

Review of Rights Discourse

Kenya

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Acronyms and Abbreviations

AI	-	Amnesty International
CAT	-	Convention Against Torture
CEDAW	-	Convention on Elimination of all forms of Discrimination against Women
CLAN	-	Children's Legal Action Network
CLARION	-	Centre for Law and Research International
CRC	-	Convention on the Rights of the Child
CRADLE	-	Child Rights Advisory Documentation and Legal Centre
COVAW	-	Coalition of Violence Against Women
CSOs	-	Civil Society Organizations
ECK	-	Electoral Commission of Kenya
ESCR	-	Economic, Social and Cultural Rights
FORD	-	Forum for the Restoration of Democracy
FIDA	-	Federation of Women Lawyers in Kenya
FOI	-	Freedom of Information
GJLOS	-	Governance, Justice, Law and Order Sector Reform
HROs	-	Human Rights Organizations
ICC	-	International Criminal Court
ICERD	-	International Convention on Elimination of all forms of Racial Discrimination
ICESCR	-	International Covenant on Economic, Social and Cultural Rights
ICCPR	-	International Covenant on Civil and Political Rights
ICJ	-	International Commission of Jurists
IMLU	-	Independent Medico-Legal Unit
IPPG	-	Inter- Parties Parliamentary Group
KAACR	-	Kenya Alliance for the Advancement of Children's Rights
KANU	-	Kenya African National Union
K-HURINET	-	Kenya Human Rights Network
KHRC	-	Kenya Human Rights Commission
KNCHR	-	Kenya National Commission on Human Rights
KPF	-	Kenya Pastoralists Forum
LSK	-	Law Society of Kenya
MNC	-	Multinational Corporation
MUHURI	-	Muslims for Human Rights
NARC	-	National Rainbow Coalition
NAC	-	National Alliance for Change
NAK	-	National Alliance Party of Kenya
NCEC	-	National Convention Executive Council
NCEP	-	National Civic Education Programme
NCKK	-	National Council of Churches of Kenya
NDP	-	National Development Party
NGOs	-	Non-governmental organizations
NPK	-	National Party of Kenya
OAU	-	Organization of African Union
PSC	-	Parliamentary Select Committee

PCSC	-	Public Complaints Standing Committee
PWDs	-	Persons with Disability
RPP	-	Release Political Prisoners
SCHR	-	Standing Committee on Human Rights
SLDF	-	Sabaot Land Defence Force
TJRC	-	Truth, Justice and Reconciliation Commission
UDHR	-	Universal Declaration of Human Rights
UNCRC	-	United Nations Convention on the Rights of the Child

1 Legal Framework of Human Rights

1.1 Formal Protection of Human Rights in National Law

Chapter V of the Kenyan Constitution spells out the fundamental rights and freedoms of every person in Kenya regardless of race, tribe, place of origin, political opinion, colour, creed and or sex (Karimbux, 2000). It specifically protects the following rights:

1. Right to life
2. Right to personal liberty
3. Freedom of conscience
4. Freedom of expression
5. Freedom of assembly and association
6. Freedom of movement

The guarantees to fundamental rights and freedoms are provided for in defined sections of Chapter V of the Constitution as follows, protection of right to life (section 71); protection of right to personal liberty (section 72); protection against slavery and forced labour (section 73); protection from inhuman treatment (section 74); protection from deprivation of property (section 75); protection against arbitrary search or entry (section 76); provisions to secure protection of law (section 77); protection of freedom of conscience (section 78); protection of freedom of expression (section 79); protection of freedom of assembly and association (section 80); protection of freedom of movement (section 81); protection from discrimination on grounds of race etc (section 82); and finally the enforcement of protective provisions as enshrined in section 84 (International Commission of Jurists (ICJ), CRADLE, COVAW and KAACR, 2005).

Essentially, the Bill of Rights in the independence Constitution is modeled on the 1948 Universal Declaration of Human Rights. The independence Constitution protected basic civil and political rights but not to the extent elaborated by the Covenant on Civil and Political rights. It also did not feature economic, social and cultural rights (Standing Committee on Human Rights (SCHR), 2001). The impediment to the enjoyment of these rights however has its genesis in the colonial era laws that were designed for the sole purpose of subjugating the African Population. The colonially derived laws were considered oppressive and some have since been repealed (SCHR, 2001). They had the effect of diluting or contradicting the Bill of Rights. However there are still some glaring omissions in the Bill of Rights namely:

- a. Lack of explicit recognition of minority rights
- b. Silence on certain types of discrimination including sex
- c. Non-domestication of regional and international human rights regimes
- d. Absence of freedom from discrimination on account of health status
- e. Economic cultural and social rights

The actualization of the rights as enshrined in the Constitution for Kenyan citizens has been a function of factors which go beyond the democratic political process witnessed since independence. The factors include:

1. The integrity of a pluralist and accountable parliament that is capable of making just laws and an Executive which is ultimately subject to the authority of elected representatives.

2. The efficiency of the law enforcement agents and the courts in the interpretation and enforcements of laws, protection of rights and rectification of wrongs.
3. Citizen's responsible behavior towards democratic rights and obligations (SCHR, 2001).

Since independence, the ability of the government to effectively implement human rights through promotion and protection has predominantly depended on the strengths of its domestic institutions. One critical player in the enforcement of rights is the Judiciary which has faced formidable challenges in actualizing its roles (SCHR, 2001). All the rights provided for in Chapter V are protected. The courts as was previously determined by the Court of Appeal for East Africa in 1970 are the guardians of the Constitution. They therefore are responsible for enforcing its provisions as they interpret them (Karimbux, 2000).

Section 84 of the Constitution confers on the High Court of Kenya power to grant remedies such as certiorari mandamus, prohibition and habeas corpus to victims of violations of fundamental rights. According to section 84, the High Court has the original jurisdiction to hear and determine any application made by any person who alleges that any of the provisions of Section 70 to 83 have been breached. However neither the Constitution of 1963 nor the current one sets out the procedure to be used to enforce the provisions of Chapter V. Section 84(6) provides that the Chief Justice may set out the rules of procedure. However, it is unclear whether the Chief Justice actually has the discretion to set out the rules of procedure owing to constitutional amendment precedents in Kenyan legal history. Previously, the courts acted according to the view that where legal rights are created by a Statute with no prescribed procedure for enforcement, the courts can be approached through any procedures applicable to them. As a result it became clear that the High Court did not have tangible jurisdiction to enforce the rights under Chapter V (Karimbux, 2000).

1.2 International Treaty Ratification

Table 1: List of Human Rights Conventions that Kenya has ratified

Human Rights Instrument	Date of Ratification	Entry into force
International Convention on the Elimination of all forms of Racial Discrimination ICERD	13 September 2001	13 th October 2001
International Covenant on Civil and political Rights (ICCPR)	1 st May 1972	23 rd March 1976
International Covenant on Economic, Social and Cultural Rights (ICESCR)	1 st May 1972	3 rd Jan 1976
Convention on the Elimination of all forms of torture against Women (CEDAW)	9 th March 1984	8 th April 1984
Convention against Torture and other Cruel, Inhuman, or Degrading Treatment or	21 st February 1997	23 rd March 1997

Punishment (CAT)		
Convention on the Rights of the Child (CRC)	30 th July 1990	2 nd September 1990
CRC Optional Protocol on involvement of children in armed conflicts	28 th Jan 2002	28 th February 2002
CRC Optional protocol on the sale of children, child prostitution and child pornography	8 th September 2000	

(Adapted from ICJ et al, 2005)

It must be noted that though Kenya has ratified these conventions, there are certain optional protocols which it has not ratified in relation to some of the conventions as outlined below:

- i) It has not ratified the first optional protocol of the International covenant on Civil and political Rights (ICCPR) 1972 giving an individual victim the right to petition and its Second optional protocol aiming at the abolition of the death penalty.
- ii) The optional protocol on the Convention on the Elimination of Discrimination of all forms of Discrimination against women CEDAW (1984) giving an individual victim the right to petition.
- iii) The Convention against Torture (CAT 1997) but not its optional protocol providing for the regular and periodic monitoring of places of detention through visits to these facilities conducted by expert bodies.
- iv) The convention on the rights of the child 1990. It has ratified its first optional protocol on the involvement of children in armed conflict but has only signed the second optional protocol on the sale of children, child prostitution and child pornography.

Other conventions including those specific to the African Continent that Kenya has ratified are:

- i. Organization of African Union (OAU) Convention Governing Specific Aspects of Refugee Problems in Africa 1992
- ii. African Charter on Human and People's Rights 1992
- iii. Africa Charter on the Rights and Welfare of the Child, 2000
- iv. Protocol to the African Charter on Human and People' s Rights Establishing the African Court on Human and People's Rights 2005
- v. Convention against Corruption
- vi. Statute of the International Criminal Court (ICC) -2005

Since Kenya is a dualist State, the provisions of a treaty entered into by the government, does not become part of the municipal law of Kenya in so far as they are made such by the law of the country. If the provisions of any treaty are in conflict with the Constitution of Kenya then to the extent of such conflict, the provisions are void(ICJ et al, 2005).

Despite the entrenchment of a Bill of Rights in the Constitution and ratification of the principal human rights instruments not all Kenyans can be said to enjoy the full

measure of their fundamental rights and freedoms. Indeed, a large section of the population continues to live in squalid conditions with poor access to the basics of life such as clean water, food and health care services. This is largely due to poverty. Many Kenyans continue to be deprived of their rights to human dignity, life and freedom and security of person through rampant and escalating crime, ethnic and clan conflict. There are also categories of Kenyans who continue to suffer from various forms of discrimination. The situation obtains despite many policy measures, programs and other initiatives aimed at the promotion of human rights (SCHR, 2001).

1.3 Domestication of International Laws

One of the reasons for the poor realization of rights is that the enactment of rights in the Constitution and the ratification of human rights instruments have not been accompanied by a concomitant effective implementation nor translation of the rights into real and meaningful provisions that would enable real changes in human rights practices to occur. To the credit of the courts, they are since 2005 taking into account the ratified instruments. Around 2001 the courts still upheld the Constitution as the supreme law of the land, overruling any other legislation. However, since 2005 there has been the recognition of the ratified legislation in court rulings.

Despite the development in the courts, domestication of key conventions remains a major problem. For instance although Kenya is a signatory to the Convention Against Torture and other Cruel and Inhuman or Degrading treatment or punishment (CAT) it has no domesticating legislation. The crime of torture is not specifically provided for in Kenyan Penal laws and is therefore not recognized as a crime per se. Persons subjected to torture have to bring their complaints under recognized crimes which mainly falls under the domain of crimes relating to assault, battery, abuse of office, murder or manslaughter. These are expressly provided under Chapter XXIV of the penal code. Thus torture victims have in the past resorted to civil actions in order to seek compensation by suing the state under liability for the torts of malicious prosecution or false imprisonment. There are however many attendant problems of the civil process in Kenya such as high court fees and long process. Victims may also pursue constitutional cases as under section 74, however the constitutional remedies are usually limited to declaration of rights as opposed to monetary compensation like damages (ICJ et al, 2005).

One of the conventions that have had significant success in domestication is the United Nations Convention on the Rights of the Child (UNCRC). Kenya was one of the first countries to sign the convention. It was domesticated and enacted in March 2002 through the Children's Act (2001). Prior to the introduction of the Children's Act in 2001, there were various laws addressing children's issues including the Young Persons Act and the Affiliation Act. The introduction of the Children's Act (2001) synchronized and harmonized these laws making it easier to create awareness on the Children's rights and the responsibilities of the various bodies, institutions and persons handling and responsible for children.

The production and dissemination of a simplified version of the Children's Act 2001 has enabled the sensitization of children on their rights. It has also afforded them the opportunity to share experiences on the challenges of actualizing their rights within their homes, schools and communities. The Act also set the stage for Child rights advocacy groups such as the Kenya Alliance for the Advancement of Children's Rights

(KAACR), to campaign for the establishment of Child Friendly Courts. The organization has collaborated with the judiciary to refurbish two children's courts in Mombasa and Kakamega respectively. Initially the children's cases were handled together with those of adults through the normal court procedures which resulted in the children staying on too long at detention facilities as their cases were processed. With the refurbishments of the courts, magistrates are able to give the children's cases priority and handle them in a more child friendly manner. The Courts have been set up in such a manner as to encourage the children to testify since they do not have to face perpetrators of abuse against them directly. The recreation grounds within the courts enable the children to relax so that they are in a proper frame of mind to give evidence. The refurbishment of the courts has been achieved alongside the sensitization of judicial officers on the provisions of the Children Act 2001, and the UNCRC (Omolo and Owiti, 2009).

Other laws that have domesticated various conventions and embody human rights principles are listed in Appendix I. The most recently enacted include the Witness Protection Act (2006), the Sexual Offences Act (2006), the Employment Act (2007), the Media Act (2007) and the Truth, Justice and Reconciliation Act (2008).

The Truth Justice and Reconciliation Act provides for the establishment of powers and functions of the Truth, Justice and Reconciliation Commission (TJRC). The Act was legislated in recognition of the fact that since independence there has occurred in Kenya, gross violations of human rights, abuse of power and misuse of public office which cannot be adequately addressed by judicial institutions due to procedural and other hindrances (National Council for Law Reporting¹, 2009). Whilst the TJRC was subsequently established in 2009, it has recently faced major obstacles as it began its operations. There has been a public outcry demanding the resignation of its Chairman who is deemed to compromise the legitimacy of the Commission by virtue of the fact that he served in the Moi government, which is accused of being responsible for some of the human rights violations the Commission is addressing.

Majority of the operational Acts in place still have some flaws that require their reformation. The Children's Act 2001 and the Disability Act 2003 both have a long way to go to ensure the realization of rights for the affected persons. Despite the legal framework governing the rights of persons with disability being in place and the fact that pressure by disability and civil rights movements has been intense, the government has remained slow in implementation of provisions of the Act. For instance, persons with disabilities (PWDs) still cannot exercise their right to a secret ballot. They have to seek assistance because the government is yet to develop infrastructure that would enhance their capacity to vote independently. These include accessible polling stations or the production of voting material in usable formats such as Braille for the blind or tactile ballot guides.

Protecting the rights of PWDs has cost implications and therefore it requires government commitment. The government has also lagged behind in reporting the

¹ The National Council for Law reporting is a corporate body established by the National Council for Law Reporting Act 1994. It has the exclusive mandate of publishing the Kenya Law Reports. The Kenya Law Reports are the official reports of the republic of Kenya which may be cited in proceedings in all courts of Kenya (http://www.kenyalaw.org/kenyalaw/klr_app/frames.php)

country situation as regards the instruments or conventions to the UN system². There are other Acts in place that lack the political will to foster their implementation for instance the Witness protection Bill. A culture of impunity and corruption has greatly contributed to the critical deficiency between human rights policies and political will to facilitate their effective implementation.

1.4 Rights that are not protected in law

Economic, social and cultural rights remain largely unprotected in law. The main constraint in pushing for the legislation of these rights is the argument that the state lacks the resources to implement them. A lot of Multinational Corporations (MNCs) engage in commercial activities in the country which affect the ancestral property rights of the indigenous people. However the rights of indigenous groups are rarely considered and the economic benefits flowing to them from the activities of the MNCs have been negligible. There has been an attempt to entrench economic, social and cultural rights in the current constitutional process. The first harmonized draft of the constitution from section 61 to 86 addressed these rights e.g. health and housing but the Parliamentary Select Committee (PSC) collapsed them into one article, deleting the qualifications therein. The argument given by the PSC was that these should await an Act of parliament. The PSC also deleted a section in the revised draft establishing a National Lands Commission, on the basis that the issues in the draft would be taken care of by the National land policy. This generated a lot of conflict amongst rights organizations who subsequently took advocacy steps to challenge the PSC decision to rescind the section on the rights. Some organizations such as the KNHCR hold the view that if the economic, social and cultural rights are to be entrenched into the constitution then significant thought should be put into addressing how the state will ensure their effective implementation.

Some rights bodies however attribute the reluctance of the state to recognize economic rights in the law not as a consequence of lack of state resources but the failure of the state to legislate the Freedom of Information (FOI) Bill. The Bill, drafted by the Kenyan Section of the International Commission of Jurists (ICJ) was presented eventually as a private member's Bill by an MP in parliament in early 2007. The Bill sought to among other things, provide access to information and the repeal of the Official Secrets Act. Although the Bill went through the first and Second reading and the committee stage, it was not enacted by the time the 9th parliament was dissolved. It lapsed and has not been enacted as present (Kenya Human Rights Commission, KHRC, 2005).

Some human rights organizations argue that the failure of the state to publicly declare its resources makes it difficult for the public to demand their economic, social and cultural rights. It further fuels corruption in the sense that the state without regulation becomes a machine for the diversion of funds meant for the public. The FOI Bill would compel the state to publicly declare resources it receives for various programmes and therefore minimize opportunities for corruption. Perhaps the embezzlement of funds meant for the Free Primary Education Programme is one of the casualties of the lack of the FOI Bill. Civil society organizations (CSOs) therefore argue that it is important for the government to enact a FOI law that stipulates the limits of other restrictive

² Report of the proceedings of the National Disability Conference 18th -23rd January 2004. On the theme THE AFRICAN DECADE OF PERSONS WITH DISABILITIES (1999 -2009) held by the Ministry of Gender Sports, Culture and Social Services in collaboration with National Disability Organizations and Partners

legislation such as the Official Secrets Act. They point out that the Official Secrets Act prohibits the respect to public freedom of information. CSOs have also argued that the FOI legislation should include penalties for non-disclosure or withholding information without proper justification (KHRC, 2005).

Currently, it is estimated that almost 60 countries provide a right of access to State held information either through discrete legislation or codes of practice on the subject. Unfortunately, Kenya is yet to enact a comprehensive right to information law. For too long, Kenyans have been denied access to information especially by key public institutions. The aura of secrecy in that type of closed environment according to the KHRC (2005) often has to do with the ruler-subject relationship as opposed to an open society where the relationship is state-civilian. In Kenya, the former phenomenon has over the years been adopted from successive governments starting with the colonial government. The context in which the Official Secret Acts was enacted in 1968 is no longer relevant in Kenya. Kenyans benefit from the international recognition of the right to information since Kenya is a signatory to the Universal Declaration of Human Rights and the ICCPR. Regionally, Kenya has acceded to the African Charter for Human Rights. The right to freedom of information is deeply entrenched in these treaties and covenants. While Kenya recognizes the afore-mentioned treaty provisions it has nonetheless failed to legislate the right to Freedom of information.

The right to Freedom of information is central towards the government's efforts at promoting transparency and accountability. The Committee of Experts working on the New constitution as at the time of the review of this report, included access to information as a fundamental right in the Bill of Rights in section (35) and also reinstated the Economic and Social Rights under Section 43 of the proposed constitution. The next stage in the review process is the deliberation of the constitution by parliament and it will be interesting to observe how they deal with these specific rights. Should parliament and Kenyans vote for the adoption of the new constitution as presently drafted it would be a milestone in the development of recognition of these rights in the legal framework.

1.5 Non-Judicial Institutional Mechanisms for complaints of human rights violations

Whilst there has been tremendous progress in human rights protection and promotion around the globe, accounts of human rights violations continue to be a major feature in many developing countries particularly Africa. Most of these violations have been directly attributable to states and their governments. In order to curb human rights violations, developing countries began establishing national human rights institutions to serve as independent bodies for the protection and promotion of human rights at the national level. By mid 2004 twenty four African countries had established human rights institutions. The Kenya National Commission on Human Rights (KNCHR) was established through an Act of Parliament in 2003. Parliament passed the Kenya National Commission on Human Rights Act on 11 June 2002 and it became operational on 12 March 2003. Among the key functions of the KNCHR is the investigation of complaints of human rights violations *suo motu* (Kithure Kindiki, 2004).

KNHCR handles the complaints through its Complaints department which mainly plays an advisory role to the government but lacks the power for remedies to violations. This is left for the courts. One major challenge KNHCR faces in this regard is the lack of

power to subpoena government officials even though it is empowered to do so by the Act. This is largely due to a culture of impunity in which senior government officials do not take seriously summons from quasi-judicial organizations and courts (Kithure Kindiki, 2004).

There is also a Public Complaints Standing Committee (PCSC) also known as the Ombudsman under the Ministry of Justice and Constitutional Affairs. The PCSC is a Public body established by the President of Kenya in June 2007. The PCSC is mandated to receive, register, sort, classify and document all complaints against public officers in Ministries, Parastatals or State Corporations, Statutory Bodies or any other public institution. In addition, the PCSC is mandated to enquire into allegations of misuse of office, corruption, and unethical conduct, breach of integrity, maladministration, delay, injustice, discourtesy, inattention, incompetence, misbehaviour, inefficiency or ineptitude. The establishment of this body was aimed at complementing ongoing public sector reforms that seek to provide Kenyans with better public services. Since its establishment the PCSC has advocated for its autonomy and sought special prosecutorial powers under the current constitutional process to effectively undertake its mandate. This is because its recommendations and complaints against public officials largely go unnoticed and ignored by those censured. The bid to have the office of the ombudsman entrenched in the Constitution has been unsuccessful.

According to one human rights scholar interviewed in this study, the PCSC is a genuine attempt to address complaints of violations. However, there needs to be put in place proper channels for feed back of the complaints to the executive. It would appear therefore from the foregoing that the PCSC was created to satisfy international standards but lacks the political will to operate effectively. CSOs further maintain that the FOI Bill would enable the complaints offices to function more effectively. This is because the offices presently have to struggle over the veracity of information given to them in the absence of information that would enable a counter argument.

1.6 Legislation governing the Operations of NGOs

Most NGOs are governed by the Societies Act or the NGO Coordination Act (1990). The NGO Coordination Act is an Act of Parliament to make provision for the registration and coordination of NGOs in Kenya. The coordination is undertaken by the NGO Council to which the NGOs are supposed to file returns and pay annual dues. The statutory legal requirements that NGOs are expected to meet are the basic statutory requirements including the establishment of a board of directors and adhering to auditing and reporting procedures. Legislation governing the operations of NGOs is therefore not restrictive but the government is often keen on compliance and in the past particularly during repressive political regimes, the denial of registration was used to exclude groups that challenged the corrupt and authoritarian nature of the state (Murungi, 2009).

2 The Evolution of Human Rights Discourses

2.1 The Political Environment

Kenya gained its independence in 1963 and became a republic in 1964 with Mzee Jomo Kenyatta as the first president. His regime did not tolerate dissent and there were

several political assassinations of political leaders namely, Pio Gama Pinto, Tom Mboya and JM Kariuki. There were also political detentions of key figures such as Martin Shikuku and Ngugi wa Thiongo (ICJ et al, 2005).

During Moi's tenure, there was initial hope that there would be significant change in the style of political administration. In December 1978, Moi released all twenty-six political detainees across the ethnic spectrum. His administration also took quick action against top civil servants accused of corruption, culminating in the resignations of key civil society officials. These actions were interpreted by Kenyans as an indication of the dawn of a new era, a conducive environment for adherence to democracy and human rights (Korwa and Munyae, 2001).

In due course, however, Moi became more interested in neutralizing those perceived to be against his leadership. The issues of corruption, tribalism and human rights per se became distant concerns. Instead, the KANU government began to centralize and personalize power when they took over control of the government (Korwa and Munyae, 2001). KANU's grand design turned out to be a strategy geared toward the achievement of specific objectives, namely, the control of the state, the consolidation of power, the legitimization of leadership, and the broadening of the president's political base and popular support. This style of centralization and personalization of power, not only laid the foundation for a dictatorship, but undermined the rule of law and respect for human rights.

When Jaramogi Oginga Odinga and George Anyona sought to register a socialist opposition party in 1982, the KANU government strategically responded with presidential directives and constitutional amendments. Apart from the Constitution of Kenya, Amendment Act, Number 7 of 1982, which introduced Section 2(A) transforming the country into a de jure one-party state, Kenya's parliament, reinstated the detention laws which had been suspended in 1978. Colonial era laws, like the Chief's Authority Act, the Public Order Act, the Preservation of Public Security Act, the Public Order Act, and the Penal Codes, gave the president the right to suspend individual rights guaranteed by the constitution. Competitive politics as well as criticism of the KANU leadership was criminalized. Throughout the 1980s to 1990s the security forces, particularly the police, were used to suppress any criticism of the regime (Korwa and Munyae, 2001).

The political detentions witnessed in Kenyatta's administration thus continued, where those viewed to be in opposition to the government were held without communication. This was put in effect under the now repealed Preservation of Public Security Act which gave the President and the minister for internal security the power to authorize the arrest and detention of an individual without trial. It was under this provision of Cap 57 of the laws of Kenya that multi-party advocates were arrested and detained without trial. Freedom of expression was therefore not upheld prior to the repeal of section 2A of the Constitution in 1992 to allow for multi-party democracy. Instead freedom of expression was criminalized by sedition, incitement to violence and treason laws (ICJ et al, 2005).

Kenyan politicians and journalists deemed political opponents were subject to arraignment in court without trial. Detention without trial took place. This was done at the Nyayo House Torture Chambers. State agents in particular the Special Branch were accused of serious cases of torture in the chambers. During the agitation for multi-

partism between 1988 and 1990, there were increasing reports of torture and harassment of politicians, university lecturers and students by the police (ICJ et al, 2005). A number of the champions of multi-party politics, John Khaminwa, Raila Odinga, Mohammed Ibrahim, Gitobu Imanyara, Kenneth Matiba and Charles Rubia among others, were detained under inhuman conditions and without trial. Human rights lawyers, Gibson Kamau Kuria and Kiraitu Murungi, fled to the United States to avoid being jailed. Demonstrations and political rallies held around this time were brutally dispersed by the police (Korwa and Munyae, 2001).

To ensure his grip on power, the president systematically usurped the functions of the other institutions of governance to the extent that the principle of the separation of powers was rendered ineffectual. Parliamentary privilege, which gave representatives the right to obtain information from the Office of the President, was also revoked (Korwa and Munyae, 2001). This meant that members of parliament, and by extension their constituents, surrendered their constitutional rights to the presidency. Parliamentary supremacy became subordinated to the presidency and the ruling KANU party (Korwa and Munyae, 2001).

For the first time in Kenya's post independence history, the provincial administration who are civil servants got involved in the internal affairs of KANU. They were to review and clear party meetings throughout the country and to isolate dissenters. KANU officials and members of parliament henceforth were subjected to these administrative procedures. This practice undermined the meaning and legitimacy of representation in Kenya's legislature. The reorganizations and restructurings further had a number of implications. First, the structures of representation both within KANU and parliament were obscured. The provincial administration now had the power to prevent an elected member of parliament from addressing his or her own constituents. Second, patronage and loyalty to the President became mandatory for one's political survival. Thirdly, both Parliament and the Judiciary ceased to have the constitutional rights to control the excesses of the executive. There were no checks and balances on the president's personal authority (Korwa and Munyae, 2001).

Suppression of freedom of the press, assembly, association, expression and movement and other fundamental rights of individuals were extended to non-governmental organizations. By this time detention and the violation of human rights were regularly protested by civil society, with the church and the Law Society of Kenya (LSK) taking the lead. Since the 1980s the church had remained the central locus of dissent against the Moi regime, and by 1990 was the regime's main worry. The Anglican Church (then known as the Church of Province of Kenya), the Catholic Church and the Presbyterian Church of East Africa, under the umbrella organization, the National Council of Churches of Kenya (NCCCK), persistently and consistently used the pulpit to criticize Moi's authoritarian regime. It also collaborated with the pro-democracy and human rights movements which used cathedrals and the compounds of churches as venues for expressing their views and drawing plans for action. But using the church as a refuge did not deter the regime from arresting, assaulting and detaining its critiques within church compounds.

As demands for competitive elections and an end to detention without trial continued, Kenya's Foreign Affairs Minister, Dr. Robert Ouko, was assassinated in February 1990. Demands to reveal his real murders amplified those for pluralism and respect for

human rights. The KANU government adopted even greater authoritarian tactics arguing on a number of occasions that multi-partyism would cause chaos in the country because Kenya was not cohesive enough. Clergymen, lawyers, and other pro-democracy and human rights advocates were thus continually arrested and harassed. The crackdown intensified during the Saba Saba (July 7) 1990 meeting, organized by the pro-democracy and human rights advocates (Korwa and Munyae, 2001).

At this stage, the US Congress, concerned with human rights violations and corruption, passed the Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1991 requiring Kenya to meet certain conditions before economic and military aid could be disbursed. These conditions were based on the provisions that Kenya charge and try or release all prisoners, including any persons detained for political reasons. There were also demands that the government should cease any physical abuse or mistreatment of prisoners, restore the independence of the judiciary and restore freedoms of expression. At this point the KANU government tactically gave in to the local and international pressure. It agreed to repeal Section 2A of the Constitution re-introducing multi-party politics (Korwa and Munyae, 2001).

Jubilation over the repeal in 1991 of Section 2A was short lived when it became apparent that the framework and machinery of the dictatorial state remained unbroken. Further revisions to the law were made in July 1992 to facilitate multi-party general elections. However, despite historic elections held in the same year, there was no enabling environment created for citizens to exercise their constitutionally guaranteed rights. Human rights violations continued unabated in a variety of forms. There were arbitrary executions and harassment of individuals by the police and violation of the personal liberty of government critics through surveillance. The press was gagged by confiscation or destruction of their printing equipment and publications. Lastly, was the violation of freedoms of assembly and association. This was executed mainly through denial of permits to opposition politicians to hold meetings and violent disruption of public gatherings by opposition politicians. Thus in spite of political liberalization, genuine democracy had not been attained (Miano, 2009).

Other than the fundamental freedoms being curtailed, the criminal justice system was also compromised. In the run up to the 1992 and after the 1997 elections there were ethnic clashes in parts of Rift Valley, Coast and Western. The circumstances that initiated and fanned the clashes were greatly blamed on the negligence and the unwillingness on the part of the police force and the provincial administration to take firm and drastic action. The government did set up an inquiry into the clashes known as the Akiwumi Commission of Inquiry, but unfortunately, the report of the team was not made known to the public. The government instead criticized the commission on how it conducted its proceedings, and showed no action towards prosecuting the named individuals (ICJ et al, 2005).

From various independent human rights reports, the 1992 and 1998 ethnic violence was deliberately inflamed for political purposes by members of the government. The two main reasons for the violence was the underlying motive to portray the multi-party system as unworkable in a multi-ethnic country such as Kenya and to eliminate the opposition in KANU only Zones such as Rift Valley where the KANU government drew most of its support (Korwa and Munyae, 2001).

At the same time, KANU adopted a number of strategies that undermined free and fair elections in 1992 and 1997. Firstly there was suppression of voter rights through lopsided voter registration which excluded opposition voters. Secondly, the Electoral Commission of Kenya (ECK) was biased primarily because the commissioners were appointed by the President alone despite protest by the opposition. Thirdly was the intimidation of journalists and banning of print media that was critical of the regime.

This led to advocacy for constitutional reforms to ensure free and fair elections. From 1993 to 1997, there was further lobbying for even greater protection of fundamental freedoms by the civil society which began a variety of constitution making initiatives. The reform agenda was however hijacked from the civil society by the political parties in an extra-parliamentary forum termed the Inter-Parties Parliamentary Group. The IPPG saw the political parties agree on piecemeal reforms to facilitate the 1991 elections. Out of the IPPG emerged the Constitution of Kenya Review Bill, a law to revise the Constitution. The IPPG was viewed by the civil society as a betrayal of the opposition political parties who acted out of political expediency and not principles. Despite the setback the IPPG was instrumental in repealing provisions of the law that restricted the enjoyment of fundamental freedoms. This meant that detention without trial, charges of vagrancy and general misuse of power by administrative officers was prohibited. More importantly, under the IPPG, opposition parties could nominate Commissioners to the Electoral Commission. A balanced ECK and a united opposition were among the key contributors to the defeat of the KANU government in the 2002 elections (ICJ, 2004; Miano, 2009).

The National Rainbow Coalition (NARC) government that came into power was more pro-human rights than the previous two regimes of Moi and Kenyatta. However the laws that were in place in the last two regimes save for a few amendments were still the same ones in place. The government opened up the Torture chambers to mark the end of an era and show that State sanctioned torture of its critics would not be condoned. It recommended the establishment of a TJRC which has since been constituted. Thirdly the government set up the Ministry of Justice and Constitutional Affairs and also established the Kenya National Commission of Human Rights in 2003. The NARC government included leaders from civil society and there was collaboration between the government and civil society. It is after the 2002 elections that the political space really opened up considerably to enable civil society organizations to promote human rights.

Whilst 2002 is marked as the beginning of realization of human rights practices by the government, which continued through to 2006, the period following the disputed 2007 elections in Kenya will go down in history as the period during which some of the worst form of gross human rights violations took place. Virtually all the fundamental human rights guaranteed by the Constitution were violated by both the State and non-state actors with impunity. The right to life, and to the security of the person, the right to property and freedom of assembly and association among others were all violated during this period. The post election violence also led to the violation of the right to health, education and shelter, the right to work, to food, clean water and to proper living conditions. Those internally displaced suffered not only loss of property, security and dignity of the person, but their right to an adequate standard of living was equally compromised. Vulnerable groups, that is women and children were particularly affected and were also victims of sexual abuse (KHRC, 2008a).

Although some of the violence was spontaneous, much of it was reportedly preplanned by local leaders. The post poll violence is currently under the investigation of the International Criminal Court (ICC).

Access to socio-economic rights remained elusive for a long period, stretching into 2009. Thousands had been rendered homeless by the violence which also had a drastic impact on the food basket of the country. Granaries of the communities targeted with violence were burned. Farmers who were displaced could not return to their farms and by the end of 2008, close to 10 million Kenyans were reported to be facing starvation (KHRC, 2008b).

Mukasa and Oloka (2009) argue that if there is one enduring lesson from the Election Violence that took place in 2008, it was that social justice and human rights work is always a work in progress and not an overnight thing. A violent election, civil strife, economic dislocation and even a leadership transition can seriously affect work which has been underway for several years. More subtle influences such as corruption, ethnic favouritism and the inability to appreciate the context in which one is operating can likewise seriously impact on the sustainable functioning of these actors.

2.2 Role of the Civil Society in the different stages of the Rights Discourse

In its roughly two decades of existence, the civil society in East Africa has played a significant and even pivotal role in reversing social decay, rolling back the dictatorial state and advancing individual liberties. In East Africa, Human Rights NGOs were largely non-existent until the 1980s although germs of such organizations were in existence since the 1970s. The human rights NGO sector in East Africa did not enjoy much political space before the introduction of multi-partyism in the early 1990s. It was after the introduction of multi-partism that the NGOs became a serious feature of the political landscape (Mutua, 2009).

Karuti Kanyinga (2009) identifies three important interrelated political moments from 1991 to 2002. He further demonstrates how Human Rights Organizations (HROs) not only shaped but provided direction in each of these stages. Kanyinga demarcates the three periods in distinct phases or years which he identifies as:

- a) The first Moment: Pressure for change (1990-1992)
- b) The Second Cycle : Rekindling Civil Society (1993-1997)
- c) The Third Cycle: Donor support for NGOs and Opposition Victory (Post 2002)

2.2.1 Pressure for Change (1990 -1992)

In this period there was an organic relationship between the opposition pro-democracy groups, the civil society and a group of progressive donors. Professional associations, the church, human rights and democracy advocacy groups came together to oppose state domination of the political space. CSOs evolved as an important training ground for opposition politics whereby those in the reform movement relied heavily on the civil society platform for engagement. Human rights organizations became important avenues for promoting change and shielding political activists from the excesses of the state. The first opposition party, the Forum for the Restoration of Democracy (FORD) drew its membership from both the civil society and the political community. It provided a foundation on which the opposition and the civil society could mobilize support for reforms.

The role of donors was also very critical in this stage and was two-fold. Firstly, they withdrew funds from the government to press for the reintroduction of multi-party democracy. The US and Scandinavian countries were particularly vocal in emphasizing that the resumption of aid would only follow a commitment by the government to undertake comprehensive democratic and governance reforms. Secondly, donors provided financial support to the CSOs to monitor progress in the opening up of the political space after the reintroduction of the multiparty politics. These included logistics to mobilize support for reforms and promote voter civic education. NGOs were also funded to monitor the elections.

In spite of the authoritarian tendency of the state, civil society groups and particularly human rights NGOs advanced some changes in the political sphere. However their focus was on neo-liberal reforms and the reintroduction of multiparty politics with some viewing political liberalization as an end in itself. This limited approach could be attributed to donors who were inclined to support neo-liberal reforms anchored in the Western neo-liberal tradition. This narrow focus on reforms left the state intact through the first moment of the transition (Kanyinga, 2009).

2.2.2 Rekindling Civil Society (1993-1997)

The defeat of opposition political parties in the 1992 elections occasioned deep fragmentation of the opposition. The divisions were further exacerbated after the government co-opted members of parliament from the opposition. Without a strong opposition, CSOs assumed the role of the effective opposition in the state. NGOs thus began to articulate issues on comprehensive constitutional reforms and the review of repressive laws. Donors increasingly worked in collaboration with civil society. The renewed donor interest in human rights and democracy witnessed an overwhelming increase in the number of human rights and governance NGOs from fewer than ten in 1990 to about one hundred in the later 1990s(Kanyinga, 2009).

The activities of NGOs also diversified to include civic education, voter civic education paralegal work, as well as education on good governance, democracy and constitutionalism. Donors funded civic empowerment projects that sought to equip the citizens with skills and knowledge to participate more effectively in public affairs.

Although there were significant gains in the education process with the citizens more informed on democracy and governance, these were eroded by the increasing reference to ethnicity by the politicians. There was also the tendency of the civil society to narrow the reform struggle to an agenda to remove the KANU administration rather than focusing on governance. The civil society became highly politicized during this phase focusing on constitutional reforms and at the same time striving to unify opposition parties. Donors provided funding for the reforms initiative, however they also later became wary of the fact that the CSOs were becoming too political. Some donors therefore became reluctant to fund the NGOs.

The opposition for its part reacted negatively to the efforts of the CSOs. Due to fear of losing the reform agenda to radical human rights groups, they formed an alliance with the government to defeat the civil society. These led to minimum reforms as provided by the IPPG. The reforms were not comprehensive but administrative and procedural in character. Thus the same opposition political parties that would have benefited from an expanded political space ironically defeated the reform agenda. The outcome of the

reforms revealed the inability of the CSOs to consolidate their hold on political space even though they had initially directed the process.

2.2.3 The third cycle: Donor support for NGOs and Opposition Victory (1998 – 2003)

Immediately after the 1997 general elections, civil society groups focused their attention on three important areas, public education on democracy and governance, constitutional reforms and unity of opposition political parties.

This orientation was borne out of the realization by CSOs and NGOs that previous attempts at civic education did not equip citizens with the skills to participate effectively in public affairs. Citizens were still largely unprepared to consolidate a mature political culture particularly against an environment where politics was highly ethnicized with voting patterns mirroring Kenya's ethnic demography and geography. Civic education had also been led by urban based groups without any coordination. This realization led to the formation of a national programme for civic education termed the National Civic Education Programme (NCEP). The programme was launched in 2000 and promoted individual awareness and knowledge about the constitutional reform agenda. Its objectives were to attain individual sense of civic competence, skill and knowledge to engage with the political system.

Civil society identified the constitutional reform process as a rallying point for opposition unity. They established a reform process of their own with the opposition parties independent of the government which had then formed an alliance with the Raila Odinga led National Development Party (NDP). This led to the formation of the Ufungamano Initiative, and several other attempts at collaboration between the opposition and the CSOs to counter the KANU/NDP merger. Eventually, the leaders of the opposition political parties joined human rights groups to form the National Alliance for Change (NAC.) Civil Society provided the leadership in the formation of NACs vision and programmes. Later NAC merged with the National Party of Kenya NPK thereafter and became the National Alliance Party of Kenya (NAK). NAK became an umbrella party of thirteen political groups and two civil society groups, the NCEC and the Progressive People's Forum.

NCEC's grassroots network in the country was a major entry point for the mobilization of citizens. In October 2002 divisions within KANU, splintered the party and one faction, the Rainbow Alliance walked out to join NAK. This marked the formation of the National Rainbow Coalition (NARC) that later formed the government after KANU's defeat in the 2002 general elections. Civil Society helped in crafting the memorandum of understanding between NAK and the Rainbow Alliance. It must be noted that Civil Society played a key role in the introduction of coalition politics in the country. It achieved this by providing the intellectual input needed to bolster opposition unity. One major consequence of this is that it cemented relations between the opposition political parties and human rights organizations. Ironically as Kanyinga (2009) notes as he concludes his analysis of the three phases, this relationship eventually weakened the civil society and prevented it from taking the role of the watchdog of the government once NARC came into power.

The decline of the civil society was preceded by several key factors. The new NARC government riding on huge democratic wave received a huge mandate and large sections of CSO members joined the government depriving CSOs of able leaders and

thereby disempowering them (Nasongo, 2009). Secondly, the CSO leaders who joined government began to speak the language of NGOs and commenced programmes that hitherto were the preserve of HROs. Such programmes included the Governance, Justice, Law and Order Sector Reform (GJLOS). Over time this led to a crisis of legitimacy and relevance among NGOs as the government began addressing corruption, human rights abuses and transitional justice. This further led to a third factor that contributed to the dearth of viable human rights NGOs, the financial disempowerment of CSOs. At the juncture where the government began to develop rights oriented programmes, the donor community began to deal directly with the government, for instance through the GJLOS reform programme under the auspices of the Kenya-Donor Joint Assistance programme (Nasong'o, 2009).

A fourth factor emerging from the coming into power of a new government was that the civil society was careful not to criticize its friends who were in government. It thus adopted a wait and see approach even as the government began to whittle down its commitment to reform. The faction of the civil society that was opposed to the government ideologically was very small and remained incoherent in its approach to critical questions. A running theme in its discourse was the need to keep the government on its toes to ensure the delivery of services. Other members of the civil society lacked a programmatic approach to operate in the new political dispensation. For instance, the group willing to work with the government remained uncoordinated in its approach to national issues. It had not taken openly strong pro-government positions and this was in part because civil society in Kenya has always been known to be anti-government (Kanyinga, 2009). Indeed Nasong'o (2009) has raised a fundamental question regarding human rights organizations in Kenya in this regard. Does it mean that if and when a democratic government is installed in Kenya, human rights organizations HROs will cease to exist because their very reason of existence and justification for funding is the fight against authoritarianism?

The next section attempts to answer this question, by analyzing how the conception of what constitutes human rights has evolved among CSOs and the extent to which economic, social and cultural rights have entered into the discourse of human rights.

2.3 Changing perspectives on the concept of human rights: To what extent have Economic, Social and Cultural Rights (ESCR) permeated the rights discourse?

The political environment in which the NGO movement was borne has largely determined its identity although it has been highly influenced by international human rights. The relationship between the international human rights bodies and domestic NGOs is largely similar in conception, mandate, and methods of work and funding (Mutua, 2009). Even though the NGOs have begun exerting their independence and originality in some areas, the genetic finger print for parent HROs such as Amnesty International (AI) or Human Rights Watch in the North remains dominant. Many of the domestic groups were orchestrated, funded and supported or at the very least deeply influenced by individuals, human rights organizations and foundations from the North (Mutua, 2009).

The main human rights NGOs in East Africa where Kenya lies, have sought to promote basic civil and political rights and especially political participation rights, such as the rights to assemble, speak, publish and organize due process protections, equal

protection rights and anti-discrimination norms. They have basically engaged in the struggle for the liberal democratic state. The negative side of this political orientation as Mutua (2009) points out is that whilst the human rights NGOs' focus has been on violations of individual rights by the state, actual human rights atrocities have had a more complex identity and composition. For instance the murder and displacements that characterized the 1990s ethnic clashes have been linked to the land struggle in Kenya and its exploitation by the political elite to serve their political goals. The suffering that women and children underwent as a result of the economic and social disadvantages they faced due to their gender has not been given the attention it deserved. Oblivious of these factors, HROs focused more on the body count, cataloguing the violations of civil and political rights, without analyzing the context or addressing the violations of economic, social and cultural rights.

Mutua (2009) further elaborates that the ignorance of ESCR by HROs in Kenya, can be attributed to the fact that the West emerging from the Cold War supported the concept of the practice of liberalism and the free market as opposed to redistributive logic. Most HROs in East Africa have copied the models of the major international rights bodies with respect to their mandates. This is in the face of majority of Kenyans, living a meager existence defined by major denials of the most basic economic, social and cultural rights. Indeed state despotism has been the central threat to the realization of human dignity in the region. However human rights NGOs have been slow to establish the link between political rights and ESCR.

One major challenge that constrains the NGOs is the lack of a conceptual understanding of human rights. Few human rights activists have any serious training in human rights. According to Mutua (2009) a lot of focus has in the past been given to retreats, fundraising, strategic planning and networking in comparison to time spent in understanding human rights. The dearth of knowledge in human rights as a doctrine and discourse among NGOs is also partly attributed to the lack of a vibrant relationship between the rights organizations and the academia. NGOs for instance have not broadened their field by establishing human rights programmes at local universities nor have they borrowed from experts at the university either to sit in their boards or give lectures on various human rights topics.

Mukasa and Oloka (2009) further argue that human rights scholars who engage with the conceptual issues have largely failed to descend from the abstract and to apply their processes of deconstruction to the experiences of practitioners who are confronting the problem of application on the ground.

It is perhaps in recognition of the need for sustained intellectual life of human rights that the KHRC established a Human Rights Institute. The institute conducts regular workshops and seminars with visiting academicians from across the world. It also conducts research to inform the rights discourse process. Indeed one of the research studies conducted by the institute made the assumptions and subsequently determined that:

1. Human rights groups in Kenya have focused mainly on national issues such as constitutional review, judicial, prisons and police reform and have had little time to engage in a critical reflection of on the concepts, theories, and ideas undergirding their advocacy work.

2. Human rights groups operate on a thin range of ideas, concepts, strategies and methodologies that are seldom updated to reflect the changing local, regional and global socio-political contexts.
3. On the basis of their overreliance on unexamined assumption, human rights groups in Kenya are unable to effectively respond to new challenges such as issues of transitional justice generated by the changing political arena.

Without a doubt, HROs struggled considerably to reinvent themselves after the coming to power of the NARC government. One of the most prominent civil and political rights organizations, Release Political Prisoners (RPP) almost lost relevance when the NARC government did away with the Nyayo Torture Chambers. It eventually regenerated itself to address issues of prison reforms and extra judicial killings. Whilst the regime change brought about an end to state repression, issues such as corruption, extra judicial killings and post election violence are retrogression in the gains made in human rights. Corruption denies state resources from the intended good meant for the public e.g. schools.

Some NGOs have had to restructure their mandate to address the second generation rights where the key problem has been implementation. A few NGOs have also focused on third generation rights and they include environmental rights groups such as the Kenya Land Alliance, Hakijamii, Mazingira, the Green Belt Movement and KHRC. The KHRC for example has gone beyond its original mandate by expanding it to include rights issues related to the horticultural industry, the export processing zones, land rights and labour conditions. Nonetheless, equal access to land and natural resources, sustainable use of natural resources and public participation in the decision about the use of the environment have remained largely contested areas.

It is only in December 2009 that parliament passed the National Land policy into legislation after seven years of advocacy and lobbying by the Kenya Land Alliance and other environmental rights groups. Whilst the policy has been successfully passed, land rights organizations continue to express concerns as to whether it will be implemented effectively given the inextricable link between power and resources. The political elite are amongst the major land holders in the country.

The recognition of ESCR in the constitution has faced a similarly protracted struggle. The 2004 draft constitution produced by the National Constitution Conference contained a host of new ESCR provisions. These included the rights to social security, health, education, housing, food, water and sanitation and consumer protection. However the draft was not adopted by Kenyans during the 2005 Referendum held to ratify the new constitution due to other critical factors that had been left out of the constitution (Onyango-Oloka, 2009).

Human rights organizations also lobbied for the inclusion of ESCR in the current constitutional process but as earlier mentioned, the Parliamentary Select Committee sitting in Naivasha in January 2009 expunged the rights from the new constitution despite protests by human rights organizations. The recommendations of the PSC have since been accepted by the COE

2.4 Realms of human rights that remains highly contested and unaccepted within the government and society.

Traditional human rights and civil society groups are somewhat reluctant to take up issues on marginalization, lesbianism, bisexuality and gay rights. The government resists deliberations on sexual orientation largely due to the influence of the church. It has been difficult for HROs to permeate their discussion as a national matter of concern because the Kenyan society lacks the level of tolerance to discuss and accept them. Perhaps HROs are not acknowledging the African culture that does not recognize same sex unions and that what may have been acceptable in Western Countries may not readily be acceptable in the Kenyan context. Another area that has generated much debate and controversy is on sexual reproduction where the Church has maintained that life begins at conception. HROs maintain that the inclusion of this concept in the constitution is misplaced. They argue that the realm of where life begins is within scientific and spiritual realms and not the constitutional domain and that such moral issues should not be addressed in the constitution.

The second area of contestation is women's rights. The constitution of Kenya guarantees a set of fundamental rights and freedoms regardless of race, tribe, residence, etc. However, the non-discrimination clause is limited in precisely the areas where discrimination against women is greatest i.e. adoption, marriage, divorce, burial, devolution of property and other matters of personal law. These limitations enable discrimination against women by customary laws. Whilst the government recognized the need for change in succession laws, the changing laws may not necessarily guarantee women equal status. Customary laws or norms are widely practiced in rural areas where the women are prevented from exercising their equal status (Karimbux, 2000).

A third area of controversy as pointed out by rights scholars is the death penalty which remains protected in law in Kenya. Once widespread in Africa, the movement to abolish the death penalty has accelerated dramatically in Africa. In 1965, none of the Sub-Saharan countries had abolished the penalty but as of 2003 almost half the countries on the continent were de facto or de jure abolitionist (Burnham, 2009). Disengagement from the death penalty has proceeded along three tracks, outright abolition, abstention from carrying out the sentence and reformation of the capital punishment system to render it more reliable.

In East Africa, where there are enormous challenges facing the criminal justice system measures to abolish the criminal justice system have been largely ineffectual. It is possible that in the face of many human rights issues confronting Africa, the death is a low priority. In Kenya for instance where political violence, escalating economic crime and the ready availability of small arms are a regular phenomenon, the death penalty may seem an apt remedy. However, as Burnham (2009) points out, a South African Constitutional Court determined that there is no reliable evidence that correlates the incidence of violent crime and the death penalty. Nonetheless, despite the death penalty remaining in the books, Kenya has not carried out an execution by hanging since 1985. There are however human rights concerns given that the death penalty is mandatory not only for murder and treason, but also for the crimes of armed robbery, and attempted robbery with violence. This is against a context where prison conditions

promote human rights abuses and those on death row are vulnerable to custodial deaths, police killings, prison torture and judicial misconduct such as hearing delays.

Recent constitutional reforms in the country have failed to limit the use of the penalty or abolish it totally. Policy makers have been particularly outspoken about the penalty. In 2003, when the newly elected president Mwai Kibaki, released 28 prisoners who had been on death row for fifteen to twenty years and commuted to life the sentences of 195 others. Prior to this the then minister of Justice expressed his opposition to the death penalty and declared that his government intended to abolish it. In 2004, when Kenya underwent the constitutional review process, the justice minister lobbied the National Constitutional Conference to reject the penalty. Despite the appeal, the draft constitution that emerged from the Conference left room for the death penalty to be imposed for the most severe crimes (Burnham 2009). The death penalty thus remains intact as of this writing.

3 Key organizations instrumental to the development of rights discourses and Linkages

3.1 State Actors

The Standing Committee on Human Rights (SCHR Kenya) established in 1996 was the predecessor to the Kenya National Commission on Human Rights. It was quite effective in raising awareness among the authorities and the public of the need for the country to create an enabling environment for the implementation of various provisions of international human rights instruments. The Committee would publish an annual index and report to be presented to the president. The report would detail the country's record of compliance and make recommendations on how to improve on rights record (ICJ, 2004). It for instance was instrumental in recommending the establishment of an independent national commission on human rights and the development of a human rights education curriculum for schools and law enforcement officials (SCHR Report, 2003). The Standing Committee was given a degree of autonomy to operate and was hence able to give a report on the violations of fundamental freedoms by the government (ICJ, 2004). The performance of the Standing Committee was however affected by public perception that it was an appendage of the KANU government, and a window dressing body intended for government public relations work complete with government appointees. The committee, affected by structural deficiencies and the absence of a requisite and facilitative legislative framework, thus presided over its own termination by fronting and spearheading the process that culminated in the creation of an independent and autonomous KNHCR.

The **Kenya National Commission of Human Rights** transformed the Standing Committee on Human Rights to provide for better protection and promotion of human rights. The KNHCR which has a wider mandate acts a government watchdog and is expected to submit annual reports to the President of Kenya and Parliament. The 2002 Act establishing the Commission empowers it under section 16 to inter alia investigate violations of human rights, visit and inspect condition of prisons and detention places and formulate, implement and oversee civic awareness programmes (ICJ, 2004).

It has been said that though the progenitor of the Commission, the SCHR, did report human rights violations in a manner rather critical of the KANU government, its overall

impact was seen as insignificant. However, the KNCHR building up on the experience of the Standing Committee has been more critical and effective especially given the enlarged democratic space in the country (Kindiki, 2004).

The Ministry of Justice and Constitutional Affairs was established under the NARC government in 2003. It is the line ministry in charge of reporting and ensuring that the reporting standards are maintained by the government. It also has under its ambit the Public Complaints Office.

The Parliament of Kenya can cause or direct complaints of torture as defined in Article 1 of the Convention to be investigated and prosecuted. Opposition law makers were extremely influential in the securing of civil and political rights.

The **Judiciary** has the jurisdiction to hear cases on fundamental violations of human rights. If any person alleges that any of his fundamental rights has been, is being or is likely to be contravened in relation to him or her, then that person may apply to the High Court for redress. The High Court have original jurisdiction to hear and determine such an application, and may issue appropriate orders as per section 84 of the Constitution (ICJ, 2004).

3.2 Non State Actors

The movement to unseat the repressive KANU regime was a critical actor in the development of human rights discourse because it generated the impetus that has enabled Kenyans to demand their rights. The movement involved and saw the establishment of important human rights organizations, pressure groups, citizens groups and community based organizations all with the mission to promote and protect the rights of Kenyans and lobby for a democratic and plural society. Some of the organizations that have been fundamental in the development of rights discourses are:

Kituo Cha Sheria, set up in 1973, is the oldest human rights organization in Kenya. It is a membership organization with a mandate to provide legal aid and raise awareness among the population of their legal rights (Murungi, 2009)

The LSK is a professional bar association that has been in existence since 1949. The LSK, previously a conservative institution embraced the activism and language of human rights starting in the late 1980s where for a period of about ten years it became the voice of pro-democratic forces. Its reach and influence were felt countrywide as it joined hands with opposition forces to push for a new constitution. It also for the first time partnered with the civil society to in efforts to expand the democratic space for citizens. As Murungi (2009) observes it rapidly rose in prominence and became known among Kenyans as the “Conscience of the People”. Its effectiveness as a watchdog has over the years been determined by the officials who sit in its governing council.

The Kenya Section of the International Commission of Jurists (ICJ Kenya) established in 1959, is a member based, non-governmental, not for profit organization that has the tripartite role of promoting, enforcing, and protecting human rights, democracy and the law. Its membership is drawn both from the bar and the Bench. It is a national section of ICJ Geneva but autonomous from it (ICJ et al, 2005). ICJ has developed a niche for being the reference organization on international law. The government consults them through the office of the Attorney General on diverse issues the most recent being related ICC. It

has therefore claimed space and used it to influence change in policy in international law³.

In 1985, the Federation of Women Lawyers in Kenya (FIDA-Kenya) was established as a membership organization. Its initial mandate was to provide legal aid to indigent women. It has since evolved into an organization that monitors the status of women's human rights nationally. It is engaged in public interest litigation and monitors government compliance to reporting standards on the international conventions. It has a deep influence on law reform and works closely with the government in the administration of justice (Murungi, 2009).

The Coalition of Violence Against Women (COVAW) founded in 1995 is also a women's human rights organization that is committed to the eradication of all forms of violence against women in Kenya. Since its inception, COVAW has worked to create a conducive atmosphere for women to enjoy their rights in the private and public spheres through community mobilization and sensitization. This is to enable communities to appropriately respond to violence against women and children in their midst. COVAW also advocates for the government's commitment to providing security for women and protection of their human rights through the domestic law and international law.

The Kenya Alliance for the Advancement of Children's Rights (KAACR) was started in 1988 as a National NGO Liaison Committee on the Rights of the child. The goal of the committee was to popularize the draft United Nations Convention on the Rights of the Child (UNCRC) and to lobby the government to adopt and ratify the UNCRC when it came into force. It has a membership of 180 NGOs and CBOs working with children. Its mission is to promote the realization of children's right, both girls and boys in Kenya. Its vision is that girls and boys shall live in a society which provides them with the right to survive, develop and participate in decision making and enjoy special protection against all forms of discrimination, neglect, cruelty and exploitation (ICJ et al, 2005).

The Child Rights Advisory Documentation and Legal Centre (CRADLE) is a non-governmental, non-partisan, and non-profit making organization committed to the promotion and protection of the rights of the child, with a focus on the girl-child. The CRADLE was founded in 1997 to respond to the need of providing legal aid to children in conflict with the law and those in need of care and protection of the law. It was thereafter officially launched in 1998 during the period to mark the 50th anniversary of the Universal Declaration of Human Rights to symbolically mark the choice of a human rights approach to cases of child abuse (ICJ et al, 2005).

The Kenya Human Rights Commission (KHRC) was formed in the United States in 1991 by Kenyan exiles and academics specifically to lobby for the respect of human rights and promotion of democratization, accountability and good governance in Kenya. Its founders were lawyers with experience in human rights law and practiced in advocacy. Whereas other groups were registered under existing laws, the KHRC was initially denied registration for close to two years. It emerged on the Kenyan scene in 1992 with a style of advocacy that was aggressive and confrontational and this may have largely contributed to the difficulties in faced in registration. In its first two years of inception it published reports on topics including academic freedom in public universities, state

³ Interview with the legal officer, ICJ Kenya

instigated violence in the 1992 general elections and the denial of health care to political detainees. Human rights in Kenya became synonymous with the KHRC.

A very critical contribution that the KHRC made to human rights discourse and practice was to host and give legal cover to human rights groups that had been denied registration by the Kenya government. The groups included the RPP pressure group, the Citizen's Coalition for Constitutional Change (4Cs), Muslims for Human Rights (MUHURI) and the Kenya Pastoralists Forum (KPF). The KHRC is one of the human rights organizations with a national outreach. It aims in its approach to ensure that communities become the agents and not objects of social change.

Within the land sector, the Green Belt Movement, a citizen's environmental justice group and the Kenya Land Alliance have been instrumental in advocating for land rights and reforms. The Green Belt Movement lobbied for an end to forest excision and land grabbing by politically connected and corrupt individuals. Kenya Land Alliance has had many achievements in fighting for community land tenure rights and was a key player in the development of a national land policy.

Other human rights organizations that have been important in the human rights struggle are the RPP, Independent Medico-Legal Unit (IMLU), Amnesty International Kenya and Children's Legal Action Network (CLAN).

The afore-mentioned organizations have played a crucial role in raising questions about governance and influencing policy and constitutional change. Some risked their lives in the 1980s and 1990s to campaign against torture, corruption, impunity and lack of academic freedom and democratic governance.

3.3 Role of the International Community

The rights discourse in Kenya has benefited tremendously from international input through linkages between the local actors and international human rights organizations and governments. As previously discussed international pressure through aid conditionality had significant influence in changing the political dynamics from a single party regime to multi-party state with expanded democratic space through which HROs could operate. More recently aid has been pegged on Judicial and electoral reforms. Such international influence has witnessed the disbandment of the ECK in December 2008 following the disputed elections and the setting up of the Interim Independent Electoral Commission to foresee reforms. Both governments and international organizations have played a complementary role in advancing the human rights discourse in the country.

However, critics and human rights experts (Mutua 2009; Murungi, 2009) are growing increasingly dissatisfied with what they term an unhealthy reliance on external donor funding from the West by the human rights NGOs. They argue that many of the HROs design programmes to suit the agendas of the international organizations rather than human rights priorities at the local level. This poses critical concerns on the ownership of the agendas of local HROs. Such heavy reliance is also seen to limit the creativity of the local rights organizations in shaping the human rights discourse. As Mutua (2009) states, the donor-receptient relationships distort NGO mandates, confuses priorities and undermine the creation of a viable and legitimate human rights movement in Kenya. He argues that donors exist to propagate their own agendas which may not be harmful but which lack congruence or relevance with the needs of the region. Nasongo (2009)

further observes that much of human rights discourse overly focuses on episodes of human rights violations rather than the underlying socio-economic and cultural contexts. He attributes this episodic approach to the lack of continuity in funding these organizations in which case they have to respond to external dynamics that dictate which programmes are funded and which are not. Given these realities HROs seem to be preoccupied with the need to bolster their own profile and thus focus on the atrocities of the state and human rights violations perpetrated by individuals instead of focusing on the fundamental causes of these violations.

Whilst acknowledging that HROs could not in the past have survived without donor support and protection from international governments, Mutua (2009) argues that both local human rights bodies and donors should work to alleviate dependence and not encourage it. He premises this argument on the core norm of the human rights movement, which is self-determination. He elucidates that human rights NGOs comprise a sector that should be committed to good government, delivery of services and political empowerment. It thus cannot at the same time encourage dependency and replicate the client status of African States. He concludes his argument by exhorting human rights organizations that the larger responsibility of defining a new relationship with international organizations lies with them. To this end he proposes a greater assertion of their autonomy through expansion of their support base and diversifying their sources of income.

4 Awareness of and Commitment to rights within Government and the Society

4.1 Civil Society Organizations

HROs in Kenya as previously alluded focus on various aspects of human rights namely civil and political liberties, good governance and the rule of law, social and economic rights, justice and equity issues as well as gender and environmental rights. Majority of HROs in Kenya operate with a vision most of which are largely hinged on a conceptualization of human rights that almost begins and ends with the postulations of the United Nations Universal Declaration of Human Rights (UDHR) of 1948 together with the retinue of UN international conventions on various aspects of rights. The UDHR roots of the vision of the human rights organization in Kenya are manifested for instance in the fact that CRADLE was launched on December 7 1998 on the eve of the 50th anniversary celebrations of the UDHR showing a deliberate choice of a rights based approach in its work. FIDA Kenya was also launched on the heels of the 3rd UN conference on women, which was held in Nairobi. Table 2 shows some of the strategies adopted by various HROs to fulfill their mandate

Table 2: Strategies of Selected Human Rights Organizations

Organization	Strategies
1. Hakijamii Trust	• Community training on human rights • Advocacy and support work • Monitoring and Report writing
2. Kituo Cha Sheria	• Results-based Management • Impact/public interest litigation • Focus on the poor and marginalized
3. Kenya Human Rights Commission	• Monitoring and awareness raising • Research and documentation • Education and training • Lobbying and influencing policy
4. FIDA Kenya	• Training of police • Counselling of victims • Public interest litigation • Training on self-representation
5. Centre for Rights Awareness and Education (CREAW)	• Legal aid • Public interest litigation • Mediation and counseling • Lobbying and advocacy • Counseling and referrals
6. The CRADLE	• Legal advice and representation • Judicial Reform • Fact-finding missions and rescues • Psycho-social support • Mobile legal clinics
7. People Against Torture (PAT)	• Advocacy • Lobbying • Research and documentation • Litigation
8. Children's Legal Action Network	• Court assistance • Participation in child-related law reform • Community awareness • Training magistrates, advocates, state officials • Networking

Source: Nasongo, 2009

In his empirical investigation of the human rights sector in Kenya, Nasongo (2009) determined that one critical challenge facing HROs is that they lack a clearly delineated methodology that informs and underlies their work. Their methodologies also often fail to help link the strategies to their objectives. He further points out that even the strategies are not formulated in the manner of a carefully detailed plan of action to achieve specific goals but are rendered merely as lists of activities to be performed. This lack of methodology or organizing principles may explain the haphazard and episodic nature of the activities of most HROs which lack coherence and effective coordination. It could also be a factor that contributes to the minimal impact of the HROs.

To be effective, Nasongo proposes that the visions of HROs should be informed by effective theoretical frameworks and have clear methodologies defined in terms of the underlying principles around which strategies are designed. Their methodologies should also take into account the socio-political environment in which they are operating (Nasongo, 2009).

Nasongo also identifies some key limitations and constraints that impinge upon the capacity of HROs to fulfill their mandate. These are:

1. The commercialization and commoditizing of human rights advocacy work. This simply means that advocacy work is taken more as an economic business than a service to the community.
2. Leadership structures of most of the HROs are highly questionable as they can be heavily ethnicized, politically aligned and suffer the embezzlement of funds.
3. A heavy reliance on donor funding means many HROs in Kenya often disrupt the running of their programmes and discontinue projects to focus on fundraising. They are thus never able to take their advocacy work to the next level because their agendas are run by what the donors are currently interested in.

In conclusion, some participants interviewed in this study noted that most CSOs do invoke human rights standards and are as such rights oriented. Nonetheless, there is a need for a balance between those that invoke the standards and those with a broader mandate that includes undertaking sophisticated monitoring. It has been noted that there has in the past been very minimal or failure to monitor the private sector. Such a balance would ensure an integrative and complementary approach.

4.2 The Government

Since 2003, the government has been more committed towards embracing human rights than the previous two regimes. The NARC government introduced a new dynamism, enthusiasm and change in the management of human rights in the country. It marked the beginning of political will in support of the human rights cause.

Kenya in the period 2003- 2004 was a more open society than it had been for at least a quarter of a century. The practice of arbitrary detention without trial had ceased with places of torture being degazetted as detention places, Kenyan newspapers were more open and less inhibited than they had been since the early years of independence. Corruption in official circles was frankly debated both in the print and electronic media. More new radio stations and private TV stations were licensed and there was more liberty in the content aired (KNHCR, 2004).

The government has since then gradually adopted the language of rights in its development plans and objectives, the latest being in the Strategic Plan for the next twenty years popularly known as Vision 2030. Whilst the government has not lived up to the expectations of the HROs and the public in effectively addressing human rights issues, the objectives and goals as listed in the plans have been viewed by the HROs as a good starting point. This is because they provide a standard against which the government's performance can be measured. Efforts to reform the system of law enforcement began between 2003 and 2004 and some institutions where reform has taken place are discussed hereunder.

4.2.1 Prison

Prison reforms have been influenced by a number of factors, the first of which was the coming to power of a political party with a reform mandate. During the KANU era, prisons served an ancillary purpose of repressing political dissent. Thus political opponents were arbitrarily arrested and detained in deplorable conditions as a measure to ensure their acquiescence. Prisons reforms attracted little mention in policy pronouncements of the KANU regime and consequently very little financial and administrative support (KNHCR, 2004). When the NARC government came into power prison reforms were executed under the Ministry of Home Affairs then headed by the Vice-President of the country. This provided both the government support and impetus needed to institute reforms.

The other major reason was the exposure of some prisons related scandals and crises which prompted their investigation. Following media reports on the 22nd May 2002 on the death of 9 inmates at a prison in Coast province, the Shimo La Tewa prison, allegedly due to diarrhea and related illnesses, the SCHR commenced an investigation. The investigation established that the living and health conditions of inmates at the prison constituted inhuman and degrading treatment (SCHR, 2002).

The SCHR during its life made other several prisons assessments where it reported that there were dire conditions facing prisoners. These included serious overcrowding and congestion in cells and lack of adequate hygiene and sanitary conditions. There were also shortages of necessities such as clothing and beddings, drugs and medical personnel. The prisoners also had few recreational activities or facilities if at all, restricted contact with the outside world and the absence of counseling towards their rehabilitation. Some juvenile remandees were accommodated together with adults without any specialized care. Generally, the conditions of prisons, police cells and other places of detention fell short of the international Standard minimum rules for the treatment of prisoners adopted by the UN General Assembly in December 1998.

The SCHR proposed that its successor, the KNHRC should carry out regular inspections of prisons to be undertaken in the company of experts, in various fields e.g. medical personnel, to assess hygiene and sanitation standards and the quality of food provided. KNHCR has since its inception, adopted several strategies to assess prison conditions including basic research on policy and surprise visits to detention centres. Its reports have been very useful in informing the prison reform process (SCHR, 2002).

While the past few years since the open door policy introduced by the then commissioner of prisons and continued by the VP and minister for home affairs have seen considerable improvement in prison conditions, these changes have not been far reaching enough. Most of the changes have been cosmetic and not really addressed the deep-rooted causes of the problems that the prison system has to grapple with. The improvements include the opening up of the prisons to the media, and public, provision of uniforms, newspapers and TV sets and availing better education opportunities for prisoners. However the state still has the responsibility to ensure that Kenya's prisons reach internationally acceptable standards as many basic human rights continue to be violated (KHRC, 2008).

Kenyan prisons still suffer from high rate of congestion, and as a KHRC report on the state of human rights determined, many of the problems that the prison system faces

have their origins elsewhere predominantly the judicial system and the state of legislation in the country. Congestion in prisons has a lot to do with the pace at which the courts deal with cases before them. Many remand prisoners remain in custody because of delays by the prosecution and judiciary in addressing their cases. Petty offenders are given custodial sentences while non-custodial sentences would suffice. Other petty offenders fill up the prisons because they are unable to meet their bail or bond terms. Reforming of the prison conditions should therefore be a multi-pronged approach. The judicial system must definitely make use of the non custodial sentences for petty offenders and those prisoners who have reformed should be given remission of their sentences to decongest prisons (KHRC, 2008). The institutional framework, policies and systems applied in prisons are still heavily dependent upon and enmeshed in bureaucracies that render decision making and other operations by prison officers difficult (KNCHR, 2004).

4.2.2 Judiciary

A radical surgery of the Judiciary was undertaken in 2003 which was aimed at rooting out corruption within the courts. Although the surgery had tremendous public support, it has been criticized for having been done in an unprocedural manner. This became evident after several judges who appeared before tribunals established by the President were found to be innocent of the charges that had been leveled against them. The judges were reinstated after several years of suspension from their posts. The suspension of the judges and dismissal of magistrates increased the workload in the courts further slowing down the court process. Although the government attempted to address the situation by appointing new judges and acting judges, the effects were far reaching. Cases being heard by the dismissed judges had to be heard afresh. Thus delays in hearing and determination of cases persist with repercussions on the already congested prisons. There are indications that levels of corruption abated soon after the election of the NARC government. However there is a general perception that graft in the judiciary continues (KNCHR, 2004). The new draft constitution has proposed that existing judges should be vetted once the constitution comes into force, but this has also raised questions on the legality of all judges resigning as well as the crisis that would ensue should there be such a vacuum.

Other reforms that have taken place within the Judiciary are the training of judicial officers in information technology and the upgrading of the judicial system to improve its management of information in the electronic age. The GJLOS programme was a major player in these reforms. Magistrates have also undergone training on children's rights issues in collaboration with KAACR.

4.2.3 Security Organs (Police and Military)

The institution has often been portrayed in a negative light regarding its human rights records. There have been widespread and persistent problems of police brutality and individual complaints of police excesses featuring constantly in the media and brought before human rights groups and the government. Officers have used violence including shooting of suspects and torture. Abuse of office and the cover up of such abuse due to loyalty within the ranks have over the years engendered a culture of impunity within the police force (SCHR, 2001).

The police in Kenya have often been described by the media and rights groups as trigger happy since they shoot to kill even when suspects surrender. The excuse that has often

been given is that they are wanted criminals or that the suspects were escaping. A special police unit, the Flying Squad which was established in 1995, has been especially notorious for such shootings. Innocent persons have lost their lives on the failure of the squad to identify suspects well. Human rights organizations have taken the government to task on the promotion of officers who shoot to kill wanted criminals. Passing of sentences and carrying out of execution without previous judgment pronounced by a regular constituted court is prohibited but the Kenyan police continue to carry out extra-judicial executions (ICJ et al, 2005).

Human rights activists do acknowledge that there are circumstances where police must shoot to save their own lives, but they argue that many incidents over the past have revealed the use of force is grossly inconsistent with the criteria of absolute necessity and proportionality of force. Human rights bodies have also decried the shoot on sight order that was issued by a police provincial commissioner, against the violent Mungiki gang members. Beginning around 2000, the Mungiki instigated a wave of violent terror against members of the public. Human rights bodies argued that the shoot on sight order was a gross violation of human rights regardless of the crimes the Mungiki were guilty of. In addition they took issue with the fact that none of the government officials in charge of provincial administration or constitutional affairs opposed the order (ICJ et al, 2005).

More recently, the post poll violence period saw the widespread use of firearms by State security organs to quell the violence particularly in Kisumu, Rift Valley, and the informal settlements of Kibera and Mathare in Nairobi. The police were accused of using lethal force even where it was uncalled for. One policeman was caught on camera, shooting down a protestor then kicking him as he lay dying. State security organs were also accused of sexual violations and ethnic partisanship (KHRC, 2008a).

In March 2008, the government launched a military operation in Mt Elgon, where members of a militia group called the Sabaot Land Defence Force (SLDF) had been wrecking havoc on the lives of the villagers. The SLDF would extort money from villagers, kill and maim many. According to the Human Rights Organizations, State response to the violence in Mt Elgon was devoid of respect for human rights of individuals. The military operation allegedly resulted in widespread torture (KHRC, 2008a).

Whilst the KNCHR has been given more access to the prisons it has had little success in penetrating police stations and obtaining details on police conduct (KNCHR, 2004). Kenya's security organs, civil and military are governed by the respective and distinct statutes that create them, provide for their management and regulate their conduct in terms and as regards civilians. The regular police force is created under the Police Act (Chapter 84 of the Laws of Kenya) and the Armed Forces (Chapter 199 of the Laws of Kenya). The statutes creating the security agencies predate the Convention Against Torture and have not been amended to include the duty of the security or law enforcement agencies to carry out educational programmes against torture and to provide information on the prohibition of torture⁴.

⁴ Alternative Report to the United Nations Committee Against Torture (2008), published under the Auspices of the Independent Medico-Legal Unit.

The lack of a freedom for Information Bill, has thus impacted access to information from security forces. In Kenya, the training of law enforcement personnel is secret and the training grounds are prohibited areas under the Protected Areas Act (Cap 204). It is therefore difficult to verify Kenya's compliance with some of the Articles under CAT. Since the election of the NARC government, several NGOs and the KNCHR have from time to time been permitted to carry out human rights educational programmes for law enforcement agencies. This has been undertaken for the administration police, prison officers, lawyers and judicial officers. However, the trainings are offered by NGOs based on the goodwill of respective commanders as opposed to policy. They have also been done on an ad hoc basis often depending on uncertain donor funding. There have also been obstacles with the NGOs being denied permission to conduct the trainings on torture without adequate explanations. The state has not made public any training curricular on torture. The state has further not made any efforts at disseminating information on the prohibition of torture except a highly opposed effort by the KNCHR to mount over 200 information billboards in police stations in 2004. The lack of cooperation from the Kenya Police resulted in mounting only a handful of bill boards to date⁵.

Despite these failures within the police, there has been considerable progress in the way they are dealing with women and children. To its credit the government has established gender and child help desks at police stations to deal with rape cases. Previously rape cases were handled insensitively with no special reporting desks designated for women and children.

4.3 Sustainability of Human rights initiatives by the government.

Broadly speaking, HROs maintain that the government has been committed and has made considerable progress in implementing human rights within state agencies. They however believe a lot more could be done, especially with an increased level of understanding and exposure to human rights.

HROs further concede that the government is responsive to criticism and invites dialogue on its human rights track record. Peer review mechanisms for instance in the African Union and human rights Councils reporting mechanisms provide opportunity for government to enter into dialogue on with critics on human right violations and they have been proactive in this regard. The KNCHR recently undertook a study on have done a study on statelessness and the government is prepared to enter into debate on the same. In some instances however, the dialogue is more about going on record of having undertaken consultations involving the civil society.

The government's commitment to human rights principles has however not been matched up with equivalent deeds. As previously mentioned although Kenya has ratified CAT, parliament has failed to enact a comprehensive law that would provide explicit and enforceable legal provisions for dealing with the offence of torture. Additionally, when a human rights action is likely to affect the government in a certain way, it is unlikely to implement it. In this regard, human rights concepts will be included in strategic plans because it looks nice and would make the international community desist from pressurizing them. However, when hard pressed, the government will not walk the talk. This has been the difficulty faced in instituting land reforms where

⁵ Ibid

majority of the land owners are linked to the political class. Nonetheless this government is more receptive to human rights dialogue than previous regimes. The Ministry of Justice and Constitutional Affairs for instance has been collaborating openly with HROs in the civil society.

The government has however not made sustained efforts to eliminate abuses by state agents. Although reforms have taken place, they have not been sustained but done on a need basis when prompted by a crisis or external pressure. When there is no pressure to ensure reforms within the agencies, the sustainability of programmes becomes difficult. The latest crisis occurred in the latter half of 2008, when prison warders went on strike bringing to the fore the rot in the prisons. A committee was immediately appointed to investigate the grievances. Its findings detailed cases of corruption, mismanagement, land grabbing, nepotism and other ills that have bedeviled the country's correctional services over the years. The depressing litanies of problems, which have been festering for years, depict the lack of sustained solutions to poor prison conditions (KNHCR, 2008b).

The Waki Report on Post election violence and the Alston report on extra judicial killings prompted the government to set up a Commission of Inquiry into the Police Systems in 2009. The Commission presented a report detailing the reforms that should be implemented within the Force. A task force to institute the reforms was established in January 2010. The actions taken by the government in this regard, show that it does walk the talk when forced to do so either by a crisis or internal and international pressure.

4.4 Awareness of Human Rights within the Society

It was not until the 1970s that human rights started to capture the public imagination. The first contact was through the work of Amnesty International with whom many Africans became acquainted with the nascent international human rights movement. Back then the term human rights was considered subversive, alien, seditious and unpatriotic by most African governments. Rights activists did not therefore use it to describe their work or organizations (Mutua, 2009). This means it was a fairly foreign concept to the average citizen for a long period. The seeds of the current human rights NGO sector were planted in the 1970s by the most activist segments of the bar and law schools. This has had significant impact on the spread of human rights amongst the wider citizenry. For the mere reason that it is a product of activist lawyers and teachers, the movement has been limited by the class identity both in terms of reach and vision. Today, human rights leaders are still drawn from the law and other elitist professions. With the exception of a few HROs, such as women's rights, land rights and faith based initiatives most of other movements exclude the participation of the people whose welfare they seek to promote. Most human rights bodies are not only modeled after the western watchdog organizations but are located in urban areas therefore alienated and disconnected from those they serve (Mutua, 2009).

To this end awareness of human rights is higher in urban centers than in the rural areas. Similarly the elite and the professionals who are based in urban centers are more aware of human rights. The lower one goes e.g. to the informal and rural sectors, the less awareness, one is likely to find. This is unless there are persons with specific problems e.g. HIV/AIDs or as earlier mentioned the women's groups with which CSOs deal directly.

Despite there being increased awareness in urban centres and within professional circles in comparison with the rural and informal sectors, this has been tampered by apathy. The indifference is due to the high level of corruption within government. There is also a high level of complacency on the part of citizens who feel they cannot effect meaningful political change. This has the danger of mutating into feudal politics where people do not rely on the state for anything. The introduction of the devolved funds such as the Constituency Development Fund (CDF) and the Local Authority Transfer Fund (LATF) has however brought about greater participation of citizens in public expenditure projects. Both the CDF and LATF initiatives provide for citizens involvement. There has thus been an increased demand to the government to provide for services, but this has not been done in human rights language.

The constitutional process and the expansion of political space have also contributed to increased awareness and demand for rights. As captured in the public phrase “*haki yetu*”⁶, there has been a shift in dialogue to demand for rights rather than favours. There is increased awareness that the state is obliged to provide services. However the awareness is not sufficiently articulated as the public is not fully equipped to effect an organized demand for the services. There is therefore a great need for public awareness on how they can be involved in holding the government accountable particularly in management of devolved funds.

Some human rights NGOs in seeking to bridge the gap between the public and themselves have transformed themselves into membership organizations and identified existing community human rights groups and forged mutually beneficial relationships with them. This has been the practice with the Kenya Land Alliance whose membership is drawn from persons whose work directly relates to land issues. It has identified partners in the local communities and through this strategy has been able to engage with the marginalized communities more effectively. The KHRC is also developing a national outreach through establishing centers and mutually beneficial partnerships with community organizations. This is aimed at entrenching human rights and democratic values at the community level. Should other rights bodies emulate the two organizations, it would result in greater awareness and acceptance of the validity of human rights at the community levels.

5 Rights Advocates and Rights Opponents

The main arguments of rights advocates have been on political, civil and legal grounds. As already discussed in detail, the main motivation of rights advocates has been the fight to expand democratic space and civil liberties which were previously limited under autocratic regimes. The political elite on their part fought to hold onto political power. The other driving force has been to ensure that the government complies with international standards.

More recently, rights advocates have been pressing for accountability within the government in order to enhance the economy. The main opponent of greater transparency in government projects and programmes has been the State. Concern for state security is often given as the reason. Rights activists observe that while this argument may be legitimate especially in the acquisition of resources in the defense and

⁶ Kiswahili phrase meaning our right

military sector, in other cases it is prompted by the fear of accountability. Power is linked to resources and access to information would pose a challenge to underhand corruption and collapse patronage links. The main challenge in the advocacy for economic, social and cultural rights has been that the State has insufficient resources. Lack of access to information limits the ability of rights advocates to verify this argument.

A third area where there has been contention is law and administration. The trend over the past few years of dealing with crime by shooting dead the suspects seemed to have gained popularity within the police force than apprehending and prosecuting offenders. As crime statistics rise, the citizenry seem to see extra judicial execution as the only way of dealing with crime. The criticism of police methods by KHRC and other HROs has thus elicited accusations of caring more for criminals than for victims of crime. According to rights advocates this practice and such acceptance threaten the fundamental rights and freedoms guaranteed by the Constitution of Kenya and international instruments to which Kenya is a party (KHRC, 2007).

Another area of controversy has been in legislating anti-terrorism laws. Since 2000 there has been increasing pressure on Kenya to pass new and wide ranging legislation against terrorism. This has raised concerns about possible violations of civil liberties. It has brought about questions on whether the country would go back to detention without trial, aggravate risks of arbitrariness in law enforcement and shortcuts in the judicial process. Of particular concern is whether the war on terror is beginning to target disproportionately Kenyan Muslims for suspicion and potential police harassment (SCHR, 2004).

Other opposition to rights advocacy has stemmed from cultural practices of communities such as Female Genital Mutilation practices. This kind of opposition stems more from ignorance rather than protecting certain benefits. Certain customary laws also infringe on the rights of women and yet the present constitution recognizes customary law. The rights of surviving spouses are not protected in the existing burial law and dispute settlement has remained slow and protracted. Protecting the rights of surviving spouses especially widows with regard to both burial and property rights is thus one of the key areas that has in the past been advocated for reform. To this end, women's rights activists have recommended that there is need for a constitutional standard to avoid a conflict in the rules of law particularly with regard to customary laws which infringe the rights of women (Karimbux, 2000).

In terms of protecting and promoting the rights of marginalized groups vis a vis those of the privileged, rarely has the rights discourse gone in the direction of the privileged. However because of the power wielded by political elite, they have been able to maintain the status quo of inequality. For instance, legislation on property has in the past been used to protect vested interests of powerful land owners. The adoption of a national land policy was met with resistance from landowners because it did not favour their interests. This was mainly in regard to lease of land as well as community tenure rights. Those who have fought for land rights have always been vulnerable to harassment and risk of personal security. Marginalized groups have also not been effective in fighting for their rights because they have not had the numbers or the means to articulate their rights. Their voices have been unheard on the media in the larger

picture because they have lacked coordination to ensure a wider reach. What has prevailed are different groups speaking without proper coordination.

5.1 Role of the media

The mass media can be viewed as one of the organs of the society that can and should play a major role in the promotion of human rights. The media in Kenya have been proactive with regard to enhancing public participation in the rights discourse. This has been especially enabled by their country wide reach. Where the media has addressed a human rights issue they have ensured that they cover the civil society's position on it, and in so doing helped in shaping the human rights debate.

However, the reporting of human rights issues in the mass media lacks depth and indicates that majority of journalists do not understand human rights concepts. Human Rights issues have in the past been depicted in a cursory manner without any efforts made to unearth the underlying causes of violations or give deeper interpretive meaning to events in the world that may have implications on human rights issues. The quality of topics discussed in the media has also compromised their ability to engage in the rights discourse. Most radio talk shows have focused on discussing inappropriate topics on air without listener censorship and have thus lost moral authority to discuss rights issues. Some rights activists feel that the media needs to improve its image before it can authoritatively lead debates on human rights issues.

There is need therefore for journalists to understand international human rights standards, conventions, declarations and treaties in order to positively contribute to the promotion of human rights in the country.

6 Expansion of rights in New Legislation

In September 1993, a group of CSOs led by the KHRC attended a forum to debate the democratic process in Kenya. The participants at the forum agreed that Kenya was in a constitutional crisis because of bad governance and the lack of accountability. They resolved to commence a national convention on the Constitution. The participants included the Faculty of Law, Centre for Law and Research International (CLARION), FIDA-Kenya, RPP, Legal Education and Aid Project, Mazingira Institute, Kenya Ex-Political Prisoners and Exiles Association, African Academy of Political Science, National Council on the Status of Women, and Council for the Development of Social Sciences Research in Africa (CODESRIA). The forum ignited a national debate on the review of the Constitution and produced a proposal for a model Constitution in 1994. The publication which was widely disseminated served as a catalyst for the constitutional review process. The Constitutional review process debated at length the devolution of power to lower regions of government, and the 2005 draft constitution included rights of marginalized groups such as women and persons with disabilities. Kenyans did not vote for the draft constitution because key among the contentious issues was the devolution of power. The government had omitted the section on devolution in the final draft presented at the referendum. The proposals in the draft have however since been refined and incorporated in the Current Proposed Constitution, 2010.

The proposed Constitution proposes devolution of power to county governments to increase citizen participation in governance and promote accountability of the government. It also proposes new rights to be included in the Bill of rights including,

Freedom of the media, Access to Information, Environment, Economic and Social Rights, Language and culture, Family, Consumer rights, access to justice, rights of arrested persons, fair hearing and rights of persons detained, held in custody or imprisoned. It also provides for a National Human Rights and Equality Commission. At present, the proposed Constitution is set to be deliberated by parliament before being subjected to a national referendum later in the year.

Another initiative by the civil society was the campaign to safeguard the gains of women in the Draft Constitution. This campaign was started by human rights and governance organizations to advocate for social justice, gender equality and respect for diversity and equity. The organizations included Institute for Education in Democracy, the KHRC, FIDA – Kenya, and the League of Kenya Women Voters. This coalition successfully engaged with conference delegates, women's organizations politicians and political parties with a view to safeguarding and strengthening gains for women.

While the civil society has been pressing for the recognition of certain rights in the Constitution, the legislature has not yet acquiesced to some of the demands. The areas of struggle between rights advocates and parliamentarians are Access to information, socio-economic rights and extra-judicial killings. Although the Committee of Experts maintained its decision to recognize access to information and socio-economic rights in the Constitution, it remains to be seen whether parliament which is set to debate the Constitution in the next stage of the review process will retain the rights.

The strategies employed by the civil society have ranged from public forums as discussed above, dissemination of information to the public, constructive engagement with the government e.g. through the Attorney General's office. On the other extreme there has been engagement through contention for instance through the mobilization of the communities to participate in mass protests.

There are several constraints and obstacles that HROs have faced in pressing for recognition of rights in new legislation as identified by Miano (2009). The constitutional review process has in the past faced challenges of inertia from the ruling elite, who favored the status quo and viewed any changes as a threat. The national inclination of the state is often to subjugate citizens to state interests in the name of national interest.

A closely related constraint is the culture of patronage that governs relations between the political elite and the ordinary citizen. It is difficult to engender a culture of constitutionalism where there exists a traditional form of governance that is based on patronage and social exchange.

A third obstacle is that the civil society itself has not been insulated from political intrigues and factional interests (Miano, 2009).

The process through which rights have come into the public agenda has by and large been fragmented and not sequential. Rights organizations can at one time deal with rights of PWDs and the next with rights of the aged. The fight for the right to freedom for expression however opened up democratic space for advocacy for articulation of other rights.

Indeed having a democratic Constitution provided a sound basis for the advancement of human rights, but until the political space opened up it was not fully utilized. The

previous regime was not receptive to human rights thus it was not easy to engage in the fight for their realization. With the coming to power of a government that recognized human rights, civil society had to however struggle to reinvent itself within the new dispensation.

7 Implementation and Enforcement of Rights

7.1 Implementation and Enforcement of Rights within the Government

One of the major constraints to the implementation and enforcement of rights in Kenya is the financial autonomy of rights promoting institutions. The Act creating the KNCHR specifies that the finances should come from funds appropriated by parliament or received from external sources such as donors. This is on the condition that these are not given to influence the decision and activities of the Commission (Nasongo, 2009).

The inability of parliament to allocate sufficient funds to the Commission affects its activities and individual performance. The requirement that the minister of Justice and Constitutional Affairs in whose docket the work of the commission falls should approve the budget including proposals further affects its independence.

Another key problem that faces the KNCHR is the non implementation of its recommendations by the government and lack of an effective enforcement mechanism. This limits its role to a purely advisory one. Whilst its advisory briefs have not gone unnoticed and its views have been taken seriously by the government, on the other hand advocacy for rights issue has not been easy when there is need to change the status quo.

The problems facing the KNCHR are not unique to the organization. Similar problems confront the African Human Rights System as a whole. The African Charter on Human and People's Rights establishes the African Commission on Human Rights. The Commission began its operations in 1987 at a time when African Heads of States were generally reluctant to embrace human rights. The Commission which has made commendable progress in executing its mandate has faced several challenges in implementing its work.

While the Charter upholds the principle of non-interference, it also makes provision for non-indifference to affairs of member states. This means it will intervene in grave circumstances such as war crimes, genocide and crimes against humanity. Nonetheless, the charter allows states to restrict basic human rights to the maximum extent allowed by domestic law for reasons of national security. Rights scholars (Mukundi, 2006) have argued that the charter thus appears to condone infringements of human rights norms as long as it is done through domestic law. This has had limitations on the African Commission on the extent to which it can enforce recommendations upon its member states.

Secondly, the nomination of persons holding government office to the membership of the Commission has undermined its independence and credibility. The membership is drawn from Attorney Generals, ministers, judges, and lecturers which present a conflict of interest as they tend to represent the interests of their appointing authority. This has had implications on the extent to which the reports of the Commission are adopted and its recommendations upheld by the member states (Mukundi, 2006).

A third challenge is underfunding. This is mainly due to inadequate support and political will from member states, which translates into limited resource allocation by the African Union.

Last but not least is the lack of an enforcement mechanism. When the activity reports of the Commission are adopted by Heads of State and Government of the AU, the Commission cannot follow up to ensure its recommendations are implemented. States have thus been ignoring its decisions. The lack of the ability to enforce the recommendations of the Commission has caused great distress, anxiety and frustration to communities seeking to espouse their claims. A case in point is that of the Endorois Community in Kenya. In 1973 the community had been forced off their ancestral land in the heart of the Great Rift Valley to create a wildlife reserve⁷. In June 2004, the African Commission at its 35th Ordinary Session granted provisional measures under its Rules of procedure to the Endorois Community in order to avoid irreparable damage to their traditional lands. The Commission urged Kenya to take immediate steps to ensure that no further mining concessions were issued or land transferred prior to the decisions of the Commission on the substance of the matter. In November 2004, however, mining equipment was transported to the region despite the unanimous objection by the community and the provisional measures requested by the Commission. By the 39th Ordinary session the Communication from the community was still being considered on its merits but Kenya was yet to heed to the provisional measures (Mukundi, 2006). The Commission finally ruled in 2010 that the Kenyan government should recognize Endorois ownership of their ancestral land and provide for its restitution. Implementation of the ruling means that Kenya needs to demarcate the borders of the Endorois ancestral land and provide the community with a title that recognizes its ownership as a collective⁸. As Morel further notes, Kenya's recent adoption of a National Land Policy which recognizes customary land rights demonstrates that the country is in tandem with the African Commissions decision and if it implements the ruling would be poised to become a leading example in the continent. However, there has always been a gap between defining legislation and implementing it. Successful implementation of the Commission's ruling will require vital monitoring support from the Commission itself to hold the Kenyan government accountable. There are already some organizations working on designing frameworks that would strengthen the implementation of the African Commission decisions across the continent⁹.

7.2 Challenges faced by HROs in monitoring and implementing human rights standards

Monitoring of human rights implementation by HROs is greatly affected by the relationship between donors and grantees, which is largely top-down. Donors do not engage with grantees beyond the immediate specifics of the projects that they are funding. This means that the mechanisms which are designed for monitoring and evaluation are inappropriate for Kenya's local contexts (Mukasa and Onyango, 2009). Additionally, donors refer to impact which is necessarily a long term enterprise but mostly demand results which expect returns in the short term. There is therefore need for a longer haul commitment which moves away from the largely project oriented

⁷ Morel, C. (2010) Victory for Indigenes: Ruling on Endorois will have an impact on land disputes in Daily Nation 19th February 2010.

⁸ Ibid

⁹ The Open Society Justice Initiative

focus to more programmatic interventions. Serious discussions of new, different and alternative sources and methods of funding are yet to be undertaken by HROs. This would be a critical step forward given the current global economic crisis (Mukasa and Onyango, 2009).

Mukasa and Onyango (2009) further argue that civil society actors are confronted with the challenge of governance and leadership. This challenge is more commonly associated with governments and corporations but has increasingly emerged as a major concern in terms of the effective operation and sustainability of HRO actors. Institutionalization and succession problems affect civil society actors in various ways. This range from the lack of a pool of experienced and committed individuals willing to work in this area, the quest for careerism and finally problems of division of roles between boards and the management. These critical issues reflect a need for more grounding in organizational theory and practice.

7.3 Reporting on International Treaty Ratification

Initially, Kenya had a poor track record of compliance with its reporting obligations as presented in Appendix II.

In 2002, the Government of Kenya through the Office of Attorney General constituted an Inter-Ministerial Committee on Human Rights Reporting Obligations to undertake the task of preparing and producing country reports under the United Nations Human Rights Treaties. The Inter-Ministerial Committee draws its membership from relevant line ministries and government departments and Non-Governmental Organizations (NGO's). The KHRC in collaboration with other human rights organizations prepares and submits shadow reports e.g. it has prepared shadow reports to the UN's Economic and Social Council committee on Economic, social and cultural rights. It has also prepared reports for the Committee against Torture.

One of the major concerns in responses to state reports by monitoring bodies is that Kenya is a dualist state and requires domestication of international instruments at the national level. In most cases monitoring bodies and committees question why the instruments have not been incorporated in the legal framework.

Kenya's track record of reporting to the African Human Rights Systems has been much poorer in comparison to its experience with international instruments. State reporting to the African Charter on Human and People's Rights has been dismal and yielded very little results since it is difficult to compel states to honour their obligations (Mukundi, 2006). There is thus still great need for Kenya to improve on its reporting record.

8 Power Relations between Actors and Organizations

The power of NGOs lies in their ability to network. Indeed whilst HROs have contributed to pushing the realm of human rights respectability in Kenya, the extent to which this has involved networking and mobilization is somewhat limited. Empirical findings point to a serious lack of genuine partnership within the HRO sector in the country. The attempt by the Kenya Human Rights Network (K-HURINET) to mobilize against the enactment of the anti-terrorism law has for instance not been effective. The network with a membership of over fifty HROs was set up due to the need for quick mobilization of HROs and human rights activists whenever the need arose. Its main objective is to lobby government and other stakeholders in cases of specific human rights violations.

However as the study conducted by the Kenya Human Rights Institute determined, HROs contended that K-HURINET does not provide an effective space for genuine collaboration and mobilization with the human rights sector (Nasongo, 2009).

One successful networking strategy was that of the National Convention Executive Council (NCEC), where in the run up to the 1997 general elections, the NCEC and the political opposition mobilized mass protests under the banner of “No reforms, no elections”. It must be mentioned however that the successful mobilization was due to the fact that the interests of the political opposition were at the time consonant with those of NCEC. Yet when the government acquiesced to the Inter Parties Parliamentary Group Agreement the political opposition abandoned civil society to contest the elections leaving the latter without the capacity to mobilize the masses for political action (Nasong’o, 2009).

Another successful network strategy is that of the KLA, which draws its power from its strength in numbers and as such has been able to make significant changes in land reforms such as mobilizing constituent groups to participate in the National Land Policy formulation process. However, alliances and networking among HROs other than the few mentioned are still at fairly nascent changes. Against this background there is recognition among HROs in Kenya of the imperative need for networking and collective mobilization to achieve greater power in pushing the rights agenda.

A second factor that influences the power of HROs is their financial base. HRO leaders in Kenya recognize the critical importance of sustainable funding for their programme activities as a source of their power. In this regard, the sustainability of donor NGO relationships gives the latter power to carry on with its earnest advocacy activities. This source of power is indeed critical for performance as attested by the disempowerment of HROs when the NARC government took over power in 2002 (Nasongo, 2009). The donor community transferred its financial beneficiaries from the NGOs which previously had a powerful voice to the government ministries and departments. The government at this point wielded greater power than the HROs.

Thirdly, HROs draw their source of power from moral authority to comment on human rights violations. For the most part, the advocacy work of HROs in Kenya is based on this form of moral persuasion directed at the power holders to convince them to institutionalize in various ways the rule of law and insurance of justice for all, especially with regard to the disadvantaged and vulnerable members of society. The HRO leaders who have enjoyed the greatest moral authority are those who have faced persecution for their beliefs and these included the founders of organizations like RPP and People Against Torture. Arguably in becoming political partisans and seeking political office, HROs lose their ability or capacity to function as voices of moral authority. This was particularly the case after the 2007 general elections where HRO leaders took sides in the country’s political factions, with some going as far as running for political office (Nasong’o, 2009).

Fourth HROs derive their power in their possession of specialized skills, information, and professionalism as well as in their contemporaneous relevance. Knowledge and information is a source of legitimacy that empowers HROs to provide an effective independent voice for justice issues. It is also useful for assisting communities in better articulating and formulating their demands for adequate living standards. The KNCHR for instance is recognized as an expert on human rights issues. KNHCR focuses on hiring

people who have expertise on human rights issues and collaborates a lot with academics and consultants in various fields. KNHCR relies on the fact that it has the mandate to advise the government which gives it leverage over other HROs.

Lastly most HROs in Kenya, are weakened by a lack of representativeness. This stems from their inability to decentralize their services. Most HROs are based in Nairobi and thus elitist by nature. Kituo cha Sheria and FIDA-K are good examples that have offices in Kisumu and Mombasa. The KLA is headquartered in Nakuru but with regional nodes countrywide, whilst KHRC also has regional initiatives across the country. The saturation of the HROs in Nairobi means that most do not see themselves as relevant to the peripheral areas where the majority of those most in need of their services reside. It is as a result of the disconnection and elite nature of HROs that the human rights discourse is in danger of becoming more and more theoretical and far removed from the concrete struggles of ordinary Kenyans (Nasong'o, 2009).

9 Role and Status of Rights in Current Political Discourses

The current focus of the rights and political discourses have been second and third generation rights. There has been a conflict between environmental rights and socio-economic rights in the recent Mau forest controversy. Whilst environmental activists have argued for the eviction of illegal settlers in the forest who were responsible for the degradation of the Water tower, social rights groups decried the manner in which the forest dwellers have been evicted without proper provisions for re-settlement.

The discourse took a political turn with some politicians vehemently opposed to the eviction of the communities. They thus stood up to fight for the rights of the displaced. Land reform and addressing historical injustices of which land is an essential factor has thus dominated political discourse in the country at present.

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Domestic Laws embodying rights principles

Name of Act	Objective: An Act of Parliament to
Penal Code (Cap 63)	Establish a code of Criminal Law
Evidence Act (80)	Declare the law of evidence
Public Health Act (242)	Make provision for securing and maintaining health
Geneva Conventions Act (1968)	Enable effect to be given to certain International Conventions done at Geneva on 12 th August 1949
Kenya Society for the Blind Act (1956)	Establish a Society to promote the welfare, education, training and employment of the blind and to assist in the prevention and alleviation of blindness
Children's Act (2001)	Make provision for parental responsibility, fostering, adoption, custody, maintenance, guardianship, care and protection of children and the administration of children's institutions; to give effect to the principles of the CRC and the African Charter on rights and welfare of the child
Persons with Disabilities Act (2003)	Provide for the rights and rehabilitation of PWDs, to achieve equalisation of opportunity for PWDs; to establish the National Council for PWDs and for connected purposes
Anti-Corruption and Economic Crimes Act (2003)	Provide for the prevention, investigation and punishment of corruption, economic crime and related offences
Kenya National Commission of Human Rights(KNCHR) Act (2003)	Provide for the establishment of the KNCHR for the better promotion and protection of human rights
Sexual Offences Act (2006)	Make provision about sexual offences, their definition, prevention and protection of all persons from harm from unlawful sexual acts
Witness Protection Act 2006	Provide for the protection of witnesses in criminal cases and other proceedings
Employment Act 2007	Declare and define the fundamental rights of employees and provide basic conditions of employment of children
Media Act 2007	Provide for establishment of the Media Council of Kenya, for the conduct and discipline of journalists and the media and for self-regulation of the media.
Truth Justice and Reconciliation Act 2008	To provide for the establishment, powers and functions of the TJRC, desirous that the Nation achieves its full potential in social, economic and political development.

Source: Kenya Law Reports

Kenya's Reporting History

Treaty	Due	Received	Examined
ICERD			
Initial report	13/10/02		
2 nd periodic report	13/10/04		
ICCPR			
Initial Report	22/3/77	15/8/79	30/3/81
2 nd Periodic Report	11/4/86	27/9/04	
3 rd Periodic Report	11/4/91		
4 th periodic report	11/4/96		
5 th periodic report	11/1/01		
ICESCR			
Initial report art 6-9	1/9/77		
Initial report art 10-12	1/9/79		
Initial report art. 13-15	1/9/81		
2 nd periodic report art. 6-9	1/9/83		
2 nd periodic report art. 10-12	1/9/86		
Initial report	30/6/90	2/8/93	9/5/94
2 nd periodic report	30/6/00		
CEDAW			
Initial report	8/4/85	4/12/90	25/1/93
Second periodic report	8/4/89	4/12/90	25/1/93
3 rd periodic report	8/4/93	5/1/00	15/1/03
4 th periodic report	8/4/97	5/1/00	15/1/03
5 th periodic report	8/4/01		
CAT			
Initial Report	22/3/98		
2 nd periodic report	22/3/02		
CRC			
Initial Report	1/9/92	13/1/00	26/9/01
2 nd periodic report	1/9/97		
3 rd periodic report	1/9/02		

Total overdue reports: 11 (as at 2005)

Source: State Violence in Kenya: An Alternative Report to the United Nations Human Rights Committee