

KENYA NATIONAL COMMISSION ON HUMAN RIGHTS
(Established under KNCHR Act, 2002)



POSITION PAPER

**ENHANCING AND OPERATIONALISING ECONOMIC, SOCIAL AND
CULTURAL RIGHTS IN THE CONSTITUTION OF KENYA**

2006

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I: BACKGROUND INFORMATION

The Kenya National Commission on Human Rights (hereinafter “the KNCHR”, “the National Commission” or “the Commission”) is a public body established through the KNCHR Act, 2002 and formally operationalised in July 2003 with the appointment of nine Commissioners. The mandate of the Commission, which is elaborated in section 16 of the KNCHR Act, is broadly to enhance the protection and promotion of human rights in Kenya. Although established by the Government, the National Commission has an autonomous status. Its operations are guided by the United Nations approved Paris Principles on the establishment and functioning of national human rights institutions. The Commission executes its mandate through advocacy, investigations, visits to places of detention, research and human rights education among other strategies. The Commission is also mandated to advise the government on how to enhance protection and promotion of human rights.

As the supreme human rights organ of the state, the National Commission is the national focal point for reliable and current information on human rights. This the Commission does by, among other things, conducting research on emerging and key human rights issues with a view to catalyse policy and legislative reforms or to inform and precipitate debate on key human rights issues. The Commission therefore issues authoritative, occasional issue-based human rights reports and position papers. Regarding the latter, the Commission states its position on a given human rights subject that is sometimes contested, and presents arguments for adopting that position with a view to setting the human rights agenda. Position papers therefore constitute one of the outputs of research through which the Commission seeks to set clarity and provide guidance on a key and sometimes-contentious human rights issue, as well as generate informed debate on the same. This position paper on ‘enhancing and operationalising economic, social and cultural rights in the Constitution of Kenya’ is prepared by the Commission’s Research, Policy and Legislation Programme under the Strategic Objective 2 on Leadership in Framing and Informing the Human Rights Discourse.

The Commission has also identified the realization of economic, social and cultural rights as a key priority. In its work and Strategic Plan (2004-2009), the National Commission seeks to put more emphasis on entrenchment and operationalisation of economic, social and cultural rights in the Constitution as a mechanism to enhance their protection and realization by Kenyans.

II: INTRODUCTION

1. One of the strategic objectives of the Kenya National Commission on Human Rights is to assume leadership in setting the country's human rights agenda. As the human rights agenda continues to advance, the Commission finds it critically important to clarify issues and provide guidance to Kenyan stakeholders as they grapple with new human rights concerns or indeed as they reinterpret existing human rights norms. The human rights field is dynamic and the Commission endeavours to locate itself on the cutting edge of human rights discourse and practice relevant for facilitating the effective exercise of human rights by individuals and communities living in Kenya.
2. This Paper presents the Commission's position on whether and/or the extent to which economic, social and cultural rights may be entrenched in the Bill of Rights in the new Constitution of Kenya; and further, the extent to which the Bill of Rights in the current Constitution can be used to enable Kenyans exercise the essence of economic, social and cultural rights. In explaining its position on these matters, this Paper responds to key arguments, which critics have used to argue for or against the entrenchment of economic, social and cultural rights in the Bill of Rights.

III: STATEMENT OF THE PROBLEM

3. The post-war period and historical context within which human rights were codified at the international level led to unequal and differential treatment of human rights with their categorization as either civil and political rights or economic, social and cultural rights¹.

EXAMPLES OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS

- *Right to food, clothing and housing*
- *Right to health*
- *Right to education*
- *Right to work*
- *Right to just and favourable working conditions*
- *Right to form and join trade unions*
- *Right to social security*
- *Right to take part in cultural life*
- *Right to enjoy the benefits of scientific progress and its applications*

4. The 1993 UN World Conference on Human rights,² however, placed all human rights at the same level by re-affirming that all human rights are universal, indivisible, interdependent and interrelated. In the 1990s, therefore, economic, social and cultural rights re-emerged as of equal importance with civil and political rights. Their

¹ This apparent differentiation was emphasised by the codification in international law of the International Covenant on Civil and Political Rights as well as the International Covenant on Economic, Social and Cultural Rights in 1966 as two distinct human rights instruments.

² The Vienna Declaration and Programme of Action adopted at the Conference, UN Doc A/CONF. 157/23, 12 July 1993, at para 5 asserted the indivisibility, interdependence, and interrelatedness as well as the equal nature of Civil and Political Rights and Economic, Social and Cultural Rights; and hence the need for treating all these rights in an equal manner, on the same basis and with the same emphasis.

Constitutional recognition grew in many countries, with the South African Constitutional Court setting judicial precedent on their justiciability.³ This notwithstanding, justiciability of economic and social rights still remains a hotly debated issue.

5. The Bill of Rights in the current Constitution of Kenya makes no provision for socio-economic rights; and at the same time it has a weak human rights enforcement mechanism. However, the Draft Constitution of Kenya (Bomas Draft), adopted by the National Constitutional Conference on 15th March 2004, as well as the Proposed New Constitution of Kenya (August 2005) protected socio-economic rights⁴ in the Bill of Rights as justiciable norms.
6. While Kenyan's rejected the Proposed New Constitution at the November referendum, they still find a need for and are continuing to work for a new Constitution for the country. In an effort to jumpstart the constitutional review process, the government appointed, in February 2006, a Committee of Eminent Persons to find a way forward for the constitutional review process after the referendum by collecting views from Kenyans, identifying what the public considers the weaknesses, successes and failures of the process and make proposals on the way forward. The Committee, which recently ended its sittings, conducted its work through submission from the public, politicians, religious bodies, professional bodies among other constituencies, and is currently preparing its report. Many Kenyans are in the meantime looking forward to a new Constitution before the 2007 General Elections.

IV. POSITION OF THE NATIONAL COMMISSION ON ENTRENCHMENT OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN THE CONSTITUTION

7. The National Commission is broadly mandated and remains committed to ensuring that all human rights are protected, promoted and fulfilled by the Government of Kenya. This is through, among other steps, ensuring that economic, social and cultural rights are recognized and entrenched in the Constitution as a means towards poverty alleviation, social justice and government accountability.
8. During discussions preceding the referendum, a number of arguments were advanced on the inappropriateness of Constitutional entrenchment of economic, social and cultural rights. These arguments are still relevant and could arise as the country moves forward to a new Constitutional dispensation. It is for this reason that the National Commission seeks to set clarity on this issue.
9. In the Commission's view, the arguments advanced for not entrenching economic, social and cultural rights in the Constitution cannot be valid essentially because such arguments would also invalidate entrenchment of civil and political rights. Economic,

³ Justiciability is the ability of an individual to seek redress before a court against violation by a state or other party in breach of its obligations and to receive a remedy against such violation.

⁴ Chapter 6 of the Bomas draft Constitution (Articles 60-66) and Articles 57 – 69 of the Proposed New Constitution of Kenya recognized economic, social and cultural rights. The Proposed New Constitution of Kenya was however rejected at the November 2005 Referendum.

social and cultural rights, just like civil and political rights, should be protected by the state against violation, and in appropriate cases, enforced by the courts and other relevant bodies. Below, the KNCHR responds to the specific concerns raised against constitutional entrenchment of economic, social and cultural rights.

The non-justiciability argument

10. One argument has contended that economic, social and cultural rights are non-justiciable and hence should not be entrenched in the Bill of Rights. One paper argues,

“Some of the rights provided in the draft Constitution, for example, the right to housing are superfluous and incapable of proper legal protection and monitoring. They are in essence aspirational phrases which are incapable of proper legal protection in the Kenyan legal system”⁵.

The crux of this argument is that by virtue of economic, social and cultural rights being non-justiciable, they should not be entrenched in the Constitution.

11. The non-justiciability argument is impeached on a number of grounds. First, entrenching economic, social and cultural rights in the Bill of Rights should not hinge primarily on whether they are justiciable or not. The guarantee and enforcement of all human rights – whether civil and political or economic, social and cultural – is undertaken by a multiplicity of state organs through a variety of strategies. The Executive and the Legislature for instance, ensure that necessary policies, legislative and administrative measures are put in place to enable the effective exercise of all human rights. Alongside this, the Judiciary institutes judicial interventions and interpretations whenever and to the extent that is necessary for the better exercise of human rights. Hence, justiciability is only one of many reasons why human rights are entrenched in a Constitution.

12. Second, in fact, economic, social and cultural rights, some more than others, are justiciable. Precedents from South Africa, India and other countries make that quite clear. In the *Grootboom Case*⁶ the Constitutional Court of South Africa held that the state breached its duty to progressively implement within its available resources a plan to provide access to housing. The novelty in this decision was the pronouncement that a court may intervene against governmental policy where such policy is unreasonable. In the *TAC Case*⁷ the Constitutional Court of South Africa held that steps taken by the South African Government to provide HIV-positive mothers with antiretroviral drugs were not reasonable and that the policy of

⁵ In the paper entitled: “*Protecting the Human Rights Gains Secured in the Proposed Constitution of Kenya*” presented at the Annual Parliamentary Human Rights Workshop by the Kenya Section of the International Commission of Jurists held at the Aberdare Country Club from 9th to 11th June 2005.

⁶ In *Grootboom and Others v. Oostenberg Municipality and Others*, the Court upheld Sec. 26(2) of the South African Constitution on the right of access to adequate housing and shelter.

⁷ See *Treatment Action Campaign and Others v. Minister of Health and Others*. This case was about the right to anti-retroviral treatment for HIV-positive mothers on the basis of Sec 27 of the Constitution of South Africa on access to health care services.

prohibiting the use of antiretroviral drugs by patients outside the 18 pilot sites was an unreasonable and unjustifiable barrier to the realisation of the right to health-care. These cases demonstrate that socio-economic rights, like civil and political rights, are judicially enforceable.

13. Likewise in Kenya, courts should take a more pro-active role to interrogate government budgets, for instance on health, and the extent to which these are targeted towards fighting malaria for example, which has been documented as one of the biggest cause of death in children. Court rulings on government expenditure would make the government more accountable because it would be questioned for wasteful and non-targeted expenditure and be forced to follow the principle of reasonableness in the allocation of resources.

The resources and budgetary implications (polycentricity) argument

14. Under the this argument on the resource and budgetary implications of economic, social and cultural rights, it has been argued that these rights entail a positive duty on the state to take a certain course of action, usually involving huge budgetary and policy implications, whereas civil and political rights entail a negative duty on the state (to refrain from a certain course of action). For this reason therefore, according to proponents of this argument, the Constitution should protect negative rights and not positive rights. This line of argument was advanced in 2005 by some commentators and politicians who called for the review of sections of the draft Constitution dealing with socio-economic rights and queried the workability of socio-economic rights especially with regard to the state being compelled to provide rights such as food and shelter. Their arguments revolved around the budgetary/ resource implications of such demands.
15. However, it is our argument that resource and budgetary implications does not only apply exclusively to economic, social and cultural rights, but is an inherent feature of all adjudication, including decisions involving civil and political rights.⁸ Both civil and political rights and economic, social and cultural rights impose positive as well as negative duties on the state. The enforcement of civil and political rights, for example, the right to vote or the right to a fair trial, make huge resource demands on the state, yet this does not undermine the relevance of that right. Courts, in enforcing these rights, are forced to make rulings that entail a positive duty and budgetary implications on the state.
16. Likewise, the fact that a socio-economic right such as the right to housing has resource implications should not merely on account of that reason make it non-justiciable. Budgetary implications should not, therefore, be the only consideration in determining the validity of rights. Furthermore, the right to housing, besides imposing a positive duty, also imposes a negative duty on the state to refrain from violating that right. In the Grootboom Case, the residents were protected against arbitrary evictions and demolitions.

⁸ Hofmeyr, A., *No Meaningless Gesture: the Measure and Meaning of Socio-Economic Rights in the New South African Constitution* (2002: Faculty of Law, University of Toronto) at 30.

17. Furthermore, enforcement of economic, social and cultural rights is governed by the principle of progressive realisation of rights, which recognises that many of these rights are realisable only gradually rather than immediately on the basis of the resources available to the state at a particular point in time. Constitutional recognition of an economic, social or cultural right, such as the right to housing, may not translate into immediate provision of housing for all (and indeed neither does such a provision suggest that such housing should be free). Rather, such recognition should provide for the creation of an enabling policy, legislative and administrative environment as well as the review of policy, legislative and administrative processes that enable citizens to realize the said right.
18. Progressive realization of a right helps to ensure that economic, social and cultural rights do not become ‘rights on demand’ that must be realized without due consideration to budgetary and other resource circumstances. The state is, however, placed under a duty to begin taking steps to progressively facilitate the realization of that right, with responsibilities clearly assigned within specific time frames. The state is obliged to ensure that the exercise of these rights does not retrogress or stay at the same level. Different state organs are mandated to monitor the extent to which measures have been taken towards the realization of the rights in the Bill of Rights concerning housing, health care, food, water, social security, education and the environment.⁹ This ensures not only monitoring of implementation, but government accountability as well. Government National Development Plans should clearly demonstrate how the government intends to, for instance, increase access to housing, health care or education within the plan period and should be held accountable, during review, on the basis of that plan.

The doctrine of separation of powers

19. Finally, it has been contended that courts should not be called upon to settle political aspects of rights,¹⁰ which is the domain of the Legislature and the Executive; that by judges having to make orders with budgetary implications and involving policy choices, the judicial role of courts is being politicised, thus interfering with the doctrine of separation of powers.
20. Whereas it is true that enforcement of socio-economic rights may entail courts making orders having direct budgetary implications, the same is the case when a court enforces civil and political rights such as the right to a fair trial or right to vote. Strict interpretation of the separation of powers doctrine would imply that most rights, including civil and political rights, cannot be guaranteed since they would require judicial examination of legislative or executive spending. Therefore, by enforcing socio-economic rights, the courts will not be playing any role different from that which is ordinarily conferred upon them by any Bill of Rights.
21. Additionally, the separation of powers principle is ensured through the limitation clauses, which are infused into human rights provisions in Constitutions. The South

⁹ See Sec 184 (3) of the South African Constitution on the functions of the South African Human Rights Commission. A similar provision was in Sec 30(3) and 31(1) of the Proposed New Constitution of Kenya.

¹⁰ Ibid.

African Constitution, for example, guarantees socio-economic rights but makes them subject to an internal limitation. Provisions on the rights to housing, health care, food, water and social security, for example, require that “the state must take reasonable legislative and other measures, within its available resources, to achieve progressive realization of this right.”¹¹ The right to housing was upheld in *Grootboom* where as in *Soobramoney*¹², the court took into account the limits to the remedies that it could award for the violation or denial of any human rights. It also took into account the ‘within available resources’ provision in the realization of economic, social and cultural rights whereby benefits to a larger part of the society overrode that of the individual including prioritisation in the enforcement of a right, as well as the ‘reasonableness’ provision which allows the court to determine on whom to place the burden of providing the socio-economic right in question. Therefore while advocating for the justiciability of economic, social and cultural rights, factors such as the principle of progressive realization and resource availability should be upheld, and at the same time, the state should be able to prove that available resources have been well utilised.

Why economic, social and cultural rights should be entrenched in the Constitution of Kenya?

22. First, socio-economic rights provide a framework for strengthening the social justice system, and improving livelihoods, especially of vulnerable groups with regards to access to food, shelter, housing, education and health facilities etc. The prevalence of poverty and underdevelopment in countries like Kenya justifies a broadening of focus from one simply of civil and political rights to include economic, social and cultural rights. It is in this light that these rights form an integral component of Kenya’s growth and development, and poverty alleviation agenda.¹³ Constitutional entrenchment and the engagements of the legislature, executive and judiciary in legislating, implementing and adjudicating these rights would translate the aspirations in these government policy documents into achievable realities for Kenyans. It would also form a point of reference from which to question some targets for access to basic needs as projected in these policy documents.
23. Second, socio-economic rights form an important core of human rights in Kenya. This is against the backdrop of economic and social injustices and the resultant inequalities¹⁴ that have been witnessed over time, and which constitute a violation of

¹¹ Chapter 2 of the Constitution of South Africa - See, Sec 26 (2) and Sec 27 (2) of the Bill of Rights. A similar provision was in Sec 30(2) of the Proposed New Constitution of Kenya.

¹² See *Soobramoney v. Minister for Health, Kwazulu Natal*. The Court ruled “the state has to manage its limited resources in order to address all these claims. There will be times when this requires it to adopt a holistic approach to the larger needs of society rather than to focus on the specific needs of particular individuals within society”.

¹³ See the Economic Recovery for Wealth and Employment Creation (2003-2007), the National Development Plan (2002-2008) and the Poverty Reduction Strategy Paper. The ERS, for instance, contains a number of socio-economic goals that the Government will implement during the plan period. These include education, health, shelter and social security.

¹⁴ A report by the Society for International Development, *Pulling apart: Facts and figures on Inequality in Kenya* (2004) characterised Kenya as one of the most unequal societies in the world – this has been a factor of bad governance and economic mismanagement which has affected the poor more than the rich.

human rights and dignity. Recognising socio-economic rights in the Constitution would give the most vulnerable and disadvantaged members of the society a means through which to claim equitable access to resources and other opportunities when their basic needs are conceived as basic rights. Why? Because economic, social and cultural rights in the Constitution gives people a point of reference from which to make demands, and provides a standard of reference from which to query actors, especially with regards to resource allocation and expenditure. Constitutional entrenchment of economic, social and cultural rights also implies empowering the vulnerable to make demands to the government to put in place mechanisms to facilitate them to earn a livelihood. For instance, Internally Displaced Persons (IDPs) in various parts of the country would have a basis upon which to demand security from the government to enable them resettle in their lands and engage in activities to enable them earn a livelihood.

24. Third, entrenchment of socio-economic rights in the Constitution creates greater government accountability. It would make it easier to interrogate government policymaking, expenditure and resource allocation towards progressive realization of socio-economic rights, and the state would continuously be challenged to set in motion policy, legislative and administrative procedures to put their realization into effect or to remedy policies which violate human rights. Therefore, Constitutional protection of rights gives them more weight than if they were mere policy pronouncements. Similarly, it would give Kenyan's a better context in which to monitor and question the allocation and expenditure of resources through devolved funds, e.g., the Constituency Development Fund (CDF), Local Authority Transfer Fund (LATIF), Constituency Bursary Funds, and Constituency Aids Funds etc.
25. Fourth, all human rights are inter-related, inter-dependent and reinforce each other, and hence should be treated equally. For example, individuals below the minimum level of well-being, education and health or without shelter cannot participate meaningfully in the exercise of their civil and political rights. It would, therefore, be meaningless, in the fight against human rights violations, to Constitutionally entrench civil and political rights, without similarly entrenching socio-economic rights. The inter-relationships of civil and political rights and economic, social and cultural rights have been demonstrated over time such that the violation of economic, social and cultural rights constitutes a violation of civil and political rights. In the 1990s, for instance, the Ogiek community of the Tinet forest took the government to court to contest government de-gazettement and settlement of other communities in the forest as well as their proposed eviction from the forest for resettlement elsewhere. The Ogiek argued that by the government settling others in the forest and pushing them (Ogiek) out of their land, they were in essence being denied their way of life and a source of livelihood, which threatened their right to life. Even though they lost the case, they succeeded in proving the indivisibility and interdependence of human rights by relating their social economic rights to shelter, health, food etc to the right to life.
26. Finally, economic, social and cultural rights are recognised in international human rights instruments to which Kenya is a state party, including the International Covenant on Economic, Social and Cultural Rights, Convention on the Rights of the

Child, Convention on Elimination of Discrimination Against Women, Convention on Elimination of Racial Discrimination and the International Labour Organisation Conventions. Kenya is required under these instruments to prepare periodic reports in which it states progress made towards realization of the provisions of these instruments, including the economic, social and cultural rights therein. It would, therefore, be pointless to have a Bill of Rights that excludes socio-economic rights to which Kenya is already obligated, under these instruments, and has made a commitment to promote, protect and fulfil.

V: CONCLUSION

27. In the absence of a Constitution that includes economic, social and cultural rights, Kenyans can still enjoy these rights even in the context of civil and political rights. The Bill of Rights as currently constituted provides for the right to life and dignity of the person, which can be interpreted, though in a fairly limited way, to imply a provision for enjoyment of economic, social and cultural rights. This is because violation of economic, social and cultural rights would in the end lead to a violation of the right to life and human dignity.
28. The inclusion of economic, social and cultural rights as justiciable norms in the Bomas draft and proposed Constitution of Kenya (2005) was a positive step in the promotion and protection of human rights given that the current Constitution does not recognise them. In similar light, all stakeholders should ensure that Kenya's new Constitution recognises economic, social and cultural rights. Kenya is seeking to move from an era of massive human rights violations and it should not regress by having weak protection for human rights under the Constitution. In particular, Parliament should be lobbied on the significance of having economic, social and cultural rights in the Constitution as justiciable norms. The public will play a critical role in finally approving the new Constitution, and they should also continue being engaged in discussions about the importance of entrenching economic, social and cultural rights in the Constitution.
29. Finally, the clear messages that the Commission seeks to communicate to Kenyans on entrenchment of economic, social and cultural rights are the following:
 - It is the state's political organs that determine policies on allocation of economic resources. Courts do not make that determination. Rather, courts review decisions of resource allocation to establish that they have been done fairly and equitably.
 - Economic and social rights aim to ensure that resources are used equitably, balancing the rights of individuals with the rights of society.
 - The enforcement of economic, social and cultural rights is not arbitrary. All that a government has to show is that it has used available resources fairly and reasonably.