HUMAN RIGHTS
AND
THE CONSTITUTION OF KENYA



KATIBA Institute
Constitution as an Instrument of Change

Social Justice Center
Working Group

UNITED NATIONS
HUMAN RIGHTS
OFFICE OF THE HIGH COMMISSIONER

Human Rights and the Constitution of Kenya

This pamphlet was developed by Katiba Institute's director Jill Ghai assisted by the Executive Director Christine Nkonge, The communications officer Kevin Mabonga and The Programs Officer Michelle Mwanahamisi to mark the 10 years anniversary of the Constitution of Kenya 2010. KI appreciates the support offered by the Office of the High Commissioner for Human Rights in the development of this publication and the Katiba at 10 celebrations. Katiba Institute wishes to acknowledge with gratitude the our partners the Social Justice centre working groups for actively participating in the 10 year commemoration of the Constitution and the development of the publication. We would like to acknowledge the entire Katiba Institute Team for their various contributions throughout the whole process of developing this book.

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Human Rights and the Constitution of Kenya

Human rights in a Constitution are a way to give legal force to the idea that we have certain rights as human beings; they are not the gift of government. They protect individuals and groups against discrimination and oppression by the state which has so much political, economic, police and military power. They guarantee a space within which the people can carry out their lives, work and other activities without unjustified interference by the state. For example, human rights protect our family life, the exercise of our beliefs or religion, enable us to acquire and enjoy property, to form associations and work with others who share our values. Many other rights, such as the freedoms of expression, education and privacy help us to fulfil our potential as human beings. Human rights are also the foundation of democracy, because they ensure to us the right to vote and to choose, and sometimes remove, state officials.

Which rights are protected under the Kenyan Constitution?

Many kinds of rights are protected, not only civil and political rights as in the previous Constitution. But civil and political rights are still there: freedom of speech, to organise, to vote, for example. So is the right to liberty, including to release on bail, to be brought before a court within 48 hours of arrest, and to a fair trial (Articles 49-51). Particularly important, given that so many Kenyans live in poverty, are socio-economic rights: health, education, food, housing, water and social security (Article 43(2)). And since we are a multi-cultural state, the rights of each community to its language and culture are protected (Article 44). The Constitution recognises the rights of specific groups, addressing

their particular problems (women, youth, elderly, children, minorities and marginalised communities, and persons with disability). In some instances, this will require the state to take positive measures, special action to assist them; this is not a denial of equal treatment, but rather ensuring real equality.

We can say that the real themes of the rights under the Kenya Constitution are equality and dignity. The Constitution says that the essential purpose of human rights is to "preserve the dignity of the individuals and communities and to promote social justice and the realisation of the potential of human beings" (Article 19)2)).

Most of the rights belong to everyone in Kenya, although a few, like the right to vote (Article 38), are restricted to adult citizens.

How do the rights work?

The Constitution says that the Bill of Rights is an integral part of Kenya's democratic state and "the framework for social, economic and cultural policies" (Article 19(1)). The rights are to be protected not only against the state but against "all persons", so for example employers have to behave towards their workers, and the landlords towards their tenants, in a manner that respects their rights. Commercial companies have become very powerful, employ thousands of workers and sell their products and services to millions of consumers, and if they were not required to respect human rights, social justice would become unattainable. The duties of companies and citizens to respect human rights do not work exactly in the same way as those of the state; it will be for the court in each case to decide whether a non-state actor had the duty to respect particular rights.

Since 2010, a number of laws have been passed to give more detailed protection to human rights, including:

- Rights of Persons Deprived of Liberty Act
- Access to Information Act
- Fair Administrative Action Act
- Consumer Protection Act
- Legal Aid Act

But won't rights - even those that have special laws passed to implement them – just remain nice words on paper?

The Kenya Human Rights and Equality Commission was established by the Constitution to promote and protect human rights, and "develop a culture of human rights in the Republic" (Article 59). However, as the Constitution allows, it was replaced by three Commissions: the Kenya National Commission on Human Rights, the National Gender and Equality Commission and the Commission on Administrative Justice.

People can complain about human rights violations to these commissions which should investigate. They may advise how a wrong should be set right. In fact, a court recently said that decisions of the Commission on Administrative Justice should be followed – its decisions are about fair decision making by public bodies.

The most powerful bodies are the courts. Judges have special responsibilities for protecting rights, with rules to facilitate the discharge of these responsibilities. It is made easier to go to court than in the past to protect rights.

If people are aware of their rights, and insist on their rights be respected, this can have an effect, even without going to court. And maybe publicity about rights and about violations of rights may lead to some public officials at least rethinking their behaviour.

It is not right to assume that someone else will always want to deny you your rights. Discussion and negotiation are often more effective than confrontation. Perhaps discussion would make it possible to resolve the issue. Aggressively insisting that "this is my right" before you have said "I should like to discuss this" may be counter-productive. But the knowledge that this is your right may give you strength, and may be an important tactic in argument at the right time.

But does the Constitution mean that rights are more important than anything else – like national security?

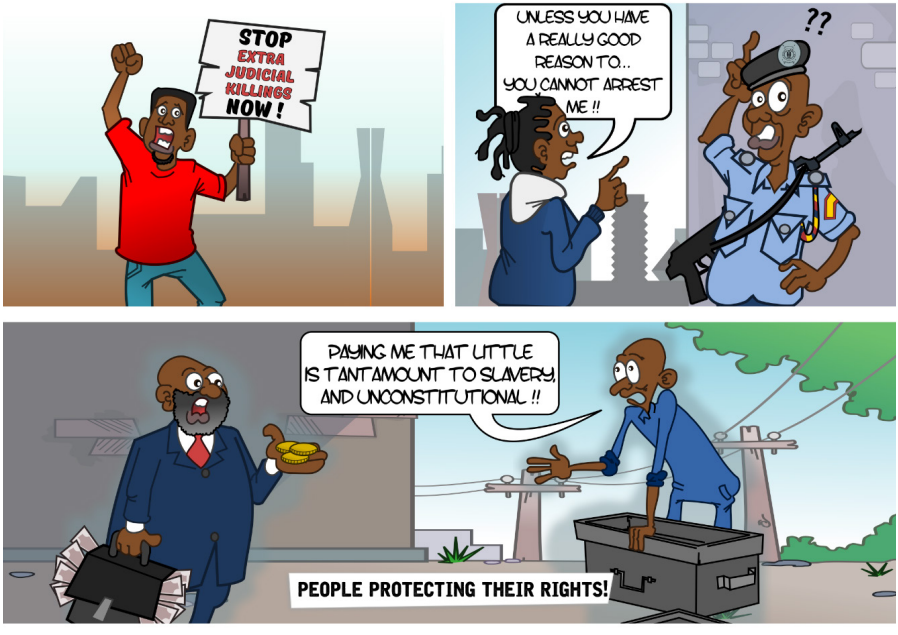
Most rights may be limited by law provided that "the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors" (Article 24). But any limitation on rights must be no more than is necessary to achieve the purpose, and the purpose itself must be justified. For example, it would not be right to restrict people's freedom of expression in order to save embarrassment to anyone, or to prevent public demonstrations because they may cause litter.

For example, a case was brought to the High Court about the government's plan for a Device Management System on mobile phone networks to monitor and identify stolen handsets, counterfeit phones, and unapproved devices. The Court decided it would violate people's privacy and said "The alleged illegal devices are not manufactured in Kenya. There are laws governing importation

of goods. There are laws governing counterfeit goods. The Kenya Bureau of Standards monitors standards. We have the Kenya Revenue Authority. We have the National Police Service. All the points of entry are manned. These laws and the institutions they create have not been shown to be insufficient. …This can be used to effectively combat the illegal devices by denying them access as was successfully done in the past. All these are lawful and less restrictive means which are available to achieve the same purpose."

When you say there is a right to health, water, education and housing does it mean that people can just sit back and the state must provide them with health care, water, education and housing?

No –the duty of the state – and of private individuals and companies – includes giving the people space to fulfil their own rights. They must not positively interfere with your rights. The state must go further – it must use its powers to protect your rights (like prosecuting people who commit crimes against rights, like violence against women and children, and environmental pollution). It must encourage the protection of rights by education, and in cases of real need it must provide what is needed – like food in a drought, water supplies, clinics and schools. Because all this takes time and money the Constitution does not expect miracles. But it does expect sustained efforts to achieve these rights "progressively". If the state says in a court case "but we don't have the money" it would have to prove to the court that this was true.



Particular rights

Equality

Every person is equal before the law and has the right to equal protection and benefit of the law. Equality includes the full and equal benefit of all rights and fundamental freedoms.

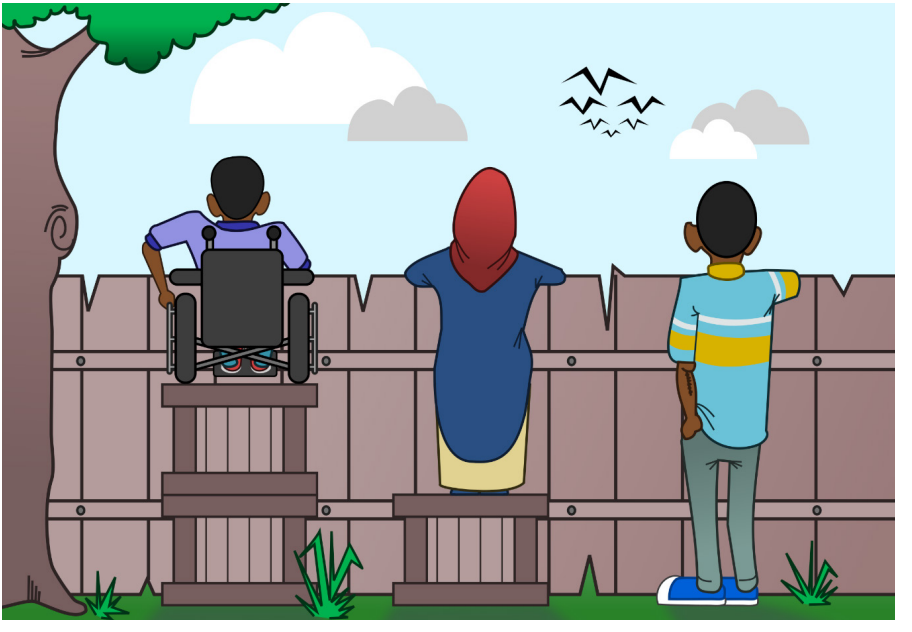
What does this mean?

It does not mean treating everyone the same if their needs are different.
It does not mean a society in which people have no individuality. Equal opportunity is very important – not sameness.

No-one must be discriminated against because of their sex, age, ethnicity, religion, language, whether they are married or not, or any other reason.

Does it mean you can't insist on qualifications for jobs etc?

Absolutely not – but the qualifications must be genuinely required. Obviously, a priest for a Hindu temple must be a Hindu – and of the right sect. A Christian could not insist on being considered.



Rights of persons with disability

A person with disability is entitled to be treated with dignity and respect…to reasonable access to all places, public transport and information. No-one should be discriminated against on the grounds of disability.

What does this involve?

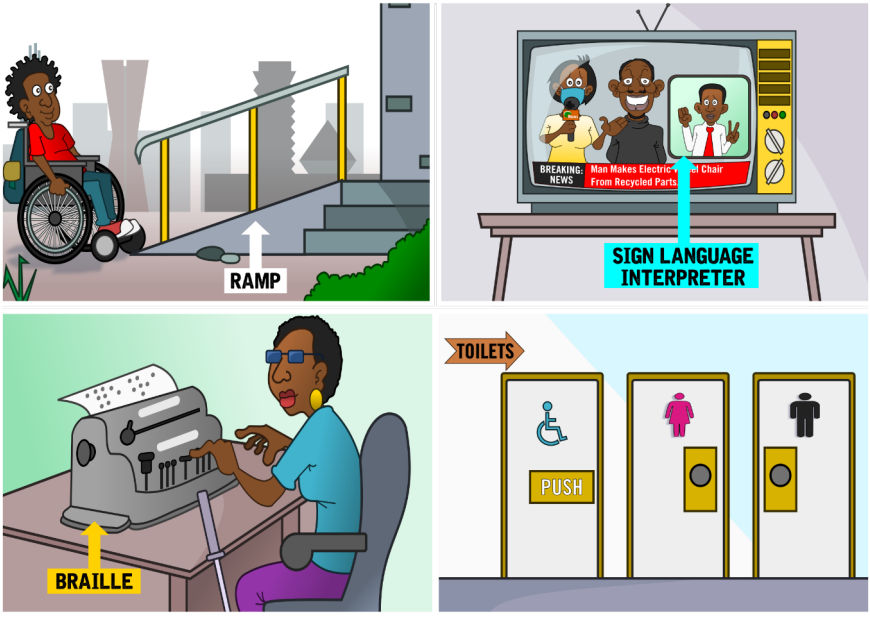
No-one – private person or authority – should use insulting language to people

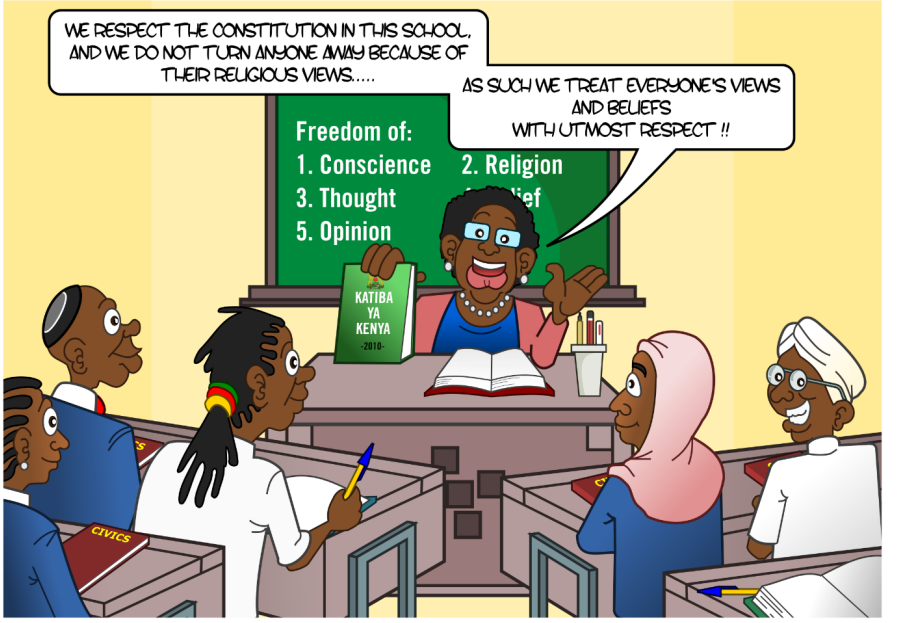
with disability. The state especially should take care to understand why some ways of addressing them is insulting or demeaning.

Public buildings should be designed or adapted to enable persons with disability to get access. The state should by law or guidance require or persuade public transport providers, and the providers of other public facilities to make sure that everyone can get access.
Architects' training should include accessibility.

Isn't this very expensive?

It does add to the cost. But a necessary cost. Otherwise people with disabilities have to bear extra costs or remain at home, and suffer. Advance planning in all sorts of ways can suggest ways of providing access with limited additional cost.





Conscience and belief

Every person has the right to freedom of conscience, religion, thought, belief and opinion.

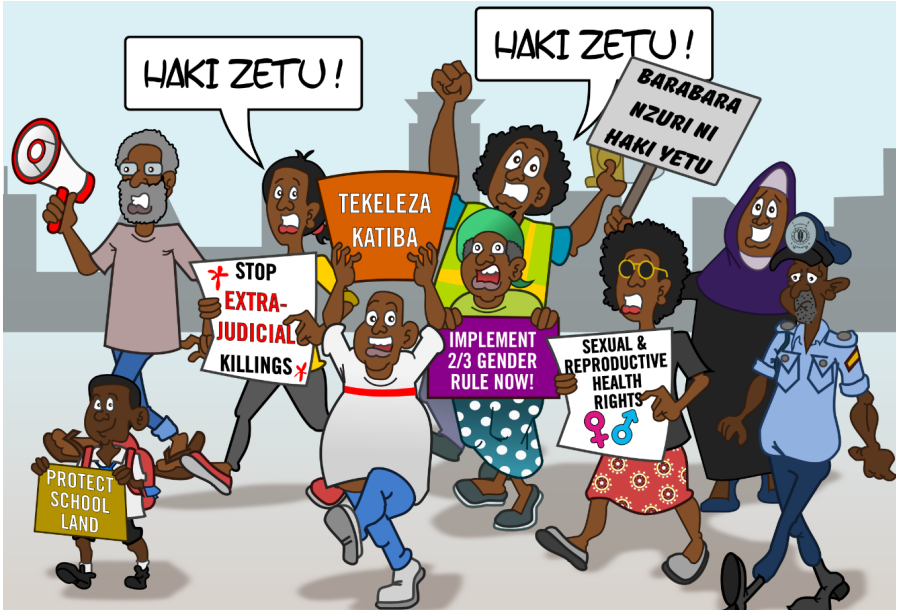
What does it mean?

Everyone has the right to hold views on any topic – politics, religion, social custom. They are entitled to express their views. They must not be discriminated against because of their views – for example, excluded from a school, or a job. The state must protect people's rights to have and express their views.

Does it mean they can push their views onto others?

Everyone must respect the views of others. No-one should think they can compel someone else to agree with them. And no-one should express their

views in ways that express hatred of others, urges discrimination against others, or stirs up violence. This Constitution makes it very clear that such behaviour does not have the protection of the Bill of Rights.



Assembly and demonstration

Every person has the right, peaceably and unarmed, to assemble, to demonstrate, to picket, and to present petitions to public authorities.

What does it mean?

People can get together with others, have marches and meetings to express a common view. Picketing means to stand outside a workplace – to try to persuade workers not to go into work if there is a strike – or some other place, perhaps with placards, or even chanting, to make a point.

The authorities should try to not try to interfere, unless there is very good reason, and indeed should protect those meeting, or protesting, from attacks by those who disagree with their views.

Does it mean that there is complete freedom to block the road and cause a nuisance?

No – while allowing people to exercise this democratic right may cause some traffic delay and inconvenience, if the interference with others is very serious (causing major traffic delays - although even these may be allowed if they are temporary - making noise outside a hospital, for example) the authorities may insist on a change of route, a change of time, or some other change of arrangements or even ban an event if the serious consequences cannot be avoided. But the reason for the change or ban must be strong, and the limits on the rights of the people must be no more than necessary.

Language and culture

Everyone has the right to use the language, and to participate in the cultural life, of that person's choice.

What does it mean?

It must not be against the law – as it has been in some countries – to use a particular language, or to follow the traditions of one's culture.

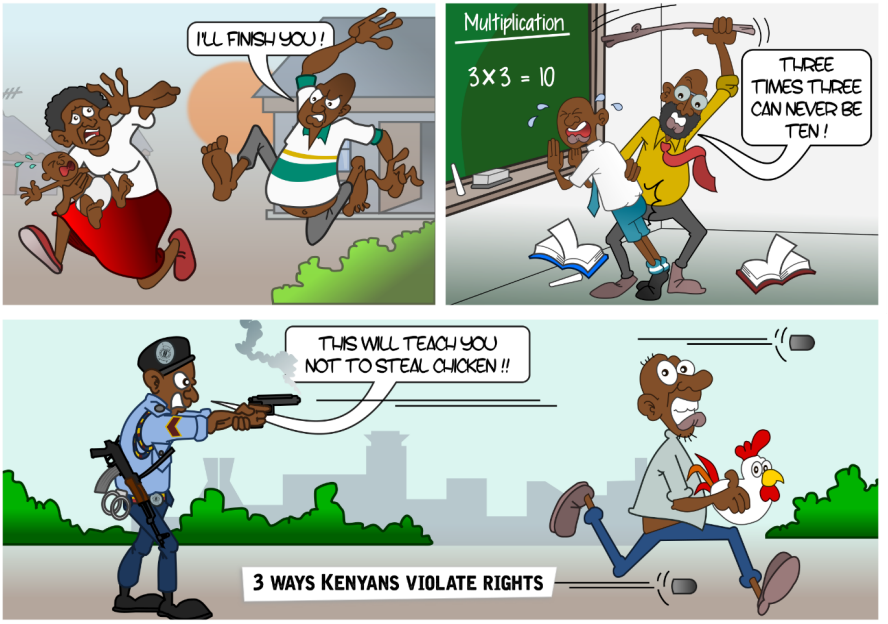
The state must not allow others to attack cultural festivals, discriminate against those who use a certain language and so on. Indeed, if possible, it should assist in making the observance of cultural traditions possible.

And it may be important for the state to communicate with people in their own languages, and make arrangements for people to use their own language if they cannot communicate in English or Kiswahili. Kiswahili is a national and official language in Kenya; English is also an official language here.

Suppose the practices are harmful?

Culture cannot be used as an excuse for harming others. This is why Female Genital Mutilation (FGM) is banned even though it is a cultural practice. Like most other rights, this one can be limited, to protect important interests, and positive harm is forbidden by Constitution.





Violence

Everyone has the right not to be subjected to any form of violence from either public or private sources.

What does it mean?

It is wrong for anyone to use violence on another.

The government must educate people about the wrong use of violence, and must have a system for punishing violence, as well as not using it itself.

But are there never any good reasons for using violence?

It may be necessary to use violence to stop injury to people, to arrest a violent

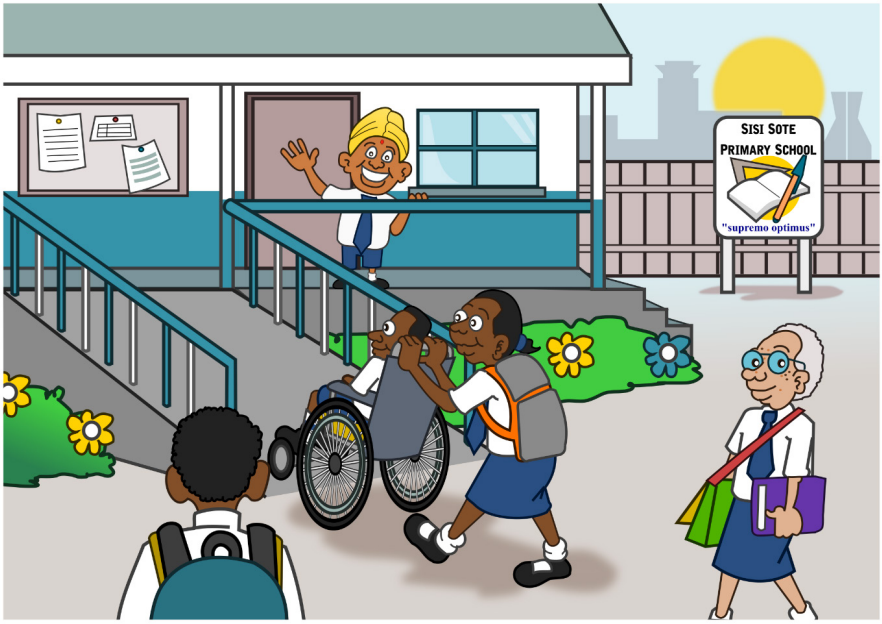
criminal for example. But the violence used must be absolutely necessary. It must be the only way to prevent risk to someone, or for some other really important reason, and must be no more than is necessary for that purpose. And torture, and cruel and inhuman punishment must never be used. And mob justice is wrong and against the law.

Child's right to education

Every child has the right to free and compulsory basic education.

What does this involve?

This is not a right that the state can say "We do not have the resources". Children have the right to education now.



Basic education is usually taken to mean at least primary education. But shortening primary school years should not be used as a way of reducing the effect of this right.

The education should be not only available for children but should be accessible (not too far away from home, for example), acceptable (it must not compel children to give up their culture, for example) and of reasonable quality.

Isn't it strange to have a right to compulsory education?

It is made compulsory partly to ensure that parents do not keep children out of school and also to ensure that children do not refuse to go to school at an age when they might not realise how important education is.

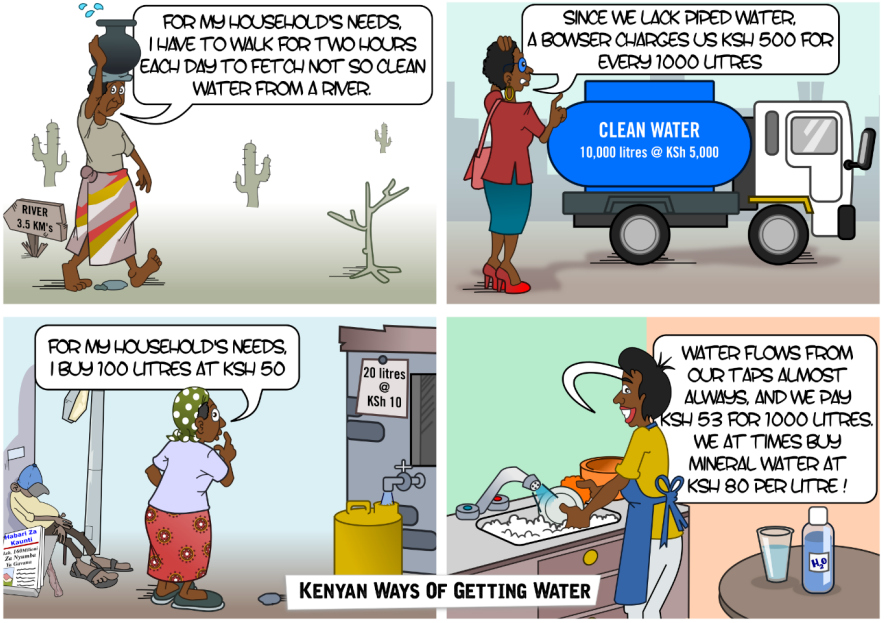
Water

Everyone has the right to water.

What does it mean?

No-one is allowed to do anything to reduce water supplies, or the quality of water for others below a reasonable standard.

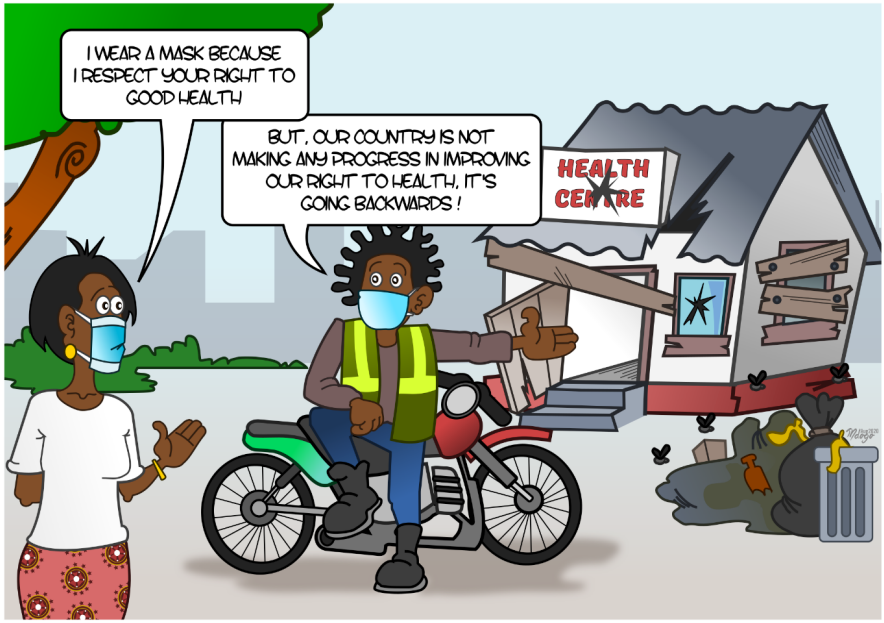
The state (which may mean the national or the county government depending on the circumstances) must protect water against pollution and people or businesses that take excessive quantities of water.



The state (national or the county government) must have a programme of improving the availability of water and the quality of water and must carry out that programme moving towards everyone having access to enough water of adequate quality – and it must give priority to people with the greatest need.

How about charges for water?

Charges should be affordable. And the poor should not be paying more for water than the rich.



Health

Everyone has the right to the highest attainable standard of health.

What does this mean?

No-one should act in a way that reduces anyone else's health.

The state (which may mean the national or the county government depending on the circumstances) must do what is reasonably necessary to prevent injury to people's health, like penalising pollution.

The state (the national or the county government) must have positive programmes – which it must follow – to improve the health of everyone. It is not expected to deal with every health issue straight away, but it must steadily

improve. Its programme can include encouraging private medical services. It must give priority to people with the greatest need.

What does highest attainable standard mean?

Not every best state of health is the same – age, disability, personal history may affect it. And financial and other difficulties mean states cannot achieve health for everyone straight away, but they must do so progressively.

Housing

Everyone has the right to accessible and adequate housing.

What does it mean?

Everyone must respect the right to housing – even if they have to evict someone because of non-payment of rent, they must give adequate notice, treat them humanely.

And demolitions of people's homes without notice and at least giving them a chance to find alternative accommodation violates the right.

The state (which may mean the national or the county government depending on the circumstances) must have programmes, and must carry them out, to progressively ensure that people have adequate housing, that is affordable. They must give priority to those most in need.

Does it mean the state must provide houses for everyone?

No – but they must try to make it easier, by law and other means (such as affordable loans), for people to get housing. And they should have emergency



housing arrangements for those in dire need. The Constitution does not expect miracles – but it expects serious, sustained and effective efforts.

How does a human rights court case work?

Imagine a law says: "No one shall gather with more than 20 other people, or demonstrate, in a public place, on a Sunday, other than for Christian worship".

A group of 30 people gather at Freedom Corner on a Sunday morning to discuss this law. They are arrested and charged with violating the law.

The magistrate refuses to hear any argument about the Constitution. They appeal to the High Court, arguing that:

> This is a violation of their freedom to assemble with others, and to express their opinions.

It is a violation of the right to non-discrimination because it favours Sunday Christian worship – but there is no similar protection for any other sort of worship, including by Seventh Day Adventists or Muslims.

The state argues that:

It is not a violation of their right to assembly or express opinions – they could always do it in their homes or a hired hall.

That the law is justified so that Christians are not disturbed when they are worshipping on Sundays.

The people convicted respond:

Like many people they cannot afford a hired hall, and none of them has a place large enough for a meeting of 30 people, and they would have disturbed people much more in their home than in Uhuru Park – so it does affect their rights.

In addition, they work on other days so Sunday is the only day they could meet.

That while not disturbing worship may be a valid purpose, the law is much too wide and should have specified within a certain distance of a church, for example, not in any public place.

Or the law could have said that it was only an offence if there actually was a disturbance.

In other words, though the right could be limited according to Article 24 of the Constitution the limits were not justified by the purpose, being much too wide.

If the court accepted their argument they would have wanted (i) their convictions to be set aside and (ii) the law declared unconstitutional.

Questions to think about

1. How do you think it is possible to develop in Kenya a "culture of human rights", in which the state respects the rights of the citizens, and the citizens respect the rights of their fellows?
2. Do you think there can be a serious problem of culture clashing with human rights?
3. Do you think it is important to protect languages from dying out? How should this be done?
4. How might the system of human rights play a role in making government and other state agencies more accountable?
5. Do you think it is important that human rights are respected not just by government but by everyone in society – including individuals, and companies?
6. In what ways are you aware of companies violating human rights?
7. The Constitution of Kenya puts a lot of emphasis on public participation. Can participation help government to respect human rights?
8. Discuss with others if there are things that you find difficult to accept. Maybe some people find it hard to accept that women are equal to men, or that children have rights, or that people with disability are not being punished for something they have done wrong. Do you think it is useful for people to be open about these ideas and discuss them?
9. How can the ordinary person become a defender of the human rights of others, with exposing themselves to being themselves arrested or vilified?

Notes

Notes

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This booklet has been produced to mark the
10th anniversary of Kenya's Constitution.

Katiba Institute
House No.5, the Crescent, off Parklands Road,
P.O. Box 26586-00100,
Nairobi, Kenya.
Telephone: 0704594962
Email: info@katibainstitute.org
Website: www.katibainstitute.org

Social Justice Centres Working Group
Dandora Community Justice Centre,
Dandora Phase 2. Muigai Kenyatta Road,
Next to Dandora Secondary School,
P.O.Box 58078-00200
Nairobi, Kenya.
Telephone: +254 722746164
Website: https://socialjusticekenya.org
Email: socialjusticecentreswg@gmail.com