

Governance and Social Protection: A Case of the Constitution Kenya 2010 as an Instrument for Social Protection

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Abstract

Has the Constitution of Kenya 2010 expanded opportunities for social protection in Kenya? This question hinges on the fact that struggles for a new constitution was vicious and protracted all in the name of the welfare of Kenyans. This paper examines the new constitutional structures by interrogating their significance for social protection. The new structures examined include the bill of rights, devolution, ombudsman and competitive party politics. The new structures deliver opportunities for delivering a variety of social protection schemes not possible in a different setting. Several social protection policies and programs have sprung from constitutional provisions and changed the social policy landscape in the country. It is concluded that the new constitution holds the best promise yet for Kenya's governance transformation resulting in enhanced social protection and social justice. However, for this promise to be fully realized civil society and the citizenry should work harder to hold all government arms and levels to account for their respective roles in enhancing social service delivery to Kenyans.

Keywords: Africa; Constitutional Law; Governance; Human Rights; Kenya; Social Policy; Social Protection; Social Welfare.

1. Introduction

In a referendum on August 4, 2010 Kenyans chose a new constitution for the country. The new constitution was promulgated on August 27, 2010. This paper asks and answers the rhetorical question: has the Constitution of Kenya 2010 expanded opportunities for social protection in Kenya? This question hinges on the fact that the struggles for a new constitution were vicious and protracted all in the name of the welfare of the Kenyan People. Indeed, as Ghai and Ghai (2011:3) have shown, Kenyans chose the new constitution in the hope that it would solve problems of corruption, ethnic conflict, violation of human rights; poverty and social injustices. The hope that Kenyans have in the transformational potency of the new constitution is the result of the suffering endured under a mutilated 1963 constitution that created an imperial presidency founded in a one-party dictatorship in which poverty, oppression and the paucity of state services reined, even as Kenyans remained some of the most highly taxed in the world.

The new constitution came with a number of new structures with potentially far reaching implications for social protection. The rest of this paper provides the conceptual context and examines these new structures with a view to explaining their significance for social policy in general and social protection in particular. First, the bill of rights confers on Kenyans certain entitlements in terms of social services and support from the state as a matter of course albeit with caveats. Second, devolution transfers resources and power to the counties and thus makes relevant social protection interventions at that level a possibility. Third, the overall constitutional dispensation with clear checks on the executive especially through the Commission on Administration of Justice (ombudsman) provides new avenues for enforcing service delivery to Kenyans.

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Fourth, the competitive party politics that the new constitution ushers in provides new opportunities for the citizenry to impose their social and democratic will on the political class and thus to demand and access state social protection. Therefore, this paper constitutes a review of the Constitution of Kenya 2010 taking the perspective that it is a tool for social protection in Kenya.

2. Conceptual Context

This paper takes the view that social policy is the overarching framework within which social protection takes place. According to Tschirgi (2000:4) social policy encompasses deliberate public strategies to tailor economic growth to serve explicit social objectives and needs. The strategies that constitute social policy are usually perceived in terms of social services – which are usually provided by the state in order to improve the welfare of citizens at individual level. Adesina (2010:4) adds two useful elements to this definition; first, that the said services may be provided by entities other than the state thus recognizing the role of non-state actors in the social services arena. And second, that social policy goes beyond guaranteeing a minimum level of social wellbeing to include publicly-mediated or guaranteed access to health-care, education, employment, housing and so on. The latter thus links the concepts of social policy and by extension social services to the realm of rights and social justice. Social services are broad and contribute in meaningful ways to the human resource development enterprise. According to Adesina (2010:14) this kind of services simultaneously meets the objectives of growth and social protection. This is amplified by such other social policy instruments as production support for farmers as was the case in Malawi in the early 2000s leading to a complete turn-around of the sector and transforming Malawi from a net grain importer into a surplus status (Adesina, 2010:15).

Social Protection on the other hand is a relatively new concept and it continues to evolve. As Sepulveda and Nyst (2012) have argued, the General Conference of the International Labour Organization (ILO) referred for the first time to the original vision of the ILO Constitution, namely the “extent of social security measures to provide a basic income to all in need of such protection and comprehensive medical care”. They add that widespread political support for non-contributory minimum social protection crystallized in 2009, when the heads of the United Nations (UN) agencies launched the Social Protection Floor Initiative as one of the nine UN joint initiatives to cope with the global economic and financial crises. Social protection thus began from a residualist stand point aiming to relief those most vulnerable. This has been the character of most social protection programs in Africa which include food provisioning, food-for-work projects, cash transfers for the aged, disabled and vulnerable children and orphans respectively.

Nonetheless, the concept has evolved somewhat beyond its residualist beginnings. Sabates-Wheeler and Devereux (2010:70) argue that social protection includes four categories of instruments: provision measures, which provide relief from deprivation; preventive measures, which attempt to prevent deprivation; promotive measures, which aim to enhance incomes and capabilities, and transformative measures, which seek to address concerns of social justice and social exclusion. The promotive and transformative measures attempt to redeem the concept of social protection from its residualist and palliative origins that provisioning and preventing measures embody. In theory therefore, promotive and transformative measures are meant to confront systemic failures that for instance distort the market and keep farmers out of production and workers out of work as well as organizational and political inefficiencies that delay or distort decisions and exclude sections of society from access to services and products deserved and thus impoverish them. In this sense, social protection takes an advocacy character and is correctional in nature.

The advocacy and correctional character of social protection are partly hinged on the risks, needs and rights framework of social protection. Munro (2010) has argued that the risk discourse emphasizes failures in insurance markets, specifically the inability of private and communal insurance mechanisms to provide cover against all forms of risk, often due to asymmetrical or incomplete information. Munro adds that the needs based aspect of the framework stresses the practical and moral importance for poor and non-poor alike of eliminating chronic poverty, and asserts both moral and economic claims in favour of social protection measures. On the rights discourse, Munro shows that the focus is on the obligations of the state derived from the assertion that citizens possess social and economic rights that are legally enforceable claims on the state. Each of these three discourses ends with a form of deficit in the welfare of citizens that social protection should address. The discourses also leave no doubt that the main actor in social protection is the state.

This is essentially because the outstanding risks arise from market failures that are a reflection of state regulatory failures; needs are morally within the arm-bit of the state to meet and rights are to be claimed primarily from the state. There is also a strong link between rights and needs in the shape of what Munro (2010: 30) calls a theory of human needs as a basis for human rights. The theory of human needs is based on the concept of moral philosophy, namely that to have a moral philosophy one must have a moral agent; that is a person capable of making choices and indeed that for one to have that capacity their needs must be fully met in line with natural law (Munro, 2010: 32) on the inherent dignity of the human being. The human needs theory of human rights, natural law, constitutional and international law constitute three important traditions in the rights school (Munro, 2010: 30). Recognition of human rights and the philosophy of social justice that they entail is the bedrock of social protection.

The focus of this paper is the Constitution of Kenya 2010 as an instrument of social protection. But what is a constitution? Ghai and Ghai (2011:3) have shown that a national constitution such as the one under discussion in this paper is a set of values and institutions which form the fundamental framework for the organization and operation of government in a country. They add that it establishes authority and institutions for running the country, limits on powers of the government, accountability of government, democracy and the rights of the people, and more broadly the unity, stability and prosperity of the country and its people, depend to a significant extent on the constitution.

3. Sites of Opportunity for Social Protection in the Constitution of Kenya 2010

This section of the paper examines four different aspects of the Constitution of Kenya 2010 as possible sites of opportunity for expansion of social protection in the country. These aspects include the bill of rights; devolved governments; commission for the administration of justice; the judiciary and competitive party politics. These are considered below in turns.

3.1 The Bill of Rights and Social Protection

Chapter Four of the Constitution of Kenya 2010 sets out the Bill of Rights. Mutunga (2014:10) shows that the Supreme Court of Kenya averred that the Constitution has a most modern Bill of Rights that envisions a human rights based, and social-justice oriented State and society. Other analysts have argued Kenya's is the second most advanced and expansive bill of rights in Africa after that of South Africa's Constitution. Article 19 (1) points out that "the bill of rights is an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies". This means that any policies that negate the bill of rights essentially abuse and undermines the tenets of the constitution. Article 21 (2) binds the state on economic and social rights thus: "the state shall take legislative, policy and other measures, including the setting of standards, to achieve the progressive realization of the rights guaranteed under Article 43". In the short period since the promulgation of the constitution in August 2010, it has become clear that the words "progressive realization of the rights" have been misapplied by the political class to mean that the said rights are to be realized at the state's discretionary pace and that there are no milestones envisaged in the constitution as to when these rights will become absolute and binding on the state without exception. This apparent ambiguity in the constitution while not constituting a serious bottleneck to the realization of the rights in question under any progressive democratic regime, it represents a legitimate excuse for any reactionary forces in the state to delay or even deny the realization of the said rights.

While Article 28 emphasizes the centrality of human dignity thus – "every person has inherent dignity and the right to have that dignity respected and protected", Article 41 underscores that dignity in terms of fair labour practices such as a fair remuneration; reasonable working conditions; the right to form, join or participate in the activities and programs of a trade union; and to go on strike; and the right to engage in collective bargaining. The idea of dignity implies that the dictates of natural law apply and therefore, that each person shall earn their respect before all institutions just for being a human being first and foremost. Hence, the affirmation that "every person has the right to a clean and healthy environment" springs from the inherent dignity in the person. Dignity equally indicates that a person will have freedom from want and rights of access to resources and opportunities for the realization of their aspirations and livelihoods.

Article 43 presents the economic and social rights. These include the right to the highest standards of health and health care services; right to accessible and adequate housing and to reasonable standards of sanitation; the right to be free from hunger, and to have adequate food of acceptable quality; the right to clean and safe water in adequate quantities; the right to social security; and the right to education.

These rights properly enjoin the state in the social protection of the Kenyan people because the rights compel the state to intervene appropriately to mitigate risks and vulnerability.

On the right to the highest standards of health and health care need is very high in Kenya. The high cost of health care limits access to the services for many Kenyans, given that 56 percent of the population lives below the poverty line (on less than one dollar a day), 30 percent of whom live in absolute poverty (Njeru, Arasa and Nguli, 2004: vii). But the government both at national county levels has remained lukewarm. The national government has shown no real ambition for a fair and comprehensive health insurance. Attempts have been made to design a health insurance scheme too burdensome on the poor. The centre-piece of that scheme is mandatory contributions of premiums by all workers. Workers in the lower pay brackets especially those earning between 5000 and 10000 shillings pay a larger percentage of their earnings compared to those earning 80000 shilling and above who contribute just about 1700 shillings per month. The enlisting of senior citizens (those aged 70 years and above) for free National Health Insurance Cover is at initial stages and is less than universal. As Chuma and Okungu (2011) have argued, the contributions were regressive that is, the poor contribute a larger proportion of their income to health care than the rich. While this scheme is unfair to the needy but promising some benefits to them, it has nonetheless not properly materialized. Therefore, the poor and vulnerable continue to spend their meagre incomes in health care bills and as a result to sink deeper into poverty and vulnerability. Overall, while some efforts such free maternal care and health services to children under the age of five have been made to deliver health care to the Kenyan people, the quantity and quality of those services do not reflect the spirit of the constitution which puts the burden on the state to ensure that there is universal unhindered access to high quality health services for all people regardless of their social or economic status.

Concerning the right to accessible and adequate housing and to reasonable standards of sanitation, although the government continues to drag its feet the constitution offers opportunities for improvement. According to the KNBS (2009) only 38 percent and 13 percent of the urban and rural populations respectively had access to piped water; while about 5 percent and 25 percent of the rural and urban population respectively had access to main sewer or good latrines. The right to safe and clean water in adequate quantities is thus a long shot in Kenya. Kenya hosts some of the largest urban slums in Africa and most rural housing units are no better in most counties. Land is overpriced in most counties and building materials are expensive and beyond the reach of most Kenyans. Efforts by the state to develop low cost building materials have had little impact on the quality of housing in most of the country. Therefore, there is scope for the state to intervene and improve the housing and sanitation standards in the country in line with the constitution. Nonetheless, affordable housing is part of the BIG 4 Agenda of President Kenyatta's second term (2017-2022) and there is some initial movement to build affordable housing mainly in urban areas.

The constitution also touches on the right to be free from hunger, and to have adequate food of acceptable quality. This right aims to cushion the poor from hunger and to do that in a manner to ensure access to high quality meals. The state pursues this right through maintaining a national grain reserve and carrying out food production forecasts to ensure that any foreseen deficits are plugged through food imports. These macro-level interventions ensure that food markets are stable across the country and consumers can access their preferred foods. At the micro-level, the state often undertakes supplies of relief food rations to population groups affected with hunger in different parts of the country. It is at this level that the state has failed the constitutional standard by providing food rations that were inadequate for targeted households in terms of quantity and quality. Mainly maize, beans and cooking oil are supplied. Beans and cooking oil are supplied in too little quantities to support balanced diets for beneficiaries, while maize the staple food is often supplied in too small quantities to serve all members of affected households. In this regard the constitution serves as a good standard for evaluation of state interventions and for the state to measure their performance against.

The right to social security is also guaranteed under the Bill of Rights in the constitution. The state has made efforts to cover this right through Cash Transfer Schemes for people with disabilities, vulnerable children and orphans, and the aged. The Cash Transfer Schemes have been piloted in Kenya for over ten years with very slow growth in spatial coverage although the schemes have been shown to add value to the lives of beneficiaries. As of 2018, the schemes cover all counties but are means-tested with strict eligibility criteria. The criteria include (i) an extremely poor household with an older person of 65 years and above; (ii) a household not enrolled in any other CT programme; (iii) a household with no member receiving a pension; (iv) a household that has resided in a particular location for more than a year; and (v) the beneficiary is a Kenyan citizen (Kenya 2017: 3).

These criteria are applied across the country by the Locational Targeting Committees (LTCs) whose functions include: (i) Identification and listing of poor and vulnerable households within the location; (ii) Providing guidance to the supervisors and enumerators in the identification of households during household registration; and, (iii) Assisting in mobilizing potential households for community validation and enrolment (Kenya 2017:10). The eligibility criteria are quite limiting in the sense that going by criterion number two – a household not enrolled in any other CT program; one notices that it is discriminatory in that if a household has a member with a disability already benefiting and the parents are poor, vulnerable and over 65 years of age, they will not qualify. A universal CT for all aged (65 years of age and over) persons not receiving any other pension would be more useful.

Moreover, the cash transfer of 2500 shillings per month to the vulnerable elderly translates to about USD 25 or under one dollar a day. For the elderly people who have no other income or support, the cash transfer scheme keeps them alive but just below the poverty line. The idea of the cash transfer for the elderly covering people mainly from very needy households is discriminatory and makes tax payers in non-beneficiary households with elderly people to subsidize the state in supporting the elderly in those households. The assumption that 90 year old persons who do not receive any pension, live in permanent houses and have some of their off-spring in formal employment do not deserve state support for the simple reason that they reside in better housing units and their sons or daughters are in employment is unforgivable. Somebody must apply themselves to grow food or do business to earn an income and that will not be done by a 90 year old. Who then is expected to do it on their behalf? In implementing the cash transfer schemes, the state has erroneously overlooked the strict obligation the constitution puts on it to deliver social security to the aged for the reason that they have retired and may not work to make a living. Support to the aged therefore ought to be universal and predictable across the country. The state also needs to view that support not as an act of charity for the most marginalized and vulnerable, but as an obligation to the elderly as retired citizens who have made a contribution to national development while they were economically active.

The right to education should also be universal. However, the state has for instance construed the waiver on school levies in public primary schools and some subsidies to public secondary schools as constituting universal free basic education. In designing a universal free basic education scheme, the basic question to answer is: ‘what prevents some children from participating in education in the first place?’ School levies are one of the reasons but certainly not the main one. One must dig deeper to find the root causes of non-participation. A possible analytical frame to use for this purpose is Abraham Maslow’s (1943) hierarchy of needs. In that hierarchy, physiological needs such as food, clothing and shelter which essentially affect the physiological functions of the body must be met before social needs such as education and relationships. Therefore, in order for policy makers to attract children from the poorest of the poor families to school; they must focus on factors outside the school namely the children’s access to food, water, clothing and shelter in order to prompt them to consider going to school and then encounter school levies as a problem at a second level. It is at that second level that the current intervention of waiver of levies will become relevant. The current free basic education policy that relies on waiver of levies and some subsidies to secondary schools generally blocks children from the poorest families by putting the cart before the horse.

The theory behind the bill of rights is essentially the risks, needs and rights framework (Munro, 2010). The gist of the framework is that insurance markets, private and communal institutions cannot cover all risks, people have moral and economic claims on the state and ultimately that they have legitimate claims on the state; and natural law, constitutional law and international law and human needs theory provide a basis for human rights. A purely legal interpretation would bind the state to adhering to the bill of rights. However, because of scarcity of resources with which to meet the needs set out in the bill of rights, international human rights instruments incorporate the doctrine of progressive realization of rights (Munro, 2010: 33). This doctrine should not however be a basis for the state to neglect their duty to citizens with the excuse that resources are scarce. It should be noted that there is high state resource wastage arising from corruption and a weak work ethic. In fact it is estimated that Kenya loses between 25% and 30% of its annual budget to corruption, especially through procurements, and wasteful spending of public funds (Okendo, 2013:12). Civil society and legislatures at county and national levels should make effort to audit state allocation of resources to ensure that social protection on the bases of the bill of rights is not neglected.

3.2 Devolution

Topperwien (2011: 75) has argued that countries with a history of centralization quite often come to a point where they are forced or convinced that they have to decentralize in a certain sense.

Kenya appears to have come to that point in the early 1990s when political opposition figures including politicians, academics and civil society leaders started pointing out that the centralized state was predatory in the sense of pulling resources from the grassroots through taxation merely to fund political dictatorship and corruption in Nairobi through an imperial presidency. It was argued that regions needed to develop into federal units to plan and manage development away from the centre and under the close watch of citizens and citizen groups. The push was generally for a federal system of government where the regions would have political, legislative and fiscal autonomy, essentially to weaken the centre and make it more responsive to the needs of the regions.

However, centralism had its beneficiaries and strong advocates and when the 2010 constitution was negotiated they put their money in it only allowing devolution where 47 counties were created complete with legislative assemblies and governors, leaving the central government nearly intact with the presidency still driving the country and largely controlling the national budget. Devolution is a term used when central governments transfer authority for decision making, finance and management to independent units of local authorities which are based on corporate status (accruing from) either the national constitution or legislature or both (Nsibambi, 1998: 6). In Kenya devolution is a constitutional structure and is dealt with in Chapter 11 of the Constitution of Kenya 2010. The system devolves resources and power – including legislative power as in Article 185 of the constitution. The county assemblies will oversee the county executive while respecting the principle of separation of powers. County governments are thus complete governments with checks and balances that should guarantee accountability and effectiveness in service delivery.

The relevant government functions devolved to the counties are contained in the Fourth Schedule and include pre-primary education, village polytechnics, home craft centres and child care facilities; agricultural services, health services, water and sanitation services; veterinary services, local roads, lighting, local planning and revenue collection. County governments therefore have a lot of scope for enhancing social protection within their respective jurisdictions. For instance they may multi-task social protection measures of growth and welfare to create social funds. The county authorities can then use those funds to jumpstart agriculture and livestock production; cooperatives and microenterprises at the grassroots. They can also use the social funds to leverage local social entrepreneurship to keep the momentum of endogenous change and progress. These efforts will grow local economies, create employment opportunities and businesses and ultimately enhance local revenue collection to offer services.

County governments are better placed to assess vulnerability more accurately and to target responses more cleverly because of their location and cultural sensitivity. For instance in Nyamira County² the 2009 population census put the people in the population aged 80 and above at 4,532. If the county had to formulate a policy in which each person in that age bracket would receive a pension of 3000 shillings per month it would cost the county 13.6 million shillings per month and 163.2 million per year to take care of their aged population. The figure could be lower because there would be some aged people already receiving other pensions and who would be exempted. This case illustrates the opportunities that county governments have to develop unique and locally appropriate social protection policies, without interference from the national government which usually overlooks local vulnerabilities because of focusing attention at macro-level problems.

3.3 Ombudsman – Commission on Administration of Justice (CAJ)

The Commission on Administration of Justice (CAJ) is not a direct creature of the constitution – it is created by an act of parliament, namely Commission on Administration of Justice Act 2011, with ombudsman powers. These powers and the commission in its entirety appear to be derived from Article 59(4) on the restructuring of the Kenya National Human Rights and Equality Commission and Article 47 of the constitution on fair administrative action and particularly the declaration that ‘every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair’ (Art. 47 Clause 1) and also Clause 3 which *inter alia* requires parliament to enact legislation to give effect to the rights in Clause 1.

The state in Kenya has historically been synonymous with corruption. Although this has not changed significantly since the promulgation of the Constitution of Kenya 2010, the drafters of the constitution appear to have set out to cushion citizens from any such corruption and bureaucratic inefficiencies through an office such as that of ombudsman.

²<https://opendata.go.ke/facet/county/Nyamira> accessed June 16, 2014

By acting to mitigate bureaucratic excesses the ombudsman would simultaneously improve the quality of services to Kenyans. CAJ has done this through spot checks in work stations in the counties as shown in the vignette³ below:

The Commission on Administration of Justice (CAJ) today put public servants on notice on abuse of power, inefficiency and non-responsiveness in service delivery in the country. Speaking after spot check in Isiolo County, the Commission Chair, Commissioner Otiende Amollo warned that stern action will be taken against public servants who subject members of the public to unfair, oppressive, unlawful and unresponsive behaviour. The Commission has an oversight jurisdiction over both the National Government and County governments. A spot check on service delivery in Isiolo County revealed absenteeism, late reporting, discourtesy, delays and inefficiency in most government institutions. Commissioner Otiende was accompanied by the CAJ vice Chair Dr. Regina Mwachia and Commissioner Saadia Mohamed.

The foregoing vignette brings out the bureaucratic excesses that bedevil public service delivery systems in Kenya and which CAJ was established to combat. This kind of actions by CAJ highlights bureaucratic weaknesses and attracts the attention of supervisors to take corrective actions to avert inefficiencies. Besides, warning such as contained in the vignette, CAJ may order compensation to service users where that is merited. This is critical to the enhancement of social protection because maladministration undermines the effectiveness of services and leads to wastage. Therefore CAJ through spot checks, research and investigation may identify systemic failures and help fix them hence strengthening social protection and improving the quality of life of service users. Overall, therefore CAJ contributes to improvement of access to and quality of public services.

Section 8(a) of the Commission on Administration of Justice 2011 provides that CAJ will: ‘investigate any conduct in state affairs, or any act or omission in public administration by any State organ, State or public officer in National and County Governments that is alleged or suspected to be prejudicial or improper or is likely to result in any impropriety or prejudice’. This provision means that the commission may in its own motion investigate any conduct of state affairs that is deemed to potentially lead to among others, maladministration. In the area of social protection, the progressive realization of services envisaged in the bill of rights rests with CAJ. Going forward, CAJ can elect to be progressive and monitor the progress that the state makes year after year in ensuring universal access health care services at reasonable cost, implementation of universal basic education, access to clean water and sanitation services, and to social security. CAJ may then issue an advisory on the extent to which the state is acting reasonably within it means to protect citizens from vulnerability. Such advisories will provide neutral facts that civil society can act on to ensure that the state does not abdicate its duty to citizens on the premise of the idle excuse of lack of resources when casual observations reveal many instances of misapplication of resources which CAJ should easily and legitimately document. There should also be scope for CAJ to if necessary and reasonable launch informed petitions to the Supreme Court to compel the state to provide such essential services as universal pensions to the elderly. It is interesting that CAJ does not find the selective cash transfer payments to elderly people discriminatory to those not covered. Additionally, it is unbelievable that CAJ continues to condone the practice where tax payers’ money is used to cushion the elderly in some parts of the country while in other parts tax payers individually shoulder the burden of maintaining the elderly, a burden that properly belongs to the state. That the latter tax payers are double taxed is inexcusable in a democracy. CAJ therefore has some virgin opportunities to help turn around the architecture of social protection in Kenya.

3.4 Competitive Party Politics

Article 4(2) declares that ‘the Republic of Kenya shall be a multi-party democratic state founded on the national values and principles of governance referred to in Article 10’. Those values and principles include among others patriotism, national unity, human dignity, equity, social justice, good governance and sustainable development. Multi-party democracy presupposes political maturity where citizens participate in regular free and fair elections to elect their parties and political leaders on the bases of the ideas of governance and development they sell. Hence, the right to form or participate in forming a political party and to be a candidate for public office is enshrined in Article 38(1) of the constitution. This makes the Republic of Kenya a truly democratic space wherein political ideas compete. While more work obviously needs to be done to make that competition fair and free from tilt by the military and ethnic elites, the constitution has laid the foundations for competitive party politics in Kenya.

³ Press Statement for Immediate Release from titled: CAJ Puts Public Servants on Notice on Abuse of Power, Discourtesy, Delays and Non Responsiveness, issued 14th May 2013 (www.ombudsman.go.ke)

In competitive politics, parties compete in elections to wrestle power democratically in order to implement their ideologies and policies. Once in office, competition compels political leaders to offer services that they promised in their party manifestos in order to build their track records for subsequent elections. It is for this reason that there is in place schemes such as Youth Enterprise Fund (YEF), Women's Enterprise Fund (WEF) and Uwezo Fund which all target the youth and women with funds to enable them fund their business ventures. The youth constitute the largest proportion of voters in any election in Kenya and therefore it is understandable that successive administrations have formulated policies to endear their parties to that important constituency.

Other ideas on social protection which have emerged since the new constitution was promulgated include free primary education, subsidies to secondary schools, free maternity care, slum upgrading programs and more funding to health care services. These are ideas that target sections of the population that are vulnerable and would otherwise not access the services. While these services are in place, members of parliament have the duty to ensure that the government delivers on its programs. They do this through departmental committees such the Public Accounts Committee (PAC) and the Public Investments Committee (PIC) which ensure that citizens get value for money on their taxes. These committees and parliament as a whole have not always been effective in their oversight role on the executive. The main reason for this is that the executive is run by members of a political party which won the elections and thus members of parliament from that party usually handle matters of corruption and ineptitude in the executive with velvet gloves. In any event the executive in Kenya is run by ethnic coalitions that promise to see no evil and hear no evil about the executive so long as it serves their parochial interests.

Nonetheless, to whatever extent the ethnic coalitions are tight; the electorate is not always friendly and up to 70 percent of sitting members of parliament always lose their seats on account of their performance in parliament and in using their Constituency Development Fund (CDF). Therefore, political competition at national, county and constituency levels has net benefits for improvement in service delivery to Kenyans. Public welfare interests will thus remain at the back of the minds of elected leaders even when they are part of ethnic numbers in the legislature almost solely for use to shield the executive or other ethnic captains. Hence, from time to time they come to their senses and speak in the interest of greater national good. However, rare that may happen; their lips are forced by political competition.

Political competition in the democratic space that the Constitution of Kenya 2010 creates has generally forced social protection programs into the party manifestos and ultimately into public policy agenda. A good example is President Kenyatta's (2017-2022) Big Four Agenda that include affordable housing, health care, food security and spurring job creation through augmented manufacturing. It is noteworthy that the agenda is heavy on social policy issues almost entirely as a result of political competition in Kenya. This is not to argue that social protection would not have been in the agenda without a multiparty democracy in place, but that social protection would never have been that prominent in another setting. The poor and vulnerable are the majority in Kenya and therefore, these policies have emerged as vote catchers.

4. Conclusion

The aim of this article was to interrogate the Constitution of Kenya 2010 with a view to locating opportunities for the expansion of social protection in the country. It has been argued that the constitution offers a variety of opportunities for expanded social protection especially through the bill of rights, devolution and the ombudsman. However, social protection expansion faces a number of challenges including conceptual difficulties and ineptitude at county level, corruption and inefficiency in service delivery at county and national levels and a weak work ethic at both levels of government. In response, civil society and citizens should keep watch and run advocacy campaigns to awaken government to its responsibilities and duty to the people. Overall, the Constitution of Kenya 2010 is the best promise yet for expanded social protection in Kenya.

References

- Adesina, JO (2010) 'Rethinking the Social Protection Paradigm: Social Policy in Africa's Development', A Paper prepared for the conference "Promoting Resilience through Social Protection in Sub-Saharan Africa", Organized by the European Report of Development in Dakar, Senegal, 28-30 June, 2010.
- Chuma, J. and V. Okungu (2011) 'Viewing the Kenyan Health System through an Equity Lens: Implications for Universal Coverage'. *International Journal for Equity in Health* Vol 10: 22, 2011. (<http://www.equityhealthj.com/content/10/1/22>)
- Ghai, P.Y. and J. C. Ghai (2011) *Kenya's Constitution: An Instrument of Change*. Nairobi: Katiba Institute.
- Kenya National Bureau of Statistics (2010) Kenya 2009 Population and Housing Census Highlights. Nairobi: Kenya National Bureau of Statistics.
- Kenya Republic of (2011) Commission on Administrative Justice Act 2011. Nairobi: Government Printer.
- Kenya Republic of (2017) Operations Manual for Consolidated Cash Transfer Programme. Nairobi: Ministry of East Africa Community, Labour and Social Protection.
- Maslow, A. (1943) 'A Theory of Human Motivation'. *Psychological Review*, 50(4), 370-96.
- Munro, L.T. (2010) 'Risks, Needs and Rights: Compatible or Contradictory Bases for Social Protection', in Barrientos, A. and D. Hulme, Eds. *Social Protection for the Poor and Poorest: Concepts, Policies and Politics*. Hampshire: Palgrave Macmillan.
- Mutunga, W. (2014) The 2010 Constitution of Kenya and its Interpretation: Reflections from the Supreme Court's Decisions. Unpublished Inaugural Lecture Delivered at the University of Fort Hare Distinguished Lecture Series on 16 October 2014.
- Njeru, EHN, R. Arasa and MN Nguli (2004) Social Health Insurance Scheme for All Kenyans: Opportunities and Sustainability Potential. Discussion Paper No. 060/2004, Nairobi: Institute of Policy Analysis and Research.
- Okendo, D.O. (2013) 'Anti-corruption Reforms Overdue'. *Adili* No. 143, August/September 2013, 12.
- Sabates-Wheeler, R and S. Devereux (2010) 'Transformative Social Protection: The Currency of Social Justice', in Barrientos, A. and D. Hulme, Eds. *Social Protection for the Poor and Poorest: Concepts, Policies and Politics*. Hampshire: Palgrave Macmillan.
- Sepulveda, M and C. Nyst (2012) The Human Rights Approach to Social Protection. Helsinki: Unit of Development Communications, Ministry for Foreign Affairs of Finland.
- Topperwien, N. (2011) 'On Decentralization and Governance' in A. Kankindi, D. Burbidge and T. Odhiambo (Eds.) *Governance Papers I*. Nairobi: Strathmore Governance Centre.
- Tschirgi, N. (2000) 'Introduction – The Paradox of Development' In D. Morales-Gomez, N. Tschirgi and J.L. Moher, Eds. *Reforming Social Policy: Changing Perspectives on Sustainable Human Development*. Ottawa: International Development Research Centre.