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Human Rights and Equality Commissions in Kenya and Their Role in Tackling Poverty and Economic Inequality

Victoria Miyandazi*

Abstract

This article explores the significance of the Kenya National Human Rights Commission ('KNCHR') and the National Gender and Equality Commission ('NGEC'), as independent 'fourth branch' institutions protecting democracy ('IPDs') in Kenya, in promoting and protecting human rights, democracy and addressing poverty and economic inequality. It provides a conceptual background for the establishment of the two Commissions and evaluates their functions and effectiveness compared to civil society organisations with similar roles. It then examines the unique role of the Commissions in addressing poverty and economic inequality and their accomplishments in upholding the rule of law, democratic ideals and human rights in Kenya. The article also analyses the challenges faced by the Commissions in achieving their goals and the opportunities arising from their emergence as fourth branch IPDs. Finally, it concludes that the constitutional entrenchment of the KNCHR and NGEC provides them with credibility, legitimacy and freedom to carry out their work effectively. However, resource constraints and dependence on political goodwill may hinder their effectiveness in translating human rights, particularly socio-economic rights, into reality. Despite these challenges, the Commissions' oversight, investigation and complaint handling roles are critical in preventing and addressing poverty and economic inequality through data-driven transformation and collaborative efforts.

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I Introduction

According to recent statistics, about 38.6 per cent of Kenyans are considered poor.[1] The lack of sufficient and affordable socio-economic infrastructure, including housing, educational facilities

1. Kenya National Bureau of Statistics ('KNBS'), *The Kenya Poverty Report: Based on the 2021 Kenya Continuous Household Survey* (Report, 2023) 33.

* Knight Fellow in Legal and Constitutional Research, Institute of Legal and Constitutional Research, University of St. Andrews. The author may be contacted at vdml@st-andrews.ac.uk

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and healthcare services, has significantly hindered efforts to break the cycle of poverty in Kenya. This situation is exacerbated by the fact that, those who are predominantly affected by poverty belong to status groups that are often discriminated against such as women, persons with disabilities and members of minority or marginalised communities.[2] Kenya's 2010 *Constitution* sought to break from the country's dark past marred by divisive ethnic politics, deep-rooted inequalities and numerous human rights violations. These include ethnic clashes, gross impunity, unlawful acquisition of land by senior government officials and their allies and ethnic discrimination in the regional distribution of public resources by incumbent governments.[3] All of these worsened the already dire socio-economic situation of the aforesaid vulnerable groups.

On the latter point, political elites, pre-2010, instrumentalised ethnic identities by using their ethnic groups as their crucial asset in accessing political power.[4] The winning party would then reward its supporters with more resource allocation for the regions in which they resided and made sure that areas inhabited by their dissenters got the least share of the national cake.[5] This was particularly the case during the Jomo Kenyatta and Daniel Moi regimes, which saw the ethnic communities they hailed from, and those that gave them the most support, being rewarded with more resource allocation and development.[6] With socio-economic development being attached to proximity to political power, which correspondingly followed ethnic patterns of favouritism — instrumentalised through patronage, corruption and tribalism — those outside power were 'relegated to the fringes of social, political and economic life'.[7] The distribution of public goods such as education facilities, health and physical infrastructure by following patterns of access to political power fuelled ethnic divisions and also led to ethno-regional development inequalities that intensified poverty.[8]

Compounding this problem, numerous amendments to the previous 1963 Constitution weakened the vital role of legislative checks and balances and the judiciary's independence. These amendments were widely criticised as undemocratic, and as entrenching an authoritarian system of government where power was centralised in the presidency and the executive under one-party rule.[9] This consolidation of power disrupted the delicate balance of power between the executive and legislative branches, greatly diminishing Parliament's ability to effectively oversee the executive's actions.[10] Constitutional amendments removed security of tenure for High Court and Court of Appeal judges in 1988, meaning that judges could be removed at the President's will.[11] This amendment, though later repealed, was meant to concentrate power in the executive. It had the effect of undermining the legitimacy of the judiciary, subordinating judges to the whims of the executive, and 'removing safeguards necessary for maintaining fair administration, neutrality of public

2. *Constitution of Kenya 2010 (Kenya)* art 21(3). This provision states that vulnerable groups in Kenya include those listed herein.
3. Truth Justice and Reconciliation Commission ('TJRC'), *Report of the Truth, Justice and Reconciliation Commission* (Report, Volume IV, 3 May 2013) 7 ('TJRC, Volume IV').
4. John Lonsdale, 'Race and Ethnicity in Colonial Kenya' in Nic Cheeseman, Karuti Kanyinga and Gabrielle Lynch (eds), *The Oxford Handbook of Kenyan Politics* (Oxford University Press, 2020) 124–5.
5. Godfrey Musila, 'A Preliminary Assessment of the Kenyan Truth, Justice and Reconciliation Commission Bill, 2008' (2008) 5 *African Renaissance* 40.
6. Victoria Miyandazi, *Equality in Kenya's 2010 Constitution: Understanding the Competing and Interrelated Conceptions* (Hart Publishing, 2021) 28.
7. Musila (n 5) 40–1.
8. Miyandazi (n 6) 27–8.
9. Stephen Ndegwa et al (eds), *History of Constitution Making in Kenya* (Konrad Adenauer Foundation, 2012) 23, 30.
10. Daniel Branch and Nic Cheeseman, 'The Politics of Control in Kenya: Undermining the Bureaucratic-Executive State, 1952–78' (2006) 33(107) *Review of African Political Economy* 11–31.
11. *Constitution of Kenya (Amendment) Act Number 4 of 1988* (Kenya).

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institutions, accountability of government, and the protection of rights in general'.[12] As a consequence, the vital checks and balances that are necessary to safeguard democracy among the three branches of government were largely absent, leading to adverse effects on the overall protection of democratic principles.

The *2010 Constitution* includes provisions that address divisive ethnic politics, inequalities, poverty and safeguard the independence of the judiciary and independent commissions. Inclusion of socio-economic rights in Article 43 of the *Constitution* is essential to ending poverty and economic inequality.[13] This is evident through recent cases where various marginalised groups have successfully sought legal recourse to ensure the judicial enforcement of their socio-economic rights.[14] These rights, including the right to health, housing, sanitation, food, water, social security and education, must be fulfilled to all persons in Kenya without discrimination, as stipulated in Article 27. By recognising and guaranteeing socio-economic rights, the *Constitution* creates an avenue for vulnerable groups to seek justice and advocate for their well-being, thereby contributing to the ongoing efforts to combat poverty and reduce economic disparities. Moreover, the *Constitution* establishes a devolved system of governance with 47 county governments receiving at least 15 per cent of the revenue raised annually, distributed equitably among them, to manage and carry out devolved functions.[15] Devolution aims to address past practices of incumbent governments favouring regions where they received the most political support.[16] Additionally, Article 204 creates an Equalisation Fund to provide basic services to marginalised areas to bring their quality of services to the level generally enjoyed by the rest of the nation, as much as possible. Also, post-2010, wide-reaching judicial reforms, as required by the *Constitution*, have been implemented to re-legitimise the judiciary, enhance its independence and increase public confidence in it.[17]

Given the aforesaid progressive constitutional provisions and the advancements made thus far, one might be inclined to feel optimistic about the future prospects of constitutionalism in Kenya. However, lessons drawn from Kenya's history of inequalities, numerous human rights violations and the undermining of the rule of law by successive governments serve as a reminder that, truly, 'eternal vigilance is the price we pay for liberty', to prevent a regression to such circumstances.[18] As much as having constitutionally entrenched socio-economic rights and the promise of a more equitable society mark a fundamental milestone in Kenya, more important still is how well these progressive rights are implemented. Recent trends show that the enactment of a new constitution, as a marker of democracy, may merely be used to create a façade of democratic legitimacy without much implementation of its progressive dictates. Consequently, the emergence of literature on 'competitive authoritarianism', 'illiberal democracy' and 'democratic backsliding' has raised people's scepticism towards the traditional Montesqueian model of government, which divides

12. Committee of Experts for Constitutional Review ('CoE'), *Final Report of the Committee of Experts on Constitutional Review* (2011) 33–4. See also Miyandazi (n 6) 11.
13. Constitution of Kenya Review Commission ('CKRC'), *The Final Report of the Constitution of Kenya Review Commission. Approved for issue at the 95th Plenary Meeting held on 10 February 2005* (Report, 2005) 118–19.
14. See Miyandazi (n 6) ch 8.
15. *Constitution of Kenya* (n 2) art 202, 203(2).
16. Albert Mwenda (ed), *Devolution in Kenya: Prospects, Challenges and the Future* (Institute of Economic Affairs, 2010) 18–27.
17. Sylvia Kang'ara, Duncan Okello and Kwamchetsi Makokha, *Beacons of Judicial Transformation: Selected Speeches, Writings and Judicial Opinions of Chief Justice Willy Mutunga* (Sheria Publishing House, 2022) 9–27; Willy Mutunga, *Progress Report on the Transformation of the Judiciary: The First Hundred and Twenty Days, 19 October 2011* (Progress Report, 2011).
18. *Vermont Gazette* (Bennington, 8 July 1817) 2.

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power among three branches — the executive, legislature and judiciary.[19] The aim is to reassess this division, recognising the need for effective checks and balances to promote state stability, safeguard human rights and uphold the principles of constitutional democracy.[20]

There is an increasing recognition among states that traditional governmental checks and balances may not be sufficient on their own. It is now widely acknowledged that the establishment of independent institutions protecting democracy ('IPDs') is equally important. These IPDs, referred to by Tushnet as the 'fourth branch of government', serve as additional safeguards to uphold democratic principles and ensure the proper functioning of the state.[21] IPDs such as human rights and equality commissions are to monitor and demand accountability from the power wielders to enhance the protection of people's human rights. Kenya joins this list of countries as the constitutional entrenchment of such commissions was said to be essential in receiving and investigating complaints on abuse of power by state officers and organs, implementing and supervising the protection of human rights and in promoting the rights and welfare of vulnerable groups.[22]

This article examines the importance of the Kenya National Commission on Human Rights ('KNCHR') and the National Gender and Equality Commission ('NGEC') as independent 'fourth branch' IPDs in Kenya, and their role in promoting and protecting human rights, democracy and tackling poverty and economic inequality.

Part II lays out the conceptual background for the establishment of the two Commissions. It also evaluates their functions and effectiveness in comparison to non-governmental civil society organisations ('CSOs') in Kenya that have similar roles. In Part III, the unique role of the two Commissions in addressing poverty and economic inequality, as well as some of their significant achievements, are explored. It also evaluates their effectiveness in ensuring that the rule of law, democratic ideals and human rights are upheld in Kenya through their investigation, complaint handling and oversight roles. In Part IV, the challenges that the two Commissions face in achieving their goals to help society address poverty and economic inequality, as well as the opportunities arising from their emerging practices as fourth branch IPDs, are examined. Part V then concludes the analysis by noting that constitutional entrenchment of the KNCHR and NGEC provides them with credibility, legitimacy and freedom to carry out their work effectively. Their oversight, investigation and complaint handling roles are crucial in addressing poverty and economic inequality in Kenya. However, resource constraints and dependence on political goodwill may hinder their effectiveness in helping to translate human rights, particularly socio-economic rights, into reality.

II Conceptual Framework and Rationale for the Establishment of Independent Human Rights and Equality Commissions in Kenya

Article 59(1) of the *2010 Constitution* establishes the Kenya National Human Rights and Equality Commission ('KNHREC'). This entity is then tasked with, inter alia, monitoring, investigating and reporting on the observance of human rights, gender equality and equity in Kenya; coordinating and facilitating gender mainstreaming in national development; receiving and investigating complaints

19. Richard Stacey and Victoria Miyandazi, 'Constituting and Regulating Democracy: Kenya's Electoral Commission and the Courts in the 2010s' (2021) *Asian Journal of Comparative Law* 193.
20. Mark Tushnet, *The New Fourth Branch: Institutions for Protecting Constitutional Democracy* (Cambridge University Press, 2021) 14–15.
21. Ibid 1–2; Mark Tushnet, 'Institutions Protecting Democracy: A Preliminary Inquiry' (2018) 12(2) *Law & Ethics of Human Rights* 181.
22. CKRC (n 13) 45–6.

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on alleged human rights violations.[23] Nevertheless, Articles 59(4) and (5) allow for the enactment of legislation restructuring the KNHREC, and for Parliament to assign each of its functions to successor commissions. In accordance with these provisions, in 2011, to ensure its efficiency in safeguarding human rights and the attainment of justice, Parliament opted to restructure the KNHREC.[24] It was split into three Commissions — the KNCHR, NGEC and Commission on Administrative Justice ('CAJ'). Each of these institutions is referred to as successors of the KNHREC and is given unique mandates tied to those set out in Article 59(2) in their various establishing Acts.[25] The CAJ is not focused on in this paper as its work mainly deals with malpractices in governance and administration by public institutions.[26] While the CAJ's work may indirectly impact poverty and economic inequality, its mandate does not directly deal with these two issues.

The constitutional foundation of the KNCHR and NGEC means that they are permanent institutions, which status helps them operate independent of political control.[27] Prior to 2010, governmental human rights bodies in Kenya faced significant challenges in effectively overseeing governmental acts that violated human rights. The Standing Committee on Human Rights (1995–2002), established vide a presidential directive, lacked independence from the President, with its members being appointed and removed at his pleasure, there being no security of tenure and it being dependent on the executive for funding.[28] Also, the Committee could not summon witnesses or order the production of documents in its investigations, and its reports were only published with presidential authorisation.[29] These challenges hindered its ability to effectively carry out its oversight functions.

The establishment of the Kenya National Commission on Human Rights (2002–2010) marked an improvement compared to its predecessor. As an independent body created by statute, it operated separately from the government and possessed a broader mandate and powers to investigate human rights violations and monitor compliance with international obligations.[30] Despite its notable successes, the Commission's effectiveness in exposing human rights violations and advocating for accountability caused tensions with government officials who may have been implicated in such violations. Consequently, there were attempts to curtail its work, including the government's attempt to limit the Commission's authority to order the production of information from government departments and threats to repeal its enabling statute.[31] These attempts to undermine the Commission's work led to a push for the constitutional entrenchment of independent commissions.[32]

23. *Constitution of Kenya* (n 2) art 59(2).
24. Bonolo Dinokopila and Rhoda Murangiri, 'The Kenya National Commission on Human Rights under the 2010 Constitutional Dispensation' (2018) 26(2) *Africa Journal of International and Comparative Law* 205, 207.
25. *Kenya National Commission on Human Rights Act No 14 of 2011* (Kenya) (*'KNCHR Act'*), s 8; *National Gender and Equality Commission Act 2011* (*'NGEC Act'*) ch 5C, s 8; *Commission on Administrative Justice Act No 23 of 2011* (Kenya) (*'CAJ Act'*), s 8.
26. *CAJ Act (n 25)* s 8(b).
27. *In the Matter of the National Land Commission* [2015] eKLR (Supreme Court Advisory Opinion Reference 2 of 2014) [172]–[80].
28. Ken Obura, 'The Kenya National Commission on Human Rights' in Charles Fombad (ed), *Compendium of Documents on National Human Rights Institutions in Eastern and Southern Africa* (Pretoria University Law Press, 2019) 333–4; Republic of Kenya, *Gazette Notice No 3842 of 1996* (Government Printers); Republic of Kenya, *Gazette Notice 2128 of 2000* (Government Printers).
29. Obura (n 28).
30. Ibid 335–7; *Kenya National Commission on Human Rights Act of 2002* (Kenya).
31. Obura (n 28) 337.
32. Ibid.

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Therefore, as Tushnet rightly states, '[w]ithout constitutional guarantees, statutory IPDs are always vulnerable to political control and attack'.[33]

Increase in civic space restrictions for non-governmental CSOs in Kenya whose work is similar to that done by the KNCHR and NGEC, also back this assertion. As much as Kenya's civil society is hailed as 'one of Africa's bravest and most vocal',[34] in recent years, the government has sought to suppress them through legislative hurdles and administrative harassment by various attempts to deregister vocal human rights organisations.[35] For example, in 2017, after the Kenya Human Rights Commission ('KHRC') — an NGO distinct from the KNCHR — openly voiced its concerns about the flawed August 2017 electoral process and intention to institute an election petition challenging the presidential election, the organisation was threatened with de-registration.[36] A similar fate befell the Africa Centre for Open Governance ('AfriCOG') upon its filing of an election petition to compel the Independent Electoral and Boundaries Commission ('IEBC') to open the electoral roll for public scrutiny, following the said August 2017 general elections.[37]

An effective and durable way of protecting the civic space is through the constitutional entrenchment of human rights and equality commissions.[38] The *2010 Constitution* drafting documents underscore the fact that independent constitutional commissions were meant to be separate from the government, to 'facilitate constitutional governance and the respect for human rights and gender equality'.[39] Human rights and equality commissions were specifically conceptualised as a bridge between the people and the government, intended to perform tasks such as 'to received and investigate complaints about abuse of power by officials or public authorities; another to implement and supervise protection of human rights, especially promoting the rights and welfare of women and children'.[40] Among the issues arising during public consultations on what the people wanted to be included in a new constitution, was the importance of constitutional commissions 'to act independently on politically sensitive matters [and] … for enhancing the protection of people's rights'.[41]

Thus, from their initial conceptualisation, the KNCHR and NGEC were to have a broad mandate of investigating, implementing and supervising human rights and equality matters, making them a beacon for public vigilance, social transformation and constitutionalism. Their constitutional entrenchment was to help install and inculcate a culture of accountability to ensure that, inter alia, laws and policies do not impede social transformation and social justice.[42]

This section has set out the conceptual framework and vital role of Kenya's independent human rights and equality commissions. The next section examines how the KNCHR and NGEC, in going about their roles, assist in tackling poverty and inequality in Kenya.

33. Mark Tushnet, 'Institutions Protecting Constitutional Democracy: Some Conceptual and Methodological Preliminaries' (2020) 70(2) *University of Toronto Law Journal* 95, 102.
34. Lillian Nalwoga, Wairagala Wakabi and Edrine Wanyama (eds), *Legal and Regulatory Frameworks Affecting Civil Society Organisations' Online and Offline Activities in Kenya'* (CIPESA, 2017) 1.
35. Yves Niyiragira, *Current Challenges Facing the Civil Society in Kenya* (Rosa Luxemburg Stiftung, 2015) 4.
36. Stella Cherono and David Mwere, 'NGOs: We Were Shut Over Plan to Contest Poll Result in Court' *Nation* (Nairobi, 15 August 2017); *Kenya Human Rights Commission v Non-governmental Organisations Co-ordination Board*, Nairobi Constitutional and Human Rights Petition No 495 of 2015.
37. Cherono and Mwere (n 36); CIVICUS, 'Human Rights NGOS Face Closure and Possible Arrest of their Leadership' *CIVICUS* (16 August 2017).
38. Bonolo Dinokopila, 'Beyond Paper-Based Affiliate status: National Human Rights Institutions and the African Commission on Human and Peoples' Rights' (2010) 10 *African Human Rights Law Journal* 26, 32.
39. CKRC (n 13) 45–6; CoE (n 12) 52.
40. CKRC (n 13) 45.
41. Ibid 28, 29, 37, 41.
42. Ibid.

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III Poverty and Economic Inequality in Kenya and the Role of Human Rights and Equality Commissions

The fact that poverty and economic inequality mostly affect individuals belonging to status groups that suffer from pre-existing discrimination has led to a growing recognition of the interrelationship between the right to equality and socio-economic rights. The disadvantage faced by vulnerable groups such as persons with disabilities, minorities and marginalised groups and older members of society is characterised by their lack of access to social goods including healthcare, adequate housing, reasonable standards of sanitation, adequate food of acceptable quality, clean and safe water, social security and education. Correcting this cycle of disadvantage is the main reason why these socio-economic rights were entrenched in Article 43 of the Constitution.[43]

The link between poverty and inequality, as evident in the Constitution, arises from the re-distributive goal of the socio-economic rights in Article 43, with Article 20(5)(b) mandating the State to prioritise the provision of such rights to vulnerable individuals and groups.[44] These groups are not only disproportionately discriminated against on the basis of their status but also predominantly feature in the status group termed as 'the poor', hence bringing out the inextricable link between equality and socio-economic rights in Kenya.[45] For instance, lack of 'reasonable accommodation'[46] in modes of public transportation, educational institutions and workplaces for persons with disabilities has left many of them unemployed, uneducated and, generally, more vulnerable to poverty.[47] Therefore, addressing both poverty and economic inequality in Kenya requires the recognition of systemic patterns of discrimination plaguing vulnerable groups that need to be addressed as the State undertakes its redistributive goal in delivering socio-economic rights to tackle poverty.

By diligently fulfilling their mandates, the KNCHR and NGEC will play an essential role in the State's efforts to combat poverty and economic inequality, and in pinpointing the link between socio-economic disadvantage and status-based discrimination. First, one of the roles of the NGEC is to 'work with other relevant institutions in the development of standards for the implementation of policies for the progressive realization of the economic and social rights specified in Article 43 of the Constitution'.[48] Second, the Commissions conduct investigations and report to Parliament and the public on structural patterns of disadvantage that adversely affect vulnerable groups, referred to by the Commissions as special interest groups ('SIGs').[49]

The two Commissions largely focus on different SIGs but there is usually an overlap: while the KNCHR concentrates on migrants, indigenous groups, children, persons with disabilities and intersex persons, the NGEC's focus is on women, children, youth, persons with disabilities, older members of society, minorities and marginalised groups.[50] Notably, the allocation of responsibilities

43. CKRC (n 13) 52–61.
44. Miyandazi (n 6) 172–7.
45. Ibid ch 7.
46. In this context, 'reasonable accommodation' refers to the provision of necessary materials, devices and infrastructure that enable individuals with specific disabilities to overcome the barriers they face in their daily lives or workplaces, thus ensuring equal access and opportunities.
47. Miyandazi (n 6) 90–3.
48. *NGEC Act* (n 25) s 8(g).
49. Ibid s 8(f); *KNCHR Act* (n 25) s 8(c), (d) and (e).
50. KNCHR, 'Special Interest Groups' tab under the 'Our Work' dropdown menu, <https://www.knchr.org>; *NGEC Act*, s 8(c); NGEC, *The First Decade of the National Gender and Equality Commission 2011–2021* (NGEC 2022) 6 ('NGEC, *The First Decade*').

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for addressing matters relating to persons with disabilities has been a source of confusion. In 2011, the mandate to promote, protect and monitor the implementation of the UN Convention on the Rights of Persons with Disabilities was initially assigned to the KNCHR. However, this mandate was subsequently transferred to the NGEC. Eventually, in 2017, through re-designation by the Attorney General, the KNCHR regained this mandate.[51]

Third, the Commissions review bills and advise various State organs, such as national and county governments, on a rights-based approach towards implementation of laws and policies in line with the Constitution and international human rights instruments that Kenya has ratified.[52] Related to this, NGEC also receives and evaluates annual reports from public institutions on their compliance with the principles of equality and non-discrimination.[53] Fourth, they receive complaints and take part in public interest litigation highlighting weaknesses in public systems that affect SIGs.[54] Fifth, the KNCHR has the mandate of tackling forced evictions and displacement of persons, which touches on the protection and fulfilment of the right to housing.[55]

Sixth, they make recommendations on equality-sensitive approaches that need to be taken to address the plight of various vulnerable groups and avoid reinforcing the socio-economic marginalisation they face.[56] Other related roles include doing work around mainstreaming of gender, disability and marginalisation issues in national development and advising the government on the same; monitoring, facilitating and advising on the implementation of affirmative action policies contemplated in the Constitution; business and human rights; public education and training on human rights issues; psychosocial support and debriefing.[57] The two Commissions are required to work together, as well as with other State organs, to ensure that their activities are efficient, effective and complementary.[58]

Having laid out the general roles of the two Commissions in tackling poverty and economic inequality, the paper will now turn to an in-depth discussion of some of the notable work by the KNCHR and NGEC.

A *The Commissions' Efforts to Address Vulnerability and Marginalisation That Would Exacerbate Poverty and Economic Inequality*

The KNCHR and NGEC have been instrumental in investigating, reporting and making recommendations on equality-sensitive approaches that need to be taken to address the plight of various SIGs and avoid exacerbating their socio-economic marginalisation. A good example is their work on sexual and gender-based violence ('SGBV'). Both Commissions have been active in reporting and doing advocacy work on the harms of SGBV and its various forms.[59]

51. 'Disability Focal Point', KNCHR (Web Page) <https://www.knchr.org/Our-Work/Research-and-Compliance/Disability>.
52. *NGEC Act* (n 25) s 8(b)-(c); *KNCHR Act* (n 25) s 8(f).
53. *NGEC Act* (n 25) s 8(j).
54. Ibid (n 25) s 8(d); *KNCHR Act* (n 25) s 8(f).
55. See below nn 101–5 and accompanying text; KNCHR, *Annual Report and Financial Statements 2020/2021* (2021) 11, 43, 44, 48 ('KNCHR, *Annual Report 2020/2021*').
56. *NGEC Act* (n 25) s 8(k); *KNCHR Act* (n 25) s 8(h).
57. *NGEC Act* (n 25) s 8; *KNCHR Act* (n 25) s 8.
58. *NGEC Act* (n 25) s 8(f); *KNCHR Act* (n 25) s 8(e) and (g).
59. NGEC, *Gender-Based Violence in Kenya: The Cost of Providing Services. A projection Based on Selected Service Delivery Points 2016* (Report, 2016) 9–10 ('NGEC, *Keeping the Promise to End GBV Campaign*'); NGEC, *Keeping the Promise to End GBV Campaign: Duty Bearer's Handbook* (Report, 2015).

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At the onset of the COVID-19 pandemic, governmental measures to curb the rapid transmission of the virus — such as nationwide lockdowns, curfews, movement restrictions and working from home directives — largely confined people to their homes. One of the adverse effects of this was the 92.2 per cent spike in SGBV cases between January and June 2020.[60] Aside from its gendered element, as NGEC rightly observes, SGBV also has a socio-economic dimension, adversely affecting socially and economically vulnerable groups because of their subordinate status in society, which makes them more susceptible to violence.[61] The NGEC highlighted the health effects and financial implications of SGBV due to, inter alia, 'increased disability, medical costs, and loss of labour hours'.[62] It estimated that an SGBV survivor and their family spend approximately Ksh 16,500 (US$146) per SGBV incident.[63] This cost is nevertheless averted when SGBV survivors are provided free SGBV-related health services at recovery centres set aside for SGBV survivors, with the cost being borne by the service provider.[64]

The SGBV example shows that an approach that recognises the interrelationship between socio-economic disadvantage and status-based discrimination is imperative in dealing with the SGBV-related poverty and economic inequality that vulnerable groups, predominantly women, face. One initiative that applies such an approach and which NGEC partners in is the National Police Service integrated POLICARE system launched in September 2021 to deal with the escalation of SGBV cases during the COVID-19 crisis.[65] POLICARE stands for 'police' and 'cares', a multi-agency SGBV victim-oriented one stop centre. The POLICARE system brought together the police, forensic investigators, healthcare providers, psychologists, representatives of the Director of Public Prosecutions, a magistrate on call, gender experts and correctional personnel in what was meant to be a one stop shop in addressing SGBV. It is also meant to reduce the cost of dealing with SGBV.[66] The NGEC is in the POLICARE management team and is specifically tasked with monitoring and advising on the integration of the principles of equality and non-discrimination in the initiative's policy and administrative regulations, and the establishment of an Integrated Data Management System.[67]

The SGBV example illustrates that, through evidence-based research, the Commissions give a clear picture of root causes of poverty and economic inequality and make pragmatic recommendations on how duty bearers can address such challenges. The data also makes it is easier for the Commissions to hold duty bearers to account on their obligations to address poverty and economic inequality. Lastly, the POLICARE example shows that partnerships enable these independent Commissions to take part in activities on actual provision and fulfilment of socio-economic services to alleviate poverty and economic inequality, rather than just providing oversight on State organs' protection and fulfilment of the same.

60. National Crime Research Centre, *Protecting the Family in the Time of COVID-19 Pandemic: Addressing the Escalating Cases of Gender-Based Violence, Girl Child Disempowerment, and Violation of Children Rights in Kenya: Summary of Findings and Recommendations* (Report, 2020) 1.
61. NGEC, *Keeping the Promise to End GBV Campaign* (n 59) 7.
62. KNBS, *Kenya Demographic and Health Survey 2014* (2014) 291.
63. NGEC, *Gender-Based Violence in Kenya: The Economic Burden on Survivors* (Report, 2016) 27–8.
64. Ibid 28.
65. Kenya National Police Service, *POLICARE Policy: June 2021* (2021).
66. Centre for Rights Education and Awareness ('CREAW'), 'Kenya Launches its First Policy for Police integrated Response to GBV' *CREAW* (Nairobi, 18 October 2021).
67. National Police Service, *POLICARE Policy: June 2021* (2021) 14.

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B *Role of the Commissions in Reviewing Laws and Policies Relating to Poverty and Economic Inequality Among Vulnerable Groups*

The KNCHR and NGEC play crucial roles in upholding the rule of law and ensuring that laws and policies conform to the Constitution's human rights and equality provisions. To this end, both Commissions review laws and policies pertaining to their specific SIGs and evaluate their compliance with relevant international and regional human rights treaties and conventions.[68] They also work to ensure that laws and policies at both national and county levels incorporate provisions for vulnerable groups. For example, the KNCHR has assessed national and county laws and policies on disability against international standards and principles, such as those on access to education and healthcare, to identify gaps in compliance.[69] Upon identifying such gaps, the Commission made recommendations for improving the protection and fulfilment of the rights of persons with disabilities.[70] This section highlights some of the KNCHR and NGEC's notable reviews of laws and policies, including their recommendations for revisions aimed at promoting and protecting human rights, as well as addressing poverty and economic inequality.

Regarding the KNCHR's work in reviewing laws and policies, the first significant example is on the right to health and water.[71] In the past decade, the Commission has reviewed over 24 national laws and policies concerning the right to health and water, evaluating their compliance with the Kenyan Constitution and international and regional treaties Kenya has ratified.[72] A case in point is the Memoranda on the national Health Bill of 2015.[73] The Commission observed that the Bill did not adequately address the core elements of the right to health including availability, accessibility, acceptability and quality, as set out in the Economic, Social and Cultural Rights Committee's General Comment No 14 on the right to health.[74] It also cited the need to provide access to healthcare without discrimination to migrants and other vulnerable and marginalised groups in Kenya such as asylum seekers and refugees, regardless of their legal status in the country.[75] This has been a key challenge to such groups accessing public healthcare, especially for unregistered urban refugees who do not have the required identification documents.[76]

The *2017 Health Act* incorporates the KNCHR's recommendations. For example, on availability and accessibility, the Act requires national and county governments to provide free and compulsory maternal care and vaccinations for children aged below 5 years.[77] Undoubtedly, these are positive measures in addressing poverty and economic inequality. On health financing, section 86(2)(a) of the Act requires the Ministry of Health to consult with inter-governmental entities in developing a

68. *NGEC Act* (n 25) s 8(c); s 8(f) *KNCHR Act* (n 25).
69. See KNCHR, *From Norm to Practice: A Status Report on Implementation of the rights of Persons with Disabilities in Kenya* (2014).
70. Ibid.
71. KNCHR, *Annual Report 2020/2021 (n 55) 18–20;* KNCHR*, Realizing the Value of Health and the Right to Water: A Human Rights Assessment of County Health and Water Services Law* (Report, 2020).
72. Constitutional Commissions and Independent Offices Forum ('CCIOF'), *Taking Stock — Constitutional Commissions and Independent Offices* (2022) 55–6.
73. KNCHR and International Organization for Migration ('IOM'), *Memoranda on the Health Bill, 2015 Presented to the Standing Committee on Health, Senate* (2018).
74. Ibid 1; CESCR, *General Comment No 14: The Right to the Highest Attainable Standard of Health (Art 12 of the International Covenant on Economic, Social and Cultural Rights),* 11 August 2000, E/C.12/2000/4.
75. KNCHR and IOM (n 73) 2–3.
76. Julie Jemutai et al, 'A Situation Analysis of Access to Refugee Health Services in Kenya: Gaps and Recommendations — A Literature Review' (2021) 178 *CHE Research Paper* 1, 5.
77. *Health Act No 211 of 2017* (Kenya) s 5(3) (*'2017 Health Act'*).

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framework to ensure provision of healthcare to vulnerable groups and the indigent. Tied to this, the KNCHR has partnered with various stakeholders in the health sector to develop monitoring standards for the realisation of the rights to health under Article 43 of the Constitution.[78] This includes its collaboration with the Ministry of Health in the development of the *Health Infrastructure Norms and Standards* and the *Human Resources for Health Norms and Standards* which set out 'standards and indicators for monitoring the right to health'.[79]

On the right to water, one of the laws that the KNCHR reviewed, and had its feedback implemented, is the *Siaya County Water and Sanitation Bill 2018*.[80] The Commission recommended adding provisions to ensure equitable and progressive provision of water and sanitation in accordance with Article 43(1)(b) and (d) of the *Constitution*. They also advised amending the Bill to avoid contradictions with the national Water Act of 2016, and to include measures for the effective, affordable and economic provision of water in reasonable quantities. Subsequently, the Siaya County Assembly Committee responsible for Water and Environment implemented approximately 80 per cent of the Commission's recommendations.[81]

Second, in relation to the *Public Participation Bill 2018*, the KNCHR pointed out that despite requiring the relevant institutions to give the public adequate notice for them to make their input, section 4(1) did not give any timeframe for meaningful participation. The Memoranda emphasised the significance of ensuring public participation, especially in development projects, as the Commission has received numerous complaints regarding rushed participation and inadequate time provided for the public to meaningfully participate.[82] The KNCHR also recommended that, on access to information by the public, there be an express inclusion of the requirement that information be accessible to persons with disabilities as mandated in Article 7(3)(b) of the Constitution.[83] This provision states that 'the state shall promote the development and use of indigenous languages, Kenyan sign Language, Braille and other communication formats and technologies accessible to persons with disabilities'. These recommendations are important since public participation is an important means of claiming one's rights and highlighting issues of poverty and economic inequality that a person or a people want resolved.

The NGEC has also released memoranda on various laws and policies it has reviewed that directly impact poverty and economic inequality issues affecting its SIGs. First, between the year 2013 and 2021, the NGEC reviewed over 320 legal instruments, policies, bills, administrative guidelines and procedures — both at the national and county level — and issued memoranda on the extent to which they protected and promoted the rights and freedoms of SIGs.[84] It also issued more than 300 advisories to various state organs geared towards mainstreaming issues affecting persons with disabilities, women and the youth in plans, budgets and other policy interventions.[85] The language of the said laws and policies was also reviewed to ensure that they did not use derogatory terms and phrases in reference to SIGs and their needs.[86] It is reported that a majority of the

78. CCIOF (n 72) 55.
79. Ibid.
80. Siaya County Assembly, *The Siaya County Water and Sanitation Bill, 2018* (Web Page) <https://siayaassembly.go.ke/wpfd_file/the-siaya-county-water-and-sanitation-bill-2018/>.
81. KNCHR, *Annual Report 2020/2021* (n 55) 20.
82. KNCHR, *Submission on the Public Participation Bill (Senate Bill No 4 of 2018) to the Senate Standing Committee on justice, Legal Affairs and Human Rights* (2018) 2.
83. Ibid.
84. NGEC, *The First Decade* (n 50) 12; CCIOF (n 72) 62.
85. NGEC (n 50) 13.
86. Ibid 12.

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advisories 'have led to the review of the discriminatory actions and considerations of the corrective measures to reduce exclusion of SIGs in major opportunities'.[87]

Second, in its *2021 Report on the Poverty Eradication Authority Bill*, the NGEC highlighted the sufficiency of existing laws and policies, including those under development, drafted pursuant to Article 43 of the *Constitution* to eliminate poverty and economic inequality.[88] As such, the Commission argued that the creation of a new public body to tackle poverty eradication was unnecessary and would place an unwarranted burden on taxpayers. Instead, it recommended that what is needed is compliance and implementation monitoring of existing institutions, and laws and policies addressing poverty. Moreover, it suggested that the proposed Authority's functions could be assigned to existing institutions via legislative amendments, as the Bill did not provide any distinct purpose for the proposed poverty eradication Fund. Further, the Commission noted the Bill's failure to adequately capture poverty's root cause — the unequal, inequitable and unfair distribution of national resources. These concerns were acknowledged by the National Assembly's Departmental Committee on Finance and National Planning, which rejected this private member's Bill entirely.[89]

Third, another noteworthy advisory by the NGEC is that directed to 44 principal secretaries, the Private Sector Alliance and 14 hospitals (both private and public), impressing upon them the fact that compliance with the *2017 Health Act* 'requires all employers to support working women to breastfeed at work through the establishment of lactation stations'.[90] Like this one, many of NGEC's advisories are not just addressed to State organs but also to institutions in the private sector.[91]

Fourth, towards achieving its goal to develop standards for the realisation of socio-economic rights, the NGEC has developed 10 standard guidelines, handbooks, model tools and instruments to integrate equality and inclusion of SIGs in the work of national and county governments as well as the private sector.[92] It is reported that, by 2021, 29 counties had established Equality and Inclusion Working Groups and 11 of these were using the Commission's equality and inclusion guidelines in their work.[93] This helps draw attention to the socio-economic needs of those who are either at the margins of society, or need special protection because of their susceptibility to discrimination on the basis of their personal characteristics such as gender, disability, social origin or health status.

Despite the institutions, laws and policies in place to implement the socio-economic rights in Article 43, there have been numerous challenges, especially concerning corruption. For instance, in its 2017/2018 Annual Report, NGEC noted that social protection programmes targeting older members of society have been hindered by mismanagement and corruption during disbursement.[94] The Commission's 2019 to 2024 Strategic Plan emphasises that Kenya's recurring misappropriation of public funds and cases of corruption have resulted in inadequate funding in various government sectors. As a result, NGEC has made it a priority during this period to collaborate closely with national and county government institutions to promote the equitable distribution of resources.[95] This collaborative approach will likely involve engaging in discussions aimed at addressing corruption as well.

87. CCIOF (n 72) 62.
88. Republic of Kenya, *Report of the Departmental Committee on Finance and National Planning on the Poverty Eradication Authority Bill (National Assembly Bill No 13 of 2020)* (Report, 2021) 12–3.
89. Ibid.
90. NGEC, *The First Decade* (n 50) 13.
91. Ibid; NGEC, *Annual Report 2017–2018* (Report, 2018) 5, 8.
92. Ibid; CCIOF (n 72) 63.
93. Ibid.
94. NGEC, *Annual Report 2017–2018* (n 91) 21.
95. NGEC, *Strategic Plan 2019–2024* (Report, 2019) 25.

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C Complaints Handling Mechanisms: Investigations and Redress — Status Reports, Inquiries and Fact-Finding Missions

Both Commissions have internal complaints handling mechanisms and have also sought to redress conflicts that relate to or could exacerbate poverty and economic inequality. They achieve this by directly hearing and processing complaints, conducting investigations and providing redress based on reported complaints, utilising alternative dispute resolution ('ADR') mechanisms and seeking judicial intervention as petitioners, co-petitioners, interested parties or *amicus curiae*.

Between 2020 and 2021, the KNCHR processed a total of 1,001 complaints alleging human rights violations, with 57.2 per cent of them being related to economic, social and cultural rights. Among these complaints, 583 were heard and closed by the Commission, while 113 were referred to its partners for further action. It conducted 113 investigations on the received human rights complaints, instituted 38 public interest court cases and resolved 24 through ADR.[96] During the same period, NGEC received and processed a total of 67 complaints related to violations of gender equality and non-discrimination principles. These complaints covered a range of issues, including cash transfer for the elderly, alleged discrimination based on gender and disability, property dispossession discrimination, land disputes, SGBV, alleged intimidation of a caregiver to a disabled person, unlawful termination and eviction.[97] The NGEC's legal and investigations department successfully processed and resolved 66 per cent of these complaints, while the remaining cases were referred to the appropriate institutions for further action.[98]

The rest of this section highlights a selection of reported complaints that were investigated, reported and subsequently addressed. As previously mentioned, the KNCHR and NGEC have the authority to investigate violations of human rights, equality and non-discrimination through inquiries and fact-finding missions, and to provide recommendations on the same in their status reports.[99] In addition, the Commissions employ financial monitoring to assess the accountability of issues such as resource distribution, ensuring that funds are utilised while upholding human rights.[100]

The KNCHR and NGEC have been actively involved in conducting various fact-finding missions and inquiries on alleged human rights violations that exacerbate poverty and economic inequality experienced by vulnerable groups. Through these investigations, the Commissions have made significant findings and actionable recommendations to address these issues.[101]

The KNCHR's function of addressing forced evictions and displacement of persons has resulted in several successful investigations. One such investigation focused on the alleged forceful eviction of members of the Ogiek indigenous community in Kenya's Nakuru County.[102] The findings revealed that police officers had used excessive force during the evictions, which resulted in the deaths of two people. The Kenya Forest Service and Ministry of Lands' construction of a cutline in the area also led to conflicts between the Ogiek and Kipsigis communities. To address these issues, the KNCHR, through ADR, engaged the Police Regional Commandant, the National Cohesion and Integration Commission and the Kenya Forest Service in Nakuru County. As a result of these

96. KNCHR, *Annual Report 2020/2021* (n 55) 41–2.
97. NGEC, *Annual Report 2020–2021* (2021) 6, 11, 35–9, 83, 92.
98. Ibid 83.
99. See above n 49.
100. See KNCHR, *Civil Society Stakeholders Forum on Mental Health: Memorandum on the Report of the Ministry of Health 'Mental Health and Wellbeing: Towards Happiness and National Prosperity, 2020'* (Report, 2020) 3.
101. CCIOF (n 72) 53 and 64–6.
102. KNCHR, *Annual Report 2020/2021* (n 55) 43.

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efforts, the government established a multi-agency team to find a lasting solution to the problem. The team reached an agreement to allocate land to the Ogiek. The community was also provided with police protection to return to their evicted land and harvest their crops.[103]

Second, in response to a formal complaint received in 2020, the KNCHR conducted a field *Fact-Finding Mission on Alleged Forceful Eviction at the Border Between Taita Taveta and Kajiado Counties, as well as Ziwani Settlement Scheme, Njukini Chala Ward Taveta Sub County, Taita Taveta*, that yielded positive outcomes.[104] The investigation found that unidentified individuals accompanied by security personnel had forcefully evicted residents of Taita Taveta's Njukini area to demarcate the boundaries between Taita Taveta and Kajiado counties. The eviction was carried out without prior notice and despite the residents possessing title deeds. The KNCHR worked with CSOs and representatives from national and county governments to achieve various outcomes. These included the successful resettlement of 12 displaced families from the Ziwani Settlement Scheme and recognition of the Boundary Dispute Agreement between Taita Taveta and Kajiado counties, which was reached on 4 July 2020.[105]

Turning to the NGEC's work, its report on *Unmasking Ethnic Minorities and Marginalised Communities in Kenya* sheds light on the plight of marginalised groups in Kenya, highlighting their socio-economic challenges.[106] The report maps out various marginalised communities and ethnic groups in Kenya, revealing that they suffer from low literacy rates, higher unemployment rates, limited access to transportation and communication infrastructure, lack of social amenities, water scarcity, food insecurity and high levels of poverty.[107] To address this issue, the NGEC recommends classifying ethnic groups whose population is below 0.5 per cent of the national population as minorities.[108] Based on this report, the Commission has partnered with entities such as the Kenya National Bureau of Statistics to ensure the official recognition of indigenous and small communities like the Wardei, Makonde, Shona, Sengwer, Cherengani, Waata, Sanya, Yaaku and the Ogiek in national census, surveys and other data collection exercises.[109] Recognising these groups is crucial as they can then claim the socio-economic and political benefits that are set out in various constitutional provisions for minority and marginalised groups.[110]

Third, the NGEC investigated ethnic clashes that occurred in Kenya's Tana River County.[111] The clashes were mainly driven by a fight for socio-economic resources, with water and grazing land being the key resources at stake. Communities in the area mostly practice crop farming and pastoralism, with the pastoralists (mostly Orma) claiming the right to access water and pasture for their livestock, while farmers (mostly Pokomo) claimed access to fertile farmlands along the river. This eventually led to a violent conflict, as pastoralists saw farmers as blocking their access to water and pasture, whereas farmers saw pastoralists as encroaching on their farms.[112]

103. Ibid.
104. Ibid.
105. Ibid.
106. NGEC, *Unmasking Ethnic Minorities and Marginalised Communities in Kenya: Who and Where?* (Report, 2017).
107. Ibid viii.
108. CCIOF (n 72) 64.
109. Ibid.
110. See *Constitution of Kenya* (n 2) art 56, 90(2)(c), 100(d)–(e), 130(2), 174(e), 177(1)(c), 232(1)(h) and (i), 241(4), 246(4), 250(4).
111. NGEC, *A Fight for Resources or Criminal Acts? The Tana Delta Account on the Plight of the Vulnerable Groups in the Tana Delta Conflict* (Report, 2013).
112. Ibid 8.

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To establish the cause of the violence and its impact on SIGs, the Commission conducted consultative meetings with elders, women and education officials in the area. The NGEC also visited camps for internally displaced persons, schools and affected villages. Based on its findings, the Commission made several recommendations, including offering psychosocial support to victims through the Ministry of Special Programmes and other actors; providing humanitarian assistance for internally displaced persons; allocating resources to address the lack of provision of public services in the area; dealing with inequalities among ethnic groups in employment, education and poverty reduction.[113]

Another significant recommendation was for affirmative action for standard 8 (primary school) and form 4 (secondary school) candidates. This was because the clashes had disrupted their final year third term studies and their preparations for national examinations to exit primary and secondary school, respectively, and move to the next level of their studies. The NGEC noted that the Kenya National Examination Council did not make proper preparations for these candidates. Further, even though national examinations were postponed for three weeks following the countrywide teachers' strike in 2012, no such postponement was given after the tribal clashes in the large Tana River County, despite most of the schools being closed during the clashes.[114] There was thus a bias against children from these marginalised communities, who were not given an equal opportunity to compete favourably with their counterparts from well-off regions through consideration of the harsh conditions in which they study.

This example highlights that the implementation of KNCHR and NGEC reports is often contingent upon political goodwill, which is influenced by 'the vision and posture of the political leadership in power'.[115] The lack of political goodwill resulted in the non-implementation of the NGEC recommendation for affirmative action targeting standard 8 and form 4 candidates.

Further, the two Commissions made significant efforts to investigate and report on the negative impact of government initiatives to curb the spread of Coronavirus that were poorly planned and ended up worsening the plight of vulnerable groups and exacerbating poverty and economic inequality.[116] However, despite the Commissions' efforts, the reports did not result in significant policy changes and initiatives to address the issues they raised. The highlighted areas of concern, such as the rising cost of living, the need to address high out-of-pocket healthcare expenses, ending forced evictions and accommodating persons with disabilities in educational institutions, workplaces and modes of transportation, remain largely unaddressed.[117]

Nevertheless, the examples discussed underscore the critical role that investigations, fact-finding and inquiry reports play in protecting the human rights of vulnerable groups, particularly in cases where violations exacerbate their existing socio-economic disadvantages. These reports are instrumental in enabling the Commissions to advocate for equitable access to social goods and special socio-economic interventions to alleviate poverty and address the economic inequality experienced by marginalised groups. By highlighting these issues and bringing them to the attention of policymakers, the Commissions can push for meaningful change and work towards creating a more just and equitable society for all.

113. Ibid 20–1.
114. *Ndoria Stephen v Minister for Education & 2 Others* [2015] eKLR [9].
115. Kang'ara, Okello and Makokha (n 17) 87.
116. KNCHR, *Nationwide Survey on Human Rights for Vulnerable Groups During the COVID-19 Pandemic: A One Year Perspective on the 'Unrelenting Virus'* (Report, 2021).
117. Ibid 19, 29; KNCHR, *Kenya National Commission on Human Rights Annual Report and Financial Statements 2017/2018* (Report, 2019) 38 ('KNCHR, *Annual Report 2017/2018*').

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D *Complaints Handling through Public Interest Litigation*

Having explored the general complaints handling process and investigations stemming from reported complaints in the previous section, this section focuses on some of the public interest court cases pursued by the Commissions.

One of these public interest cases, *Kenya National Commission on Human Rights & Another v Attorney General & 3 Others,* aimed to prevent the aggravation of poverty and economic inequality by rendering refugees and asylum seekers homeless. The KNCHR filed a constitutional petition challenging the unlawfulness of the threatened closure by the government of Kenya's Dadaab and Kakuma refugee camps, where more than 494,921 registered refugees and asylum seekers reside.[118] The main issue for determination was whether the government had violated the non-refoulement principle in section 18 of Kenya's previous *Refugees Act 2006*, Article 33 of the *1951 Convention Relating to the Status of Refugees* and other regional and international treaties that Kenya has ratified.[119] Nullifying the directive, the Court held that it violated the principle of non-refoulement, was discriminatory and unconstitutional.[120] Another directive on closure of the two camps was successfully challenged in 2021.[121] As of June 2023, both Dadaab and Kakuma refugee camps continue to be operational illustrating that the court orders were somewhat effective. In accordance with Part VII of the Refugees Act of 2021, the government is formulating plans to transform these camps into integrated settlements for refugees to co-exist with host communities.[122]

The NGEC has also been actively involved in equality and non-discrimination cases. In the case of *National Gender and Equality Commission v Majority Leader, County Assembly of Nakuru & 4 Others,* the Commission challenged a motion passed by the Nakuru County Assembly to de-whip nominated members of the County Assembly ('MCAs'), who mainly consisted of NGEC's SIGs such as women, persons with disabilities and youth, from serving as chairpersons and vice-chairpersons in different committees.[123] This motion would have resulted in discrimination against nominated members in taking up leadership roles in the County Assembly, as elected members saw themselves as more deserving of such roles. Further, the case had an economic inequality aspect since it concerned a circular issued by the Salaries and Remunerations Commission capping the mileage allowance of nominated MCAs to the standard mileage provision, which was lower than that of elected MCAs. Joel Ngugi J held that 'nominated and elected members of County Assemblies had equal status and are entitled to equal opportunities, responsibilities and privileges including opportunities for leadership positions in County Assembly Committees'.[124] He also held that 'nominated MCAs represent special interest groups especially the vulnerable, minority and historically marginalized groups such as women, youth, persons with disabilities and racial minorities'.[125] This public interest litigation by the NGEC, therefore, prevented this particular reinforcing of economic inequality.

118. Jemutai et al (n 76) 1; *Kenya National Commission on Human Rights & Another v Attorney General & 3 Others* [2017] eKLR (*'Non-refoulement Case'*).
119. *Refugees Act No 13 of 2006* (Kenya); *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137.
120. *Non-refoulement Case* (n 118) 21–2.
121. *Legal Advice Centre T/A Kituo Cha Sheria v Ministry of Interior and Coordination of National Government & Others*, Petition No E123 of 2021.
122. *The Refugees Act No 10 of 2021* (Kenya); Mary Wambui, 'Dadaab, Kakuma Refugee Camps to Transition into Integrated Settlements' *Nation* (Nairobi, 10 May 2023).
123. *National Gender and Equality Commission v Majority Leader, County Assembly of Nakuru & 4 others; Jubilee Party & Another (Interested Parties)* [2019] eKLR.
124. Ibid [70].
125. Ibid.

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These examples demonstrate that the involvement of the KNCHR and NGEC in public interest litigation plays a crucial role in holding State actors accountable for human rights violations and ensuring the protection of human rights, especially in the prevention of poverty and economic inequality.

Nevertheless, the ability of the Commissions to use public interest litigation to uphold socio-economic rights and equality is negatively impacted by the prevailing culture of impunity in Kenya, which manifests in the non-adherence to court orders by government organs.[126] This is evident in the case of Parliament's persistent failure to implement Article 27(8) of the Constitution and related provisions, which stipulate that not more than two-thirds of the members in elective and appointive bodies should be of the same gender. Despite the various legal interventions and initiatives by the Commissions and other entities, the rule remains unimplemented, which undermines the Commissions' efforts to promote gender equality and prevent discrimination.[127]

IV Challenges, Opportunities and Emerging Trends in Human Rights and Equality Commissions as Fourth Branch IPDs

Based on the discussion in Part III, several challenges, opportunities and emerging trends in human rights and equality commissions as fourth branch IPDs and contributing to the reduction of poverty and economic inequality have been identified. These are outlined below.

A *Overlapping Mandates*

Despite efforts to clearly define the division of tasks between the KNCHR and NGEC, their work often overlaps due to several reasons. First, some of their SIGs such as persons with disabilities, children and refugees are similar, leading to duplicity of effort. Second, they sometimes review the same laws and policies, which creates confusion.[128] The overlapping mandates of the two Commissions resulted in the proposed *Kenya National Commission on Human Rights (Amendment) Bill* of 2020, which suggested the merger of the KNCHR and NGEC to solve the problem of overlapping mandates, enhance effectiveness and save taxpayers money. However, the NGEC opposed the merger, stating that it would lead to a 'loss of strategic clarity and focus' as they have many unique focus areas.[129] Although the Bill was published in the Kenya Gazette in February 2020 for introduction into the National Assembly, there is no documented information regarding its progress thereafter.[130] However, it is evident that the Bill did not receive parliamentary approval and was not passed into law. Close collaboration in thematic areas where their mandates overlap is essential for effective utilisation of resources and better coverage of issues. Therefore, an emerging trend is the need to address the silo mentality of such IPDs in tackling related issues.

126. David Maraga, 'Statement on Failure to Comply with Court Orders' (Republic of Kenya (Judiciary), 7 February 2018); Moses Michira, 'Contempt of Court Risks Sliding Kenya into Disorder', *Standard Digital* (11 February 2018).
127. David Maraga, 'Chief Justice's Advice to the President on Dissolution of Parliament for Failure to Enact the Gender Rule' (Republic of Kenya (Judiciary), 21 September 2020); NGEC, *The First Decade* (n 50) 15; CCIOF (n 72) 67.
128. See above nn 50–1 and accompanying text.
129. 'Statement on proposed merger of NGEC and KNCHR' *NGEC* (Web Page, 17 March 2020) <https://www.ngeckenya.org/news/8237/statement-on-proposed-merger-of-ngec-and-knchr>.
130. *Kenya National Commission on Human Rights (Amendment) Bill 2020* (Kenya).

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B *Reach*

The KNCHR and NGEC are headquartered in Nairobi and their regional branches are mostly located in urban centres making their services inaccessible to many of the poor and marginalised in rural areas.[131] Adding to this concern, most human rights NGOs in Kenya, such as KHRC, Haki Africa and the Kenya Chapter of the Federation of Women Lawyers, only have branches in urban areas, hindering the scaling up of their positive impact on the society.[132] Pro bono services are also largely inaccessible for the rural population.[133] The KNCHR has noted that its limited regional presence and accessibility is a challenge to its workings.[134]

Furthermore, limited staffing affects the Commissions' reach. In the 2017/2018 financial year, the KNCHR had only 106 in-post staff, which fell short of the recommended staffing number of 205.[135] This shortage of personnel persisted despite the Commission receiving over 3,437 complaints during that period.[136] This shortage of staff impedes the Commissions' ability to effectively promote and protect human rights. To overcome these challenges, it is crucial that the Commissions expand their regional presence and collaborate with local organisations to reach more rural areas, while also addressing staffing shortfalls.

On a positive note, the Commissions' oversight role applied to private sector actors who adopted their standard setting and mainstreaming guidelines.[137] This not only legitimises their work but also demonstrates the horizontal reach of their efforts.

C *Resourcing*

Despite the high demand for their assistance, the KNCHR and NGEC face significant challenges related to the lack of adequate resources to run their programmes. Financial autonomy is a major impediment to the KNCHR's work, with the government often delaying disbursement of funds.[138] Additionally, the KNCHR has experienced consistent budget cuts by the exchequer in recent years, negatively impacting its ability to meet set targets. For example, over the past seven years, its funding has decreased significantly from Ksh 463.02 million (US$3.76 million) in the 2014/2015 financial year to Ksh 398.76 million (US$3.43 million) in the 2017/2018 financial year.[139] Such funding cuts impede the Commissions' ability to effectively address human rights violations and provide adequate assistance to those in need, which contravenes Article 249(3) of the *Constitution*. This provision obliges Parliament to allocate sufficient funds to the Commissions to enable them to fulfil their functions appropriately. As Obura aptly argues, it also threats their independence as fear of budget cuts could make them reluctant to criticise the government.[140]

131. The KNCHR's branches are in Mombasa, Kisumu, Kitale, Nyahururu and Wajir and those of the NGEC in Nakuru, Kisumu, Kitui, Garissa and Malindi.
132. Danish Institute for Human Rights ('DIHR'), *Access to Justice and Legal Aid in East Africa: A Comparison of the Legal Aid Schemes used in the Region and the Level of Cooperation and Coordination between the Various Actors* (Report, 2011) 38, 43.
133. Ibid 4.
134. See KNCHR, *Annual Report 2017/2018* (n 117) 38.
135. Ibid 4.
136. Ibid 10–11.
137. See above nn 90–1 and accompanying text.
138. KNCHR, *It's Hard to be Good: The Work, the Wins and Challenges of the Kenya National Commission on Human Rights, July 2003–August 2011* (2012) 21, 26–7 ('KNCHR, *It's Hard to be Good*').
139. KNCHR, *11th Annual Report 2013/2014* (2014) 11; KNCHR, *Annual Report 2017/2018* (n 117) 3–4.
140. Obura (n 28) 346.

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However, the KNCHR and NGEC's work in safeguarding people's socio-economic rights and equality has attracted many local and international development partners. These include the Royal Danish Embassy, Uraia Trust, the European Union, the Royal Netherlands Embassy and Royal Norwegian Embassy, which provide the Commissions with additional financial resources that enable them to conduct more resource-intensive work like the aforesaid POLICARE example.[141] Notably, in the 2017/2018 financial year, the KNCHR received Ksh 190.65 million (US$1.64 million) in funding from development partners.[142]

D *Political Goodwill*

The effectiveness of the Commissions as government watchdogs is impacted by their dependence on government goodwill.[143] One example is the KNCHR's struggle to hold duty bearers and agencies such as the National Police Service accountable for human rights violations due to their non-responsiveness or limited responses.[144] Moreover, lack of cooperation from public and private institutions has been identified as a major obstacle to resolving complaints in a timely manner.[145]

Nevertheless, unlike in the past, where reports were made on problems facing the country, but little was done to address them, the two Commissions' engagement and collaboration with other stakeholders with implementation powers, and their follow-up actions, reveal that positive action is possible, and that the culture is changing.[146] The small wins are as meaningful as the big ones, and the NGEC's report on *Unmasking Ethnic Minorities and Marginalised Communities in Kenya* demonstrates that recommendations can be implemented by piecemeal, over time, and that reports can be useful in future initiatives. Reports spark discourse, reflection and engagement on issues affecting SIGs. Such data is crucial to inform future reforms, reviews of laws and policies, and to address reported matters.

V Conclusion

This article has highlighted the advantages of the constitutional entrenchment of the KNCHR and NGEC, which gives them more credibility, legitimacy and freedom in carrying out their work compared to NGOs. As highlighted, the latter face various hurdles, such as de-registration threats, when they speak out against violations of fundamental rights by state organs.

The Commissions' oversight and investigation roles are crucial in addressing and preventing the exacerbation of poverty and economic inequality in various ways. First, the Commissions' reports on the status of human rights and equality issues in Kenya, as well as existing gaps, emphasise the importance of data in driving transformation. They serve as a basis for the Commissions and other entities, or individuals, to seek redress for socio-economic rights and equality violations that exacerbate poverty and economic inequality. The provision of empirical data also provides a

141. KNCHR, *Annual Report 2017/2018* (n 117) 4; KNCHR, *It's Hard to be Good* (n 138) 19; see above nn 65–7 and accompanying text.
142. KNCHR, *Annual Report 2017/2018* (n 117) 4.
143. See above nn 115–17 and accompanying text.
144. KNCHR, *Annual Report 2017/2018* (n 117) 38.
145. Ibid.
146. TJRC, *Volume IV* (n 3) iii.

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scientific basis for resource allocation to meet the socio-economic rights of vulnerable groups, thereby alleviating poverty and economic inequality.

Second, tackling poverty and economic inequality requires a collaborative approach. The Commissions' independence has given them domestic and international credibility, attracting additional funding from development partners to meet their targets. Such collaborations have enabled them to engage in multi-institutional activities touching on humanitarian assistance and the delivery of social goods and services to the people, reducing poverty and economic inequality.

However, despite the positive trends in the Commissions' work as fourth branch IPDs, various challenges, such as resource constraints and dependence on political goodwill, could undermine their effectiveness in helping to translate human rights, especially socio-economic rights, into reality.

ORCID iD

Victoria Miyandazi https://orcid.org/0000-0001-9124-7145

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