

# KENYA'S NATIONAL HUMAN RIGHTS LEGISLATIVE FRAMEWORK AND PROTECTION MECHANISMS



**Constitution  
of Kenya**



**Policies and  
Action Plans**

**Regulations**

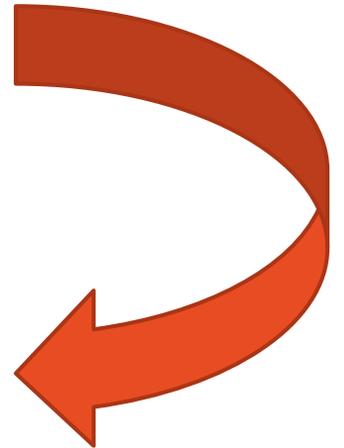
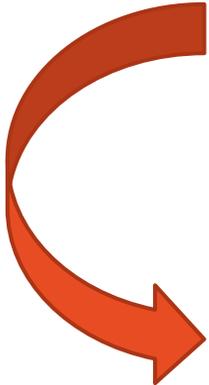


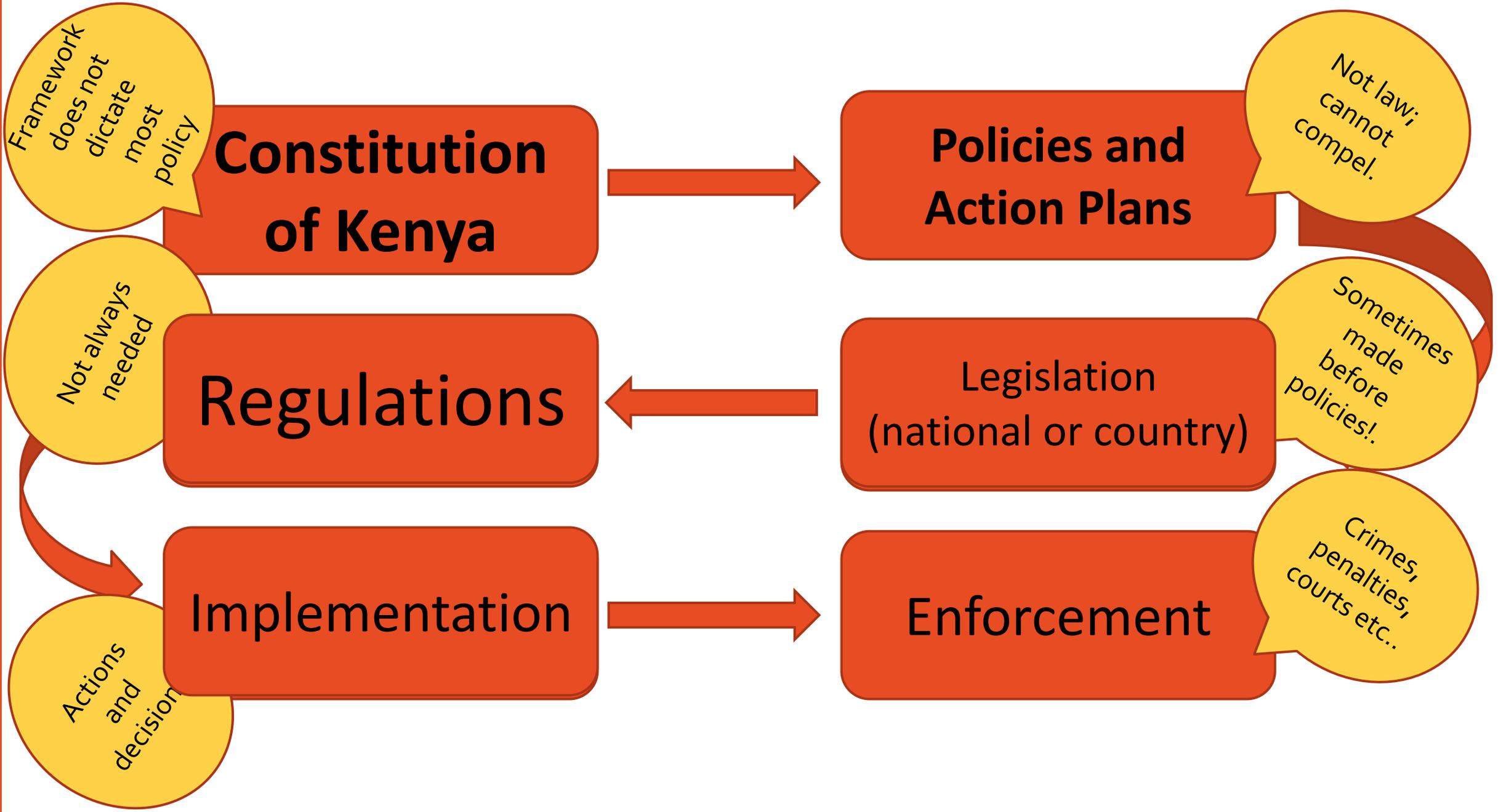
**Legislation  
(national or  
country)**

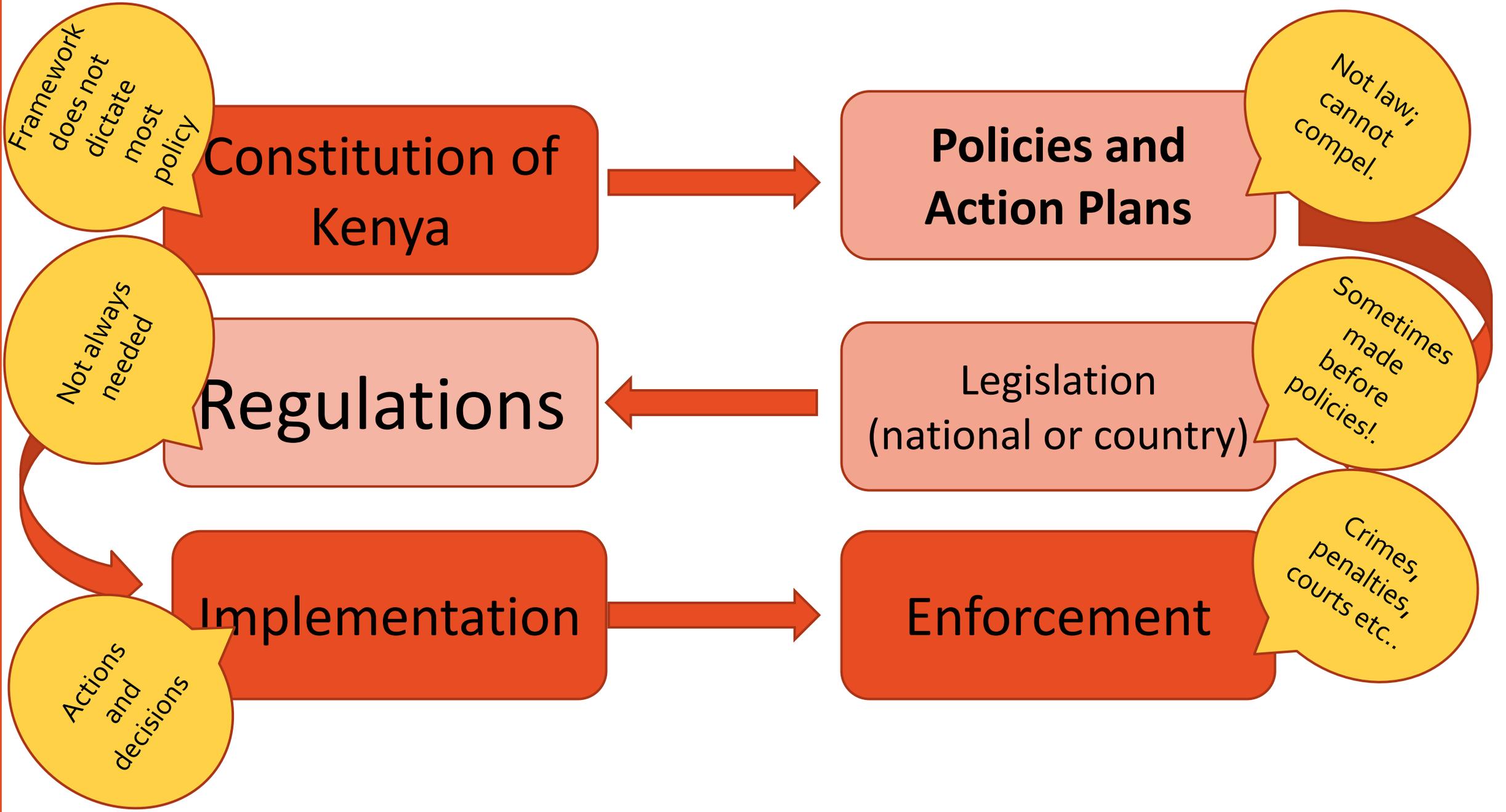
**Implementation**



**Enforcement**







# The theory of human rights

- We have those rights because we are human
  - Not because the government allows us to have them
  - Not even because of international law!
- This is why the constitution says they are “recognized and protected”
- But they will not have overriding power unless they have the status of the constitution
- “The purpose of recognising and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings”

# The impact of the Bill of Rights

- Applies to all law and binds all State organs and all persons.
- It is a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights
- Many rights are of everyone not just citizens
- Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.

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# Rights may be limited

(except a few not so relevant to us)

- Only so far as is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom
- Which means taking account of all relevant factors including
  - the nature of the right or fundamental freedom;
  - the importance of the purpose of the limitation;
  - the nature and extent of the limitation;
  - Proportionality
    - the relation between the limitation and its purpose
    - whether there are less restrictive means to achieve the purpose.
- Anyone who wishes to justify a limit on a right has the responsibility to show that the requirements of this Article have been satisfied – or the limitation is ineffective.

# Relationship to international human rights law

- The State shall enact and implement legislation to fulfil its international obligations in respect of human rights and fundamental freedoms.
- Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution
- Notes:
  - Kenya signed but has not ratified the treaty on enforced disappearances
  - Kenya may accept all of a treaty except certain aspects
    - E.g. abortion in the Maputo protocol
    - Though how far a country can have reservations to human rights treaties is controversial
  - Now ratification of a treaty requires parliamentary approval.

# Does international law matter?

- If there is a gap, can use international law to fill it
  - BUT – may be a bit of a problem if there was a deliberate decision not to include some right in the Constitution
  - Actually, most of the rights are reflected in the Constitution
  - When the Constitution does reflect international law. Is a clear invitation to look at General Comments etc.
- “With regard to the justiciability of social economic rights which the 2<sup>nd</sup> respondent also challenges, I can do no better than to quote **General Comment No. 9 on the Domestic Application of the International Covenant on Economic, Social and Cultural Rights, CESCR, General Comment 9,**” *Mitu-Bell*
  - I believe that the starting point would be a reference to the UN Committee on Economic, Social and Cultural Rights (CESCR) which has adopted two general Comments. I am convinced that these Comments are crucial in clarifying the interpretation of the right to adequate housing and the nature of the State Parties' obligations and I shall specifically focus on General Comment 4 on the right to adequate housing and General Comment 7 on forced evictions. *Muthurwa*

# Rights that may be particularly relevant:

- Equality
  - Especially affirmative action
  - Rights to land
- Speech, association and assembly
- Information
- Fair administrative action
- Rights of special groups
  - Children
  - Elderly
  - Persons with disability
  - Minorities and marginalized
- Property
- Housing
- Water and sanitation
- Health
- Environment

# Equality.....especially

## Affirmative action

- To make up for past discrimination
- Could include:
  - Special grants for women
  - UWEZO
  - Housing preferences
  - etc.
- Note: those benefiting must be in need
  - Past discrimination alone not enough

## Rights to land

- Are some special provisions but do not appear as rights:
- Parliament must pass law to “regulate the recognition and protection of matrimonial property and in particular the matrimonial home during and on the termination of marriage” (Article 68).
- One objective of land management is to be the “elimination of gender discrimination in law, customs and practices related to land and property in land” (Article 6o).

# BUT

- Earlier drafts for a new Constitution said
- “Women and men have an equal right to inherit, have access to and control property”.
- Survived until the second draft of the Committee of Experts in 2010.
- Removed by the MPs at Naivasha.
- Not strictly necessary, but.....

# And.....

## Speech, association and assembly

- Very important supports for political organizing and advocating

## Information

- All citizens have the right to information held by government
  - Subject to exceptions that are less likely to be relevant to land rights, but do include
    - Privacy
    - National security
  - Can be overridden in public interest.

# As well as .....

- Fair administrative action
  - Any decision (or action) including
    - Issuing title deeds
    - Eviction notices
    - Land Control Board
    - Related to agriculture
  - Must be
    - Lawful
    - Reasonable
    - Procedurally fair
      - Adequate notice
      - Chance to object
      - Reasons given
      - Way to appeal
- Rights of special groups
  - Children
  - Elderly
  - Persons with disability
  - Minorities and marginalized
- None specific to land

# Plus.....

- Property

- Everyone has a right to own etc
- No law to allow arbitrary deprivation
- State cannot take land (or any interest)
  - Unless for public purpose or in public interest
  - Law requires prompt compensation
- Occupants not owners in good faith may be compensated
  - Good faith
  - May not shall

- Housing

- To accessible and adequate housing
- State must work towards
- Does not mean it has an excuse for not starting now
- Still has duty to respect – which means not to actively interfere with

# And

- Water and sanitation
  - Also to be achieved “progressively”
- Health
  - Highest attainable standard
  - Including reproductive
- Environment
  - Clean and healthy
  - Including for future generations
  - Public participation

# Understanding Article 43 rights

- Progressive realization
  - Can't expect to get there all at once
    - There is no such thing as a state of full realisation
- Respect
  - Not to do something positive to violate
    - E.g. forceful eviction
- Protect
  - Against the actions of others
    - Laws, police etc
- Promote
  - Encourage, educate, incentivize
- Fulfil
  - Take positive actions to fulfil, e.g. build houses, provide food
- Resources
  - If government says "We don't have resources" they have to prove it.
  - State must give priority to widest enjoyment
    - Factor in vulnerability of groups and individuals

# Policy and planning for human rights I

## National Human Rights Policy and Action Plan

To address the challenges for women the Government will:

1. Take measures to empower women to claim their rights;
2. Ensure the equitable representation at all levels of decision making;
3. Strengthen institutions that promote women's rights; and
4. Implement policies and laws to eliminate discrimination against women and promote equity.

Promises affirmative action to ensure that minorities and marginalised groups realize all the rights including

- Measures to ensure the protection of ancestral land and other rights of these groups in line with the National Land Policy.

• Will -

- Pass law on evictions
- Stop land grabbing
- Efficient land transactions
- Remedy historic land injustices

And

- Measures to ensure security of tenure for all particularly vulnerable and marginalized;
- Ensure that housing is provided within the framework of legal security of tenure, habitability, location, availability of utilities, economic and physical accessibility as well as cultural acceptability;

Expected outcome	Outcome indicators
Legislative, policy and other measures to guarantee the right of access to adequate housing developed	Number of legislations, policy and other measures to guarantee the right of access to adequate housing
Access to adequate housing for the vulnerable and marginalized increased	Number of housing units constructed for the vulnerable and marginalized guided by the constituent elements of the right to housing including access to clean and safe water, sanitation facility, electricity and garbage disposal
Planning and implementation of housing projects targeted for vulnerable and marginalized groups effectively involve and consult them	Number of houses constructed per year targeted for vulnerable and marginalized groups effectively involve and consult them
All people living in decent [sic – decent!] shelter	Proportion of homeless people in the overall population
Security of tenure provided	<p>Proportion of people in the overall population with legal title to their homes, with statutory or other legal protections with respect to evictions</p> <p>Proportion of people living in informal settlements</p> <p>Proportion of people forcibly evicted within a given period</p>

Expected outcome	Outcome indicators
Situations of people living in housing situated in unsafe and unhealthy locations eliminated	Proportion of poor households within 5 kilometres of a hazardous site
Improve provision of adequate affordable housing	Monthly housing expenditure of median poor household as a proportion of monthly income
Improved adequacy of physically accessible housing	Proportion of residential buildings occupied by the disabled that are easily accessible
Improved provision of housing services	Proportion of households with potable water, sanitation facilities, electricity, roads

# Examples of Laws relevant to human rights

## Land Act

- “matrimonial home” cannot be mortgaged without consent of both spouses.
- Mortgage can be reopened!
- 2016 amendments on Eviction notices\procedure

## Water

- Every person in Kenya has the right to clean and safe water in adequate quantities

## Access to Information Act

## Fair Administrative Act

## Health Act

- Objects Include protect, respect, promote and fulfill the health rights of all persons in Kenya to the progressive realization of their right to the highest attainable standard of health, including reproductive health care and the right to emergency medical treatment;
- the rights of children to basic nutrition and health care services
- of vulnerable groups .. regarding health

## Basic Education Act

- the right of every child to free and compulsory basic education

## Tax

- Affordable housing tax relief
- Stamp duty relief for first time buyers

# How about counties?

- They could not form a human rights commission (I think)
  - Protection of human rights not a county function
- But they are bound by the constitution
  - Their laws and actions must not violate human rights
  - Because they have functions on health, agriculture, land etc.
    - They will sometimes have a duty to take positive steps to realise human rights

# Institutions

- **Commissions**
  - **Kenya National Human Rights Commission**
    - General Mandate
  - **National Gender and Equality Commission**
    - Equality
    - Particular groups
  - **Commission on Administrative Justice**
    - Article 47 – fair administrative justice
    - Article 35 – access to information
- **Receive individual complaints**
  - Investigate
  - Conciliate
  - Recommend
- **Initiate investigations**
- **Study particular rights related issues**
- **Can go to court**
- **Supposed to help achieve rights compliant nation**

# Courts

- **Have a special role**
  - Have the last word on what the constitution means
  - Can declare a law unconstitutional (especially but not only because violates human rights)
  - Can declare an action of government unconstitutional
- **Limited to the High Court and higher**
- **Procedure**
  - Anyone can claim their own right violated
  - A person or group can claim the rights of others' are violated
    - If they are unable to do so themselves
  - Or that the public interest is affected
  - Is supposed to be a very simple procedure
    - Informal documentation
    - Never used
  - Is supposed to be no court fee
  - Usually no award of costs if lose.

# A few examples

## Mitubell in High Court

- “Granted, also, that these rights are progressive in nature, but there is a constitutional obligation on the state, when confronted with a matter such as this, to go beyond the standard objection that the petitioners have not demonstrated a right to the land, or how their rights have been violated. Its obligation requires that it assists the court by showing if, and how, it is addressing or intends to address the rights of citizens to the attainment of the social economic rights, and what policies, if any, it has put in place to ensure that the rights are realized progressively, and how the petitioners in this case fit into its policies and plans.”
- “That the respondents do engage with the petitioners, Pamoja Trust, other relevant state agencies and civil society organizations with a view to identifying an appropriate resolution to the petitioners’ grievances following their eviction from Mitumba Village.”

# But in the Court of Appeal

- “The trial court erred in abdicating its judicial function and bestowing the same to persons and entities not vested with the constitutional mandate to identify and determine appropriate relief and resolution to the petitioners’ grievances.”
- “It is advisable to bear in mind that in interpretation of the Constitutional Articles on socio-economic right, it is not the role or function of courts to re-engineer and redistribute private property rights. Re-engineering of property relationship is an executive and legislative function with public participation. In the absence of a legal framework, courts have no role in the guise of constitutional interpretation to re-engineering, take away and re-distribute property rights.”
- **IT’S GOING TO THE SUPREME COURT!**

# Property on divorce

- **J A O v N A [2013]**
  - We do not have to wait until the matrimonial property bill is enacted into law to start applying what is contained therein. The constitution, international conventions and treaties which have been ratified by Kenya have shown the way.
  - The Plaintiff herein has demonstrated that she contributed towards the acquisition of the properties in question. Her contribution need not necessarily have been financial. I find that she is entitled to half share of all the properties which have been found to be matrimonial property.

**BUT**

- **Federation of Women Lawyers Kenya (FIDA) v Attorney General**
- **Cases are of equal status!**

# Police

## Really?

- **The National Police Service must comply with constitutional standards of human rights and fundamental freedoms;**
- **train staff to the highest possible standards of competence and integrity and to respect human rights and fundamental freedoms and dignity;**