2013). (opposing the laptop project due to prospective e-waste, etc) Cf. News24 website (2013) "Free laptop project case dropped," at <http://m.news24.com/kenya/National/News/Free-laptop-project-case-dropped-20130613> (accessed 26/6/2013).

⁶⁷ Most pupils do not have reasonable class rooms, desks, and learning materials generally.

Are the laptops merely intended for some feel good factor? Is it about the arrogance of power? Or about primitive accumulation or rent seeking, in terms of dosh or jobs for the boys and girls?⁶⁸ Or a government focused on showbiz, cat walk or *maua*? How are appropriate competencies including skills, knowledge, attitudes, values and innovation (SKAVI) to be imparted and examined? What of the security and durability of laptops at night or during the day (as the toddlers study under trees or go to *susu*)? Access to power and related infrastructure? What about in-built obsolescence of the technology or equipment and the requisite infrastructure and repairs, maintenance and replacement? Teacher training to make the laptops useful?

There is need for a new curriculum that will cater for a variety of issues arising from the Constitution, the new education statutes, and rules and regulations that are still under preparation, as well as Vision 2030.⁶⁹ Modes of delivery, and teaching or learning aids are never procured before the foregoing reform steps are taken.

Other challenges that a keen central and county government would address include standards, quality and relevance as well as transition (standard 8 to Form I and Form 4 to college or university). There is a lot of wastage.⁷⁰

3.1. The rule and principle on national and county educational services

The Fourth Schedule to the Constitution states that the central or national Government shall discharge the following functions relating to education:⁷¹

- “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,⁷² secondary schools⁷³ and special education institutions.
17. Promotion of sports and sports education.”

⁶⁸ Gaylord Gitau (2013) “Laptop Revolution In Kenyan Schools,” *The Star*, Saturday, 27/4/2013, at <http://www.the-star.co.ke/news/article-118536/laptop-revolution-kenyan-schools#sthash.XgRlZDSJ.dpuf> (accessed 22/7/2013).

⁶⁹ *ibid.*

⁷⁰ The Kenya Human Rights Commission (KHCR) (2012) *Strategic Plan 2008 – 2012*, at https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&ved=0CDAQFjAA&url=http%3A%2F%2Fwww.khrc.or.ke%2Fresources%2Fpublications%2Fdoc_download%2F37-khrc-strategic-plan-2008-12.html&ei=JWysUdnnBcnfOPzXgLgC&usg=AFQjCNFZNk_gis4SAnp7fJrjhrkCphg4hw&sig2=vX5MBgC-cVnruyZ9FvVNpw&bvm=bv.47244034,d.ZWU (accessed 1/5/2013).

⁷¹ See Annex 2 below.

⁷² This is usually called special needs education (SNE) and relates to education for talented or gifted learners (sports, drama, music...) and for persons with disability (PWD).

⁷³ This includes International General Certificate of Secondary Education (IGCSE).

A major function relating to education which has been left to the 47 county governments is:

“9. Pre-primary education, village polytechnics,⁷⁴ homecraft centres and childcare facilities.”

These provisions have been given life in some laws with regards to the discharge of education functions between the two levels of government. These include the Basic Education Act 2013, the Teachers Service Commission Act 2012, the Kenya Institute of Curriculum Development Act, 2012 and the Kenya National Examinations Council Act, 2012. Two laws are to focus on higher education generally: Technical Industrial and Vocational Education Act (TIVETA), 2012 and the Universities Act 2012.⁷⁵

The sharing of functions was done with due consideration to the principle of “unbundling of functions” as discussed in the final Report of the Task Force on Devolution.⁷⁶ According to the unbundling of functions principle of devolution, further clarification of functions is necessary. These relate to the specific intent of defining and allocating functions and competences to various actors in a manner that leads to effective delivery of public services. Unbundling of functions follows where the Constitution is not specific.⁷⁷

3.2. The structure of devolved educational services in Kenya

The Basic Education Act 2013 establishes the National Education Board (NEB) and the County Education Board (CEB) to carry out an array of functions at the two levels of devolved government.⁷⁸

The National Education Board (NEB) is to be the link between the Ministry of Education, the Cabinet Secretary and the County Education Board. It is noteworthy that the functions of the NEB are mostly advisory and facilitative.⁷⁹ Section 5 provides that:

⁷⁴ Sic: the more appropriate term is “youth polytechnics.”

⁷⁵ Some laws address more specific aspects of education, training, research and innovation. These include Science, Technology and Innovation Act, No 28 of 2013, The Legal Education Act, 2012; Kenya School of Law Act No 26 of 2012.

⁷⁶ Republic of Kenya (2010) *Report of the Task Force on Devolved Government* (TFDG) was established in October 22, 2010 through Gazette Notice 12876 dated 25th October 2010.

⁷⁷ Cf. The Fourth Schedule and Articles 187 (on transfer of functions between the two levels of governments, or intra-governmental transfer). See Annex 2 on Fourth Schedule on Distribution of functions between the national or central Government and the county Governments.

⁷⁸ Sections 5 and 18 of Basic Education Act 2013, respectively.

⁷⁹ See under Article 259(11) “advise,” “advice,” “advisory” and cognate expressions have deeper meaning than before. Article 259(11) states:

“If a function or power conferred on a person under this Constitution is exercisable by the person only on the advice or recommendation, with the approval or consent of, or on consultation with, another person, the function may be performed or the power exercised only on that advice, recommendation, with that approval or consent, or after that consultation, except to the extent that this Constitution provides otherwise.”

“(2) The functions of the Board shall be to advise the Cabinet Secretary, the Department of Education and related departments on policy matters in respect to–

- (a) collaboration with the Quality Assurance and Standards Council, Teachers Service Commission and with other stakeholders to promote standards in basic education and training;
- (b) working with all relevant authorities and agencies to ensure that all the barriers to the right to quality education are removed and that the National and County governments facilitate the realization of the right to education by all Kenyans.”

This is partly informed by the fact that the Cabinet Secretary’s functions should not conflict or overlap with those of any other statutory body or office.

Section 5 further provides that NEB’s function is to address:

- “(c) the initiation of guidelines for approval by the Cabinet Secretary on the establishment of basic education institutions;
- (d) putting measures in place to ensure all children attend and remain in school to complete basic education requirements;
- (e) putting measures to ensure, where applicable, transition to the next level of education, especially for the vulnerable and marginalized children;
- (f) any other matter as shall from time to time be referred to the Board by the Cabinet Secretary.”⁸⁰

Section 17 of the Basic Education Act 2013 establishes the County Education Board (CEB). The CEB is an agent of the NEB. Despite the fact that the name may indicate otherwise, the CEB is in no way answerable to the County government. The County Education Board is assigned the task of implementing the proposals and directions of the National Education Board, and by extension the *central* or national Government through the Ministry of Education.

The functions of the CEB, according to section 18(1), fourteen (14). The CEB is to:

- “(a) oversee in consultation with the county government, the operation and management of youth polytechnics,⁸¹ pre-primary education including early childhood care and education programmes in the county;

⁸⁰ It was widely expected that Ministries would be renamed Departments following the US and UK approach where Cabinet Secretaries (not Ministers) preside over Departments (not consisting of Government ministries?). Presidential Circular No 1 of 2013 largely retained the term Ministry. It replaces Presidential Circular No. 1 of 2008 on the structure of the Grand Coalition between Orange Democratic Movement (ODM) and Party of National Unity (PNU).

⁸¹ As drafters, we deliberately used the more accurate and progressive “youth” polytechnic as a corrective to the inaccurate and retrogressive “village” polytechnic used in the Fourth Schedule to the Constitution. This author was

- (b) coordinate and monitor education and training in the county on behalf of the national government and the county government;
- (c) interpret national policies in education based on the county's needs;
- (d) initiate proposals for policy reforms;
- (e) plan, promote, develop, and coordinate education, training and research in the county in accordance with the provisions of this Act, the national education policy⁸² and the laws and policies of the county government;⁸³
- (f) collaborate with the Board of Management, the Principal, the Head Teacher, and other appropriate authorities in the management of basic schools;
- (g) register and maintain a data bank of all education and training institutions within the county.”

The other functions of the County Education Board (CEB) under section 18(1) are to:

- “(h) monitor curriculum implementation in basic education in the county;
- (i) monitor the conduct of examinations and assessments at the basic education and training levels in the county in collaboration with all the relevant national bodies;
- (j) collaborate with the Teachers Service Commission on teacher management within the county;
- (k) prepare and submit a comprehensive school termly annual report including Educational Management Information System data to the Cabinet Secretary on all areas of its mandate including education and training services, curriculum, policy implementation and school based audit report within the County;
- (l) coordinate with all relevant agencies to ensure that all the barriers to the right to quality education are removed and with the National Government to facilitate the realization of the right to education within the county;
- (m) put measures in place to ensure all children and youth of school going age within the county attend and stay in school to complete basic education;
- (n) perform such other functions as may be necessary for the better carrying out of the functions of the county education board under this Act or any other written law.”

Under s. 18(2) of the Basic Education Act, 2013,

“The County Education Board may in consultation with the National Education Board and relevant stakeholders appoint a sub county education office with clear functions and powers.”

the Chair of the Ministry of Education's Education Bills Drafting Committee that worked under the guidance of then Education Minister Mutua Kilonzo and the Ministry's team. Co-drafters were Mr Dima Dima and Mrs Vane Akama.

⁸² Sessional Paper No. 1 of 2005 is still a major generic policy framework on education, training and research. There are other sectoral policies on education, training, research and innovation. Most require review to align them to the Constitution 2010 and Vision 2030.

⁸³ County governments are yet to formulate relevant policies or enact relevant laws or regulations. In the meantime, Senate, the constitutional guardian of county government, especially in the legislative context, is under attack from the presidency (especially through the County Commissioners and the devolution technocracy or *kiama*), the national executive generally (especially the National Treasury, the Transition Authority, the Attorney-General's office, security agencies....), and some members of the National Assembly who (may not) appreciate the counter- and anti-devolution crusade.

3.3 Devolution and financing of education

Article 203(2) of the Constitution of Kenya 2010 provides that at least fifteen percent (15%) of the national budget shall be allocated to the 47 County Governments so as to facilitate the actualisation of the County Governments' role under the Fourth Schedule.⁸⁴ These funds when subjected to the further checks and balances under the County Government shall ensure equitable, transparent and accountable use to meet county level obligations. Funds at the national level are required to be used under the guidance of the National Assembly, the Controller of Budget, the Auditor General,⁸⁵ the National Treasury⁸⁶ and the Cabinet Secretary.⁸⁷

The first budget following the operationalisation of devolution has come under close scrutiny. The National Assembly initially allocated KES 210 billion for the 47 county governments under the Division of Revenue Bill, 2013. The Speaker of the National Assembly, The National Alliance's (TNA's) Mr Justin Muturi, then forwarded the Bill to Senate for its contribution through the Senate Speaker, United Republican Party's (URP's) Mr Ekwe Ethuro. The Senate passed the Division of Revenue Bill, 2013 after amending it by raising the allocation to KES 258 billion for the County Governments from the initial KES 210 billion that had been passed by the National Assembly.⁸⁸ The National Assembly reversed Senate.

A supremacy war broke out. Kenyatta Plus ignored Senate's concerns and even the constitutional role of the mediation committee and assented to the Bill.⁸⁹ Then Senate vowed to challenge the validity of the Bill in the courts.⁹⁰ Senate Speaker, Hon Ekwe Ethuro, was quoted as stating that

⁸⁴ These include roles such as "9. Pre-primary education, village polytechnics, homecraft centres and childcare facilities."

⁸⁵ Article 226 of the Constitution of Kenya 2010.

⁸⁶ Article 225 of the Constitution of Kenya 2010.

⁸⁷ Article 208 of the Constitution of Kenya 2010; sec. 88 of Basic Education Act 2013.

⁸⁸ The "new figure" reflected 42.4 per cent of the Sh 608 billion in audited revenue. See Moses Njagih (2013) "Ethuro dismisses Muturi's ruling," at <http://www.standardmedia.co.ke/choice2013/home/article/2000084292/1/-ethuro-dismisses-muturi-s-ruling> (accessed 26/6/2013).

⁸⁹ Kenyatta Plus office explained that he had signed because it would have delayed budget and that he was persuaded by national interest when he accented to the bill. Political expediency trumps constitutional text? See Lordrick Mayabi (2013) "Senators in court over revenue law stand-off," at <http://www.capitalfm.co.ke/news/2013/06/senators-in-court-over-revenue-law-stand-off/> (accessed 21/7/2013).

⁹⁰ Hon Kipchumba Murkomen, United Republican Party (URP) Senator for Elgeyo Marakwet County, was quoted as stating that "We have no business being senators if we have no business to do with allocation of resources to our counties." See John Ngirachu & Alphonse Shiundu (2013) "President Kenyatta assents to Revenue Bill - Duale," *The Business Daily* (Nairobi), Tuesday, June 11, 2013, at <http://www.businessdailyafrica.com/-/539546/1879330/-/r8waip/-/index.html> (accessed 26/6/2013).

“The Senate claims for itself the right to determine the scope and extent of its role and mandate on any matter, including Bills, not least of all a Division of Revenue Bill.”⁹¹

Struggles such as these between the two Houses if not corrected will see development stall in the delivery of crucial governmental services such as education. The education sector shall face double jeopardy since delivery of educational services applies at the national and County levels. As such delays in the allocation of funds for education shall have far reaching effects on service delivery. This may lead to other constitutional questions such as the violation of the right to education under Article 43 and Article 53.⁹²

The Fourth Schedule provides that the County governments’ role as far as education is concerned is primarily pre-primary education, “village” (sic: Youth) polytechnics, homecraft centres and childcare facilities.⁹³ It must be understood that the classification of schools as county schools does not mean a burden on the County government to financially support them.⁹⁴ This is based on the division of functions in Part I of the Fourth Schedule which places institutions of higher education primarily under the National Government.⁹⁵ The administration of schools within the county shall remain the sole responsibility of the National Government.

The Regional Commissioners and County Commissioners controversially appointed under the National Government and Coordination Act⁹⁶ were tasked with the co-ordination of national Government functions as set out in the Constitution.⁹⁷ How can the county commissioners be involved in overseeing resource allocation or use in schools or in counties without offending the constitutional and statutory design of devolution? County governments have a mandate and great claim to ensure that the allocation and use of funds promote non-discrimination and protect of the marginalized besides securing good governance, integrity, transparency and accountability.⁹⁸

⁹¹ *ibid.* Prof Peter Anyang’ Nyong’o, ODM, also stated that “From a purely layman’s point of view, something is wrong somewhere.” See Anyang’ Nyong’o (2013) “Division of revenue: Who is the money for anyway?” *The Saturday Standard* on June 15, 2013 at http://www.standardmedia.co.ke/?articleID=2000086066&story_title=division-of-revenue-who-is-the-money-for-anyway (accessed 26/6/2013). See also Evelyn Kwamboka (2013) “Fresh headache for Uhuru on governors: County chiefs declare they will ask Kenyans to approve amendments to the Constitution through a national referendum to give Senate more powers,” *The Standard* (Nairobi), at 1-3.

⁹² Critics see cynism in Kenyatta\Plus’s handling of this and related devolution matters: killing devolution through financial constraints; and generally infidelity to the Constitution to sustain the Kenyatta-Moi-Kenyatta continuation of personal and dynastic role. The MPs and Senators are largely engaged in proxy wars targeting devolution.

⁹³ S. 9 of Part II in the Fourth Schedule of the Constitution of Kenya 2010.

⁹⁴ Secondary schools are classified as national, county (formerly provincial), and district or local. Cf. Benjamin Muindi (2012) “Kenya to expand national secondary school system,” *Africa Review* on December 17, 2013 at <http://www.africareview.com/News/Kenya-to-expand-national-secondary-school-system/-/979180/1645834/-/s18esr/-/index.html> (accessed 25/6/2010).

⁹⁵ S. 15 of Part I in the Fourth Schedule of the Constitution of Kenya 2010.

⁹⁶ National Government and Coordination Act, No 1 of 2013.

⁹⁷ S.17 of the National Government and Coordination Act 2013.

⁹⁸ Article 10 of the Constitution of Kenya 2010.

4. Devolution of education and private schools

Devolution of education services face critical challenges and competition from the already established private schools in the counties. Some see this as a positive challenge for the governments to better the quality of education offered in public schools. Seen from this perspective, the competition from the private schools is a positive challenge to the government. The notion that the government has unmatched resources is not reflected in the state and conditions in public schools.⁹⁹ In service delivery, the government fades in comparison to private schools especially at the primary school level.

The standards of education in public schools poses the important question of poor planning, wrong prioritization, mismanagement and neglect by the *central* or national Government.¹⁰⁰ Private schools have for long dominated the top slots and positions in the Kenya Certificate of Primary Education (KCPE).¹⁰¹

It has been observed that the enrolment in private schools has skyrocketed over the past decade. In their work in 2011, Dr Mwangi Kimenyi and colleagues argue that this trend was driven, somewhat paradoxically, by the abolition of fees in public primary schools in 2003, and the concomitant decline in the perceived quality of public schools.¹⁰² The upsurge in private school enrollment means more work for the Government to give matching if not better quality education to compete adequately with the private schools at the county level.

Failure of the Government to address the private school issue adequately may render the devolution of education services inconsequential or counter-productive. This would mean lower teacher/student ratios in public schools, student/toilet ratio, student/textbook ratio, gender balance, teachers remuneration and better infrastructure.¹⁰³ The recommended teacher student ratio is 1:35.¹⁰⁴ In Kenya, however, the teacher: student ratio in most public schools ranges

⁹⁹ Tessa Bold, Mwangi Kimenyi, Germano Mwabu and Justin Sandefur (2012) “The high return to low-cost private schooling in a developing country,” Working Paper February 28, 2012 under the auspices of The International Growth Centre (IGC), at https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=6&ved=0CEMQFjAF&url=http%3A%2F%2Fwww.theigc.org%2Fsites%2Fdefault%2Ffiles%2FBold%2520et%2520al%2520final.pdf&ei=v4A1UsWWNOeI4gTYpYHoAw&usg=AFQjCNEym_sNLmvjhAKMIEqn9vsAZ3FugQ&sig2=Nzn6O6OdZZx3t2QY7cG9WQ&bvm=by.52164340.d.bGE (accessed 15/9/2013).

¹⁰⁰ Rachel Glennerster, Michael Kremer, Isaac Mbiti & Kudzai Takavarasha (2011) “Access and Quality in the Kenyan Education System: A review of the progress, challenges and potential solutions,” A report prepared for Office of the Prime Minister of Kenya in Collaboration with The Abdul Latif Poverty Action Lab at MIT (J-PAL) and Innovations for Poverty Action (IPA).

¹⁰¹ *ibid.* Tessa Bold, Mwangi Kimenyi, Germano Mwabu and Justin Sandefur (2012) “The high return to low-cost private schooling in a developing country,” *op. cit.*

¹⁰² Tessa Bold, M. Kimenyi, G. Mwabu, & J. Sandefur (2011) “Why did abolishing fees not increase public school enrollment in Kenya?” Center for Global Development Working Paper Series, 271.

¹⁰³ Republic of Kenya (2008) *Report to the African Union on the Implementation of the African Charter on the Rights and Welfare of the Child-2003 to 2007* Government Printer, Nairobi, 67.

¹⁰⁴ UNESCO Institute for Statistics (2006) *Teachers and Educational Quality: Monitoring global needs for 2015*, UNESCO, UIS, Montreal, at <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=6&ved=0CFIQFjAF&url=http%3A%2F%2F>

between 1:50 and 1:100. An example is Kapsimbiri Primary in Nakuru County, (previously Rift Valley Province).¹⁰⁵ The school has only 15 teachers against more than 800 pupils.¹⁰⁶

The implementation and enforcement of the required ratios and standards is more achievable at the county level when applying the principle of subsidiarity. Empowerment of government schools from the county level shall be the best strategy of giving them a competing chance against the private schools.

5. Teachers' strikes

Teachers in Kenya have organised themselves into trade unions for purposes of collective bargaining according to the employment or labour laws.¹⁰⁷ The two main trade unions formed by teachers are the Kenya National Union of Teachers (KNUT) and the Kenya Union of Post Primary Education Teachers (KUPPET).

Section 4 of the Labour Relations Act 2010 provides that every employee has the right to participate in forming a trade union or federation of trade unions, join a trade union or leave a trade union.¹⁰⁸ The right to be a part of trade union is further entrenched in article 41 of the Constitution of Kenya 2010.¹⁰⁹ The principles of collective bargaining provide the basis for the right to strike. This position has further been bolstered under Article 41 of the Constitution and section 76 of the Labour Relations Act 2010. The justification for teacher strikes is grounded on a claim to fair terms and conditions of work, including remuneration and the enforcement of past agreements with the central or national government as the employer.¹¹⁰

The right to strike is interpreted in the context of the Constitution and Kenya's political economy. There is apparent conflict between the right to strike under article 41 and the right to

[Fwww.uis.unesco.org%2FLibrary%2FDocuments%2Fteachers06-en.pdf&ei=P8FKUv6NAPgThQfQ1oDwDA&usg=AFQjCNG71XdOOa1kywT-U4o5hIvo2-igqQ&sig2=qZ4ae_JgPILKRT5_aFFiqA&bvm=bv.53371865,d.ZG4](http://www.uis.unesco.org/2FLibrary/2FDocuments/2Fteachers06-en.pdf&ei=P8FKUv6NAPgThQfQ1oDwDA&usg=AFQjCNG71XdOOa1kywT-U4o5hIvo2-igqQ&sig2=qZ4ae_JgPILKRT5_aFFiqA&bvm=bv.53371865,d.ZG4) (accessed 1/10/2013).

¹⁰⁵ *The Standard* (2013) "Teacher-pupil ratio still low despite high enrollment rate," in *The Standard*, Nairobi, Thursday, January 31, 2013, at http://www.standardmedia.co.ke/?articleID=2000076269&story_title=teacher-pupil-ratio-still-low-despite-high-enrollment-rate (accessed 15/9/2013).

¹⁰⁶ *ibid.* Esther Duflo, Pascaline Dupas & Michael Kremer (2007) "Peer effects, pupil-teacher ratios, and teacher incentives in Kenya," at <http://www.povertyactionlab.org/evaluation/peer-effects-pupil-teacher-ratios-and-teacher-incentives-kenya> (accessed 15/9/2013). See Annex I on List of the Counties.

¹⁰⁷ In Kenya, the Labour Relations Act provides for establishment of trade unions.

¹⁰⁸ Ben Sihanya (2013) "Public participation and public interest lawyering under the Kenyan Constitution: Theory, process and reforms," Vol 9 (1) *Law Society of Kenya Journal* 1-32.

¹⁰⁹ Article 41(2)(c) states that Every worker has the right to form, join or participate in the activities and programmes of a trade union. Sihanya (2013) "Public participation and public interest lawyering under the Kenyan Constitution: Theory, process and reforms," Vol 9 (1) *Law Society of Kenya Journal* 1-32.

¹¹⁰ For example the 2013 teachers strike which was based on the failure of the Treasury to factor in their Legal Notice No 534 of 1997 allowances into the preliminary budget estimates. See Ally Jamah (2013) "Report back to class or face the sack, teachers told," in *The Standard* on Tuesday, July 16, 2013 at http://www.standardmedia.co.ke/?articleID=2000088534&story_title=teachers-told-to-resume-work-or-be-sacked (accessed 26/8/2013).

education under articles 43 and 53. Can the legitimate right to strike be a ground for “limiting” the right to education? Can the right to education be interpreted widely as being the teacher’s duty to impart and the child’s right to receive education?

It has been argued that to protect the right to education, the right to strike should only be exercised after exhaustion of other means of dispute resolution.¹¹¹ This is the position adopted by the Court in the recent teacher’s strike which ran from June 25, 2013 to July 17, 2013.¹¹²

The Industrial Court declared the strike illegal after the Teachers Service Commission filed a petition in the Industrial Court in Nairobi seeking about four remedies.¹¹³ First, that the petitioner and the respondent decamp from their hard line position and proceed to negotiating table in good faith. Second, that the two parties report the outcome of the negotiations to court on July 15, 2013. Third, that teachers report to work on Tuesday, July 2, 2013 and any strike afterwards shall be unprotected and illegal. Fourth, that the parties, their members and their agents restrain from commenting on ongoing negotiations outside the negotiations.

Lady Justice Linet Ndolo ordered the teachers to report back to work on Tuesday July 2, 2013 stating that the teachers had failed to give the seven (7) day notice as required by the law.¹¹⁴ The Court also ordered the central or national Government and teachers to get back to the negotiating table and present a report in court in the 14 days that followed. The Court also imposed a fine of KES 5 million on KNUT, and the officials were handcuffed. In acceding to a few of the demands, Kenyatta Plus insisted that the teachers promise to support his laptop project!

Remarkably, the Industrial Court is still being used counter-constitutionally to suppress teachers, lecturers, health workers and other public sector employees. And the Salaries and Remuneration Commission (SRC) also came out as a cheer leader of Kenyatta Plus against teachers, insisting that the teachers could not be paid what they demanded, were promised by the Government and richly deserved.¹¹⁵ Both Kenyatta Plus and SRC had no role; SRC should have gazetted recommended pay for these workers.

¹¹¹ *Ibid.* Section 76(b) of the Labour Relations Act provides for conciliation. Cf. Johannes Petrus Rossouw (2012) “The feasibility of localised strike action by educators in cases of learner misconduct,” Vol 32(2) *South African Journal of Education* 133-143.

¹¹² Ally Jamah (2013) “Report back to class or face the sack, teachers told,” in *The Standard* on Tuesday, July 16, 2013 at http://www.standardmedia.co.ke/?articleID=2000088534&story_title=teachers-told-to-resume-work-or-be-sacked (accessed 26/8/2013).

¹¹³ *Teachers Service Commission v. Kenya National Union of Teachers* vide Petition No 23 of 2013. Cf. Lydia Matata (2013) “Court declares teachers strike illegal,” in *The Star*, Nairobi, on Monday, July 1, 2013, at <http://www.the-star.co.ke/news/article-126273/court-declares-teachers-strike-illegal#sthash.R6AjjfWe.dpuf> (accessed 11/9/2013).

¹¹⁴ *ibid.*

¹¹⁵ Lydia Matata (2013) “Court declares teachers strike illegal,” *op. cit.*

6. Challenges to implementation of devolution in education in Kenya

There are about four challenges regarding the implementation of education in the devolved systems of Government in Kenya. First, some of the roles assigned to the County Education Board (CEB) and the National Education Board (NEB) are vague. There remains a lot of discretion by the Cabinet Secretary in these national Government institutions.

Second, to some extent the Cabinet Secretary still retains a lot of powers under the devolved system too, even where county governments have a clear mandate. This constrains the effectiveness of the devolution in the education sector.

Third, devolution in the education sector is largely in the basic education structure while higher levels of education are left to the *central* or national Government. Examples include the roles of the relevant institutions under the Basic Education Act, 2013, Kenya Institute of Curriculum Development Act, 2013, the Kenya National Examination Council Act, 2012, the Universities Act, 2012 and the Legal Education Act, 2012.

Fourth, some of the powers of sponsors of schools under the Basic Education Act, 2013 may hinder the working of the County Education Boards, the relevant county executive members and the county assemblies.

Fifth, there are still important questions regarding teacher recruitment, deployment, remuneration, development, and transfer, discipline and dismissal. It is important that the issues discussed above be addressed to secure constitutional implementation through devolution and education law and policy.

7. Proposed reforms on devolved education services in Kenya

The Constitution has explicitly assigned roles to the two levels of government concerning socio-economic programmes and rights, including education. County governments can improve service delivery in education. Some of these functions are assigned to counties and they should run the functions well so as to enable citizens realise constitutional and legal rights. Counties with pre-school institutions can run them more efficiently and equitably by refurbishing the buildings, hiring trained teachers and equipping these centres.

Teacher's strikes shall continue to have implications at the national and county level. Therefore, rights, interests and legitimate and expectations of teachers must be given due consideration under the Constitution and in discussing or adopting the relevant laws, rules, regulations, policies, principles and administrative procedures at the level of the *central* or national and

county government. Otherwise the education sector shall continue to be plagued by the same problems as it has for a long time now.¹¹⁶

Counties can manage their other functions so well so as to make a case for the transfer or assignment of further functions from the central or national Government.¹¹⁷ For example, a county that delivers pre-school education efficiently and effectively may make a case to be assigned to run secondary schools.

Counties therefore need to make plans to ensure participatory decision making and effective service delivery to ensure that counties benefit from having the Government closer to the people. A Government that is closer to the people also brings economic stimulation and employment opportunities for citizens in the county. And there are numerous benefits that can accrue from effective devolution of education services in Kenya.

¹¹⁶ Courts have never found any strike lawful or legal. Yet it is a constitutional right once notice has been issued and no appropriate measure taken by the employer. See Ben Sihanya (2013) “Public participation and public interest lawyering under the Kenyan Constitution: Theory, process and reforms,” Vol 9 (1) *Law Society of Kenya Journal* 1-32.

¹¹⁷ Art. 187; Fourth Schedule of Constitution of Kenya 2010. See Annex 2 on distribution of functions between the National government and the county Governments.

Annex 1 – Counties (under Articles 176, 179, 183-187;

First Schedule)

List of the Counties as in the First Schedule of the Constitution of Kenya 2010

1. Mombasa
2. Kwale
3. Kilifi
4. Tana River
5. Lamu
6. Taita/Taveta
7. Garissa
8. Wajir
9. Mandera
10. Marsabit
11. Isiolo
12. Meru
13. Tharaka-Nithi
14. Embu
15. Kitui
16. Machakos
17. Makueni
18. Nyandarua
19. Nyeri
20. Kirinyaga
21. Murang'a
22. Kiambu
23. Turkana
24. West Pokot
25. Samburu
26. Trans Nzoia
27. Uasin Gishu
28. Elgeyo/Marakwet
29. Nandi
30. Baringo
31. Laikipia
32. Nakuru
33. Narok
34. Kajiado
35. Kericho
36. Bomet
37. Kakamega
38. Vihiga
39. Bungoma
40. Busia

41. Siaya
42. Kisumu
43. Homa Bay
44. Migori
45. Kisii
46. Nyamira
47. Nairobi City

Annex 2 – Fourth Schedule

Distribution of Education functions between the National Government and the County Governments

Part I:

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 II:

The functions and powers of the county are—

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

Annex 3: Categories of special needs education to integrated schools ...to minimize stigma from charity to religious based; SNE - limited to severe disability....; include “ordinary “ children in special PWD schools...).

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