



Faculty of Law

Lund University

## **Master of International Human Rights Law**

Master thesis

By

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# The African Charter on Human and Peoples Rights and the Human Rights Question in Kenya

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Autumn 2002

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# Dedication

Dedicated in memory of my father the Late Austin Awori who started it all.

# Acknowledgments

First and foremost, sincere thanks go to Professor Gudmundur Alfredsson the Director of Raoul Wallenberg Institute of Human Rights and Humanitarian Law for introducing me to the programme and supervising my work.

Special thanks go to Professor Göran Melander and visiting Professors Chanda and Hansungule and the entire staff of the institute for their support during my studies.

I have a long list of coursemates from around the globe too numerous to mention to whom I say thank you and all the best

May I also take this opportunity to extend my gratitude to my employer, the Kenyan Judiciary, for affording me the opportunity to take up this programme and to SIDA for the scholarship.

Last but not least I wish to thank my family, in particular my husband Emmanuel Matheka and daughters Melissa Mbula and Mitchell Wanza for being supportive and understanding during the entire period.

To you all God Bless.

# Abbreviations

4Cs	Citizens for Constitutional Change
AU	African Union
ACHPR	African Charter on Human and Peoples Rights
ACHR	American Convention on Human Rights
BOR	Bill of Rights
CAT	Convention Against Torture
CCK	Communications Commission of Kenya
CKRC	Constitution of Kenya Review Commission
CRC	Convention on the Rights of the Child
EPZ	Export Processing Zone
FIDA	Federation of Women Lawyers
ICEDAW	International Covenant on the Elimination of Discrimination Against Women
ICESCR	International Covenant on Economic Social and Cultural Rights
ICJ	International Commission of Jurists
ICCPR	International Covenant on Civil and Political Rights
KANU	Kenya African National Union
KCS	<i>Kituo Cha Sheria</i> (Legal Advice Center)
KHRC	Kenya Human Rights Commission
KMA	Kenya Medical Association
KNA	Kenya News Agency
KPF	Kenya Pastoralist Forum
LRF	Legal Resources Foundation
LSK	Law Society of Kenya
MUHURI	Muslims for Human Rights
NCKK	National Council of Churches of Kenya
NGO	Non Governmental Organisation
OAS	Organisation of American States
OAU	Organisation Of African Unity
PLI	Public Law Institute
RPP	Release Political Prisoners Pressure Group
UN	United Nations
UNEP	United Nations Environment Programme

# 1 Introduction

## 1.1 Scope of the Study

Human rights issues have come into sharper focus since the end of the cold war. Prof U.Oji Umzurike in his book entitled *The African Charter on Human and Peoples' Rights* in defining Rights states that,

“Human Rights are thus claims which are invariably supported by ethics and which should be supported by law made on society, especially on its official managers by individual or groups of individuals on the basis of their humanity. They apply regardless of race, colour, sex or other distinction and may not be withdrawn or denied by governments.”<sup>1</sup>

International Human Rights law in its present format of international treaties was created largely in the aftermath of the Second World War, in response to the atrocities committed by the defeated powers. The United Nations is engaged in a wide range of activities aimed at fulfilling one of its principal purposes-the promotion and protection of human rights. Of great importance is the complex machinery which has been set up under various international covenants and conventions to establish standards, monitor implementation, promote compliance and investigate violations of human rights, for example, the Universal Declaration of Human Rights was adopted and subsequently given legal force in two international covenants, which came into force in 1976.<sup>2</sup> In addition to these activities, the United Nations also provides practical assistance to States in their efforts to protect and promote human rights, and informs the public about the rights to which it is entitled.

These structures and activities permit the United Nations to play a pivotal role in the realization of human rights and fundamental freedoms. However, it is important to acknowledge that the United Nations has finite resources and inherent limitations on its capacity for direct action, particularly in individual cases. As a practical matter, one organization can never hope to keep an eye on every situation. Neither can it investigate every alleged violation of human rights or bring relief to all victims.

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<sup>1</sup> UMOZURIKE U.O., *The African Charter on Human and Peoples Rights*, Maurtinus Nijhoff Publishers, The Hague, 1997, Vol 2, pp.5.

<sup>2</sup> International Covenant on Civil and Political Rights adopted 16.12.1966 entered into force on 23.3.1976. International Covenant on Economic Social and Cultural Rights adopted 16.12.1966 entered onto force on 3.1.1976.

For these reasons, the international system relies heavily on the support it receives from regional human rights systems such as those operating in Europe, Africa and America. Additional support comes from Governments and from concerned non-governmental organizations (NGOs). Each of these groups has a special role to play in the development of a universal culture of human rights. NGOs, for example, by their very nature, have a freedom of expression, a flexibility of action and a liberty of movement, which allow them to perform tasks, which Governments and intergovernmental organizations are unable or may even be unwilling to perform. Regional human rights systems have reinforced international standards and machinery by providing the means by which human rights concerns can be addressed within the particular social, historical and political context of the region concerned.

At the regional level there was the adoption of the European Convention of Human Rights in 1950 (ECHR).<sup>3</sup> The inter American mechanism under the auspices of the OAS established a commission in 1959 to promote respect of Human Rights as set out in the American Declaration on the Rights and Duties of Man of 1948,<sup>4</sup> and a binding document came into existence with the American Convention on Human Rights in 1969 (ACHR).<sup>5</sup>

The African Charter on Human and Peoples Rights (ACHPR) is the regional mechanism for the continent and the youngest of the regional systems. It was adopted under the auspices of the OAU<sup>6</sup> in 1981 and came into force in 1986 after a number of conferences and meetings. It became effective on 21 October, 1986 and has been ratified by all African States.

Part 11 of the Charter encompasses the measures of safeguard of which the African Commission on Human and Peoples' Rights,<sup>7</sup> seated in Banjul (Gambia) plays a central role. The Commission is composed of eleven members who are elected for a term of six years by secret ballot by the Assembly of Heads of State and Governments. Lack of effective enforcement due to the non - binding nature of the Commission's findings and the Commission's lack of power to act on its own initiative culminated in a movement to adopt a Protocol to the African

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<sup>3</sup> European Convention for the Protection of Rights and Fundamental Freedoms signed on 4.11.1950 entered into force on 3.9.1953.

<sup>4</sup> Signed on 2.5.1948.

<sup>5</sup> Signed on 22.11.1969 entered into force on 18.7.1978.

<sup>6</sup> To bring about greater economic and political intergration of the African continent, the Constitutive Act establishing the African Union was adopted on 11.7.2000 at Lome, Togo by the 53 African States to replace the OAU Charter. The Constitutive Act came into force on the 26.5.2001 and provides for a one year transitional period.

<sup>7</sup> One of the advantages of the African system is that once a state has become a party to the Charter, its protection mechanism applies automatically. There is no requirement under the African Charter for a State Party to accede to an optional protocol or to include a separate declaration in order to recognize the competence of the African Commission to receive complaints from State Parties and Individuals.



Charter in terms of which an African Court on Human and Peoples` Rights would be established to supplement the Commission`s protective mandate.

The role of national governments in the realization of human rights is particularly important. Human rights involve relationships among individuals, and between individuals and the State. Therefore, the practical task of protecting and promoting human rights is primarily a national one, for which each State must be responsible. At the national level, rights can be best protected through adequate legislation, an independent judiciary, the enactment and enforcement of individual safeguards and remedies, and the establishment of democratic institutions. In addition, the most effective education and information campaigns are likely to be those which are designed and carried out at the national or local level and which take the local cultural and traditional context into account.

When States ratify a human rights instrument, they either incorporate its provisions directly into their domestic legislation or undertake to comply in other ways with the obligations contained therein. Therefore, universal human rights standards and norms today find their expression in the domestic laws of most countries. Often, however, the fact that a law exists to protect certain rights is not enough if these laws do not also provide for all of the legal powers and institutions necessary to ensure their effective realization.

This problem of effective implementation at the national level has, particularly in recent times, generated a great deal of international interest and action. The emergence or re-emergence of democratic rule in many countries has focused attention on the importance of democratic institutions in safeguarding the legal and political foundations upon which human rights are based.

It has therefore become increasingly apparent that the effective enjoyment of human rights calls for the establishment of national infrastructures for their protection and promotion. Many countries have set up official human rights institutions in recent years. While the tasks of such institutions may vary considerably from country to country, they share a common purpose and for this reason are collectively referred to as *national institutions for the protection and promotion of human rights*.

The basic obligations of the State Parties to the African Charter are spelled out in Article 1. It provides that they shall recognize the rights duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them. This obligation is implemented by Article 62, which requires the State Parties to report biennially on the legislative or other measures they have adopted to give effect to the rights the Charter guarantees.

Kenya ratified the Charter on the 23 January 1992 with no reservations. International instruments become enforceable in Kenya after they are

incorporated into domestic law by implementing legislation currently the government has not passed any domestic legislation explicitly incorporating the African Charter. However the Kenyan Constitution does provide for some of the fundamental rights set out in the Charter. These can be broken down into four categories:

- Right to life and what sustains life
- Rights relating to liberty and security of person
- Rights dealing with communication of ideas; and
- Rights regarding protection under the law.<sup>8</sup>

Under the last category, non-discrimination under the law does not relate to matters of gender, adoption, marriage, divorce, burial, devolution of property on death and other matters of personal law.<sup>9</sup> This is contrary to the African Charter. Under the Kenyan law, the species of human rights that is explicitly guaranteed is called political and civil rights. Apart from these, there are economic, social and cultural rights and third generation group rights provided for under the African Charter. The ideal situation in a country is one where political and civil rights and economic, social and cultural rights and group rights, are granted and enjoyed by citizens simultaneously. Consequently governments should ensure all species of human rights are provided for under domestic law.

It is well to provide in a Constitution or in international instruments the fundamental rights and freedom of an individual. However, if an effective machinery for vindication of such rights is lacking at the national level, human rights cannot be realistically enjoyed. Human Rights will be meaningless if the Courts do not vindicate them when they are violated. The citizens must have easy access to the courts to ensure prompt vindication of claims. It must also be emphasized that Kenyans need to know what their fundamental rights and freedoms are before they can enforce them. In this regard the Charter establishes two other important duties. Under Article 25 the State Parties have a duty to promote and ensure through teaching, education and publication the respect of the rights the Charter guarantees and to ensure that these rights as well as corresponding obligations and duties are understood. In Article 26, State Parties have a duty to ensure the independence of the judiciary and should allow for the establishment and the improvement of national institutions entrusted with the promotion of the rights set forth in the Charter.<sup>10</sup>

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<sup>8</sup> Chapter 5 of the Constitution. This is the supreme law of the land.

<sup>9</sup> Section 82 of the Constitution

<sup>10</sup> Article 18, also obliges the State Parties to assist the family, to ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions. Article 21 State Parties to the present Charter shall individually and collectively exercise the right to freely dispose of their wealth and natural resources with a view to strengthening African unity and solidarity. State Parties to the present Charter shall undertake to eliminate all forms of foreign economic exploitation particularly that practiced

In the Kenyan case there is a Standing Committee on Human Rights with no legal basis and a limited mandate, which leaves a lot to be desired. National institutions like the Ombudsman or specialized institutions are unknown in the Kenyan system. Civic education on Human Rights and independence of the judiciary is lacking, not to mention the limited participation of NGOS in this area.

Human rights need to be provided for in the municipal laws together with effective implementation procedures. People need to know them in order to hold their rulers accountable for any violations. In the long run, it is in the interest of the state to observe existing human rights (in the country's laws) and expand human rights provisions since the country's human rights performance indicates the nature and quality of the government and life in the country. A good human rights record can only exist where there is good governance as well as an aware, awakened and vigilant citizenry.

This study will, in view of the foregoing investigate the implementation mechanism of the African Charter under the municipal sphere with a view to identifying the loopholes that create and sustain the systematic and rampant violations of the provisions of the Charter at the expense of the cardinal principle of the protection of human rights. Any possible legal and practical solutions will also be recommended with a view to strengthening the Kenyan system on the promotion and protection of human rights.

## **1.2 Research Methodology**

This study will basically be library oriented. Textbooks and articles on the subject will be of primary importance. Important also will be global and regional treaties, charters, conventions, protocols and declarations in the field of human rights. Magazines, newspaper reports and journals will also be used.

Unlike in other areas of study, the concept of human rights is dynamic and many of the existing materials are in raw form. Other materials that will be relied upon are still unpublished. It is hoped that the bulk of these materials will be available in libraries. This will include the Raoul Wallenberg Institute of Human Rights library, the Juridicum Biblioteket and the Stadsbiblioteket all in Lund. The author has also

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by international monopolies so as to enable their peoples to fully benefit from the advantages derived from their national resources. Article 22 States shall individually or collectively, ensure the exercise of the right to development. And Article 23 States shall ensure that any individual enjoying the right of asylum under Article 12 of the Charter shall not engage in subversive activities against his country of origin or any other State party to the present Charter; and their territories shall not be used as bases for subversive or terrorist activities against the people of any other State Party to the present Charter.

sought and received materials from the University of Nairobi, Jomo Kenyatta Memorial Library, the faculty of Law library at Parklands campus, the American Cultural Center, British Council Library, UNEP library at Gigiri all in Nairobi and the Abo Academie library in Finland.

A limited effort will be expended on interviewing and discussing with a number of professors in the field of human rights examples being Professors Alfred Chanda and Michelo Hansungule, former visiting professors, Raoul Wallenberg Institute of Human Rights in Lund Sweden and Professors Göran Melander and Gudmundur Alfredsson of the same institution.

### **1.3 Chapter Synopsis**

The Specific objectives of the study are already spelled out and need not be restated. However, it is necessary to point out in broad terms that the main purpose of the study is to examine the domestic implementation of the African Charter in Kenya in an effort to make the Charter more effective and to enhance the promotion and protection of human rights in Kenya.

To achieve its objective, the study is structured as follows:

The first part of the thesis includes the introduction, that is, the scope of the study, methodology and chapter synopsis.

The second chapter looks at the rights protected under the African Charter with chapter three analysing the implementation mechanisms of the Charter, namely, the African Commission and the proposed African Court.

Chapter four deals with the domestic application of the Charter from the structure of the government to sources of the law in Kenya.

Chapter five and six is concerned with the enforcement mechanisms of the Charter in Kenya such as the courts, the police and the prisons including national institutions

The last Chapter is the conclusion of the study and the proposal for reforms.

## 2 THE AFRICAN CHARTER ON HUMAN AND PEOPLES RIGHTS

*The African States . . . firmly convinced of their duty to promote and protect human and peoples' rights and freedoms taking into account the importance traditionally attached to these rights and freedoms in Africa.*

*from the Preamble of the **Banjul Charter** (1981)*

### 2.1 Introduction

The African Charter on Human and Peoples Rights has been described as “autochthonous”<sup>11</sup> or as capturing the essence of the African concept of Human Rights. In particular, the argument that groups took precedence over the individual who was absorbed in it and the fact that the right to development has, unlike in any other convention, been placed on a legal pedestal, are regarded as giving the Charter its specific African character. Whether and to what extent these assertions are justified will become evident as our discussion evolves.

### 2.2 The origins and History of the Charter

Human Rights occupied an important part in the traditional African societies. The rights of members of a community were respected and regarded as being part and parcel with the rights of the community. The rights of the members were thus not isolated or held against the community but formed a great admixture with community rights so that members had an interest in the well being of other members. The society was socialistic and communalistic. There were however notable exceptions based on sex and status. The major differences from the modern concept were that rights were restricted to the members of the community and not regarded as universal. Even then, there were notable exceptions in favour of neighbouring communities in friendly or special relations based on common ancestry, marriage etc.<sup>12</sup>

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<sup>11</sup> Osita, C.E., African Concept of human Rights in Kalu, A.U. and Osinbajo, Y., (eds), Perspectives on Human Rights, Infodata Bureau Services, Lagos, 1992 pp. 8-31.

<sup>12</sup> See, Umozurike U.O.,” International law and Colonialism in Africa,” Howard Law Journal (1971) pp. 334-349

Foreign intervention in Africa changed all this. The Atlantic trade in African slaves began in 1510, reached its height in the 18<sup>th</sup> Century and was complemented by the Arab operators in East and Central Africa. The Industrial revolution in Europe required cheap sources of raw material produced by cheap labour and a market for the surplus goods. In the meantime, humanitarian sentiment against the slave trade was building up. The slave trade was thus succeeded by colonialism and both responded to the economic changes in Europe. The scramble for Africa culminated with the treaty of Berlin in 1885. It laid down the ground rules for colonialism and further intensified it. The slave trade and colonialism had such a devastating effect on human rights that it required decades of redemptive work to revive the tradition of respect for human rights in Africa.<sup>13</sup>

The colonial period witnessed a systematic subjugation and exploitation of the people for the benefit of Western States. The regaining of independence, starting with Ghana, did not immediately ensure respect for human rights. The new leaders tended to extend the same treatment they had suffered under the colonialist to their own people. The customary principle of domestic jurisdiction was often used by such states. The cold war between the super powers had its toll on human rights, for regimes that were pliable. Those regimes that allowed themselves to be attracted to the cold war orbit were supported even if they had the worst human rights records. The credibility of such regimes was sustained by outside powers despite their internal weaknesses.<sup>14</sup>

The 1970s found human rights in a deplorable state in independent Africa. The worst excesses were in Uganda under Idi Amin, Central African Republic under Jean Bokassa and Equitorial Guinea under Marcias Nguema. Revulsion against excessive violation in these countries supported by the steady progress under the European Convention 1953 and to a lesser extent the inter American Convention of 1969 and the UN constantly pressing for the implementation of human rights resulted in a favourable change in the fortunes of human rights on the continent.<sup>15</sup>

In the Monrovia summit of 1979, the Assembly of Heads of States and Government directed the Secretary General of the OAU to set the machinery in motion for an African Charter on Human Rights. The result of this laborious effort was the African Charter on Human and Peoples Rights that was adopted at the Nairobi Summit in 1981, and which came into force on 21<sup>st</sup> October 1986 with the ratification of a simple majority of the African States. All states of the OAU have now ratified the Charter.<sup>16</sup> Two states have made reservations to the Charter.<sup>17</sup>

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<sup>13</sup> Ibid

<sup>14</sup> Ibid

<sup>15</sup> Supra note 1, pp. 22-28.

<sup>16</sup> Ethiopia and Eritrea were the last to ratify in 1999.

<sup>17</sup> Zambia and Egypt.

With the ratification of this Charter, Africa joined Europe and the Americas as one of three world regions with its own human rights convention.<sup>18</sup> The great majority of African states had previously ratified the United Nations Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights. Since most African states had already committed themselves to respect a broad range of human rights, why was an African Charter deemed necessary? Okoth-Ogendo argues that it is because many African leaders felt the "need to develop a scheme of human rights norms and principles founded on the historical traditions and values of African civilizations rather than simply reproduce and try to administer the norms and principles derived from the historical experiences of Europe and the Americas"<sup>19</sup>

## 2.3 The Rights Protected

The African Charter is a binding treaty that comprises three parts and six chapters. The drafting committee of the Charter was guided by the principle that "it should reflect the African philosophy of law and meet the needs of Africa". The Committee recognized the value of universally accepted human rights standards. In summary, four main categories of rights and duties are covered by the African Charter: individual rights, rights of peoples, duties of States, and duties of individuals.

The combination on the specific needs and values of the African cultures and the international human rights standards has resulted in some distinctive features, compared to other regional Charters. Firstly, the Charter confers rights upon peoples, be it without defining this term in a legal framework.

The recognition of collective rights can be explained by the reference made in the preamble to the importance of "the virtues of their historical tradition and the values of African civilization". The strong group orientation characteristic of African Communities is one of the expressions of the African traditions. In addition Article 20 of the Charter calls for the right to self-determination and independence. This article stems from the idea that a number of people inhabiting

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<sup>18</sup> For a comparison of the regional systems see, OKERE B.O., "The Protection of Human Rights in Africa and the African Charter on Human and Peoples' Rights: A Comparative Analysis with the European and American Systems", Human Rights Quarterly VI, 1984, p.141

<sup>19</sup> Okoth-Ogendo, H.W.O., Human and Peoples' Right; What point is Africa trying to make?" In R. Cohen, G. Hyden, W. Nagen, (eds), Human Rights and Governance in Africa, Gainesville, FL; University Press of Florida, 1993, pp.76.

Africa used to be independent and possess their own lands before the start of colonial times.<sup>20</sup>

Secondly, the Charter is unique in emphasizing the duties of the individual vis - a - vis the community and the state. Duties only apply to individuals and not to peoples. For example, Article 29 Subsection 3 obliges everyone not to compromise the security of the State whose national or resident he or she is. The Charter does not elaborate on the mutual relationship between individual rights and the duties that conflict with each other, like for instance the freedom of speech with the duty not to endanger the security of the State.

Furthermore the Charter does not provide for the principle of “derogation”. Derogation from the elementary human rights guarantees in times of emergency is a well-recognized principle of international law. The fact that the principle of derogation is missing from the African Charter means in theory, the instrument is perpetually in force, even during a state of war. This contrasts sharply with the practice obtaining in international law. For example, the European Convention (ECHR)<sup>21</sup> does provide for derogation in defined circumstances. Similarly, the International Covenant on Civil and Political Rights (ICCPR)<sup>22</sup> also provides for derogation subject to conditions.

One disconcerting feature of the African Charter is the nature of the “claw back”<sup>23</sup> clauses included in the Charter, which are in urgent need of revision. These clauses are provisions that make the Charter rights subject to limitations imposed by domestic law. This could be construed to mean that the level of the

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<sup>20</sup> This was tested in the case of *Katangese Peoples Congress v. Zaire (75/92)*. This was an application to the Commission to recognize the Katangese Peoples Congress as a liberation movement; to recognize the independence of Katanga and to help secure evacuation of Zaire from Katanga.

The Commission acknowledged the existing controversy on the term “peoples”, but appeared to take all Zaireans as “a people” and not the Katangese. Enumerating the instances when the right to self-determination is exercisable, the Commission thought the right ought to be limited by principles of sovereignty and self-determination.

<sup>21</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, Article 15. It says: “In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law”.

<sup>22</sup> International Covenant on Civil and Political Rights, 1966. Article 4 inter alia provides: “In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from the present Covenant....”

<sup>23</sup> The word “claw” stands for “trying desperately to find things to hold on”. Claw back means get back some of the power, which had been lost. When used in economics it means the treasury getting back some of the resources that had been given away like getting back the money given for social welfare by way of indirect tax.



protection provided by the Charter is equated to the level of protection provided by domestic law. An example is Article 10, which provides that “every individual has a right to free association”, provided he abides by the law. In other sections, the phrases, “except for reasons and conditions previously laid down by the law”, “within the law” and “in accordance with the law” are used.

U.O. Umozurike, argues that this is not necessarily fatal. Considered along with international customary law and civilized state practice, there are implicit grounds for judging the reasonableness of laws that detract from rights.<sup>24</sup> Indeed Articles 60 and 61 are far-reaching and should influence the formulation, interpretation and application of laws:

Article 60. The Commission shall draw inspiration from international law on human and peoples rights, particularly from the provisions of various African instruments on human and peoples rights, the charter of the United Nations, the Charter of the Organization of African Unity, the Universal Declaration of Human Rights, Other Documents adopted by the United Nations and by African countries in the field of human and peoples rights as well as from the provisions of various instruments adopted within the Specialised Agencies of the United Nations of which the Parties to the present charter are members.

Article 61. The Commission shall also take into consideration, as subsidiary measures to determine the principles of law, other general or special international conventions, laying down rules expressly recognised by member states of the Organisation of African Unity, African Practices consistent with international norms on human and peoples rights, customs generally accepted as law, general principles of law recognised by African states as well as legal precedents and doctrine.

The Charter thus allows the importation of international human rights norms into the domestic legal system and gives them primacy over municipal norms.

### **2.3.1 Civil and Political Rights**

In Articles 3 and 5 the Charter guarantees without qualifications the right to equality before the law, human dignity and inviolability. It prohibits all forms of degrading treatment and exploitation, especially slavery, torture and degrading punishment.<sup>25</sup> The right to a fair hearing is guaranteed and the elements of these

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<sup>24</sup> Supra note 15, pp.37-36.

<sup>25</sup> 25/89, 47/90, 56/91, 100/93 World Organisation Against Torture, Lawyers Committee for Human Rights, Union Inter africaine des Droits de l'Homme, Les Temoins de Jehovah v Zaire, the commission held that allegations of torture, detention and arbitrary

are enumerated in Article 7, the right to appeal, presumption of innocence, right to defence counsel of ones choice and a trial within a reasonable time by an impartial court or tribunal. Retroactive criminal legislation is prohibited and only the offender may be personally punished.<sup>26</sup>

Other rights are qualified for example the rights to life<sup>27</sup>, liberty<sup>28</sup>, freedom of association assembly and movement.<sup>29</sup> Although the Charter does not mention refugees, Article 12(1) provides for freedom of movement within the borders of a state once a person is legally within it. An individual has the right to leave a country including his own and to return to his or her own country. Every persecuted person has the right to seek asylum in accordance with the law of the country in which he takes refuge and in accordance with international conventions.<sup>30</sup>

Every citizen is guaranteed the right to participate in government directly or through freely chosen representatives in accordance with the provisions of the law. The independence of the judiciary is protected.<sup>31</sup> The freedom of movement is guaranteed and any person may leave any country, including his own. He may also seek asylum in other countries when persecuted.<sup>32</sup> The Charter provides equal access to the public services. The mass expulsion of non-citizens is prohibited. Mass expulsion is defined under the clause as that directed against national, racial, ethnic or religious groups.<sup>33</sup>

### **2.3.2 Social, Economic and Cultural Rights.**

The Charter protects the right to property but provides that it may be encroached upon in the interest of the public need or the general interest of the community and in accordance with the provisions of appropriate laws.<sup>34</sup> There is no mention of the standard whether “prompt, effective or adequate” in the traditional western

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arrests admits evidence of the existence of a series or massive violations of human and peoples rights.

<sup>26</sup> In cases 60/91 Constitutional Rights Project v Nigeria (in respect of Wahab Akamu and others) and 87/93 Constitutional Rights Project v Nigeria (in respect of Zamani Lekwot and others), the commission found that a trial by a tribunal that includes army and military personnel under a law that excludes the right of appeal to a court of law contravened article 7 of the Charter.

<sup>27</sup> Article 4.

<sup>28</sup> Article 6.

<sup>29</sup> Article 11.

<sup>30</sup> See further on refugees G.Melander, ‘The Two Refugee Definitions’, in Raoul Wallenberg Institute of Human Rights and Humanitarian Law, Report No.4; G.S.Goodwig Gill, *The Refugee in International law*, 1989.

<sup>31</sup> Article 26.

<sup>32</sup> Article 12.

<sup>33</sup> Article 12(5).

<sup>34</sup> Article 14.

sense or “appropriate or reasonable” in the UN sense. In view of the controversy, which occurs during the appropriation of property, perhaps it is necessary to set out standards for state intervention.

The Charter provides for the right to work under equitable and satisfactory conditions and to equal pay for equal work.<sup>35</sup> African states do not usually discriminate against women in pay. It should be clear the Charter does not guarantee the right to work. This would be impossible considering the present economic conditions. With few industries and limited wage system, African states cannot guarantee the right to work. Besides the bulk of the population are peasant farmers and it is for the government to ensure an efficient marketing system, preservation of produce, credit facilities and necessary inputs at subsidized prices.

Under Article 16, individuals are entitled to enjoy the best state of physical and mental health. States are obliged not only to protect the health of people but also to ensure that they receive medical attention when they are sick.<sup>36</sup> The implementation of this obligation seems enormous for African States. Burdensome social services and ailing economies are incompatible. The right to education is also provided for but the level of the right is not indicated.<sup>37</sup> However a minimum of free primary education would suffice for the time being.

### 2.3.3 Peoples Rights

The Charter asserts the oft-repeated right of self-determination of people, enabling them to freely determine their political economic and social development.<sup>38</sup> People are entitled to dispose of their wealth and resources and to lawful recovery or compensation in the event of spoliation or dispossession.<sup>39</sup> States are called upon to eliminate all forms of foreign economic exploitation particularly that practiced by international monopolies.

The Charter guarantees the right to national and international peace and security.<sup>40</sup> It cites the example of asylees being engaged in subversive activities against any country, actions which members must suppress nor should they allow their territories to be used as bases for such activities.

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<sup>35</sup> Article 15, see 39/90 Annette Pagnoule (on behalf of Abdoulaye Mazou) v Cameroon

<sup>36</sup> See communications 137/94, 139/94, 154/96, 161/97 International Pen, Constitutional Rights Project, Interights on behalf of Ken Saro Wiwa Jr. and Civil Liberties Organisation v Nigeria.

<sup>37</sup> Article 17.

<sup>38</sup> Article 20.

<sup>39</sup> Article 21.

<sup>40</sup> Article 23.

The emergent of the concept of common heritage of mankind evident in the current Law of the Sea dealing with the resources of the deep sea bed outside national jurisdiction and of outer space law dealing with the natural resources of the celestial bodies finds expression in the Charter. All peoples shall have the right to the equal enjoyment of the common heritage of mankind. Four disadvantaged groups are especially protected namely, women, children, the aged and the disabled.<sup>41</sup>

The Right to development in economic, social and cultural matters is also provided for in the Charter. States are obliged to ensure the exercise of the right to development and to create a favourable atmosphere for it.<sup>42</sup> Interpretations can also be drawn from Article 1 of the UN Declaration on the Right to Development which states: “the right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and to enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized”.

The right to development is a relatively new right, if it is a right at all. Professor Omozurike suggests that, the human person is identified as the beneficiary of the right to development, as of all human rights. The right to development can be invoked both by individuals and by peoples. Right to development imposes obligations both on individual States - to ensure equal and adequate access to essential resources - and on the international community - to promote fair development policies and effective international cooperation.<sup>43</sup>

### 2.3.4 Duties

The Charter is unique in that it includes duties of individuals in an international instrument .<sup>44</sup> The Charter recognizes the duties of the individuals to the family, to preserve the harmonious development and cohesion of the family, respect for parents and to maintain them in case of need, to serve the nation, preserve its independence, security and solidarity; and pay taxes.<sup>45</sup> The Charter also recognizes duties to the international community.<sup>46</sup> There is also a duty to preserve the positive African cultural values and of commitment to the achievement of African unity.<sup>47</sup> However there is no provision for complaints

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<sup>41</sup> Article 18

<sup>42</sup> Article 22.

<sup>43</sup> Supra note 1 pp.59-61, see further M. BEDJAOUI, “The Right to development and Jus Cogens”, 2 (2) Lesotho Law Journal, 1986, p.93.

<sup>44</sup> See Chapter 11

<sup>45</sup> Article 29.

<sup>46</sup> Article 27.

<sup>47</sup> Article 29(8).

being made against individuals to the Human Rights Commission. It is unlikely that the aim was to confer general jurisdiction on all African States over all individuals. It maybe that the provision merely obligates states to inculcate these values in their subjects. Individual duties are absent in the European Convention and barely mentioned in the American Convention Article 32(1) which, states that: “everyone has a responsibilities to his community and mankind”

## **2.4 Summary**

The African Charter reflects to a great extent, not only the discourse on human rights prevailing internationally at the time of its development but also contains a number of distinctive features, in many ways purporting to reflect an African philosophy of law and conception of human rights and attempt to embrace all three generations of human rights (civil and political rights, economic social and cultural rights and solidarity rights, in particular the right to development). The most important of these features is the presence of “peoples” in the title, which refers to group rights or collective rights among them the right of people to self-determination, to development and to their environment and the right to freely dispose of natural resources. The African Charter also imposes duties upon the individual towards the state and community.

The embracing of all three generations of Human Rights is a major strength but also a weakness in the Charter. The human rights discourse in Africa is by its nature elastic and legalistic, as it is based on states and treaties among states, the states that are often the violators of human rights. In Africa, with its weak or authoritarian states, ongoing or emerging conflicts in several countries and stalemated development, it is necessary to link the discussion on human rights with democratisation, conflict resolutions and development even if this makes it more difficult to make legal interpretations. Legitimate democratic procedure will be the only long-term guarantee that a state that has ratified the Charter also establishes a human rights regime despite lack of political will in the ruling elite. In addition conflict resolution and development is necessary to establish security on individual as well as groups and state level.

# 3 THE AFRICAN COMMISSION ON HUMAN AND PEOPLES RIGHTS

## 3.1 Introduction

The African Commission on Human and Peoples Rights is the body entrusted to ensure State compliance of the rights and freedoms guaranteed by the African Charter. This chapter will discuss the institution and mandate and functioning of the Commission.

## 3.2 Institution and Mandate

In Part 11 of the Charter, the African Commission a body of 11 independent experts, is established to promote, protect and interpret the Charter. Members are normally elected for a six-year period but are eligible for re election. The term of office of four members drawn by ballot after the first election shall terminate after two years and of three others after four years.<sup>48</sup> Their emoluments and allowances shall be paid out of the regular budget of the OAU and now the AU.

The members of the Commission shall be elected from “African personalities of the highest reputation, known for their high morality, integrity, impartiality and competence in matters of human and Peoples rights, particular consideration being given to persons having legal experience.”<sup>49</sup> A member’s seat becomes vacant on his death or resignation or if in the unanimous opinion of the other members, he has “stopped discharging his duties for any reason other than temporary absence”.<sup>50</sup>

The Commission shall lay down its rules of procedure and elect its Chairman and Vice-Chairman for a 2-year period.<sup>51</sup> The elected officers are eligible for re-election. The OAU Secretary General appoints the Secretary of the Commission and the supporting staff.<sup>52</sup>

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<sup>48</sup> Article 36.

<sup>49</sup> Article 31.

<sup>50</sup> Article 39.

<sup>51</sup> Article 42.

<sup>52</sup> Article 41.

The Commission is mandated to undertake two main functions, which may be characterized as promotional and protective.

- 1) In order to promote the Charter, the Commissioners are assigned the duty to disseminate information and to educate Africans about its provisions. To attain this goal seminars and workshops have to be organized, and the Commission undertakes regular visits. The Commission further adopts resolutions on human rights issues and examines bi-annual reports submitted by state parties. Although this part of its mandate has not been used so far the Commission under Article 45(3) is supposed to interpret the provisions of the Charter upon the request of a state party, an OAU institution or an organization recognized by the OAU. More recently, the Commission started appointing Special Rapporteurs to highlight certain thematic issues by conducting investigations and reporting on them.
- 2) In order to protect the rights in the Charter the commission investigates and makes non binding recommendations about individual communications (or complaints) and is expected to do the same in respect of complaints from one state party against another (inter State complaint).<sup>53</sup> An inter state complaint must be based on the African Charter and the party complained about must be a state party to the Charter. Under Articles 47-54 of the Charter the Commission has also undertaken on site visits (missions) to state Parties against which individual complaints had been lodged.

### **3.3 The Functioning of the Commission**

In accordance with the Charter, a Commission on Human and Peoples' Rights was set up on 29 July 1987 with three major functions: the promoting of Human and Peoples' Rights in Africa, protecting these rights and interpreting the Charter.<sup>54</sup>

The structure and working of the Commission has improved over the years. However there still remain considerable imbalances as regards geographical and gender representation and the question of incompatibility (i.e. of some of the Commissioners being full - time, high level government employees) is emphasized by many. As we mentioned earlier the Commissioners are nominated by member States and elected by the Assembly of Heads of States and Government for a

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<sup>53</sup> Two individual complaints have so far been brought against Kenya i.e., Kenya Human Rights Commission v Kenya 135/94 and Muthuthirin Njoka v Kenya 142/92.  
<sup>54</sup> Article 45 of the Charter.

period of six years and may be re - elected, the perceived independence of the Commission will be it's strongest asset in the future.

The Commission meets twice a year originally for 15 days but at present, due to financial constraints<sup>55</sup>, for only 10 days. Some of the major problems in this area are;

- \* the limited time the Commissioners have at their disposal at each meeting as well as between the meetings for preparatory as well as promotional work particularly as regards the Special Rapporteurs;
- \* lack of funds for extension of sessions, travel and communications both for the secretariat and the Commissioners; and,
- \* insufficiently well-prepared agendas for the Commission meetings.

Article 59 of the African Charter does not provide much room for the Commission to publicize its activities.<sup>56</sup> Subparagraph 1 provides that the measures taken shall remain confidential until the OAU Assembly decides otherwise. Article 59 is problematic and does not leave much room for publicity, an element that would have an important deterrent effect to future human rights violations. The provision calls for amendment. The possibility of such an amendment is provided for under Article 68 of the Charter.<sup>57</sup>

But perhaps the most disappointing feature of the Commission is that it acts as a fact finder for example, Article 52 states that:

“After having obtained from the state concerned and from the other sources all the information it deems necessary and after having tried all appropriate means to reach an amicable solution based on the respect of human and peoples rights, the Commission shall prepare, within a reasonable time from the notification referred

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<sup>55</sup> One main problem faced by the Commission is lack of funding. This includes lack of staff, resources and services. There is no mistaking the fact that financial resources are important, but there is room for improvement despite lack of resources.

<sup>56</sup> The Bulletin and the Review (publications on the Commission's activities) are published at least twice yearly but are not distributed or disseminated widely or soon enough after their authorization or adoption. There is also an annual activity report which is published.

<sup>57</sup> Article 68 of the Charter states that, “The present Charter may be amended if a state party makes a written request to the Secretary General of the Organization of African Unity. The Assembly of Heads of State and Government may only consider the draft amendment after all the State Parties have been duly informed of it and the Commission has given its opinion on it at the request of the sponsoring state. The amendment shall be approved by a simple majority of the State Parties. It shall come into force for each state which has accepted it in accordance with its constitutional procedure three months after the Secretary- General has received notice of the acceptance”.



to in Article 48, a report stating the facts and findings. This report shall be sent to the States concerned and communicated to the Assembly of Heads of States and Government”.

It seems from this that the work of the Commission is supposed to culminate into a report stating the facts and findings and not a judgment like in other systems. What the Commission should come up with is basically an internal report for use just like a report in municipal law of a commission of inquiry set up by a government in connection with a matter of public concern. The report goes to the government for consideration and action, which means the final actor, is the government and not the body that was appointed to investigate and compile the report. This makes the Commission a weak institution without any teeth of its own to bite violators of basic rights.<sup>58</sup>

### **3.4 The African Court of Human and Peoples Rights**

Lack of effective enforcement due to the non-binding nature of the Commission’s findings and the Commission’s lack of power to act on its own initiative culminated in a movement to adopt a Protocol to the African Charter in terms of which an African Court on Human and Peoples Rights would be established to supplement the Commission’s protective mandate.

The Court will comprise 11 Judges, with six - year mandates renewable once. Apart from the President and the Registrar they will sit on a part time basis, at least initially, in order to cut costs. The appointment process and the judges’ independent status will be similar to those applying to the Commission. The court elects its President and Vice President for two-year mandates, renewable once.<sup>59</sup>

The Court “shall complement the Protective mandate” of the Commission, according to the Protocol, and avoid any overlap.<sup>60</sup> Its jurisdiction is potentially wide, extending to all cases and disputes submitted to it concerning the interpretation and application of the Charter, the protocol instituting the court “and any other relevant Human Rights instrument ratified by the States concerned”.<sup>61</sup> In addition to strong interpretative powers, the Court may also provide advisory opinions, and determines its own rules and regulations.

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<sup>58</sup> Prof. M. Hansungule, *The African Charter on Peoples and Human Rights*, Raoul Wallenberg Institute of Human Rights and Humanitarian Law, University of Lund Sweden, 2000, pp.37.

<sup>59</sup> Articles 11 to 15 of the Protocol

<sup>60</sup> Ibid Article 2

<sup>61</sup> Ibid Article 3

The African Commission, litigants, defendants and States are all granted access to the Court, as are “African intergovernmental organizations”. However, access to the Court by NGOS and individuals is contingent on member governments’ special acceptance of the relevant provisions. Thus, the Court will be one step behind the Commission.<sup>62</sup>

The Court “must conduct its proceedings in public”. This means that the evidence and the two sides of the debate are given public exposure. The Court’s duly motivated judgment must similarly “be read in open court”. These two provisions contrast with the confidentiality the original African Charter imposed on the Commission. However no publicity is given to the Court’s annual report, where it is specifically required to mention whether any member state has failed to comply with a Court judgment.<sup>63</sup>

The Court decides its own procedures. Its judgment is final and must be rendered within three months after deliberations are completed. The Court must transmit judgments to OAU member States, the African Commission and the OAU Council of Ministers.<sup>64</sup>

In the event of a violation, the court must provide for remedies, including “the payment of fair compensation or reparation”. The Court may also prescribe provisional measures “in the case of extreme gravity and urgency, and when necessary to avoid irreparable harm to persons”. A major difference when compared to the Commission is that the Courts judgments are binding and final. The OAU Council of Ministers monitors their execution “on behalf” of Heads of State and Government.<sup>65</sup>

The Protocol requires ratification by 15 Member States before the court can be established. By comparison, it took an absolute majority of OAU member states (i.e., about two dozen) before the African Charter came into force. As with the Charter, it will require considerable time and persuasion.<sup>66</sup>

It is too early to predict precisely what impact the Court will have on the work of the commission. Duplications must be avoided and enough funds must be secured to run both institutions effectively otherwise the high hopes for improving human rights situation in Africa which so many have vested in the creation of the Court will be disappointed.

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<sup>62</sup> Ibid Article 5  
<sup>63</sup> Ibid Articles 10 and 28  
<sup>64</sup> Ibid Articles 28 and 29  
<sup>65</sup> Ibid Article 27  
<sup>66</sup> Ibid Article 34

### **3.5 Summary**

In analysing the structures and implementation procedures under the Charter in some detail a number of weaknesses, obstacles and omissions have been identified which should be dealt with. But this is not to say that the African Charter should be abandoned altogether because it is still born; we still believe that the African Charter's implementation procedures are workable and redeemable so long as necessary adjustments are made and states adhere to the Charter.

However, the Charter is only a document, which has to be made meaningful by its popularisation, application and development not only at the international level but more importantly at the national level as well. In the next chapter we will examine the domestic implementation of the Charter starting with the Kenyan legal and political setting.

# 4 SETTING THE STAGE: POLITICAL AND LEGAL FRAMEWORK IN KENYA

## 4.1 Introduction

In 1963 Kenya gained independence from British colonial rule, and a year later it became a republic. From 1969 to 1982, the Republic was effectively a one – party state; in 1983 it became one legally. The only legitimate party was the Kenya African National Union (KANU). However, in December 1991 a constitutional amendment reinstated a multiparty system. The Republic's first multiparty elections were held in December 1992.<sup>67</sup>

The total area of Kenya is 224,960 square miles and the total population is about 30 million, of which slightly more than half are women. The population is comprised of 42 ethnic groups, of which the major groups are the Embu, Kalenjin, Kamba, Kikuyu, Kisii, Luo, Luhya, Maasai, Meru, Samburu, and Taita. The main religions are Christianity (66% of the population), including Roman Catholicism (28%) and Protestantism (38%), and Islam (6%). Another 26% of the population adhere to traditional beliefs.<sup>68</sup>

To understand the various laws and policies affecting domestic implementation of international human rights standards it is necessary to consider the legal and political systems of the country which we propose to do in this chapter.

## 4.2 The Structure of Government.

There are three main branches of government in Kenya – the executive, the legislative and the judicial.<sup>69</sup> The executive branch of the government consists of the President, who is the head of state and commander in chief of the armed forces, the vice-president; and a cabinet.<sup>70</sup> The president is elected for a five-year term by popular vote for a maximum of two terms<sup>71</sup>, while the vice president and

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<sup>67</sup> Supra note 8

<sup>68</sup> See, <http://kenya.rcbowen.com/people/population.html> assessed on 5th September 2002.

<sup>69</sup> Kenya Constitution Section 4-69

<sup>70</sup> Ibid, Section 4,15,17.

<sup>71</sup> Ibid, Section 9(1),(2).

the cabinet are appointed by the President from the members of the National Assembly.<sup>72</sup> The Attorney General serves as the principle legal adviser to the government and retains the power to institute and undertake criminal proceedings.<sup>73</sup> The country is administratively divided into seven provinces, each of which is governed by a provincial commissioner. Provinces are divided into 48 districts, which are governed by district commissioners, and districts are further subdivided into local government areas administered by local authorities.

The Constitution vests the legislative power of the Republic in the Parliament of Kenya, which consists of the president and the National Assembly.<sup>74</sup> The National Assembly is comprised of a minimum of 188 members directly elected by popular vote on a constituency basis<sup>75</sup>, with 12 additional members nominated by the president.<sup>76</sup> The National Assembly exercises its legislative power by passing bills, which must then be submitted to the president for assent.<sup>77</sup> If the president refuses to assent to legislation submitted by the National Assembly, the National Assembly may override this veto by a resolution supported by a special majority of 65% of Assembly members.<sup>78</sup>

Courts both create and interpret law. The judicial system can have a significant impact on legislation, including that affecting international human rights standards. The Constitution creates a hierarchical system of courts in Kenya, comprising a Court of Appeal, a High Court, Kadhi's Courts and other subordinate courts established by acts of Parliament.<sup>79</sup> The highest court is the court of Appeal presided over by the chief justice and at least two other judges.<sup>80</sup> The Court of Appeal has jurisdiction to hear appeals from the High Court.<sup>81</sup> The High court which is presided over by the chief justice and at least 11 associate judges referred to as 'puisne' judges, has jurisdiction to hear appeals from lower courts and has unlimited original jurisdiction in civil and criminal matters. Kadhi's Courts have jurisdiction to hear questions of Muslim law relating to 'personal status, marriage, divorce or inheritance in proceedings in which all the parties are Muslims. Resident magistrates courts and District magistrates' courts established under the magistrates courts act have limited jurisdiction in criminal and civil matters respectively.

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<sup>72</sup> Ibid, Section 15(1), 16(2).

<sup>73</sup> Ibid, Section 26(2), 3(a).

<sup>74</sup> Ibid, Section 30.

<sup>75</sup> Ibid, Section 32,42(2).

<sup>76</sup> Ibid, Section 33.

<sup>77</sup> Ibid, Section 46(1), (2).

<sup>78</sup> Ibid, Section 46(5).

<sup>79</sup> Ibid, Section 60(1), 64(1),65(1),66.

<sup>80</sup> Ibid, Section 64.

<sup>81</sup> Ibid, Section 64(1).

### 4.3 Domestic Sources of Law

Section 3 of the Judicature Act states that the major sources of Kenyan law include the Constitution; other written laws; doctrines of equity and statutes of general application in force in England on August 12, 1897; the procedure and practice observed in courts of justice in England at that date; African customary law; and common law.

The Constitution declares itself the supreme law of the land. Any law, either written or unwritten, which is inconsistent with its provisions is void to the extent that it is in conflict. The constitution explicitly states that 'no law shall make any provision that is discriminatory either of itself or in its effect. However, the grounds of unacceptable discriminatory treatment enumerated in the constitution are confined to 'race, tribe, place of origin or residence or other local connection, political opinions, colour or creed'. Discrimination based on gender is thus not explicitly prohibited. This non-discrimination provision also does not apply to matters related to adoption, marriage, divorce, burial, devolution of property on death, or other matters of personal law.

Other sources of Kenyan law include enactments of the Kenyan Parliament since 1963, and subsidiary legislation in the form of orders, rules, directives, and local by-laws enacted pursuant to the authority of Acts of Parliament. In addition certain acts of the British Parliament passed before the establishment of the republic, which are listed in the schedule of the Judicature Act are also sources of law in Kenya. Section 3(1) of the Judicature Act states that the common law, doctrines of equity and statutes of general application in force in England on August 12, 1897, are applicable 'only so far as circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances may render necessary'. The extent to which English common law, doctrines, and statutes are applicable in Kenya is a matter for Kenyan courts to decide based upon the facts of each case.

The Judicature Act in Kenya directs all courts to be guided by African Customary law in Civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law. Courts are further directed to decide all cases according to substantial justice without undue regard to technicalities of procedure and without undue delay'. The areas of customary law that fall within the jurisdiction of the Districts Magistrates Court include: (a) land held under customary tenure; (b) marriage, divorce, maintenance or dowry; (c) seduction or pregnancy of an unmarried woman or girl; (d) enticement of or adultery with a married woman; (e) matters affecting status, and in particular the status of women, widows and children, including guardianship, custody, adoption, and legitimacy; (c) and intestate succession and administration of intestate estates, so

far as not governed by any written law'. Customary laws relating to succession have, however, been superseded in large measure by the Law of Succession Act.<sup>82</sup>

Until recently, the status of customary law in Kenya's legal system was unclear. In 1987, however, the landmark case of *Otieno v. Ougo*<sup>83</sup> provided some guidelines for the application of customary law and reaffirmed its importance in the Kenyan legal system. The *Otieno* case held that 'the place of customary law as the personal law of the people of Kenya is complementary to the relevant written laws'. The court further found that if a matter of personal law is not governed by written law, and 'if there is clear customary law on this kind of matter, the common law will not fit the circumstances of the people of Kenya'. According to this case, Kenyan courts should only resort to the English common law if in a particular instance the customs were held to be repugnant to justice and morality.<sup>84</sup>

The application of customary law in Kenya continues to be complicated by the difficulty of ascertaining the content of these laws. Many of the ethno-linguistic groups in Kenya have their own systems of customary laws. Some degree of certainty was attained regarding the application of customary laws by the 1968 publication of a restatement of customary laws relating to marriage, divorce, and succession. However, the restatement is not comprehensive, and the magistrate courts have statutory authority to call for and hear other evidence regarding African customary law applicable to any case before them.

## 4.4 International Sources of Law

Because international instruments are legally binding they create an obligation on the part of the government to undertake numerous actions, including those at the national level. Although the Judicature Act does not explicitly say that international law is a source of Kenyan law, the government is a party to a number of international legal instruments, including, *inter alia*: the International Covenant on Civil and Political Rights; the international Covenant on Economic, Social, and Cultural Rights; the Convention on the Elimination of all forms of Discrimination Against Women; the Convention of the Rights of the Child and more importantly for the purpose of this study the African Charter on Human and Peoples Rights. International legal instruments become enforceable in Kenya after they are incorporated into the domestic law by implementing legislation. Currently the government has not passed any legislation explicitly incorporating the international human rights instruments to which Kenya is a party.

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<sup>82</sup> Cap 160 of the Laws of Kenya

<sup>83</sup> *Otieno v. Ougo* Civil Case No.211 of 1987

<sup>84</sup> *Ibid*

## 4.5 Summary

Governments lay down law so that law can be followed by all to ensure the existence of order in society. Both the government and individuals are duty bound to obey the law. Human rights in Kenya are, as we have seen, (eventhough to a limited extent ), enshrined in the Constitution and other laws. The Government and the individuals in any country are bound by human rights provisions. If the Government violates human rights, it would be sending the message to the citizens that the citizens could, if they wished, break the countries laws.



# **5 DOMESTIC IMPLEMENTATION OF THE AFRICAN CHARTER IN KENYA**

## **5.1 Introduction**

It is all well to provide in an international instrument the fundamental rights and freedoms of the individual. However, if effective machinery for vindication of such rights is lacking at the domestic level, human rights cannot be realistically enjoyed by the individual. In this chapter we shall discuss how human rights are enforced in Kenya.

## **5.2 Reporting Obligations under the Charter**

All human rights treaties to which Kenya is a party, require states to report periodically on the progress of implementation of the rights set forth in the treaty to the relevant treaty monitoring body. Once submitted, the report is examined by the treaty body (normally a Committee created under the treaty for that purpose). The examination is done in light of information received from a variety of sources including NGOs, UN agencies and experts. After considering the information, the treaty body issues concluding observations /comments containing recommendations for action by the state Party enabling better implementation of the relevant treaty. The treaty body monitors follow up action by the State party on the concluding comments/observations during examination of the next report submitted.

Under Article 62 of the African Charter on Human and Peoples' Rights, the State Parties must submit a report every two years on their domestic human rights situation. After a report has been submitted, states are invited to send representatives to a session of the African Commission to present the report in person. These reports are to include reports on the Constitution and other legislation affecting human rights, such as the criminal code, and to discuss the status of the African Charter in domestic law. They furnish a unique source of information on law and human rights in Africa.

Kenya's record to the adherence of its international state reporting obligations is dismal. Kenya as we stated earlier ratified the African Charter on Human and Peoples rights on 23<sup>rd</sup> January 1992. Like other human rights instruments the African Charter requires State parties to submit periodic reports to the African Commission on Human and Peoples rights in Banjul, the Gambia. Kenya's first

report was due on the 23<sup>rd</sup> January 1994 and has never been submitted. In total the country has yet to file four reports to the commission. The fifth report was due on 23<sup>rd</sup> January 2002.<sup>85</sup>

Similarly Kenya has defaulted on the following reports.

1. International Covenant on Economic Social and Cultural Rights. The last report was submitted on the 1<sup>st</sup> August 1993. The second periodic report was due on 30<sup>th</sup> June 2000.<sup>86</sup>
2. International Covenant on Civil and Political Rights. The country submitted its first report on 14<sup>th</sup> August 1979. However the second, third, fourth and fifth reports were due in 1986, 1991, 1996 and 2001 respectively.<sup>87</sup>
3. The Convention on the Elimination of Discrimination Against Women. The First periodic report was submitted on 7<sup>th</sup> April 1985. The second and third reports were due in 1993 were submitted on 5<sup>th</sup> January 2000. The fourth and fifth reports were due on in 1997 and 2001 respectively.<sup>88</sup>
4. Convention against Torture. Kenya has not made any reports on this convention. The initial report was due on the 22<sup>nd</sup> March 1998.<sup>89</sup>
5. Convention on the Rights of the Child. Though the country submitted its first report on this convention in 2000, the second periodic report has been due since 1<sup>st</sup> September 1997.<sup>90</sup>

The challenge therefore, is not only for the Kenya to meet its international reporting obligations but also to bring home these guarantees by domesticating these treaties.

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<sup>85</sup> <http://www1.umn.edu/humanrts/africa/comision.html> assessed on 14th September 2002

<sup>86</sup> <http://www.unhchr.ch/html/menu2/6/cescr/cescrs.htm> assessed on 14th September 2002

<sup>87</sup> <http://www.unhchr.ch/html/menu2/6/hrc/hrcs.htm> assessed on 14th September 2002

<sup>88</sup> <http://www.unhchr.ch/html/menu2/6/cedaw/cedaws.htm> assessed on 14th September 2002

<sup>89</sup> <http://www.unhchr.ch/html/menu2/6/cat/cats.htm> assessed on 14th September 2002

<sup>90</sup> <http://www.unhchr.ch/html/menu2/6/crc/crcs.htm> assessed on 14th September 2002

### 5.3 Legislative provisions

The thirteen sections of Kenya's constitution (Chapter 5) are known as the Bill of Rights (BOR). These sections were drafted at the constitutional conference held in London in 1962. The BOR aims to provide comprehensive protection of citizens' fundamental rights and freedoms. The document affirms both substantive and procedural rights, together with traditional political and civil liberties. Citizens are afforded protections against inhumane treatment in prison and against arbitrary search and entry of premises. Freedoms of conscience, thought, and religion are affirmed, as are freedom of expression and assembly, including the right to form labour unions and other associations. There are strong protections for property rights. The Bill declares that no person shall be discriminated against on grounds of "race, tribe, place of origin or residence or other local connection, political opinions, colour, or creed." These protections do not, however, apply to non-citizens. Nor do they extend into personal matters including marriage, divorce, and burial, nor to matters settled by customary law.<sup>91</sup>

The Constitution does not specifically address discrimination based on gender, and women continue to face both legal and actual discrimination on several fronts. For example, a woman is legally required to obtain consent from her husband or father before obtaining a passport. In practice a woman must also have her husband's or father's approval to secure a bank loan. Also, women can legally work at night only in the Export Processing Zones (EPZ's). Women have long dominated agricultural work in terms of numbers of labourers, and they have become more active in urban small business. Still, the average monthly income of women is about 37 percent lower than that of men. According to pension law, a widow loses her work pension upon remarriage, whereas a man does not. Not only do women have difficulty moving into non-traditional fields, they are also promoted more slowly than men and bear the brunt of job retrenchments. Kenya's Law of Succession, which governs inheritance rights, provides for equal consideration of male and female children. In practice, most inheritance problems do not come before the courts. Women are often excluded from inheritance settlements or given smaller shares than male claimants. In addition, a widow cannot be the sole administrator of her husband's estate unless she has her children's consent. There is an urgent need to amend the Constitution in Kenya to remove any kind of discrimination.

Other laws have also been enacted which deprive Kenyan citizens of their fundamental rights. Kenyan laws which infringe internationally agreed human rights standards and Kenya's treaty obligations under the Charter should be repealed or amended including:

- The Preservation of Public Security Act, which allows indefinite detention without trial and restrictions on freedom of movement.

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<sup>91</sup> Section 82 of the Constitution

- Sections of the Penal Code dealing with sedition and treason which, are used to imprison government critics.
- The Public Order Act, which is used to restrict freedom of association by requiring certain public meetings to be licensed in advance.
- The Chiefs' Authority Act, which gives local administration chiefs wide powers to restrict freedom of movement and other basic rights.
- The Administration Police Act, which gives chiefs and sub-chiefs direct control over a section of the police force.
- The Societies Act, which restricts freedom of association and inhibits organizations, including trade unions and political parties, from obtaining registration

Kenya has been a party to the African Charter since 23 January 1992. However, not all the rights provided in the said treaty are recognized in Kenya, there are not contained in the constitution of Kenya or in a separate bill of rights. The provisions of the Charter relating to economic, social and cultural rights do not even seem to have been incorporated into the municipal law of Kenya.<sup>92</sup> There is also no means of overseeing the implementation of these rights in the country. Kenya needs to live up to its obligations as soon as possible so that the economic, social and cultural rights can be given full effect, for the benefit of the people of Kenya

Under the law in Kenya, the species of human rights that is explicitly guaranteed is called political and civil rights. Apart from the above fundamental rights and freedoms, there are economic, social and cultural rights and third generation group rights. The latter two rights are articulated in the African Charter. The ideal situation in Kenya being a party to the said Charter is one where political and civil rights, economic, social and cultural rights and third generation rights are enjoyed by citizens simultaneously. Consequently, Kenya should ensure all species of human rights are provided for under domestic law.

The overall objective therefore, is to bring about the actual integration into the domestic legal system not only the African Charter but any of the treaties which Kenya has ratified or acceded to, so as to enable the State to give effect to the rights and obligations contained in those instruments, through appropriate domestic measures (legislative, executive or judicial), which promote respect for treaty law for the benefit of individuals. This objective can be achieved by having

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<sup>92</sup> Accept the Right to Property, see section 75 of the Constitution.

appropriate provisions in the constitution dealing with the problem with respect to all treaties to which Kenya is a party and not human rights treaties only, thus avoiding a piecemeal approach that relies on the enactment of specific legislations, initiating procedures of integration under each category or groups of treaties.

For this reason, it can be said that the problem of integration of treaties into domestic laws of the country is a constitutional one. It represents a gap in the constitutional law that needs to be filled, as amply demonstrated in the case of non-implementation of human rights treaties to accord the individuals their treaty based rights. Thus it is possible to suggest a model constitutional provision that would help Kenya to:

- a) Formulate clear treaty making and implementation procedures based on constitutional provisions which; define the relationship between treaties and domestic laws and establish a process of integration of treaties into the domestic legal systems.
- b) Fulfil their treaty obligations in the field of human rights, as further developed by relevant, non-legally binding international instruments such as resolutions or plans of actions adopted by States at various international conferences of global or regional character.

To fill this gap in the law in Kenya, one has to look at section 3 of the Republic's present constitution, which reads as follows:

“This Constitution is the Constitution of the Republic of Kenya and shall have the force of law throughout Kenya, subject to section 47, if any other law is inconsistent with this constitution, this constitution shall prevail and the other law shall, to the extent of the inconsistency, be void”

The core issue is that the quoted provision of the Kenyan Constitution, which is similar those found in a number of other commonwealth countries constitutions, could be amplified to take on board suggestions made under points (a) and (b) set out above.

The Constitution of Kenya Review Act 2001 established the Constitution of Kenya Review Commission (CKRC) to review the Constitution and indeed a draft Constitution of the Republic of Kenya was released on the 27<sup>th</sup> of September, 2002.<sup>93</sup> However before the same could be debated upon by the public and later by parliament, the President dissolved the Eighth Parliament on

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The Draft Constitution of the Republic of Kenya.

the 25<sup>th</sup> October 2002 to pave way for the polls to be held on the 27<sup>th</sup> December 2002.<sup>94</sup>

## 5.4 Enforcement of Fundamental Freedoms

### 5.4.1 The Courts

The African Charter as well as the Kenyan Constitution provides for an independent judiciary; however, the judiciary is accused of being corrupt and subject to executive branch influence.<sup>95</sup> The President has extensive powers over appointments, including those of the Attorney General, the Chief Justice, and Appeal and High Court judges. The President also can dismiss judges and the Attorney General upon the recommendation of a special presidentially appointed tribunal. However, judges have life tenure (except for the very few foreign judges who are hired on contract).<sup>96</sup>

The court system consists of a Court of Appeals, a High Court, and two levels of magistrate courts, where most criminal and civil cases originate. The Chief Justice is a member of both the Court of Appeals and the High Court. Military personnel are tried by military courts-martial, and verdicts may be appealed through military court channels. The Chief Justice appoints attorneys for military personnel on a case-by-case basis.<sup>97</sup>

In recent years, the judiciary has faced many accusations of corruption. In 1998 the Chief Justice appointed a special judiciary commission chaired by Justice Richard Kwach to report on the problems of the judiciary. The Kwach Commission cited "corruption, incompetence, neglect of duty, theft, drunkenness, lateness, sexual harassment, and racketeering" as common problems in the judiciary.<sup>98</sup> The Commission recommended amending the Constitution to allow for the removal of incompetent judges, introducing a code of ethics, improving the independence of the judiciary, overhauling the Judicial Services Commission (the administrative branch of the judiciary), and shifting prosecutorial responsibilities

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<sup>94</sup> Daily Nation 28<sup>th</sup> October, 2002.

<sup>95</sup> Article 26 of the Charter and Chapter 3 of the Constitution

<sup>96</sup> Chapter 3 of the Constitution

<sup>97</sup> Ibid

<sup>98</sup> Kwach Report on The Judiciary, 1998.

from the police to the judiciary.<sup>99</sup> Upon receipt of the report, the Chief Justice in late 1998 appointed another commission to investigate modalities of implementing the Kwach Commission's recommendations for improving the judiciary. The Judicial Services Commission circulated proposals for a judicial code of conduct in the first half of the year.

There are no customary or traditional courts in the country. However, the national courts use the customary law of an ethnic group as a guide in civil matters so long as it does not conflict with statutory law. This is done most often in cases that involve marriage, death, and inheritance issues and in which there is an original contract founded in customary law. For example, if a couple married under national law, then their divorce is adjudicated under national law, but if they married under customary law, then their divorce is adjudicated under customary law. Citizens may choose between national and customary law when they enter into marriage or other contracts; thereafter, however, the courts determine which kind of law governs the enforcement of the contract. Some women's organizations seek to eliminate customary law because they feel it is biased in favour of men.

Civilians are tried publicly, although some testimony may be given in closed session. The law provides for a presumption of innocence, and for defendants to have the right to attend their trial, to confront witnesses, and to present witnesses and evidence. Civilians also can appeal a verdict to the High Court and ultimately to the Court of Appeals. Judges hear all cases. In treason and murder cases, the deputy registrar of the High Court can appoint three assessors to sit with the High Court judge. The assessors are taken from all walks of life and receive a sitting allowance for the case. Although the assessors render a verdict, their judgment is not binding. Lawyers can object to the appointments of specific assessors.

Defendants do not have the right to government-provided legal counsel, except in capital cases. For lesser charges, free legal aid is not usually available outside Nairobi or other major cities. As a result, poor persons may be convicted for lack of an articulate defence. Although defendants have access to an attorney in advance of trial, defence lawyers do not always have access to government-held evidence. The Government can plead the State Security Secrets Clause as a basis for withholding evidence, and local officials sometimes classify documents to hide guilt. Court fees for filing and hearing cases are high for ordinary citizens. The daily rate of at least \$25 (2,000 shillings) for arguing a case before a judge is beyond the reach of most citizens.<sup>100</sup>

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<sup>99</sup> Ibid, pp.75-81

<sup>100</sup> Advocates Renumeration Act

## 5.4.2 The Police

Human rights defenders, politicians, journalists and others continue to be harassed, ill-treated or detained for non-violent activities. Torture by security officials is widespread, causing a number of deaths in custody. Excessive force is used by police against peaceful protesters, and in a number of incidents the police make no attempt to stop vigilante groups from attacking peaceful demonstrators.

The Kenyan Government reported a figure of 137 suspected criminals killed by police last year i.e. 2001, with another 31 suspects and detainees dying in custody. According to the findings of the Kenyan Human Rights Commission, the number killed is at 251, including 49 tortured to death. The number of lives lost at the hands of the police increased significantly last year, according to KHRC, which said 198 died in this manner in 2000.<sup>101</sup>

A police department reports of 73 officers charged during 2001 for unspecified offences. According to the Police Department's own figures, 13 of the accused officers were tried, and nine acquitted. One officer received a 10-year sentence; another received a three-year sentence; a third was ordered imprisoned for 15 months and another was fined approximately \$128 (Kshs10,000).<sup>102</sup>

Police torture is systematic, primarily for common criminals. At least several people die in custody apparently as a result of torture every year. The government has now published a Bill creating a commission to investigate cases of torture. The commission would be able to conduct investigations on its own volition or upon a complaint by any person or group of persons. The Criminal Law Amendment Bill 2000 proposes the abolition of corporal punishment and repeal of the provision that allows courts to admit as evidence confessions made to police.<sup>103</sup>

In July 1999, a 25-year-old man was allegedly tortured to death by two drunken administration policemen (AP) in Kiambu. Mr Peter Kariuki, who was arrested at Karia trading centre in Githunguri division, died two hours later at the nearby AP Camp. A witness, Mr Francis Muchai, said the APs tied Mr Kariuki's hands and legs together with a rope and poured cold water on him to force him to confess he was a thief. Mr Muchai, who was locked up in a tiny cell with the deceased, said he watched helplessly as the policemen clobbered Mr Kariuki with a piece of wood to death. The two APs were transferred the following day and have since been replaced at the camp.<sup>104</sup>

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<sup>101</sup> Daily Nation 6<sup>th</sup> March 2002.

<sup>102</sup> Ibid

<sup>103</sup> Daily Nation 20<sup>th</sup> October, 2000,

<sup>104</sup> Daily Nation 20<sup>th</sup> July 1999



Some criminal suspects are shot dead by police even though they appeared to pose no threat Excessive force continues to be used by riot police. Investigations are rare, prosecutions virtually non-existent. In August 1999, five members of a wedding party died of gunshot wounds, while another 15 were wounded and a policeman hacked to death during the violence in the mosque at Chaini village in Matuga division, Kwale District. Seven police officers, had gone to the mosque to apprehend a man suspected of arson.<sup>105</sup>

On several occasions security guards, vigilante groups and others violently disrupted peaceful meetings or demonstrations while the police present do nothing to stop the violence. In January 1999, Wangari Maathai, a prominent human rights and environmental activist, was hit on the head by security guards while police watched, during a demonstration against the handover of public land to developers in Karura Forest, northern Nairobi. The Attorney General later ordered an investigation, but it was not known if anyone was arrested in connection with the incident.<sup>106</sup>

Journalists reporting political meetings were also targeted by the police. In May 1999, at a rally in Ugunja town, Nyanza province, journalists were charged by riot police while filing their stories from nearby phone booths. The police had declared the rally illegal and had dispersed the crowds using batons and teargas.<sup>107</sup>

On 10 June 1999, scores of demonstrators were hurt by police when participants at a rally organized by pro-democracy advocates and church groups decided to march on the Kenyan Parliament. Demonstrators were prevented from reaching parliament by police officers who violently broke up the march using batons, teargas, stun grenades and water cannon — riot control equipment purchased from South Africa. The Reverend Timothy Njoya, who led the march, was attacked by two men, who used their fists, boots and sticks to beat him to the ground and broke his arm while uniformed police watched. Following a public outcry, one man was later arrested and charged with assaulting Reverend Njoya.<sup>108</sup>

In December 2000, twenty-four people were arrested as police stopped a Muungano wa Mageuzi rally in Kiambu . Police fired in the air and lobbed tear

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<sup>105</sup> Daily Nation 14<sup>th</sup> August, 1999

<sup>106</sup> Daily Nation 9<sup>th</sup> January 1999

<sup>107</sup> Daily Nation 25<sup>th</sup> April 1999

<sup>108</sup> Daily Nation 11<sup>th</sup> June 1999

gas canisters to stop five Opposition MPs and wananchi from marching to the Karuri Stadium for a rally earlier cancelled by the police.<sup>109</sup>

Mass arrests of refugees and asylum-seekers were reported in August and September 1999. Most were from Somalia and Ethiopia. Some were arrested in a refugee camp near Mombasa. There were reports of ill treatment by the police and threats of forcible return to countries where they would be at risk of serious human rights violations. It is not known if any refugees were forcibly returned to their country of origin.<sup>110</sup> In November the Kenyan authorities refused to allow 4,700 refugees, including women and children, into Kenya from Ethiopia on the grounds that they did not have Kenyan identification documents. Concern was expressed by the UN refugee agency UNHCR, which had been assisting with their repatriation, that the refugees faced severe food shortages at Moyale trading centre, a border town, where they were being temporarily housed.<sup>111</sup>

### 5.4.3 Prisons

Kenya is failing to protect the lives of Kenyans in its custody, allowing scores to die as a result of torture, ill treatment and cruel, inhuman and degrading conditions of detention. Information about the conditions in Kenyan prisons is limited because access to prisons is denied or severely restricted. Human rights non-governmental organizations (NGOs), prisoners, doctors and members of the judiciary have all spoken out and called for an end to torture and improvements in prison conditions

Some Kenyan prisoners have been killed while attempting to escape or have died as a result of torture by prison officers. In September 1999, six prisoners, Peter Loyara Lomukunyi, Peter Kolini, John Nyoro Njuguna, Julius Mungania, Peter Ngurushanaon and James Irungu Ndugo, on death row at King'ong'o prison, Nyeri, Central Province, died during an escape attempt. The police and the Commissioner of Prisons, (who is in charge of the prison service under the Minister of Home Affairs), both began investigations into these deaths. The initial police report stated that they had been shot by prison officers to prevent their escape. However, prison officers alleged that the prisoners had died as a result of falling from the eight-metre high perimeter fence. A post mortem stated that none of the bodies had bullet wounds and gave the cause of death as falling from a height. Their bodies were then buried, reportedly either without the knowledge of their families or after pressure had been put on the families by the authorities. The Attorney General ordered an inquest. Human rights groups and others alleged that

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<sup>109</sup> Daily Nation, 19<sup>th</sup> December 2000

<sup>110</sup> Daily Nation 22<sup>nd</sup> August 1999

<sup>111</sup> Daily Nation 8<sup>th</sup> November 1999

the prisoners had been beaten to death and that the authorities were attempting a cover-up. A second post mortem was carried out for the families, after the bodies were exhumed, with the assistance of medical and human rights organizations, attended by a forensic pathologist representing Amnesty International. Medical evidence obtained indicated that the bodies had been subject to repeated blunt trauma, injuries that were not consistent with a fall.<sup>112</sup>

Torture and ill treatment appear to be used indiscriminately in Kenyan prisons to instil discipline. Prisoners are reportedly beaten if they do not obey the orders of prison officers or breach prison rules. A prison officer at Langata Women's Prison stated that "whipping, punching and slapping are often used as disciplinary measures". In March 2000 Sophia Dolar, Pauline Wanjiru and Ester Wairimu were amongst 11 human rights activists who were arrested, charged with unlawful assembly and held for five days in Nakuru Prison, Rift Valley Province. Upon arrival the women were forced to strip naked in full view of other prisoners and jeering prison guards. When interrogated they were beaten with sticks if they failed to address the prison guards as "madam". The women were held in a large cell that already held 39 women, many of whom were sick and suffering from diarrhoea. Whenever a prison guard entered the overcrowded and dirty cells, the women were made to squat in rows and on one occasion when they refused to eat a meal, because the food had not been cooked properly, they were beaten with canes and forced to eat the food.<sup>113</sup> There have been no reports of an official investigation into their allegations of torture.

The United Nations (UN) Special Rapporteur on torture stated that the use of torture by law enforcement officials in Kenya was widespread and systematic. He recommended that: "The government should ensure that all allegations of torture and similar treatment are promptly, independently and thoroughly investigated by a body capable of prosecuting perpetrators". Impunity is a major concern in Kenya. The few investigations into allegations of torture, deaths in prisons or possible extrajudicial executions by the security forces appear to be summary and the evidence available from many investigations not sufficient to result in a prosecution. In cases where inquests have been ordered to establish the cause of death these have been delayed over several years.<sup>114</sup>

Prison conditions in many prisons in Kenya amounts to cruel, inhuman and degrading treatment contrary to article 7 of the African Charter. Hundreds of prisoners die each year, some as a result of torture by prison officers, the majority from infectious diseases resulting from severe overcrowding, insanitary conditions, shortages of food, clean water, clothing, blankets and adequate medical care. In September 2000 the Nyeri District Commissioner, Ali Korane, stated: "Our

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<sup>112</sup> Haki Zetu, A Publication of the Standing Committee on Human Rights (K), Vol 4 No.1, Dec 2001, pp.10-12

<sup>113</sup> <http://www.amnesty.ca/stoptorture/act5.htm> assessed on 20th October 2002

<sup>114</sup> E/CN.4/2000/9/Add.4

prisons are in very poor conditions. In all the provinces I have served as an administrator, all the facilities are pathetic. These harsh conditions end up hardening criminals rather than rehabilitating them".<sup>115</sup> In these conditions, infectious diseases such as diarrhoea, typhoid, tuberculosis and HIV/AIDS spread easily. Prison Reform International reported in June 2000 that 90 prisoners die each month in Kenya.<sup>116</sup>

Caning is a cruel, inhuman and degrading treatment, and is therefore prohibited by international human rights treaties including the African Charter. However, Kenyan courts continue to impose caning as a punishment for many offences including robbery and rape, in addition to imprisonment as this is provided for in the relevant laws.<sup>117</sup>

Kenyan prisons hold as many as three times the number of inmates they were designed for. There are 78 jails in Kenya, which were designed to accommodate 15,000 inmates. The Commissioner of Prisons claims that they now house 35,000 while other reports suggest that the actual number is nearer 50,000.<sup>118</sup> Kodiaga Prison, Nyanza Province, for example, in January 2000 was holding 600 more prisoners than its capacity of 800. Much of the overcrowding is due to the large number of people held on remand, many of whom are unable to raise the money needed to obtain bail, and who often wait up to three years for their case to come to court. Some prisoners on capital charges who do not qualify for bail have reportedly been held for over five years, awaiting trial. The length of time taken to process appeals, particularly for death penalty cases, which can be up to seven years, also contributes to overcrowding. The Commissioner of Prisons, Mr Abraham Kamakil, has blamed the rot in Kenyan prisons on Government policy makers. Kamakil said existing buildings, constructed in the colonial era when the country's population was only 6 million, were meant for only 11,000 inmates yet they currently accommodate more than 40,000 prisoners out of a population of 30 million.<sup>119</sup>

More recently, Bungoma prison in Western Province has been declared unfit for human habitation. A report prepared by the Ministry of Public Health concluded that the institution is not suitable to host prisoners.<sup>120</sup> The report on the sanitary inspection of the prison done on January 21, 2002, was prepared by a team led by the District Public Health Officer, Mr Bernard Mureka. It said the prison has inadequate medical kits to cater for the prisoners and staff adding that it had insufficient water to cater for the 1069 prisoners. The report, also revealed that the inspection team diagnosed 44 cases of tuberculosis at the prison during its

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<sup>115</sup> East African Standard, 20<sup>th</sup> September 2000

<sup>116</sup> Daily Nation 7<sup>th</sup> June 2000

<sup>117</sup> Supra note 98

<sup>118</sup> Daily Nation 18<sup>th</sup> November 1999

<sup>119</sup> East African Standard, 18<sup>th</sup> February 2002

<sup>120</sup> East African Standard, 5<sup>th</sup> March 2002

work. It said there are no adequate mattresses and blankets for inmates thereby necessitating three to four people sharing a single blanket. “Effluent from the prison is discharged to a poorly maintained pool which is now harmful to the neighbouring community,” added the report.<sup>121</sup> It recommended that authorities ease excessive overcrowding at the institution by looking for alternative means of dealing with petty offenders and foreigners. There is also need to upgrade the prison dispensary to health centre status in order to meet the target population of 1100 inmates and 760 staff and their families, it added.<sup>122</sup>

Prisoners have limited access to medication. Most prison medical units have few or no resources and prisoners or their families are reportedly often asked to pay for any medical treatment. When medication is given it is often inadequate, such as temporary painkillers for injuries requiring more intensive treatment. Very few prisons have a doctor and most instead rely on the District Medical Officer, who visits occasionally, and untrained medical orderlies. Private doctors who attempt to treat prisoners frequently report difficulties in gaining access to their patients. The law allows registered medical practitioners to visit their patients. However, the Officer in Charge of the Prison usually insists on a court order to allow the doctor to examine the patient, which can take up to a week to obtain, and even then the doctor may be refused access unless the prison doctor is available which, given there are very few prison doctors, compounds delays.

Access to hospital treatment is restricted by prison officers who reportedly either refuse to take very sick inmates to hospital or do so, so late, that the inmates are often extremely ill or dying by the time they arrive. The persistent coughing of a defendant during a hearing in the Mombasa High court in December 2000 caused a judge to raise concerns about the health of prisoners in Shimo la Tewa prison. The prisoner had been refused hospital treatment by prison officers on security grounds. Prisoners at Shimo la Tewa prison complained of a lack of essential drugs at the prison and said that most prisoners who needed hospital treatment end up dying at the prison's dispensary, which was unable to treat chronic diseases. Once in hospital, the prisoners are chained to the bed. Hospital doctors note that prisoners usually come to hospital to die.<sup>123</sup>

Kenyan human rights NGOs are not allowed to visit prisons, despite the fact that the law does not prohibit access by members of civil society. International NGOs have also been refused access to prisons and in September 1999 the UN Special Rapporteur on torture was refused permission to visit Kamiti Maximum Security Prison, Nairobi, despite his formal request, which had been accepted by the Commissioner of Prisons.<sup>124</sup>

Lawyers, doctors and relatives of prisoners have all reported problems in gaining

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<sup>121</sup> Loc. Cit.

<sup>122</sup> Loc. Cit.

<sup>123</sup> Daily Nation, 6<sup>th</sup> December 2000

<sup>124</sup> Supra note 109, paragraph 37

access to prisoners, which is heavily regulated. In January 2000 a team of doctors from the Kenya Medical Association (KMA) were barred from entering Kodiaga Prison by armed riot police. The doctors were responding to reports by prisoners of deaths, torture, outbreaks of diseases, hunger, lack of medical attention and deliberate infection of HIV/AIDS. The doctors were planning to examine prisoners, assess the medical conditions and distribute medical supplies. Dr Buteyo, the then chair of KMA, stated that "We will continue to press for independent inspection of prison facilities all over the country by health professionals without necessarily having to book long appointments". The District Commissioner denied that conditions in Kodiaga Prison were poor. There are also reports of prison guards demanding money in exchange for legitimate visitation rights.<sup>125</sup> On 6 July 2000 the Rift Valley Prisons Commander publicly acknowledged the problem and urged people who were having problems visiting prisons to report to him the corrupt prison officers.<sup>126</sup>

In response to national and international pressure the government introduced the Community Service Orders Programme in July 1999 in an attempt to reduce overcrowding<sup>127</sup>. Since then over 20,000 minor offenders have reportedly been given non-custodial sentences. A workshop was organized in May 2000 by the Ministry of Home Affairs, and the KMA Standing Committee on Human Rights, for members of the justice and criminal agencies, doctors and human rights activists, after discussions with the KMA following the refusal of entry to Kodiaga prison in the beginning of that year. On 13 October 2000 the government introduced a Bill to set up a Kenya National Committee on Human Rights.<sup>128</sup>

We recognize that the Kenyan authorities have a duty to protect the public against violent crime. We also recognize the very real budgetary limitations on the resources in Kenya. However, we also note the failure of putting to an end the continuing torture, ill treatment and cruel, inhuman and degrading conditions in Kenyan prisons. Kenya has a responsibility, under the African Charter, to protect the lives of all Kenyans, particularly those who are in custody, as they and their health and well-being is entirely in the control of agents of the state, and to ensure prison conditions meet international human rights standards. Without adequate post-mortems, prompt, thorough and impartial investigations and the bringing to justice of those responsible in every case, torture and deaths in prisons will continue. All prison personnel must be made aware that they cannot violate human rights with impunity. The failure to tackle conditions in Kenyan prisons is perpetuating grave human rights violations, affecting the lives of thousands of Kenyans.

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<sup>125</sup> Daily Nation 23<sup>rd</sup> January 2000

<sup>126</sup> Daily Nation 7<sup>th</sup> July 2000

<sup>127</sup> The Committee was set up under the 1999 Community Service Orders Act, which allows for non-custodial sentences for minor and first offenders.

<sup>128</sup> See Chapter 6 below

## **5.5 Civic Education**

It must be emphasized that Kenyans need to know what their fundamental rights and freedoms are. Under Article 25 of the African Charter, State Parties have a duty to promote and ensure through teaching, education and publication the respect of the rights the Charter guarantees and to ensure that these rights as well as corresponding obligations and duties are understood. It is therefore imperative that the Constitution is translated into languages that people are familiar with. The Public Law Institute has started by translating some parts of the Constitution into Kiswahili. In our view the government printer should print and distribute simplified versions of the Constitution in Kiswahili and other languages spoken in Kenya.

In primary schools in Kenya civics is taught. A perusal of the syllabus shows that the introductory constitutional law is taught within the subject of civics. An emphasis on law generally and on fundamental rights and freedoms specifically could be encouraged. Government- including rudimentary constitutional law- is taught in secondary school education. The same emphasis as was suggested with respect to primary school is appropriate. Also in adult literacy classes, an attempt could be made to teach general aspects of law and constitutional law in particular. Here fundamental rights and freedoms could be emphasized. Such a move in adult education could help make such education more functional and relevant to adult lives.

## **5.6 Summary**

Enforcement of human rights may well be the most crucial aspect of provision and enjoyment of human rights. However impressive the array of human rights a Constitution or international instrument grants, the rights may not mean much where an individual cannot enforce them. Both in the municipal sphere and also under international law, courts and other enforcement agencies seem to differ in human rights enforcement to the detriment of the interests of individuals. Apart from ensuring that the content of human rights guaranteed continuously expands, it is necessary that enforcement of those rights must be real so that the individual's human rights are vindicated genuinely.

# 6 DOMESTIC MONITORING MECHANISMS

## 6.1 Introduction

Kenya, with a population of 30 million, achieved its political independence from Britain in 1963. Soon after independence, Kenya became a one party state. Multi-party democracy was reintroduced in December 1991 and an election conducted on December 29, 1992.<sup>129</sup> Although multi-party democracy now exists, Kenya has yet to fully adjust to the freedoms that this should provide. In this chapter we will briefly analyse the domestic monitoring institutions with a view to suggesting some reforms.

## 6.2 National institutions

In Article 26 of the African Charter, State Parties should allow for the establishment and the improvement of national institution entrusted with the promotion of the rights set forth in the Charter. The Standing Committee on Human Rights (K), (the 'Committee') was formally constituted and gazetted on 21<sup>st</sup> June 1996. The Committee derives its powers from its appointing authority who is the President of the Republic of Kenya, in exercise of the executive authority vested in him under article 23(1) of the Constitution of Kenya.

The Committee is made up of ten members and a secretary. The latter also serves as the chief executive of the secretariate. None of the Committee members serve on a full time basis. They are drawn from all regions of the country representing the diversity of Kenyan communities including their racial origins and religious affiliations.

These are:

Prof O.K Mutungi	Chairman
Amb. Denis Afande	Member
Rev. John Gichinga	Member
Mr. Norman Brooks	Member
Mrs. Martha Mugambi	Member
Mr. M.Z.A Malik	Member

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<sup>129</sup>

Supra note 61



Prof Kamuti Kiteme	Member
Prof. H.W.O Okoth-Ogendo	Member <sup>130</sup>
Ms. P. Chelagat Mutai	Member <sup>131</sup>
Prof Mohammed Bakari	Member <sup>132</sup>
Mr. Thuita Mwangi	Secretary <sup>133</sup>

Under its terms of reference the Committee is empowered to:

- 1 Investigate complaints of alleged violations of fundamental rights and freedoms as set out in the Kenyan Constitution, as well as complaints of alleged injustices.
2. Investigate abuse of power and unfair treatment of any person by a public official in exercise of his or her official duties.
3. Educate the public as to their human rights by any means it deems appropriate.<sup>134</sup>

In an attempt to fulfill this mandate, the Committee functions through three sub-commissions, namely: Fundamental Rights and Freedoms, Conduct of Public Servants and Human Rights Education. Despite resource constraints, both financial and manpower, the Committee has been able to accomplish quite a lot during the first three years, for example, it received about 400 cases of complaints, of which 115 have been investigated to finality. Some of the investigations including those involving violent clashes in parts of Rift Valley and Coast provinces had been taken up by the Committee acting at its own initiative.<sup>135</sup>

In its efforts to foster awareness and knowledge of Human Rights in Kenya, the Committee has been able to visit all the eight provinces, holding public *barazas*, hearings and educating the rural population about human rights. In April 1999, it embarked on a curriculum Development project for teaching human rights education in schools. The Committee held a series of consensus building workshops and pilot district educational seminars, aimed at focusing further the attention of the public on human rights, and providing a forum for developing a

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<sup>130</sup> Kenya Gazette Notice No.3482 dated 22<sup>nd</sup> May 1996

<sup>131</sup> Kenya Gazette Notice No.4845 dated 27<sup>th</sup> July 2000

<sup>132</sup> Ibid

<sup>133</sup> Supra note 125

<sup>134</sup> Ibid

<sup>135</sup> Haki Zetu, A Publication of The Standing Committee on Human Rights (K), Vol 2 No. 1, Dec 1999, pp.4

consensus on materials for a curriculum for effective teaching and communicating human rights education in primary and secondary schools.<sup>136</sup>

Be that as it may, there is need for a legal framework to be provided that will enable the Committee to function as an autonomous and statutory body vested with the necessary powers and resources. To achieve this end, the Attorney General published the Human Rights Commission bill on the 13<sup>th</sup> of October 2000.<sup>137</sup> The Bill provides for the protection and promotion of human rights as its primary role. In addition, however, and in keeping with emerging trends elsewhere in the world, the draft legislation endows the Commission with powers to move beyond this sphere to embrace situations in which a person(s) acting as a government or public agent violates these rights by means of abusing public office or otherwise causing an injustice or unfair treatment to citizens. The co-existence of these two distinct but mutually reinforcing functions within the mandate of the Commission is a viable adjunct to state institutions that support constitutional and democratic order, to the extent that it is an addition to the armoury of mechanisms that are employed in order to create and sustain a fair and stable government. It also limits potential for overlap and duplication of work, and even conflict brought by the existence of too many institutions dealing with protection of various categories of rights and freedoms, groups or classes of people.

The essential features of the Bill are provided under the structures and powers, which define its precise authority and functions. Generally, the Commission shall enjoy a broad jurisdiction, including:

- \*Investigation alleged violations of human rights.
- \*Conducting public enquiries on its own initiative,
- \*Promoting of human rights education, including the collection, production and dissemination of information,
- \*Provide advice and assistance to the Government including as an oversight body in monitoring the implementation of international human rights instruments and reporting obligations under various treaty bodies,
- \*In the performance of its functions, the commission shall have the powers of a court i.e, to issue summons, commit persons for contempt, compel persons to co-operate in matters under investigation, etc.

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<sup>136</sup>

Ibid pp.5

<sup>137</sup>

Haki Zetu, A Publication of The Standing Committee on Human Rights (K), Vol 3 No.1, Dec 2000, pp.8

\*The Commission may also prosecute persons found to have violated human rights.

Another important feature contained in the draft is the criteria and method of appointment of commissioners. They will be chosen from persons of high moral integrity, whose names will have been vetted before being presented for appointment. In order that the commission can operate with complete independence, the draft provides safeguards to ensure that such independence and autonomy is secured. Since the autonomy is also commensurate with its financial independence, the draft guarantees funding, which shall be appropriated by the parliament. The text has now been presented to Parliament by the Attorney General, for enactment into law.<sup>138</sup>

As much as we agree that independence of the Commission in the manner described above is critical to its effective functioning, there are other important factors to be considered. The most important being accessibility and accountability of the Commission. The Commission must be readily accessible to its clients through easy channels of communication, both in oral form and physical accessibility, and through field offices. Towards this end, the Commission must be able to develop proactive strategies for assisting those who are most vulnerable and disadvantaged.

Accountability entails observance of certain regulations and exposure of the commission to public scrutiny. This should not be as to interfere with the ability of the institution to discharge its responsibilities effectively. The current bill before parliament strikes a good balance with regard to its reports, which are to be presented to the President and to Parliament. The Minister concerned is required to table the report before parliament within two months.

Finally, it is important to entrench the independence of the Commission in the constitution. It should not only be stated therein but also be given meaning and content as a constitutional organ. This will give concrete additional guarantee of independence.

### **6.3 The Role of NGOS**

A wide array of local human rights organizations are engaged in monitoring human rights in Kenya. The government is still unsure how much freedom to permit even under a multi-party democracy in Kenya. This has created a serious dilemma for Kenyan human rights groups, who react by exercising caution in their activities. They avoid the more controversial areas of human rights monitoring and politically contentious public interest litigation. Indeed, only the newly formed Kenya Human Rights Commission lays any claim to human rights monitoring and is proposing to

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<sup>138</sup>

Ibid

institute legal challenges of government human rights violations. In this section we will examine some of the major NGOS dealing with human rights.

### **6.3.1 International Commission of Jurists-Kenya (ICJ-Kenya)<sup>139</sup>**

The International Commission of Jurists-Kenya Section (ICJ-Kenya) is affiliated to its main body, the Geneva-based ICJ. ICJ-Kenya has been registered since 1974 under the Societies Act. ICJ-Kenya's objectives include the promotion of human rights, rule of law and democracy in Kenya.

ICJ-Kenya is made up of approximately 160 lawyer members and has a governing Board headed by a Chairman. There are five staff, and the Secretariat is headed by the Executive Director, Kagwiria Mbogori.

ICJ-Kenya's activities focus on public advocacy and articulation of human rights and democratic issues. The group produces publications on human rights issues. Publications include the books Law and the Administration of Justice in Kenya and Law and Society. A quarterly, The Kenya Jurist, contains analyses as well as human rights news, events and opinions. The group has organised workshops, conferences and paralegal training sessions. ICJ-Kenya played a prominent role in monitoring Kenya's recent elections. The organisation plans to begin a public interest litigation programme soon.

### **6.3.2 International Federation of Women Lawyers-Kenya [FIDA (K)]<sup>140</sup>**

The International Federation of Women Lawyers-Kenya Section [FIDA (K)] was established in Kenya in 1985 to provide legal aid services for women, to monitor human rights abuses against women and to analyse the status of women in law and development.

A membership organisation of about fifty women lawyers, FIDA (K) is governed by a policy-making council of nine, headed by Martha Koome, and a staff of three, headed by the Executive Director, Jean Kiragu.

FIDA (K)'s main activities are the provision of legal assistance to women. Cases handled have dealt with issues such as freedom of expression, violence against women, forced marriages, genital mutilation and impediments to inheritance. FIDA (K) also intervenes administratively to secure the rights of women.

### **6.3.3 Kenya Human Rights Commission**

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<sup>139</sup> <http://www1.umn.edu/humanrts/africa/kenya.htm> assessed on 2nd September 2002

<sup>140</sup> Loc. cit.

## **(KHRC)<sup>141</sup>**

In 1992, the KHRC sought registration in Kenya and was ultimately registered as an NGO under the NGO Co-ordination Act, 1990 on January 20 1994. Since then, the KHRC has consistently monitored and documented human rights violations in Kenya.

The organisation has a seven-member Board headed by Dr. Makau Wa Mutua, who is based in the United States of America. The Vice-Chairman of the Board is Dr. Willy Mutunga, President of the Law Society of Kenya. Maina Kiai is the Executive Director of the organisation and runs the day-to-day activities of the group, supported by an administrative staff.

The Kenya Human Rights Commission (KHRC) is a non-partisan, non-profit making, membership non-governmental organization based in Nairobi, Kenya. The KHRC was formed in the United States of America in 1991 by Kenyan exiles and activists to specifically lobby for the respect of human rights and promotion of democratisation, accountability and good governance in Kenya.

The KHRC has provided legal hosting to human rights groups that have been denied registration. Thus the Release Political Prisoners pressure group (RPP), the Legal Resources Foundation (LRF), the Citizens for Constitutional Change (4Cs), Muslims for Human Rights (MUHURI), and the Kenya Pastoralist Forum (KPF) operate as projects of the KHRC although they are in practical terms autonomous organisations. These legal covers, and the subsequent collaboration with these organizations, have enabled these projects to have a lasting impact on the struggle for the respect for human rights and democratisation in Kenya.

\*Promotion, protection, and the enhancement for the respect and enjoyment of all internationally recognized human rights in all facets of the Kenyan society

\*We promote our mission by monitoring, documenting and publicizing human rights violations in Kenya

\*Carrying out advocacy campaigns in support of the rule of law and mobilizing the public to defend their rights

\*Mainstreaming gender in all programmes

\*Creating a human rights movement that will support continuous democratic change in Kenya

\*Committing ourselves to the realisation of a Kenyan society without human rights violations

The KHRC supports social, political, economic, and cultural change aimed at enhancing respect of the rule of law, the development of a society that upholds democratic values, a society aware of its rights and comes to their defence whenever threatened or attacked.

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<sup>141</sup>

Loc. cit

#### **6.3.4 *Kituo Cha Sheria* (Legal Advice Centre)<sup>142</sup>**

*Kituo Cha Sheria*, Swahili for Legal Advice Centre, was established in 1973 to provide legal services to the poor and heighten awareness of the law through publication of legal education materials and organising meetings and workshops. *Kituo* also works towards enhancing the democratic process and rule of law.

*Kituo* is officially registered and is a membership organisation with about 400 members. It is governed by a Board of Directors who make the policy decisions that are implemented by the staff. There are eighteen staff members, including an Executive Director, four lawyers, one administrator, two community organisers and three secretaries.

Legal services provided by *Kituo* include representation of the poor in the courts and provision of legal advice on the following areas of law: family law, land disputes, employment and labour disputes, landlord and tenant issues, criminal offences, accident claims, rape cases, women's rights issues, and others.

*Kituo* organises paralegal training programmes in rural areas in order to provide access to and knowledge of the law in those communities. *Kituo* printed a Civil Rights Card in both English and Kiswahili outlining the powers of the police and educating the people on their rights. *Kituo* has also encouraged the establishment of human rights clubs in schools to promote student awareness.

#### **6.3.5 Law Society of Kenya (LSK)<sup>143</sup>**

The Law Society of Kenya was established by an Act of Parliament in 1949. All Kenyan lawyers called to the Bar automatically become members of the Society. The Society is primarily established to protect lawyers' welfare as well as to monitor the state of the law in Kenya and its effect on the practice of law. In recent times, the organisation has become concerned with human rights issues, setting up two committees in this regard--the Human Rights Committee and the Legal Aid Committee.

The policy-making organ of the Society is its Executive Committee, which is elected annually and is headed by the Chairman. The day-to-day running of the Society is handled by the Secretary, a lawyer, who is assisted by three administrative staff.

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<sup>142</sup> Loc. cit

<sup>143</sup> Loc. cit.

The Human Rights Committee of the Society is exploring the idea of writing a new constitution for Kenya. It is cooperating with other human rights groups in this regard. The Society does not provide legal services or representation; however, its Legal Aid Committee refers deserving cases to other human rights groups providing such services.

### **6.3.6 Public Law Institute (PLI)<sup>144</sup>**

The Public Law Institute (PLI) was created by the National Council of Churches of Kenya (NCCCK) and the Law Society of Kenya (LSK). The Institute was registered as a legal entity in 1981, and also under the NGO (Co-ordination) Act of 1990, to promote and protect human rights and the rule of law in Kenya. Its scope includes consumer and environmental protection as well as legal representation and services to the poor and

The Joint Policy Council, composed of the Board of Trustees and an Executive Committee, is the Institute's policy-making organ. The LSK and NCCCK jointly appoint the Council. At the management level is the Executive Director who, together with the staff, run the daily affairs of the Institute. The Institute has a total of twenty-three staff members, of which twelve are professional and eleven administrative.

The Institute's legal representation in human rights cases is mostly focused on public interest issues. PLI also handles more routine legal matters. It takes on consumer rights issues and in 1988, together with the Kenya Consumer Organisation (KCO), successfully sued Kenya Power Lighting Company for a reversal and refund of power supply tariff increases. On the environmental front an unsuccessful legal challenge of a planned construction of a skyscraper in Uhuru Park, a public recreational centre in the city of Nairobi, exerted pressure on the government and the backers of the project that led to its abandonment.

PLI has also embarked on legal education of the public through publications, workshops, seminars, and paralegal training programmes. PLI's legal aid centre operates with full-time lawyers as well as volunteers who interview applicants seeking legal assistance in order to determine eligibility.

The role of NGOs in the protection and promotion of human rights in Kenya cannot be over emphasized. However, a few comments need to be mentioned at this point. Firstly, duplications need to be avoided and the NGOS need to be more co-ordinated to achieve this. Secondly, most of the staff working in Kenyan human rights groups have had little or no training in human rights. Training staff will be an important contribution towards developing the focus and sophistication of the groups. Staff training is needed in the areas of report writing, advocacy skills,

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<sup>144</sup>

Loc. cit

use of international standards, charters and procedures, documentation, computer use, lobbying strategies, internal management and administrative skills, and fundraising skills.

## 6.4 Role of the Media

Kenya has loosened its control over the media in the past 10 years, but opportunities for independent broadcasters have been limited by strict licensing controls. The Attorney General has tabled in Parliament a media Bill which seeks to regulate the conduct of Journalists. The proposed Miscellaneous Amendment Bill 2001 has been opposed by journalists, media owners, human right activists, churches and politicians. They see it as a further attempt to muzzle the Press.<sup>145</sup>

There are a number of privately owned FM radio stations and the internet and satellite television are now widely available. Most newspapers are independent and they are frequently critical of the government. There have been several instances in which journalists have been beaten, detained or brought before court.

\*A 25 April 2001, policemen shut down the private Citizen FM and Citizen TV. Both media are property of Samuel Kamau Macharia, who was arrested by the police on the same day and released a few hours later on bail of 500,000 shillings (7,200 euros). Journalists who covered the arrest were locked in a room of Citizen press group for a while. Policemen were accompanied by officers from the Communications Commission of Kenya (CCK). This Commission says that the two media did not respect the Communications Act of 1998. Mr. Macharia was charged with the setting up of a radio station without a licence and obstructing the police when they searched his premises.

Citizen FM was already closed in 2000 for the same reasons but a high court decision allowed the station to continue broadcasting while the appeal was pending. The CCK was forbidden from interfering with the radio station during the procedure.<sup>146</sup>

\*A journalist was arrested on 21 April 2001 by the police in Garissa (east of the country). Milton Omondi, correspondent for the Kenya News Agency (KNA) went to a police station to report death threats he received after exposing corruption matters among police officers. There the journalist was accused of "creating a disturbance" and put in jail. He was reportedly released the same day and arrested again three days later.<sup>147</sup>

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<sup>145</sup> Daily Nation 14<sup>th</sup> February 2002

<sup>146</sup> [http://www.afrol.com/News2001/ken005\\_media\\_raided.htm](http://www.afrol.com/News2001/ken005_media_raided.htm) assessed on 2nd September 2002

<sup>147</sup> Ibid



\*In January 2001, the police attacked a Nation Media Group journalist Betty Dindi who had gone to cover a farmers meeting. As chaos broke out at the Mbo-i-Kamiti meeting police officers were sent to maintain law and order. Instead, they threatened to kill Ms Dindi, she was targeted for a beating by officers who pursued her through a coffee plantation and threatened to flush her out of a farmhouse with teargas.<sup>148</sup>

It is not only unconscionable for police officers to target journalists going about their duty. But it is also criminal for senior police officers to make good public threats to harm the very same citizens they have been employed to protect.

Despite these obstacles, the Kenyan media deserves commendation for the significant role they have played in the fight for the promotion and protection of human rights. Through their exposes of a myriad of evils afflicting the society, Kenyans have been able to get insights and at the same time express their disgust at the level of human rights violations. For example, always on the alert the media was at hand to reveal how prison Authorities closed doors on Sir Nigel Rodley, the UN Special Rapporteur on Torture. It was not lost on most observers and Sir Nigel as well, that perhaps the harrowing tales of torture, and inhuman living conditions, that often come out of Kamiti prison and other Kenyan prisons may have been the reason behind the whole saga.<sup>149</sup> We can go on and on, and catalogue the many instances that the media has championed the rights of individuals. They have brought to the fore the plight of hunger stricken citizens in Makueni, Turkana and Kitui districts. The plight of victims of domestic violence, victims of tribal clashes, victims of all forms of insecurity, of the land-less (squatters) and more importantly they have provided a voice for the voiceless.

We can only call on the media to carry on with this noble role of being very welcomed partners with all of us who desire to help create in Kenya a culture that seeks to respect human rights of all. On the other hand the State needs to ensure that all Kenyans are allowed to exercise their basic human rights, including freedom of expression, association and assembly, which is enshrined in the African Charter.

## 6.5 Summary

Many viewed with scepticism the recent proposal by the State, to review the Constitution and repeal or amend laws, which violate international standards. It is not enough to hope that this time they are serious. All those involved in the current crisis must be brought together immediately in a meaningful dialogue to ensure that freedoms enshrined in the Charter are guaranteed to all Kenyans

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<sup>148</sup> Daily Nation 1<sup>st</sup> January 2001

<sup>149</sup> Haki Zetu, A Publication of the Standing Committee on Human Rights (K), Vol 2 No. 1, Dec 1999, pp. 11.

# 7 Recommendations and Conclusions

## 7.1 Recommendations

### 7.1.1 Constitutional and Legal Reform

There is an urgent need to bring about the actual integration into the domestic legal system the entire African Charter so as to enable the State to give effect to the rights and obligations contained in this instrument, through appropriate domestic measures (legislative, executive or judicial), which promote respect for treaty law for the benefit of individuals.

The Constitution should be strengthened to guarantee the fundamental rights of Kenyans at all times, to prohibit arbitrary detention, and cruel, inhuman and degrading punishments, such as caning and executions, and to ensure freedom of expression, movement, assembly and association, and freedom from discrimination. The Constitution should be further strengthened to ensure that constitutional rights cannot be abridged, abrogated or abolished by the executive authorities. The Constitution should allow for the restriction of rights in the Constitution only where certain stipulated criteria are met (for example, where such limitations are strictly necessary in an open and democratic society based on freedom and equality). The Constitution should also empower the Courts to review legislation or government action which restricts rights in the Constitution and to order appropriate measures to be taken by the government to remedy the situation.

Kenyan laws which infringe internationally agreed human rights standards and Kenya's treaty obligations under the African Charter should be repealed or amended including: The Preservation of Public Security Act, Sections of the Penal Code dealing with sedition and treason, The Public Order Act, The Chiefs' Authority Act, The Administration Police Act and, The Societies Act.

### 7.1.2 Courts

The judiciary should be protected against undue interference by the executive, and should receive the necessary political support and resources to carry out its duties. The government should provide free legal assistance to defendants without resources including, but not limited to, defendants charged with capital offences. This should include free pre-trial legal assistance.

Illegal detention should be strictly prohibited and compensation paid if it occurs. Judges should be rigorous in examining the legality of detention and the physical condition of defendants, and in investigating all allegations of torture and other cruel, inhuman or degrading treatment or punishment.

On caning and death penalty, we recommend the replacement of caning by other penalties, which are consistent with recognized international standards for the prevention of crime and treatment of offenders. The death penalty should be abolished and all existing death sentences should be commuted. Pending abolition of the death penalty, no executions should be carried out, no offence should carry a mandatory death sentence, no one should be tried for an offence carrying the death penalty without having legal representation, no one should be tried for an offence carrying the death penalty in a magistrate's court and no one should have a prison sentence increased to a death sentence by an appeal court.

### **7.1.3 Police**

Police officers should use force or firearms only when strictly necessary, and to the minimum extent required in the circumstances. Police officers should minimize injury and respect and preserve human life in their use of necessary force. Lethal force should only be used when strictly necessary to protect the lives of others. When injury or death is caused by the use of force and firearms by police officers, they should report the incident to their superiors, who should ensure that independent and impartial investigations of all such incidents are carried out.

All arrests should be carried out under strict judicial control and only by authorized personnel. Everyone should be informed, at the time of arrest, of the specific reasons for his or her arrest. All detainees should receive a clear oral and written explanation of how to avail themselves of their legal rights, including the right to lodge complaints of ill-treatment. The maximum period of 24 hours a detainee may be held by the police without being brought before a judge should be adhered to. This period should be the same for all detainees including those facing possible capital charges. Those failing to adhere to these safeguards should be effectively disciplined or brought to justice.

No one should be arrested solely on the basis of their nationality or ethnic origin. No refugee should be sent back to their country of origin if they are likely to be at risk of human rights violations there.

#### **7.1.4 Prisons**

Kenya should ensure that domestic law and practice conforms fully with international human rights treaties including the African Charter ratified by Kenya as well as international human rights standards, in particular, the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and the UN Standard Minimum Rules for the Treatment of Prisoners. The government should take particular care to ensure the protection of detainees who are vulnerable for reasons of age or gender.

All detention centres and prisons should be open to visits and regular inspections by representatives of an independent body such as the International Committee of the Red Cross according to their working principles. Any detainee or prisoner should have the right to communicate freely and in full confidentiality with the inspectors. The inspectors should have unrestricted access to all relevant records and be authorized to receive and deal with detainees' complaints. The inspection body should prepare detailed reports of each visit, particularly about overcrowding and the health of the detainees, and should ensure that appropriate action is taken to remedy all shortcomings relating to the treatment of detainees and prisoners. The inspection body should make recommendations for improving conditions of detention in Treatment of Prisoners. These should be acted upon within a reasonable period.

## **7.2 Conclusion**

The African Charter has had a significant impact in the promotion and protection of human rights in Africa. The African Commission has considered more than 300 complaints of alleged violations of human rights, and has also considered more than 30 state reports in 13 countries since its inception. During the course of so doing, it has also clarified the obligations of state parties to the African Charter. Increasingly, African States and NGOs are involved in the activities of the commission through participating actively in commission sessions.<sup>150</sup>

Despite the modest success achieved, the African Charter and the Commission continues to face numerous challenges and obstacles. These include under funding; understaffing; inadequate publicity on its activities; lack of independence on the part of some commissioners who maintain close ties with the executive structures in their respective countries; and non-compliance of states in submitting

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<sup>150</sup>  
October 2002

See, [http://www.achpr.org/state\\_periodic\\_reports.doc](http://www.achpr.org/state_periodic_reports.doc) assessed on 30th

their state reports, as well as the implementation of commission decisions.

The question - whether the African court complementing the African commission, could enhance the impact of the African system of human rights in the African human rights scene in general, and in conflict prevention and resolution in particular - is open to debate. Some commentators are optimistic that the African court will strengthen the African human rights system. Others, however, are concerned that the court will draw resources and attention away from the African commission, thus weakening the African system of human rights.

The African human rights enforcement mechanism can only be as strong as the African States wish it to be. The effectiveness of the African human rights system will depend on the extent to which the African states support it, by allocating sufficient resources to it, by implementing the decisions and recommendations emanating from it and, above all, by striving to fulfil their human rights obligations under the African Charter, as well as any other African human rights instruments. African States and Kenya in particular, need to take action in order to indicate their conviction that genuine protection of human rights in Africa is the only firm foundation on which peace and development can be built and sustained on the continent.

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### **(C) USEFUL WEBSITES**

<http://www.amnesty.org/>

<http://www.hrw.org/>

<http://www.un.org>

<http://www.unhchr.ch/>

<http://www1.umn.edu/humanrts/links/africanlinks.html>

<http://www.up.ac.za/chr/ahrdb/ahrdb.html>

<http://www.law.wits.ac.za/>

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