

MONITORING THE IMPLEMENTATION OF THE RIGHT TO HEALTH UNDER THE CONSTITUTION OF KENYA

A TRAINING MANUAL



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P.O Box 112 -0020 Nairobi

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Impact Africa Ltd

P. O. Box 13776 – 00800, Nairobi

Email: info@impact-africa.com

Website: www.impact-africa.com

Tel: +254 708 484 878

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FOREWORD

This training manual is intended to enhance the role of CSOs in promoting and protecting of the right to health under the Constitution. It will play an integral part in ensuring that civil society organizations have the knowledge and skills to hold duty bearers accountable to effective and efficient health service delivery.

Schedule Four of the Constitution creates two levels of governance with distinct functions. The national government is mandated to formulate health policy and manage national referral health facilities while the county government is responsible for delivery of health services at the local level. The civil society groups that are working on health issues must therefore understand the roles and responsibilities of the different actors at both levels if they are to meaningfully engage in national and county processes.

This manual is presented in four modules. The first module outlines the constitutional provisions on the right to health and what these provisions mean to the implementation of health as a right. The second module addresses the substance of the right to health including the international standards developed for the implementation of this right. The third module outlines the systems and structures of the devolved government and the role of the different state organs and agencies at national and county level in health service delivery.

The fourth module then focuses on the role of the civil society in monitoring the implementation of the right to health. It also highlights the key issues concerning the right to health and outlines the specific responsibilities of CSOs in holding each level of government to account for their mandates to deliver on the right to health.

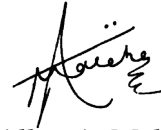


Allan A. Maleche
Executive Director - KELIN

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Allan A. Maleche
Executive Director - KELIN

BACKGROUND

KELIN is a human rights NGO working to protect and promote HIV-related human rights in Kenya. We do this by: providing legal services and support, training professionals on human rights, engaging in advocacy campaigns that promote awareness of human rights issues, conducting research and influencing policy that promotes evidence-based change.

KELIN has been in the forefront in realization of the right to health in Kenya by engaging in litigation, training, advocacy, legal support and research that could influence the actualization of this right.

The legal environment is now favorable given that the right to health is enshrined in the Constitution. The design and implementation of policies and procedures in the health sector should therefore be in accordance with the Constitution. The Ministry of Health has recently enacted a policy document entitled 'Kenya Health Policy 2014 - 2030' in a quest to adopt rights based approaches to health, aiming for each citizen in Kenya to have the highest attainable standard of health.

Over the past years, stakeholders have focused on promoting health as a human right based on fundamental principles of equity. The health sector in Kenya has as well witnessed a number of positive steps since the devolution process began post March 2013.

This training manual is intended to enhance CSOs understanding of their role with respect to their work on the right to health under the Constitution of Kenya. CSOs are organizations and forums formed at the community, local, county, national, regional and international levels to mainly *advocate* for good governance including the protection of human rights and the provision of services to citizens in a particular jurisdiction.

The role of CSOs in monitoring accountability in governance and development is internationally recognized and their activities are supported with funding from development partners, foundations, philanthropists and other players in the private sector. CSO activities are intended to protect public interest and should therefore be people centred. CSO activities sometimes include service delivery that complements government efforts. The CSOs world over have played one of the greatest roles in influencing the transformation of governance systems to democracies and the shaping of development agendas across the world. At all levels - local, national and international - CSOs represent the 'voice of the people'. During the past two decades CSO have actively advocated for the fullest recognition of the right to health and the need for governments to invest more resources in the progressive realization of this right. They have also advocated for the rights based approach towards the implementation of health services demanding the recognition of health as a right in laws and policies and the adoption of service delivery processes that are respective of the rights of the people.

Whereas the entry point for the organizations that have collaborated to develop this manual is HIV and the related concerns, the manual has focused on the broader right to health recognizing the fact that the full enjoyment of HIV related rights is entrenched in general health strategies and outcomes.

This is a recognition that currently prevails at the national, regional and international levels. Making health as the entry point therefore comprehensively addresses the rights relating to HIV while not excluding any other health concern.

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ACRONYMS & ABBREVIATIONS

AAAQ	Availability, Accessibility, Acceptability and Quality
ACPHR	African Charter on Human and Peoples' Rights of 1981
AG	Attorney General
AIDS	Acquired immune deficiency syndrome
AU	African Union
CAJ	Commission on Administrative Justice
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women of 1979
CIDP	County Integrated Development plan
COG	Council of Governors
CRC	Convention on the Rights of the Child of 1989
CRPD	Convention on the Rights of Persons with Disabilities of 2006
CS	Cabinet Secretary
HIV	Human immunodeficiency virus
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination of 1965
ICESCR	International Covenant on Economic, Social and Cultural Rights of 1966
KEMRI	Kenya Medical Research Institute
KEMSA	Kenya Medical Supplies Authority
KMTC	Kenya Medical Training College
KNCHR	Kenya National Commission on Human Rights
MDGs	Millennium Development Goals
NACC	National AIDS Control Council
NGEC	National Gender and Equality Commission
NGO	Non-Governmental Organisation
NHIF	National Hospital Insurance Fund
PLHIV	Persons living with HIV
SDG	Sustainable Development Goal
TB	Tuberculosis
UDHR	Universal Declaration of Human Rights of 1948
WHO	World Health Organization

MODULE 1 - UNDERSTANDING THE CONSTITUTIONAL FRAMEWORK IN KENYA IN RELATION TO THE RIGHT TO HEALTH

1.1. Objective of the module:

The objective of this module is to facilitate the full understanding of the provisions of the Constitution of Kenya and what they mean for the implementation of health as a right.

1.2. Introduction to the module:

This module will help the participant understand the constitutional provisions and framework in Kenya in relation to right to health. At the end of this module, trainees will be able to understand the character of the constitution and the roles of the different actors in regard to the implementation of the right to health.

The constitution lays emphasis on the people's power as being sovereign and the constitution as being the supreme law of the land; this means that any law or custom that contradicts the constitution is invalid. The constitution also defines a new system of devolved government with two levels of government: the national government and 47 county governments. It also has a bill of rights that recognizes socio-economic rights including the right to health. Provision of health services is one of the functions that have been devolved as under Schedule 4 the Constitution of Kenya.

1.3 Constitution and constitutionalism

Constitutionalism is an idea equated with the concept of the rule of law, that a government can and should be legally limited in its powers and that its authority depends on enforcing these limitations. Constitutionalism denotes the commitment on the part of any given political community to be governed by constitutional rules and principles.

1.4 Sovereignty of the people

The Constitution at Article 1 provides that all sovereign power belongs to the people of Kenya and it should be exercised in accordance with the Constitution. The people of Kenya can exercise their sovereign power either directly or through their democratically elected representatives. In understanding the centrality of the people to the Constitution, it is important to recall that the Constitution came into force on August 27, 2010 after being *ratified* by majority of Kenyans in the August 4, 2010 referendum. The Constitution in bestowing to the 'people' supreme authority puts them in a pivotal position in its implementation and operationalization.



Illustration 1.1: Direct exercise of power through voting¹



Illustration 1.2: Parliament of Kenya – citizens indirectly exercise power through members elected or nominated to parliament.²

1.5 Defense of the constitution

Every citizen has an obligation to respect, uphold and defend the Constitution.

Session 2

1.6 Involving the People – The Principle of Public Participation

Over and above the pronouncement that the power in the constitution belongs to the people, the constitution requires all state organs to involve the people in decision-making. Article 231(1) (d) specifically requires public servants to include the citizens in the process of policy making and facilitation of this process through transparency and provision of timely accurate information to the public.

1.7 Public Participation and the Legislative Process

Article 118 mandates the National Assembly and the Senate to conduct their business in an open manner and in public. They are to facilitate public participation in legislative drafting and other business of parliament. The sittings of parliament are supposed to be open to the media and the public.

Any person including Civil Society Organizations may petition the County Assembly to consider any matter including the enactment or repeal of any legislation - The *County Government Act 2012* - The Standing Orders of Parliament and Section 24 of the CGA provide for the publishing of the bill to seek public participation.

1.8 Public Participation in the Executive Functions

The governor is obligated to promote and facilitate citizen participation in the development of policies and plans and delivery of services- Section 31(3) (g) of the County Government Act - 2012.

1 Picture adopted from "Afromusing: Africa and Beyond!" at <http://afromusing.com/2007/12/28/kenya-elections-pictures-from-eldoret-rift-valley/> (accessed on 17 May, 2016).

2 Picture adapted from www.parliament.go.ke

The County Executive Committee is under obligation to facilitate citizen participation in the evaluation of the performance of county government - Section 46(2)(g) and to provide public sharing of performance progress reports-Section 46(2)(e).

Part VIII of the County Government Act - provides for citizen participation in counties - Section 87 requires facilitation of timely access to information, data, documents and other information relevant to policy formulation; it requires reasonable access to the process of formulating and implementing policies, laws and regulations.

Step up public participation in budget-making process

The budget-making process has for a long time been thought to be a technical process of numbers where only technocrats could be part of. Indeed, in the former dispensation, the only time Kenyans came into slight contact with the budgets was through TVs when the Finance Minister read it in Parliament. And even then, majority of Kenyans did not understand still what the numbers meant. A financial analyst had to explain the biggest losers and gainers.

The promulgation of the new Constitution and the onset of devolution provided unprecedented opportunity for Kenyans to interrogate the budgets before they are passed, make meaningful recommendations and participate in accountability mechanisms.

However, three budget cycles later, public participation in budget-making processes is still bogged down by limited public interest, disillusionment and deliberate hurdles by the Executive despite legal provisions. Whereas the excuse in the previous cycles has been on weak systems and structures to ensure meaningful public participation, the narrative cannot stand now.

County governments must open their doors for the public to interrogate their plans, and not merely

to be seen but with the genuine desire to collect their ideas and integrate them into their development plans. Whereas not all ideas are feasible and practical, county governments must explain their criteria for accepting or rejecting submissions that have been made.

In the proposed budgets for the next financial year, counties have planned to spend heavily on administration, especially in the governors' offices and travels as opposed to development. Not that there's anything wrong with that. But in line with programme-based budgeting, a requirement of the Public Finance Management Act 2012, there should be a story behind the numbers. Like why for example the county feel that it is prudent to spend more on an office more than it spends on people.

It should be clear to any Kenyan who doesn't have much knowledge on the budgets the rationale behind reducing the budgetary allocation to a sector while increasing allocation to another sector. But most urgently, we need to prevent the ailing healthcare system, a key devolved function of the county governments, from crumbling down right on our watch.

A quick analysis of most county budgets reveal that most have not

allocated significant resources on youth and adolescent health, reproductive health, community health systems, family planning among other essential services.

If we are to harness demographic dividend and realise Vision 2030, we cannot afford to neglect youth.

Family Planning, for example, is a programme that must be adequately funded. Before devolution, the national government had a deliberate budget line for family planning. However, after devolution, this budget line was dropped by most counties despite bold evidence of its usefulness.

A study by National Council for Population and Development and Population Reference Bureau (2012) estimates that by investing Sh5.3 billion on contraception, we will save Sh8.6 billion on education, Sh5.6 billion on maternal health, Sh2.8 billion in immunisation, Sh2.7 billion on water and sanitation and Sh600 million on malaria. This saves up to Sh20.3 billion by 2015, much more than the initial investment. This discussion on budgets and prioritisation must be taken at mama mboga's doorstep including with budgetary allocation for civic education and public trainings on the budget-making process.

(Robert Aseda, Nairobi)

Case Study I: Discussion on how counties facilitate public participation in budget making processes



Notes to the Facilitator

Direct exercise of power by the people

- The people exercise direct power through election of the leadership of the nation.
- The people have the right to recall an elected member in the legislative bodies.
- The people have the right to petition parliament to consider any matter within its authority;
- Parliament has powers to amend the constitution; but limited only to some issues and such amendment must be passed by at least two thirds of the members of the National Assembly and the Senate - Article 256.
- In the case of constitutional provisions at the core of the constitutional order, the power to amend resides with the people of Kenya through a popular vote or referendum.

Indirect exercise of the power of the people (Article 1 (2) and (3))

The people's power is indirectly exercised at the national and county levels through delegation to:

- The legislative authority, which is derived from the people; is delegated to the national Assembly, the Senate and the County Assemblies
- The executive authority, which derives from the people of Kenya and is to be exercised by the National Executive and the County Executives - Articles 1(3)(b) and 129(1); and
- Judicial authority, which is derived from the people - Articles 1(3) (c) and 159(1).

MODULE 2 - THE RIGHT TO HEALTH UNDER THE CONSTITUTION OF KENYA

2.1 Introduction to the Module

This module will address the substance on the right to health including the international standards developed for determining the implementation of this right. It will also discuss the rights based approach to health service delivery and the roles and responsibilities of duty bearers in bringing about a service delivery culture that integrated the values and principles of the constitution.

At the end of this module, participants will be expected to have acquired a comprehensive understanding of what the right to health means in the Kenyan and international context and what is expected of service providers under Article 10 and Article 43 of the Constitution. This should in turn inform a better and more effective advocacy in the CSO tasks of advocating for and monitoring the implementation of health as a human right.

2.2 Objective of the Module

The objective of this module is to facilitate the understanding of the provisions of the Constitution on human rights and the right to health.

Session 1

2.3 Definition of the Right to Health

The preamble of the 1946 World Health Organization (WHO) Constitution defines health broadly as “a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.”³ The Constitution defines the right to health as “the enjoyment of the highest attainable standard of health,” and enumerates some principles of this right as healthy child development; equitable dissemination of medical knowledge and its benefits; and government-provided social measures to ensure adequate health.

³ <http://apps.who.int/gb/bd/PDF/bd47/EN/constitution-en.pdf> Geneva: World Health Organization. 1948.

Indicators On and the Responsibility to Implement the Right to Health The UN Committee on Economic Social and Cultural rights developed General Comment No. 14 in 2000 to guide the planning for and monitoring of the implementation of the right health by States. It came up with four indicators on how to measure the delivery of the right to health. These are *Availability, Accessibility, Acceptability* and *Quality* (AAAQ). When monitoring compliance by the national and county governments, CSOs should work with these four indicators.

Availability:

This entails the infrastructural landscape in respect of the services for delivering the right to health i.e. healthcare facilities, skilled workforce, health products, commodities and technologies, programmes etc., and their availability for all people that need them. In determining availability the principles of equity, social justice, and inclusiveness must also apply; guided by the international and national standards and indicators including things like the ratio of doctors and nurses to the population, and the level of equity in the distribution of the infrastructure.

Accessibility:

For this indicator the key issues to consider are the physical proximity of services to people who need them; economic affordability of health services; access to information for decision making and equality and non-discrimination in services with inclusion and protection of the of the vulnerable and marginalised populations.

Acceptability:

On the other hand entails the principle of respect of individual’s situations in the delivery of health services. It requires sensitivity to cultural and religious diversities and notions while ensuring respect for human dignity and human rights including the right to confidentiality, the freedom of expression and the right to choose.

It also entails the observance of professional and medical ethics for the different health professionals.

Quality:

Refers to the *norms and standards for delivering health services for health service delivery*. It requires implementers to be accountable to setting and enforcing acceptable standards for health service delivery. These include different things for different environment including medically appropriate services, skilled medical personnel, appropriate medication and equipment, Safe and potable water, adequate sanitation, clean and healthy environment among other things.

Session 2

2.4 The right to health under the Constitution of Kenya

Article 43 of the constitution provides that *“every person has the right to the highest attainable standard of health, which includes the right to health care services, including reproductive health care”*. It also provides that *“a person shall not be denied emergency medical treatment”*.

The constitution further provides for the protection of the health and safety of consumers (Article 46) acknowledging that the determinants of health are many and may be situated in actions and omissions in other sectors. It therefore points to the need for health and safety standards to be developed to guide all sectors given their inter-relations with health. Plenary Exercise – Discuss the key determinants of health and the inter-relation between the right to health and other rights.

2.5 The Bill of Rights

Kenya boasts of having one of the most progressive constitutions because of its bill of rights. The bill of rights, found in chapter four of the Constitution, includes civil and political rights; economic, social and cultural rights and environmental rights. *The Bill of Rights* is expected to be the framework for social, economic and cultural policies. Included in the bill of rights is a strong equality and non-discrimination provision

that includes the health status as one of the grounds that should not justify discrimination. It also provides for the inclusion of special interest groups including Children, Persons with Disabilities, Youth, Minorities and Marginalized groups and older members of society. The Chapter on the Bill of Rights can only be amended directly by the people through a referendum. In addition, *The Bill of Rights* and the Constitution recognizes ratified international treaties as being part of the laws of Kenya

A major characteristic of human rights is that they are indivisible and interdependent. All human rights are indivisible, whether they are civil and political rights, such as the right to life, equality before the law and freedom of expression; economic, social and cultural rights are indivisible, interrelated and interdependent. The right to health cannot be separated from the right to life, equality and freedom from discrimination, human dignity, privacy and access to information. The improvement of one right facilitates advancement of the others. Likewise, the deprivation of one right adversely affects the others.

The Constitution also provides that any law including customary law that is inconsistent with the constitution is void to the extent of the inconsistency. *The Bill of Rights* is expected to be the framework for social, economic and cultural policies.

2.6 The Right to Health under International Treaties

The right to health is also recognized in various international human rights instruments that Kenya has ratified and which, by virtue of Article 2, now form part of the laws of Kenya. These treaties include:

The table below provides a snapshot of the relevant treaty provisions.

Human Rights Instrument	Right to Health Provision
World Health Organization (WHO) Constitution of 1946	The right to health was first articulated in the WHO Constitution which states that: “the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, and political belief, economic or social condition.” The preamble of the Constitution defines health as: “A state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.”
Universal Declaration of Human Rights of 1948 (UDHR)	The Declaration sets forth a standard under which the right to adequate health can be understood. Article 25 states that “Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services.”
International Covenant on Economic, Social and Cultural Rights of 1966 (ICESCR)	The most comprehensive statement of the right to health is Article 12 of the ICESCR. Article 12 states: 1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. 2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for: (a) The provision for the reduction of the stillbirth-rate and of infant mortality And for the healthy development of the child;

Human Rights Instrument	Right to Health Provision
	(b) The improvement of all aspects of environmental and industrial hygiene; (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases; (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness ...
Convention on the Elimination of All Forms of Discrimination against Women of 1979 (CEDAW)	This Convention reaffirms the universal protection of the right to adequate health and details the special protections and considerations due to women. Article 12 of the Convention specifically concerns women’s health. It states as follows: 1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning. 2. Notwithstanding the provisions of paragraph 1 of this article, States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation. Kenya ratified the convention in 1984.
International Convention on the Elimination of All Forms of Racial Discrimination of 1965 (ICERD)	Article 5 (e) (iv) of the Convention calls upon States to “Prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law,” and references under this provision “The right to public health, medical care, social security and social services.”

Human Rights Instrument	Right to Health Provision
Convention on the Rights of Persons with Disabilities of 2006 (CRPD)	<p>The CRPD contains this right in Article 25: “States Parties recognize that persons with disabilities have the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability. States Parties shall take all appropriate measures to ensure access for persons with disabilities to health services that are gender-sensitive, including health-related rehabilitation. In particular, States Parties shall:</p> <p>(a) Provide persons with disabilities with the same range, quality and standard of free or affordable health care and programmes as provided to other persons, including in the area of sexual and reproductive health and population-based public health programmes;</p> <p>(b) Provide those health services needed by persons with disabilities specifically because of their disabilities, including early identification and intervention as appropriate, and services designed to minimize and prevent further disabilities, including among children and older persons;</p> <p>(c) Provide these health services as close as possible to people’s own communities, including in rural areas;</p> <p>(d) Require health professionals to provide care of the same quality to persons with disabilities as to others, including on the basis of free and informed consent by, inter alia, raising awareness of the human rights, dignity, autonomy and needs of persons with disabilities through training and the promulgation of ethical standards for public and private health care;</p> <p>(e) Prohibit discrimination against persons with disabilities in the provision of health insurance, and life insurance where such insurance is permitted by national law, which shall be provided in a fair and reasonable manner;</p>

Human Rights Instrument	Right to Health Provision
Convention on the Rights of Persons with Disabilities of 2006 (CRPD)	<p>(f) Prevent discriminatory denial of health care or health services or food and fluids on the basis of disability”.</p> <p>Kenya ratified the convention in 2008.</p> <p>2. States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures:</p> <p>(a) To diminish infant and child mortality;</p> <p>(b) To ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care;</p> <p>(c) To combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution;</p> <p>(d) To ensure appropriate pre-natal and post-natal health care for mothers;</p> <p>(e) To ensure that all segments of society, in particular parents and children, are informed, have access to education and are supported in the use of basic knowledge of child health and nutrition, the advantages of breastfeeding, hygiene and environmental sanitation and the prevention of accidents;</p> <p>(f) To develop preventive health care, guidance for parents and family planning education and services.</p>

Human Rights Instrument	Right to Health Provision
Convention on the Rights of the Child of 1989 (CRC)	<p>Article 24 of the CRC identifies specific aspects of the right to health as it applies to children and their development. It states:</p> <ol style="list-style-type: none"> 1. States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.
African Charter on Human and Peoples' Rights of 1981 (ACPHR)	<p>Article 16 states</p> <ol style="list-style-type: none"> 1. Every individual shall have the right to enjoy the best attainable state of physical and mental health. 2. States Parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.
Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women (Maputo Protocol)	<p>Article 14 on Health and Reproductive Rights states:</p> <ol style="list-style-type: none"> 1. States Parties shall ensure that the right to health of women, including sexual and reproductive health is respected and promoted. This includes: <ol style="list-style-type: none"> a) The right to control their fertility; b) The right to decide whether to have children, the number of children and the spacing of children; c) The right to choose any method of contraception; d) The right to self-protection and to be protected against sexually transmitted infections, including HIV/AIDS; e) The right to be informed on one's health status and on the health status of one's partner, particularly if affected with sexually transmitted infections, including HIV/AIDS, in accordance with internationally recognised standards and best practices;

Human Rights Instrument	Right to Health Provision
Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women (Maputo Protocol)	<ol style="list-style-type: none"> f) The right to have family planning education. 2. States Parties shall take all appropriate measures to: <ol style="list-style-type: none"> a) Provide adequate, affordable and accessible health services, including information, education and communication programmes to women especially those in rural areas; b) Establish and strengthen existing pre-natal, delivery and post-natal health and nutritional services for women during pregnancy and while they are breast-feeding; c) Protect the reproductive rights of women by authorising medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus. <p>Article 14 states:</p> <ol style="list-style-type: none"> 1. Every child shall have the right to enjoy the best attainable state of physical, mental and spiritual health. 2. States Parties to the present Charter shall undertake to pursue the full implementation of this right and in particular shall take measures: <ol style="list-style-type: none"> (a) To reduce infant and child mortality rate; (b) To ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care; (c) To ensure the provision of adequate nutrition and safe drinking water; (d) To combat disease and malnutrition within the framework of primary health care through the application of appropriate technology; (e) To ensure appropriate health care for expectant and nursing mothers;

Human Rights Instrument	Right to Health Provision
African Charter on the Rights and Welfare of the Child of 1990	<p>the society, in particular, parents, children, community leaders and community workers are informed and supported in the use of basic knowledge of child health and nutrition, the advantages of breastfeeding, hygiene and environmental sanitation and the prevention of domestic and other accidents;</p> <p>(I) To ensure the meaningful participation of non-governmental organizations, local communities and the beneficiary population in the planning and management of a basic service programme for children;</p> <p>(j) To support through technical and financial means, the mobilization of local community resources in the development of primary health care for children.</p>

2.7 Other Regional and International Obligations

Whereas the constitution refers to ratified international instruments, it is important to note that there are other regional and international obligations that Kenya as a member of the global community commits to implementing and it is important to hold the government accountable to meeting such obligations. Below are some of the obligations.

1. The Abuja Declaration on HIV & AIDS, Tuberculosis and Other diseases infectious diseases has been in place for the last 14 years and has been a strong tool for advocacy by communities and civil society to hold governments accountable. Regrettably only six countries in Africa have been able to allocate 15% of their public expenditure to health as desired by the Abuja Declaration. A special summit was held in July 2013 where the African leaders reconfirmed their commitment towards achieving the Abuja Declaration. The Abuja +12 was coined and adopted as the pathway of shaping the future of health in Africa. It is important to note that the Abuja limit of 15% does not stop us as a country from allocating much more to health.

2. Sustainable Development Goal (SDG) 3, the overarching goal on health issues, seeks to ensure healthy lives and promote wellbeing for all at all ages. Target 3.3 is, “By 2030, end the epidemics of AIDS, tuberculosis, malaria and neglected tropical diseases and combat hepatitis, water-borne diseases and other communicable diseases”.³ There are several other goals and targets in the proposed SDGs that are relevant to ending AIDS by 2030; these include goals 1-5, 8, 10, 11, 16 and 17.

Session 3

2.8 Constitutional Values and Principles and the Rights Based Approach to Service Delivery Governance.

Article 10 provides for the national values and principles of governance including patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people; human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized; good governance, integrity, transparency and accountability; and sustainable development among others. The values and principles bind all State organs, State officers, public officers whenever any of them:

- (a) Applies or interprets the Constitution;
- (b) Enacts, applies or interprets the law or
- (c) Makes or implements public policy decisions

Further to Article 10, Article 232 also provides the values and principles of public service which include high standards of professional ethics; efficient, effective and economic use of resources; recruitment in a manner that is competitive and equitable devoid of tribalism and other forms of discrimination; involvement of the people in the process of policy making; transparency and provision to the public of timely, accurate information among others.

The values of principles of the constitution are so important that they can only be directly amended by the people through a referendum.

The president has also been given a specific constitutional mandate to report in an address to the nation once every year, on all the measures taken and progress achieved in the realisation of the national values and principles in Article 10- Article 132(1) (c) (i).

Important to note is the fact that the rights based approach as understood internationally is domesticated for Kenya within the Article 10 principle which has fully embraced the human rights principles of equality and non-discrimination, transparency, accountability and public participation. The rights approach requires a comprehensive process that not only recognises health as a human right in policies, laws and regulatory frameworks but one that embraces a service culture that respects those seeking services by ensuring respect for their dignity, protection from violation of their rights, facilitation of access to information, respect for their confidentiality and privacy, their involvement in decision making on matters that affect them and respect for their choices.

2.9 The duty to implement the right to health

The constitution requires the State and all to ensure that the rights and freedoms in the bill of rights including the right to health are observed, respected, promoted, and fulfilled- Article 21 (1). The State is further required to take “legislative, policy, and other measures, including the setting of standards to achieve the progressive realisation of the rights under Article 43(2)- (read the right to health)”. All state organs are expected to address the need of vulnerable groups within society, persons with disability, children, and youth, members of minority or marginalised communities and members of particular ethnic or religious or cultural communities- Article 21(4). The state is also expected to enact legislation for the implementation of its obligations under the ratified international instruments on fundamental rights and freedoms.



Discuss the following duties with respect to both state and non-state actors:

1. duty to observe the right to health;
2. duty to respect and protect the right to health;
3. duty to promote the right to health;
4. duty to fulfil the right to health

MODULE 3 – GOVERNANCE STRUCTURES FOR IMPLEMENTING THE RIGHT TO HEALTH IN KENYA

3.1 Objective of the Module

To build the capacity of participants on the Kenyan system of devolved governance and the role of the different state organs and agencies at the two levels of governance in the delivery of services in the health sector.

3.2 Introduction to the Module

The Constitution provides for the devolved system of governance in Kenya. Article 6 divides the territory of Kenya into counties and integrates the principles of devolution and access to justice into the Kenyan system of governance. Devolution is also one of the national value and principle of governance that must be adhered to by any state organ, state officer, public officer and all persons in:

- (a) application or interpretation of the Constitution;
- (b) enactment, application or interpretation of any law; or
- (c) making or implementing of public policy decisions.

The levels of governments under the devolved system have distinct functions as outlined in the fourth schedule. Health is one of the devolved functions. It is therefore important that the role of the different actors at the two levels of government is well understood by the civil society as they carry out their different mandates in the health sector.

It is expected that at the end of this module participants will have the knowledge on the responsibilities of the different structures in respect of the right to health and will therefore be in a position to properly guide their actions on advocacy and other programmes intended to enhance the enjoyment of the right to health.

Session 1

3.3. The Kenyan System of Devolved Government

There are two levels of governments: one National and Forty Seven (47) County governments. The governments at the national and county levels are *distinct and inter-dependent*. They are expected to conduct their mutual relations through *consultation and cooperation*.

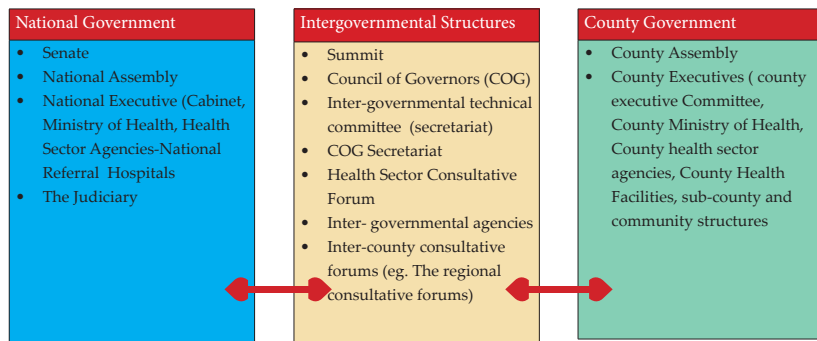
The principle of *distinctiveness* connotes that each level of government has distinct boundaries, sources of resources and functions. The Fourth Schedule has assigned functions to both the national and county levels of government. The distinctiveness of the governments is in respect of the functions that are exclusively assigned to either level of government. The national government is for instance in charge of developing the national policies and standards for the health sector while county governments are in charge of planning and managing the service delivery in county health facilities.

The principle of *interdependence* connotes that they depend on each other, they serve same citizens, some functions overlap - one does policy and the other implements. This is demonstrated by the fact that the county governments' implementation must accord with the national standards while the national government's agenda to achieve progressive realization of health cannot be achieved without the proper delivery of services through the functions assigned to Counties.


The principles of oversight: oversight is left to intergovernmental institutions such as independent offices and commissions. To facilitate consultation and cooperation, the constitution has provided for *intergovernmental* relations between the two levels of government in Article 189. This includes provisions on how any function may be transferred from a government at one level to another government in another level- Article 187.

County governments are expected to observe democratic principles and the separation of powers. They are supposed to have reliable resources of revenue to enable them to govern and deliver services effectively.

The Constitution imposes to both levels of governments (national and county) the duty to *observe, respect, protect, promote* and *fulfill* the rights and fundamental freedoms in the Bill of Rights (which includes the right to health). Further, the State is obligated to take legislative, policy and other measures, including the setting of standards, to achieve the progressive realization of the rights guaranteed under Article 43.



Constitutional structures



Plenary Exercise: Discuss and encourage the identification of situations where the rights based approach is practised or not practised.

Session 2

3.4 National Government Structures

The national government is composed of Parliament (the National Assembly and the Senate), the National Executive and the Judiciary.

3.5 The National Legislature

The National Legislature (Parliament) is the legislative body at the national government level and consists of the National Assembly and the Senate. As a legislative body, parliament exercises legislative authority which is the power to make, amend and/or repeal laws.

While the duty to make laws collectively rests on both the Senate and the National Assembly, the Senate may only originate a bill concerning county governments (Article 109).

The role of Parliament on the right to health

- To put in place legislative measures for the progressive realization or implementation of the right to health.
- To review all the laws that relate to the health sector to ensure that they have clearly incorporated health as a human right and that they have integrated values and principles of the constitution well enough to give clear statutory guidance for the delivery of health as a right.
- The National Assembly has the role of providing oversight to the National Government Executive in respect of its mandate to develop policies and implement programmes for facilitating access to the right to health.
- The National Assembly and the Senate have the role of allocating adequate resources to counties from the nationally collected revenue for the implementation of functions assigned to counties.
- The National Assembly has a responsibility to ensure adequate allocation of funds to the delivery of health as right in the national government’s budget to the health sector.

The overall functions of the National Assembly and Senate are provided in Article 95 and 96 as summarized in the table below:

Functions of the National Assembly (Article 95 of the Constitution)	Functions of the Senate (Article 96 of the Constitution)
1. Represents the people of the constituencies and special interests in the National Assembly	Represents the counties and serves to protect the interest of the counties and the governments
2. Deliberates on and resolves issues of concern to the people including the implementation of programmes for facilitating the right to health	Participates in law making function of Parliament by considering, debating and approving Bills concerning counties including the laws relating to the right to health (Articles 109 to 113)
3. Enacts legislation	Determines the allocation of national revenues among counties
4. Determines the allocation of national revenue between the levels of governments	Exercises oversight over national revenue allocated to the county governments
5. Appropriates funds for expenditure by the national government and other national state organs	
6. Exercises oversight over national revenue and its expenditure	
7. Reviews the conduct in office of the President, the Deputy President and other state officers and initiates the process of removing them from office.	Enacts legislation to authorize the Cabinet Secretary responsible for finance to stop the transfer of a State organ or public entity (Article 225)
8. Exercises oversight of state organs	

3.6 The National Executive

The national executive comprises of the President, his deputy, and the rest of the cabinet. The President is the head of State and the Chief Executive of the national government.

3.7 General Function of the Executive

The executive formulates policy, develops sectoral and national strategies for the implementation of the national development agenda in line with the constitution.

3.8 Role of Executive in delivering the right to health

For the health sector, the national executive

- (i) Reviews and develops health sector policies and bills for tabling in Parliament with adequate provisions to guide the achievement of the right to health.
- (ii) Sets standards for guiding service delivery.
- (iii) Develops service delivery protocols for national referral facilities, which are among the national government mandates.

The national government executive works through the assistance of public officers at the national executive level, national public entities and agencies including State corporations, parastatals and other semi-autonomous institutions that fall under the national executive. State organs and public entities and agencies of the national executive are obligated to decentralise their services to ensure reasonable access to their services in all parts of the Republic -Article 6(3).

The national executive is expected to review all policies and laws that existed before the promulgation of the current constitution to ensure that they comply with the constitution and the new system of governance. This included the restructuring of parastatals with county government mandates to relinquish them.

3.9 The Judiciary

The judiciary is established pursuant to Article 159 of the constitution. The courts and tribunals are expected to ensure access to justice for all, irrespective of status; that justice shall not be delayed; that alternative forms of dispute resolution are promoted so long as they do not contravene the Bill of Rights or are inconsistent with the constitution and any written law.

3.1.1 Function in relation to the right to health

The High Court has been assigned specific constitutional mandate and power under Articles 23 and 165 to determine applications for the redress of a denial, violation or infringement of or a threat to a right or fundamental freedom in the Bill of Rights (the right to health being one of them).

The High Court may therefore make a declaration of rights, issue an injunction to stop violation of rights and make a declaration of invalidity of any law, policy or any other instrument that facilitates the denials, violations, and infringements or threatens the right to health. The Court may also issue an order of compensation in some instances.



Illustration 3.1: The TB is not a crime campaign

From the above cases, it is thus clear that individuals and organizations (including CSOs) representing affected people or groups may bring cases before the courts seeking interpretation or redress for the violation of rights including the right to health (Article 22). Where a State organ seeks to justify the limitation of a right, it is up to that state organ to demonstrate that the limitation was done in accordance with the Constitution (Article 24).

3.1.2 Constitutional Commissions and Independent Offices

Constitutional commissions and independent offices are provided for in Chapter 15 of the constitution. Article 249(1) provides that the objects of the commissions and the independent offices which include - the protection of the sovereignty of the people, to secure the observance by all state organs of the values and principles of the constitution and to promote constitutionalism. The constitution establishes over 10 commissions and independent offices, which include those established under Article 59 on human rights and equality.

The Kenya National Commission on Human Rights (KNCHR), the National Gender and Equality Commission (NGEC) and the Commission on Administrative Justice (CAJ) play different roles in monitoring the implementation of human rights and administrative Justice in Kenya. The three commissions are mandated to provide oversight on matters relating to human rights. The National Gender and Equality Commission is particularly mandated under its statute to work with other relevant institutions in the development of standards for the implementation of policies for the progressive realization of the economic and social rights specified in Article 43 of the Constitution and other written laws- these include the development of standards for the progressive implementation of the right to health.

Session 3

3.1.3 County Government Structures

With devolution, came county governments under Article 176 of the Constitution consisting of county assemblies and county executive.

3.1.4 The County Assembly

The County Assembly is the legislative arm of the county and consists of members elected by the registered voters and nominated members and the speaker.

Article 185 of the Constitution and Section 8(1) of the County Government Act gives County Assemblies their mandate. Below is the list of the mandate as adopted to apply to the delivery of the right to health;

1. To make any laws that are necessary for, or incidental to, the effective performance of the functions and exercise of powers of the county governments under the Fourth Schedule. In this case to enact any county laws relating to the health sector and the right to health.
2. While respecting the principle of separation of powers, exercise oversight over the county executive committee and any other county executive organs (in their implementation of their health function).
3. Receive and approve plans and policies for the management of the county health sector and the development of its infrastructure and institutions.
4. Approve the health budget of the county in accordance with Article 207 of the Constitution.
5. Approve expenditure of the county government from the County Revenue Fund.
6. Provide for the establishment of other funds by the county and the management of those funds.
7. To authorize the retention or the utilization of facility collected revenues in the health facilities.
8. To vet and approve nominees for appointment to county public offices including the CEC member in charge of health

3.1.5 County Executive

The County Executive comprises the Governor, the Deputy Governor, the County executive committee members and the county public service. The county executive can also work through agencies and county based entities.

The mandate of the county executive government is to implement functions assigned to county governments under the Fourth Schedule.

The County Executive must therefore:

- Determine and define the key county health concerns to guide the development of an evidence-based strategy for health service delivery in the county.
- Determine the appropriate county government structures for the implementation the services for delivering on the right to health. Every county government is constitutionally mandated under Article 176 (2) to decentralize its functions and the provision of its services to the extent that is efficient and practicable to do so. The county health services will therefore be expected to extent to the county decentralised units including urban areas, sub-counties, wards, villages and any other as the county may determine given its health profile and strategy for implementation.
- Develop county policies for the delivery of health services in line with the national policies and standards.
- Develop draft legislation for the delivery of health services for submission to and legislation by the county legislatures.
- Develop the county health sector development plan to be integrated in the County Integrated Development plan (CIDP).
- Prepare the county budget for the health sector including estimates for revenue and expenditure in accordance with Article 220 of the Constitution.
- Develop proposals for financing any anticipated deficit for the period of any health plan.

- Prepare any proposals for borrowing or any other form of public liability expected to increase the public debt.
- Develop Annual county health implementation plans and budgets for the delivery of health services.
- Develop operational structures and culture for the application of the constitutional values and principles in health service delivery in the counties.
- Facilitate civic education to the public on health in the county.
- Facilitate access to information to the public on relevant health matters.
- Facilitate meaningful public participation by the public in the planning, and policy making on county government health services. The departments of health need to engage fully with the County Assembly committees on health for efficient and effective service delivery.

For example, in the case of *Patricia Asero & Others v Attorney General* (Petition 409 of 2009), the petitioners filed a petition in the High Court of Kenya to challenge the provision of sections 2, 32 and 34 of the Anti-Counterfeit Act, 2008. The petitioners argued that the provisions were affecting or likely to affect their access to affordable essential drugs and medicines including generic drugs/medicines thereby infringing upon their fundamental right to life, dignity and health. They argued that the application and enforcement of the Act would deny them the right to enjoy the highest attainable standard of health as the cost of the HIV medication could substantially increase if they were denied the opportunity to access generic drugs.

The Court found that Sections 2, 32 and 34 of the Anti-Counterfeit Act threaten to violate the right to life of the petitioners as protected by Article 26 (1), the right to human dignity guaranteed under Article 28 and the right to the highest attainable standard of health guaranteed under Article 43 (1). Relatedly, in *Daniel Ng'etich & 2 others v Attorney General & 3 others* [2016] eKLR (Petition 329 of 2014) the Petitioners challenged the constitutionality of using section 27 of the Public Health Act who have infectious diseases, notably tuberculosis, and have defaulted in the treatment of the diseases, arrested, charged and confined to prison on the orders of a Magistrate's Court. The petitioners argued that the use of the provisions of the Act to have them committed to prison for the purposes of treatment amounted to a violation of their constitutional rights including the right to dignity, the right to freedom from torture and other cruel and degrading treatment, and the right to freedom of movement. The Court agreed that indeed the act of confining persons suffering from infectious diseases in prison was both unconstitutional and unlawful. The court further directed the government to develop a policy on the involuntary confinement of persons with TB and other infectious diseases

3.1.6 Intergovernmental structures for the delivery of health services

Given the interdependent nature of the Kenyan system of devolved government, the Constitution has placed a duty on the two levels of government to consult and cooperate in order to ensure a harmonious and coordinated delivery of health services in the country.

Article 189 of the Constitution provides for cooperation between national and county governments. The Constitution provides as follows on the responsibility to consult and cooperate:

- Government at either level shall perform, and exercise its powers, in a manner that respects the functional and institutional integrity of government at the other level, and respect the constitutional status and institutions of government within the county level.
- Governments at either level shall assist, support and consult and as appropriate implement the legislation of the other level of government.
- Government at either level shall liaise with government at the other level for the purpose of exchanging information, coordinating policies and administration and enhancing capacity.
- The Government at each level and different governments at the county level shall co-operate in the performance of functions and exercise of powers and, for that purpose, may set up joint committees and joint authorities.
- Government may set up mechanisms for resolving intergovernmental disputes.

The *Intergovernmental Relations Act* 2012 provides for the establishment of the structures to facilitate the intergovernmental relations envisaged above. These structures include the Summit, the Council of Governors (COG), the Sectoral intergovernmental forums and the Intergovernmental Technical Committee. The interdependence nature of the Kenyan devolution provides a lot of opportunity for inter-government cooperation for better service delivery in the health sector. Examples of such opportunities include:

- a) Intergovernmental cooperation of the national government and the 47 counties for facilitation of a particular service to many needy people across all the counties. The free maternity

and delivery services in public facilities is one such programme with great potential.

- b) Intergovernmental cooperation among 5 geographically adjacent counties on the sharing of a facility or facilities or equipment and costs for the benefit of the residents of all the five counties.
- c) Inter-county cooperation between 2 counties to jointly facilitate operations of a dispensary situated on the boarder of the 2 counties and serving residents from both counties.
- d) Inter-county cooperation among the 47 Counties to jointly purchase drugs and commodities as a cost effective measure.

Objects of devolution -Article 174:

- To promote democratic and accountable exercise of power.
- To foster national unity by recognizing diversity.
- To give power of self-governance to the people and enhance participation of the people in the exercise of the powers of the state and in making decisions that affect them.
- To recognize the right of communities to manage their own affairs and to further their development.
- To protect and promote the interests and rights of minorities and marginalized communities.
- To promote social and economic development and the provision of proximate easily accessible services throughout Kenya.
- To ensure equitable sharing of national and local resources throughout Kenya.
- To facilitate the decentralization of state organs, their functions and services from the capital of Kenya.
- To enhance checks and balances and the separation of powers.

MODULE 4 - MONITORING THE IMPLEMENTATION OF THE RIGHT TO HEALTH

4.1 Introduction to the Module

Monitoring implementation of the right to health requires forging (new) partnerships. This includes professionals who have not traditionally been involved in the human rights work.

It is the duty of every individual citizen to monitor the implementation of the right to health. The three arms of government have roles spelt out in the constitution to ensure that implementation of the right to health is realized. Human rights based indicators support the effective monitoring of key health outcomes and some of the processes to achieve them

At the end of this module, the learner is expected to appreciate the importance of monitoring implementation of the right to health; employ the learned skills and knowledge to effectively monitor the implementation of the right to health and build alliances necessary to advocate for implementation of the right to health

4.2 Objective of the Module

The key objective of this module is to facilitate an understanding of the responsibilities of different stakeholders in respect of their mandates in monitoring the right to health.

Session 1

4.3 Monitoring the implementation of the right to health

Why is it important to monitor implementation of the right to health?

- Monitoring the extent of the fulfilment and violation of health human rights is a fundamental approach to promoting human rights.

- The collection and dissemination of data about unfulfilled rights and about rights violations puts pressure on duty bearers to meet their obligations to respect, protect and fulfil human rights.
- Human rights monitoring can help strengthen the compliance of duty bearers with human rights standards.

Methods to monitor the implementation of the right to health could include;

1. Monitoring legislation and policies related to health
2. Monitoring budgets
3. Monitoring violation of the right to health
4. Monitoring the right to health through judicial and quasi-judicial mechanisms

4.4 Monitoring legislation and policies related to health

Activities relevant to monitoring legal developments or law reform include:

1. Monitoring legislative discussions, including national and county constitutional drafting or reform processes;
2. Analysing the compatibility of existing legislation with the constitution international human rights standards;
3. Identifying gaps in legislation or lack of legislation to adequately protect health right
4. Facilitating the participation of NGOs and special interest groups in legislative processes, including by sharing information on existing processes, comparative analyses, etc.;
5. (e) Identifying pieces of legislation that are inconsistent with constitution and international human rights law.

4.5 Monitoring budgets

Be aware of any national legislation guaranteeing access to public information, including financial information, ongoing projects, public procurement, national and county budgets and audits.

This is important to know what kind of information one can access as well as to encourage rights holders and organizations acting on their behalf to claim access to such information;

- Understand the budget cycle. For instance, when budgets are formulated, discussed and approved, who is responsible at the national/County levels and at the local levels? When is information about the previous cycle's execution made public?
- Understand the role different actors play in drawing up, approving and implementing budgets.
- Identify experiences in other counties (neighbouring counties, for instance, or counties with a similar income or development) and assess the effectiveness of their participatory budget processes;
- Identify accountability mechanisms (including independent audits) that can ensure adequate levels of social investment and transparent use of resources. Often these mechanisms are set up to fight corruption but their findings and analyses can be useful to monitor budgets for human rights purposes;

4.6 Monitoring violation of the right to health

This could include;

- The identification of the victim or group of victims whose rights have been violated;
- The identification of the responsible authorities;
- Reporting of the violations to the relevant authorities;
- The identification of other relevant actors involved in the alleged violation (public or private individuals/ Institutions);
- A detailed account of the facts;
- Additional information relevant to the case, including the version of the authorities and any corrective action undertaken; and
- The rights affected and the obligations that have allegedly been breached, and a causal link with the facts of the case.

Case study:

'A grassroots HIV/AIDS advocacy group has heard informal reports of patients infected with HIV being turned down for surgery in certain hospitals, although national health laws and policies provide for equal access to health services and therefore prohibit discrimination. The group conducts a small-scale community-based study among HIV-positive patients and their careers which reveal that infected patients are indeed routinely turned down for elective surgery as well as for other healthcare services in public hospitals within a particular medical district. It also provides evidence that the official non-discrimination policy is being neither implemented

4.7 Monitoring the right to health through judicial and quasi-judicial mechanisms

The following considerations need to be taken to account when monitoring judicial and quasi-judicial processes in relation to health rights,

- Are remedies available? Assess whether the domestic legal system provides for adequate remedies for violations of health rights through judicial or quasi-judicial mechanisms
- If remedies are available, authorities can help empower judges to decide such cases and civil society organizations to use these remedies
- If remedies are NOT available, or if the available remedies are manifestly ineffective or excessively slow, monitoring complaints about violations of health human rights. Monitoring the manifest lack of remedies or the slowness of the system may be important to highlight the legal gaps and obstacles that prevent victims from receiving redress.

Session 2

4.8 Roles of different bodies in monitoring the implementation of the right to health

4.1.1 Role of the Legislature in monitoring the right to health

The legislature derives its legislative authority from the people of the Republic of Kenya. It also manifests the diversity of the nation, represents the will of the people and exercises their sovereignty.

- While the National Assembly deals with protecting the interests of the national government, the senate does this for the County level. The interests include those of the right to health
- It determines the allocation of the national revenue between the levels of government as provided for in part 4 chapter 12
- It exercises oversight of state organs,

4.9 Role of the Judiciary in monitoring the implementation of right to health

The judicial authority is derived from the people and vests in and exercised by the courts, tribunals established under the constitution. As provided for in the constitution article 159, the Judiciary performs the following functions;

- Ensure that justice is done for all indiscriminately.
- Ensure that alternative forms of dispute resolution including reconciliation mediation, arbitration etc. do not contravene the bill of rights.
- Ensure that traditional dispute mechanisms do not contravene the Bill of rights and the Constitution.

It is also important to note the role that the judiciary plays in triggering legal and policy change when called upon to. Petitioners can move the court to interpret a law, determine the constitutionality or otherwise of a law or policy, or ask the court to compel the government to develop

or change a law or policy in appropriate circumstances. The High Court in Kenya has done this in the case of *Daniel Ng'etich & Others v. AG & Others*, where the court ordered the government to develop an isolation policy on involuntary confinement of persons with infectious diseases that respects human rights and is in line with international standards.

4.1.1 Roles and Responsibility of CSOs in monitoring the right to health

CSOs work for and on behalf of the people (communities, interest groups- women, children, PLHIV, youth, persons with disability etc). Like all other persons, CSOs must, in their work 'Respect, uphold and defend the constitution". CSOs will mainly engage in the following key activities in respect of the right to health.

1. Community empowerment on the right to health.
2. Monitoring implementation of the right to health.
3. Facilitating access to justice in respect of violations of the right to health.
4. Providing health services to communities.

Even though the CSOs work as representatives of the people, they have a duty to ensure that their work respects the values and principles in Article 10, which equally binds them as it does the state as the primary duty bearers. In this regard CSOs are expected to apply the principles of the rule of law, democracy and participation of the people, human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised. CSOs must recognise that they work on behalf of the public and must also apply the principles of good governance, integrity, transparency and accountability to the people in their work. This will require:

- Honest and accurate representation of the issues affecting the communities they work for.
- Provision of accurate information and advice to those they work for.
- Facilitation of access to full information on matters affecting them.

- Respect for the right to privacy and confidentiality.
- Accountability with respect to resources raised in the name of and for communities.

4.1.2 Community Empowerment on the right to health

CSO should work to ensure the empowerment of the communities they work with as relates to the right to health. This community empowerment can be done through:

- Developing the capacity of community-based organizations to understand health as a right under the constitution.
- Sensitizing communities on their right to health entitlements under the constitution.
- Providing civic education to communities and facilitate their participation in review of draft legislation on health issues before relevant Parliamentary committees to advocate for the faithful implementation of the right to health and the constitution.
- Providing civic education to communities and interest groups to meaningfully participate in processes to influence the executive agendas in the health sector including the allocation of adequate resources for the implementation of the right to health.
- Organizing communities for engagement public participation forums at the grass root/ sub-county levels, County and National levels.
- Developing strategic partnerships in communities for the demand of the right to health in line with the constitution.
- Engaging at the regional and international levels to advocate for faithful implementation of the constitutional and international treaty provisions.

4.1.3 Advocacy for accountability on the delivery of services by executives at the national and county governments for facilitating the right to health

Advocate for the State, as the primary duty bearer mandated to take certain measures to facilitate the progressive realization of these rights, to develop the necessary frameworks, tools and standards for facilitating access to the right to health. These include:

- Policies, laws and operational frameworks.
- Functional health systems including health infrastructure, human resources, health products and commodities including health technologies.
- Development of strategic partnerships for better delivery of health services.
- Development of county and national health information systems that facilitate service delivery to all including to the vulnerable and marginalized.
- Adequate investment in Health with adequate allocation of financing to health services and budgets.

4.1.4 Strategic Litigation

Strategic litigation: raises awareness about human rights violations; empowers and restores dignity to a plaintiff or a community; fosters coalitions among committed partners; and motivates other branches of government to take action.

4.1.5 Factors to consider when selecting strategic litigation cases:

In selecting cases for strategic litigation, it is important to weigh the following factors:

- The nature of the problem: How severe and widespread is the problem? Does the community affected by the problem view it as a priority issue?
- The likelihood of success: consider the strength of the case, an appropriate client who can act as the plaintiff, is the current state of the law supportive enough? Does the court have the capacity, independence, and impartiality needed to adjudicate the case properly? Is there an opportunity to broaden support for the cause or to reframe the debate?
- The anticipated impact of success or loss: the positive or negative impact of winning or losing the case on international or national law development, if success of the case could have a negative impact on human rights protection elsewhere the risk of backlash if the case is won or if it is lost, opportunities or concerns related to media coverage of the case.
- The opportunity to collaborate: the need to collaborate with legal professionals and advocates, the commitment and capacity of the potential partners to work on the case, an opportunity for support from other key constituencies (e.g., medical, scientific, religious) Need to acquire new clients, allies, or perspectives over the course of this case
- Resource implications: How much time is expected to be needed? Is there enough time? What are the cost implications? What is the cost best analysis on the case to be litigated and the nature of remedies sought.
- Nature of remedies sought: what remedies are being sought? What will be the impact, positive or negative, if the remedies are granted or denied?

4.1.6 The role of CSOs in advocating on the right to health is summarized in the following table:

CSO ADVOCACY ON THE RIGHT TO HEALTH	
Implementation strategy	Advocacy steps
Policies, laws and operational frameworks.	<ul style="list-style-type: none"> ▪ Monitor and review county and national government policies, laws and regulations on health to identify gaps and or obstacles to the enjoyment of the right to health. ▪ Monitor the development of the health sector plans and budgets at the national and county levels and participate in forums to influence the integration of rights based approaches and the allocation of adequate resources for the implementation of the right to health. ▪ Develop advocacy material and strategies for compliant county, national and intergovernmental policy and legislative frameworks. ▪ Advocate for the inclusion of the health needs of marginalized and vulnerable populations in the planning and implementation of the health sector programmes.
Health Systems: Health infrastructure,	<ul style="list-style-type: none"> ▪ Undertake research on the health infrastructure available at the county and national level. ▪ Determine the status and quality of the infrastructures applying the AAAQ indicators. ▪ Use the evidence to advocate for equitable access to quality health infrastructure by the people

CSO ADVOCACY ON THE RIGHT TO HEALTH	
Implementation strategy	Advocacy steps
Human resources	<ul style="list-style-type: none"> ▪ Undertake research on the level of human resources available in a county or nationally by type, cadre, specialty etc. ▪ Determine level required to meet minimum standards. ▪ Advocate for the Minimum or the adequate number of health sector staff to facilitate access to services.
Health products, commodities and technologies	<ul style="list-style-type: none"> ▪ Undertake research on the level of availability of the necessary Health products, commodities and technologies for delivering services in health facilities. ▪ Determine level required to meet minimum standards. ▪ Advocate for the Minimum or the adequate level of these products to facilitate access to the right to health.
Health information systems	<ul style="list-style-type: none"> ▪ Review the relevant county and national health sector development plans. ▪ Determine how adequately it has provided information to ensure equal access to all including the vulnerable and marginalised. ▪ Advocate for inclusion of key information that may have been omitted and populations that may have been left out.

CSO ADVOCACY ON THE RIGHT TO HEALTH	
Implementation strategy	Advocacy steps
Strategic partnerships	<ul style="list-style-type: none"> ▪ Determine the different partnerships that county and national government may have entered into for the delivery of the right to health. ▪ Monitor the faithful adherence to the constitution and the protection of the right to health by all partners as they collaborate with governments at either level. ▪ Partner with other organisations to monitor issues relates to corruption in the health sector or wastage of resources;

4.1.7 The Role of CSOs In Regard To Constitutional Commissions

- CSOs need to identify constitutional commissions that they can work with to ensure the promotion of the right to health. Specifically, CSOs ought:
- To participate in commission activities for enhancing the review and advocating for the development of frameworks for the enhancement of the enjoyment of the right to health.
- To raise concerns on any violations or threat to the violation of the right to health.
- Provide civic education to groups and communities to raise concerns on violation of their health rights with the relevant complaints mechanisms of constitutional commissions.
- To represent individuals in the complaint processes of constitutional commissions.

4.2.8 CSOs engaging at the Regional and International Levels

Leveraging the SDG's with development partners and donors, as course of correcting the inequalities that were not addressed by the MDG's. Develop shadow reports for presentation to the relevant human rights treaty bodies on the implementation of the relevant health rights obligations by Kenya as a state. Appear before relevant or treaty bodies at the East African Community, The AU and the United Nations to present evidence in respect of any matter relating to the right to health and its implementation in Kenya. Participate in regional and global dialogues various matters relating to the right to health in addition to liaising with other international NGOs.



EXERCISE: Group Work

1. Based on the information that you have received in this training, develop a quick strategy on the CSO engagement that will ensure the comprehensive application of the rights in the Kenyan constitution in:
 - TB and HIV work
 - Sexual and reproductive health work.
 - Harm reduction
 - Health rights for MSM and Sex Workers
 - Widows and orphans
2. Access to essential medicines

Annex 1 - Constitutional assignment of the health function between the National and County governments

National Government functions on Health	County Governments' functions on Health
National referral health facilities. Health policy. Setting of standards Providing Technical support to county governments	County health services, including, in particular— (a) County health facilities and pharmacies; (b) Ambulance services; (c) Promotion of primary health care; (d) Licensing and control of undertakings that sell food to the public; (e) Veterinary services (excluding regulation of the profession); (f) Cemeteries, funeral parlours and crematoria; and (g) Refuse removal, refuse dumps and solid waste disposal. TA gazette notice No. 116 of 9th August 2013 (a) County health facilities and pharmacies including— (i) County health facilities including county and sub county hospitals, rural health centres, dispensaries, rural health training and demonstration centres. Rehabilitation and maintenance of county health facilities including maintenance of vehicles, medical equipment and machinery. Inspection and licensing of medical premises including reporting; (ii) County health pharmacies including specifications, quantification, storage, distribution, dispensing and rational use of medical commodities: Provided that until alternative intergovernmental arrangements are made, all counties shall procure medical commodities from the Kenya Medical Supplies Authority except where a particular commodity required by a county government is not available at the Kenya Medical Supplies Authority; (b) Ambulance services including emergency response and patient referral system; (c) Licensing and control of undertakings that sell food to the public including food safety and control;

National Government functions on Health	County Governments' functions on Health
	<p>(d) Promotion of primary health care including health education, health promotion, community health services, reproductive health, child health, tuberculosis, HIV, malaria, school health program, environmental health, maternal health care, immunization, disease surveillance, outreach services, referral, nutrition, occupational safety, food and water quality and safety, disease screening, hygiene and sanitation, disease prevention and control, ophthalmic services, clinical services, rehabilitation, mental health, laboratory services, oral health, disaster preparedness and disease outbreak services. Planning and monitoring, health information system (data collection, collation, analysis and reporting), supportive supervision, patient and health facility records and inventories;</p>
	<p>(e) Veterinary services to carry out, coordinate and oversee veterinary services including clinical services, artificial insemination, and reproductive health management; but excluding regulation of the profession; and</p> <p>(f) Enforcement of waste management policies, standards and regulations; in particular –</p> <p>(i) Refuse removal (Garbage) including, provision of waste collection bins, segregation of waste at source, licensing of waste transportation;</p> <p>(ii) Refuse dumps including zoning waste operational areas, conducting environmental impact assessment for the siting of dumps, fencing of dumps, controlling fires, monitoring waste characteristics and monitoring of waste water from the dumpsite (leachate); and</p> <p>(iii) Solid waste disposal including enforcement of national waste management policies, standards and laws with respect to land filling, incineration with energy recovery, composting, recycling and operation of transfer stations.</p>
Disaster management	

References

Legislative framework and policies

International

Convention on the Elimination of all forms of Discrimination Against women (CEDAW)

Convention on the Elimination of Racial Discrimination (CERD)

Convention on the Rights of the Child (CRC)

General Comment No. 14 by the Committee of Economic, Social and Cultural Rights: The Right to the Highest Attainable Standard of Health (Art. 12) UN Document E/C.12/2000/4)

International Convention on Economic, Social and Cultural Rights (ICESCR)

International Conference on Population and Development (ICPD) 1994

Universal Declaration of Human Rights (UDHR)

Regional

Africa Charter on Human and People's Rights

African Charter on the Rights and Welfare of the Child

Protocol to the African Charter on Human and People's Rights on the Rights of Women of Africa

Africa Health Strategy: 2007 – 2015- CAMH/MIN/5(III)

National

Constitution of Kenya 2010

Public Health Act Cap 242

Public Health Officers (Training Registration and Licensing) Act of 2013

Kenya Health Sector Referral Implementation Guidelines 2014

Kenya Health Sector Referral Strategy 2014-2018

Kenya Health Policy 2012-2030

Kenya National Patients' Right Charter 2013

Standards for Peer-Education and Outreach Programs for Sex Workers 2010

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Nairobi Office
4th floor Somak House Mombasa Road

-  112 - 00202 Nairobi
-  +254 788 220 300
-  +254 708 389 870
-  info@kelinkenya.org
-  www.kelinkenya.org
-  @KELIKenya

Kisumu Office
Aga Khan Road Opp Jalaram Academy

-  17708 - 40100 Kisumu,
-  +254 (57) 253 2664
-  +254 708 342 197
-  info@kelinkenya.org
-  www.kelinkenya.org
-  Facebook/kelinkenya

