



UNIVERSITY OF EMBU

THE BILL OF RIGHTS AS ENSHRINED IN THE CONSTITUTION OF KENYA

2018

Part 1 – General provisions to the Bill of Rights

Part 1 refers to “The purpose of recognizing and protecting human rights and fundamental freedoms is to preserve the dignity of individual and communities and to promote social justice and the realization of the potential of all human beings.”

Clause 3 of article 19 makes it clear freedoms of the bill of rights “belong to each individual and are not granted by the state.” In other words, these rights are inalienable and not a gift of the state, that can be recalled or taken away without due process.

The constitution conceives of the application of the bill of rights such that citizens will enjoy these rights to the greatest extent. Where such enjoyment is curtailed, for instance by lack of resources, the state shall give priority to ensuring the widest possible enjoyment of these rights having due regard to the existing circumstances.

The bill seeks to underpin that Kenyans have the right to enjoy the freedoms enshrined in this bill without hindrance. Where such enjoyment is curtailed, the state must prioritize scarce resources to allow the rights to be enjoyed as fully as possible within the constrained circumstances. This clearly has implications for rights such as education and health.

Every person who feels his/her rights are threatened, denied or violated has the right to commence court proceedings to seek redress. This is an interesting right

in that identifying threats to the freedoms is a subjective process that could give rise to frequent court actions by litigious citizens. Article 22 clause 3C further says “no fee may be charged for commencing the proceedings.” Clearly, there is the possibility of frivolous court actions where these can be initiated without cost. Courts have the ability, under this chapter, to compensate and serve injunctions where freedoms have been retrenched by denial or violation of any description.

Freedoms under this bill may not be limited except in exceptional circumstances taking into consideration factors such as the freedom being limited, the reason for the limitation, the extent of the limitation and the need to ensure that individual needs do not prejudice the rights of others.

The following rights may not be limited under any circumstances:

- Freedom from torture, cruel, inhuman or degrading treatment
- Freedom from slavery
- The right to a fair trial
- The right to an order of Habeas Corpus (A recourse in the law that ensures a person under arrest is brought before a judge or court to determine if he is being held lawfully.)

Part 2 – Rights and fundamental freedoms Explores the rights and freedoms at the heart of the Bill.

- Right to life – In Kenya, life is recognized at conception stage. This has significant implications for abortion and maternal welfare rights.

- Equality and freedom from discrimination – All people are equal before the law regardless of gender, race, health, religion, culture, ethnic or social origin, language.
- Human dignity must be respected and protected.
- Security of the individual is enshrined in the constitution.

The person must not be detained without trial except in a state of emergency. They must not be deprived of freedom arbitrarily or subjected to violence. Physical and psychological torture are explicitly forbidden.

- Freedom from slavery, servitude and forced labor
- Privacy, including the right not to have arbitrary searches of the home or their person is expressed.
- Every person has the right to freedom of conscience, religion, thought, belief and opinion. Compulsion to behave in a manner contrary to beliefs or religion is forbidden.
- Kenyans have a right to freedom of expression. This includes; The freedom to seek and impart information and ideas. However, this freedom is not without limit. The freedom for instance does not extend to propaganda for war, incitement to violence, hate speech and advocacy of hatred. For instance, what exactly qualifies as hate speech? Does referring to someone’s tribe in a tasteless joke constitute hate speech?
- Freedom of the media is enshrined with the same limitations as those described above.
- Citizens have the right to receive and access information held by the state.

Interestingly there is no time limitation clause and no reference to official secrets. This opens the question of whether or not people can compel the government to divulge sensitive information during war, emergency or negotiations with third parties.

- People have the freedom of association, which include the right to form, join or participate in the activities of an

- association of any kind. People are also entitled to peaceably and unarmed, to demonstrate, picket and present petitions to public authorities.
- Political rights including the right to form political parties, campaign and vote are guaranteed.
 - The right to freedom of movement is guaranteed and is entitled to acquire and own property,

Other guaranteed rights include:

- Fair labor practices
- A healthy environment
- Economic and social rights – The notion of national social security is mentioned in article 43 clause 3. Whether or not the state can afford this concept any time soon remains to be seen.
- Languages and culture are protected
- A right to family life including marriage to someone of the opposite sex is expressed. This clearly excludes same sex marriages or unions.
- Consumer rights including access to goods and services of reasonable quality are included. What constitutes reasonable is clearly an area for debate.
- Access to justice without undue cost is covered in this chapter. This includes the rights of arrested people having the right to be informed of the reasons for arrest and the right to remain silent. Those in the legal system are entitled to a fair hearing including the presumption of innocence until proven guilty. Articles 48 through 51 deal extensively with the rights of citizens in the judicial system.

This chapter deals with the specific application of rights for certain groups of people such as:

- Children
- People with disabilities
- Youth
- Minorities and marginalized groups
- Older members of society.

This section elaborates on the freedoms and rights for these groups ensuring they are not disadvantaged vis a vis the rest of the populace.

Part 4 – State of Emergency

This clause covers rights and freedoms during a period of emergency. A state of emergency may only be declared in special circumstances such as war, invasion, general insurrection or natural disaster.

Periods of declared emergency are restricted in length and may only be extended by parliamentary majorities of between two thirds and three quarters depending on how many times the extension has been sought.

Limitation of rights in a state of emergency is valid only to the extent that it is required by the emergency.

Part 5 – Kenya National Human Rights and Equality Commission

The final part of this chapter deals with the Kenya National Human Rights and Equality Commission. This commission is the vehicle by which human rights in Kenya are preserved, promoted and extended to all citizens.

The authors of the constitution clearly had much to say regarding the rights and freedoms of Kenyan citizens. This is perhaps a reflection of the dark days when basic rights and freedoms were trampled upon by successive governments with impunity.

This constitution aims to ensure Kenyans know their rights and have the legal authority to challenge the state when such rights are violated.

A commitment to equality is at the heart of this new Constitution: the preamble recognizes “The aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law” and measures to respect, protect and fulfill the rights to equality and non-discrimination have a prominent position both in the Bill of Rights

Article 27 which enshrines the rights to equality and freedom from discrimination substantially expands the list of protected grounds and the scope of the right to non-discrimination compared to the previous Constitution. It is supplemented in part three of the Bill of Rights by a number of articles providing for the application of rights to particular groups of persons.

A strong commitment to the principles of equality and non-discrimination is evident throughout the Constitution of Kenya 2010; the Bill of Rights provides a strong set of protections from discrimination in both the public and private spheres, together with excellent enforcement mechanisms and remedies; and key provisions elsewhere in the Constitution provide the basis to tackle some of the critical problems which perpetuate systemic de facto inequalities. As such, its adoption is a very important step in giving effect to Kenya’s international legal obligations to respect, protect and fulfill the rights to equality and non-discrimination.

Article 24, which sets out permissible limitations of rights provided in the Bill of Rights, including the rights provided in Articles 27, 53, 54, 55, 56 and 57, is interpreted strictly in light of Kenya’s international obligations to respect, protect and fulfill the rights to equality and non-discrimination, and in line with constraints provided for such limitations in Article 24(1) itself.

The Chief Justice of Kenya, in discharging obligations arising under Article 22(3) of the Constitution to develop rules governing proceedings brought under the Bill of Rights, should have regard to the need for such rules to “ensure that individuals (...) have accessible and effective remedies to vindicate” the rights to equality and non-discrimination.¹⁵ In particular, where the facts and events at issue lie wholly, or in part, within the exclusive knowledge of the authorities or other respondent, the burden of proof should be regarded as resting on the authorities, or the other respondent, respectively.¹⁶