



Hakijamii Trust

The Right to Social Security in Kenya

**The gap between international human rights and
domestic law and policy**

Parallel Report to Committee on Economic, Social and Cultural Rights

Article 9 of the Covenant

November 2007, Nairobi, Kenya

Table of Contents

1. The right to social security: An introduction.....	2
2. Social security in Kenya.....	4
2.1 Lack of legal and policy framework	4
2.2 Retirement Benefits Act, 1997 and Retirement Benefits (Amendment) Act, 1998	5
2.3 The National Hospital Insurance Fund Act, 1998.....	6
2.4 The National Social Security Fund Act, Chapter 258.....	8
2.4 The Pensions Act, Cap. 189	9
3. Conclusion and recommendations.....	10

1. The right to social security: An introduction

According to the International Labour Organisation (ILO), about 80 per cent of the world’s population have no access to formal social security beyond the possibilities presented by informal networks such as family, kinship groups or communities.¹ In other words, four out of every five people in the world live in conditions of social insecurity. This proportion is even higher in countries of sub-Saharan Africa where more than 90 per cent of the population is generally not covered under any social security scheme.² In Kenya, existing pension schemes are limited to formal sector workers. The ILO estimates that ‘about 84 per cent of the labour force is excluded, while many of those who are covered receive benefits that fall short of their basic needs. In addition, basic health care remains out of reach for the 56 per cent of Kenyans who live in poverty’.³

One of the factors that have contributed to this scenario, especially in countries of sub-Saharan Africa, is the absence of laws and policies on social security, which means that whatever social security programmes exist are not the product of coherent, co-ordinated and participatory policy-making processes. Even where laws and policies exist, these are

¹ According to the ILO, social security includes all measures that are intended *to provide income security and alleviate poverty* in conditions of old age, sickness, invalidity, maternity or unemployment; *measures to guarantee access to medical care, health and social services* and measures designed to *protect the income, health and wellbeing* of workers and their families. See ILO, “Social Security for All: Investing in Global Social and Economic Development”, *Issues in Social Security, Discussion Paper No. 16 August 2006* (Social Security Department, ILO), p. 5.

² ILO/Wouter van Ginneken, *Extending social security: Policies for developing countries. ESS Paper No. 13.*(Geneva, International Labour Office, 2003, p. 7.

³ ILO Press Release, th December 2004, “ILO Global Campaign on Social Security Launched in Kenya” available at http://www2.ilo.org/public/english/protection/secsoc/downloads/about/pressrelease_091204.pdf accessed on 4th November 2007

oftentimes at variance with international human rights standards and principles on the right to social security.

The right to social security cuts across a number of provisions of the International Covenant on Economic, Social and Cultural Rights - e.g. provisions on the right to work, to just and favourable conditions of work, to adequate standard of physical and mental health, adequate standard of living etc. - but is explicitly mentioned in Articles 9 and 10.

Article 9 provides that “the States Parties to the present Covenant *recognize the right of everyone to social security, including social insurance*”⁴ while Article 10(2) requires that “special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave *with adequate social security benefits*”⁵.

The right to social security awaits a formal definition from the Committee but the draft General Comment on the Right to Social Security indicates that it covers the right to access benefits through a system of social security in order to secure adequate income security access to health care and family support.⁶ The Committee’s accompanying explanation, its revised guidelines for state reporting⁷ and general practice indicate that the benefits should fall into the nine categories agreed to by States in ILO Conventions, namely: medical care, sickness, unemployment, old-age, employment injury, family, maternity, invalidity, and death of family members.

In order for the right to social security to be realised, the social security system must:⁸

- a) Be *available* and established under national law; which should include being financially viable, sustainable and responsive to conditions;
- b) Provide *adequate* benefits in amount and duration of payment;
- c) Be *accessible* so as to extend social security provision to those lacking coverage, especially those in the ‘informal economy’, economically affordable, physically accessible with access to relevant information and participation.
- d) Be available to all persons equally and without discrimination on any grounds

⁴ Emphasis added

⁵ Emphasis added

⁶ The Draft General Comment on the Right to Social Security [E/C. 12/GC/20/CRP.1 16 February 2006], Item 5 of the provisional agenda of the 36th Session of the Committee on Economic, Social and Cultural Rights, Geneva, 1-19th May 2006, para. 2.

⁷ *Official Records of The Economic and Social Council*, 1991, Supp. No.3 (E/1991/23-E/C.12/1990/8), Annex IV.

⁸ This is drawn from the Draft General Comment on Right to Social Security (n. 6 above). It accords with scholarly work including M. Langford, ‘The Right to Social Security and Implications for Law, Policy and Practice’, in E. Riedel (ed.) *Social Security as a Human Right: Drafting a General comment on Article 9 ICESCR – Some challenges* (Berlin: SpringerVerlag, 2006), pp. 29-53 and L. Lamarche, ‘The Right to Social Security in the International Covenant on Economic, Social and Cultural Rights’, in A. Chapman and S. Russell, (eds.), *Core Obligations: Building a Framework for Economic, Social and Cultural Rights*, (Antwerp/Oxford: Intersentia, 2002), pp. 87-114.

- e) Pay special attention and afford special protections, to vulnerable groups such as women, children and youth, persons with disabilities, those in the informal sector, persons with disabilities, older persons, minority groups, non-nationals and prisoners and detainees.⁹

While these provisions bestow on individuals the right to social security, they also place on the State the duty to uphold these rights. Under Article 2 of the ICESCR, Kenya has a general obligation to use all appropriate means, including the adoption of legislative measures, to progressively ensure the full realization of the rights recognized in the Covenant and to guarantee their exercise without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.¹⁰ Under Article 3, States must ensure men and women can equally enjoy the right.

In accordance with the Committee's jurisprudence, States' Parties have a specific obligation to respect, protect and fulfil the right without discrimination. The duty to fulfil includes taking deliberate, concrete and targeted steps in the form of law, policy and programmes, adopting and implementing a national social security strategy and plan of action, ensuring a minimum essential level of social security for all.

2. Social security in Kenya

2.1 Lack of legal and policy framework

In Kenya, the achievement of universal and affordable access to social security, reduction of income insecurity, reduction of the unequal access to opportunities, and removal of discrimination has been slow due to a number of factors. These include high poverty levels, changes in the country's demography represented by an increase in the population of older people, spread of diseases such as HIV/AIDS and the resultant burden on existing social security arrangements,¹¹ global migration patterns resulting in a high non-national labour force, refugee crisis, changing family structures and values etc. In the words of the ILO, it requires the adoption of a "comprehensive policy response".¹²

Despite this glaring need, Kenya does not have a conducive constitutional, legislative, policy and institutional environment. First, the Constitution of Kenya, which is the country's supreme law that provides for other fundamental rights and freedoms, does not recognise the right to social security. The Government has not domesticated the provisions of international treaties and conventions on the right to social security, a pre-requisite before such provisions can be invoked in domestic court. This has a number of negative implications:

⁹ Article 68 of Convention 102 on 'Equality of Treatment of Non-National Residents' provides that non-national residents shall have the same rights as national residents subject to certain exceptions.

¹⁰ Article 2 of the International Covenant on Economic, Social and Cultural Rights.

¹¹ By the end of 2005, according to HelpAge International, between 990,000 and 1.3 million Kenyans above the age of 15 were infected with HIV. In that year, 140,000 people, most of them young, died from AIDS leaving behind more than 1.1 million AIDS orphans in the country.

¹² ILO, 'Social Security for All' (n. 1 above), pp. 27, 32.

- a) persons who have no access, or have inadequate access, to social security cannot make any claim or demand for social security as a matter of right and the State and other actors have no enforceable legal duty to provide that right;
- b) persons whose right to social security has been violated cannot avail themselves of the substantive and procedural protections afforded by the Constitution such as having an automatic right of audience before the High Court or even obtaining restitutive orders etc.

Second, Kenya does not have an official policy on social security, social insurance or other form of social protection. This means that whatever legislative or institutional interventions exist or are made from time to time do not flow, emanate or derive from a clear, central, co-ordinated policy locus.

Third, social security in Kenya is regulated and provided for under a plethora of laws- the Retirement Benefits Act, 1997, the Retirement Benefits (Amendment) Act, 1998, the National Social Security Fund Act, the National Health Insurance Fund Act, the Pensions Act and the Pensions (Increase) Act. Each of these is critically examined below:

2.2 Retirement Benefits legislation

The Retirement Benefits Act (hereafter ‘RBA Act’) establishes the Retirement Benefits Authority which is a regulatory and supervisory body charged with the responsibility of “regulation, supervision and promotion of retirement benefits schemes, the development of the retirement benefits sector and for connected purposes”.¹³ However, the Authority does not constitute a retirement benefits scheme, does not receive contributions from members, does not pay benefits to scheme members, does not hold scheme funds, does not direct schemes where to invest their money but only gives broad guidelines as to how scheme funds are to be invested and does not pay any money to the Government. Thus, apart from playing its regulatory and supervisory role, the Authority does not play any substantive role of its own in promoting the right to social security.

In the course of its duties, the Authority has acknowledged the existence of some operational challenges to the growth of the social security sector in Kenya. These include under-funding of social security schemes especially in the public sector, poor investment of scheme funds leading to poor returns for members, misappropriation of scheme funds due to member's lack of adequate awareness, poor administration and record keeping leading to long delays in payment of benefits to members, excessive interference by sponsors in scheme affairs, denial of benefits to certain staff members on spurious grounds etc.¹⁴

¹³ Preamble to the Retirement Benefits Act, 1997. According to Section 5 of the Act, the objectives of the Authority are to regulate and supervise the establishment and management of retirement benefits schemes, protect the interest of members and sponsors of the schemes; promote the development of the retirement benefits industry; advise the Minister for Finance on the national policy to be followed with regard to the retirement benefits industry and to implement all government policies relating thereto.

¹⁴ Retirement Benefits Authority website <http://www.rba.go.ke> visited on 30th October 2007.

2.3 The National Hospital Insurance Fund Act

The National Hospital Insurance Fund Act (1998) establishes the National Health Insurance Fund ('the Fund') and the Fund Management Board and provides for contributions to and the payment of benefits out of the Fund. The Act has a number of progressive provisions:

- a) It attempts to promote the principle of all-inclusiveness and participation of all sections of society in the management of the Fund by providing a slot for one representative of non-governmental organisations involved in the provision of healthcare services in the Fund Management Board (Section 4(1)(l)).
- b) It allows contributions to the Fund from both persons who are in salaried employment as well as those whose income is derived from self-employment (Section 15).
- c) The Fund offers monthly premiums that are low (ranging from Kshs 30 to Kshs 320) compared to those of conventional insurance schemes, which are actuarially determined.¹⁵
- d) In relation to the benefits offered, NHIF has no provision for exclusions. As such, all medical conditions are covered, including maternity cases; there is also no limit as to the number of a beneficiary's dependants;
- e) It provides for both in-patient and out-patient cover although, in practice, up to now, only in-patient benefits are offered.

However, despite these laudable contributions of the NHIF Act, there are a number of shortcomings that undermine the full realisation of the right to social security for the majority:

- a) Even though the periodic contributions to the Fund are low compared to contributions prescribed under commercial schemes, due to the high poverty incidence in the country, these amounts are still beyond the reach of most Kenyans. This explains why most have not been able to join. To date, the fund covers only about 20-30 per cent of the population and is more skewed in favour of the formal sector, leaving out the population categories in the informal sector.¹⁶
- b) Section 19(2) of the Act imposes a penalty on persons liable to pay a special contribution for not paying on due date to pay 'a penalty equal to five times the amount of the contribution.'¹⁷ This penalises the poor, the unemployed and casual labourers and others in the informal sector who do not rely on a regular income to pay their contributions.
- c) At the operational level, the NHIF faces a number of challenges, which were revealed by a study conducted by the Institute for Policy Analysis and Research in

¹⁵ IPAR, 'Social Health Insurance Scheme for All Kenyans: Opportunities and Sustainability Potential', *IPAR Policy Brief*, Vol. 11, No. 2 (2005), p. 2.

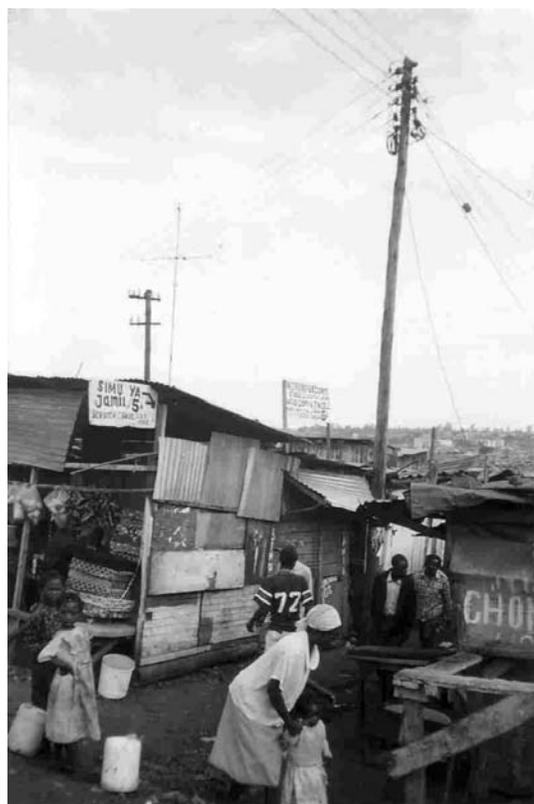
¹⁶ Ibid.

¹⁷ Section 19(2) of the NHIF Act provides: "If a special contribution which any person is liable to pay under this section is not paid on or before the day on which the payment is due, a penalty equal to five times the amount of the contribution shall be payable by that person for each month or part thereof during which the contribution remains unpaid, and any such penalty shall be recoverable as a sum due to the Fund and when recovered shall be paid into the Fund".

2005: “poor quality service delivery; inefficiency in collections; limited coverage; bureaucratic obstacles (the fund reports to treasury on financial matters and to MOH on administrative issues); tedious claiming process, with high transaction costs that are characterized by fraud and abuse. As such, the fund remains non-accountable to its members and less responsive to their needs.”¹⁸

- d) In terms of accessibility, as at 2005, NHIF had offices in less than half of the then 72 of Kenya’s administrative districts, and about 400 accredited health care providers (for in-patient services), which were unevenly distributed. Access to NHIF services in the rural and, particularly remote areas, was minimal due mainly to poor infrastructure and long distances to the Fund’s offices.¹⁹

Attempts were made in 2005 to address these challenges and the broader failings of the NHIF vis-à-vis international social security standards through the National Social Health Insurance Fund Bill. Unfortunately, this Bill was vehemently opposed in Parliament by the Minister for Finance. He claimed that it would be expensive to maintain and the President of the Republic of Kenya later declined to assent to the Bill.



Residents of Kibera working in informal sector

¹⁸ IPAR, ‘Social Health Insurance Scheme for All Kenyans’ (n. 15 above), p. 1.

¹⁹ Ibid. p. 2.

2.4 The National Social Security Fund Act

The National Social Security Fund Act, Chapter 258 ('NSSF') Act establishes the National Social Security Fund (NSSF). Under the Act, NSSF members are eligible for Age/retirement benefit, survivor's benefit, invalidity benefit, withdrawal benefit, emigration and other benefits that may be prescribed by the Minister with the concurrence of the Minister for Finance.²⁰ According to the NSSF, discussions are underway within the institution regarding the introduction of a maternity grant "to assist women (and their families) financially if/when they take maternity leave"²¹.

Despite this broad mandate, the NSSF Act fails to enhance the enjoyment of the right to social security in Kenya in a number of respects. First, the Act places a lot of emphasis on certain categories of workers thereby discriminating against the unemployed and other categories of workers such as the casual workers and those working in the informal sector. According to the NSSF website, the mission of the NSSF is "to provide basic social security services, and welfare support, to *all workers* in Kenya. This includes providing *workers* with financial security in retirement, as well as providing them with basic security against contingencies such as employment injury, illness and/or disability and death."²² This statement of purpose clearly shows that the NSSF aims to serve workers.

In addition to the Mission, substantive provisions of the Act also place a lot of emphasis on the employed sections of the population to the exclusion of casual workers and those working in the informal sector. Membership of and contribution to the Fund is pegged on one's nature of employment. A number of provisions of the Act demonstrate this (with emphasis added):

- a) Section 5(1) of the NSSF Act provides that "subject to this Part, the Minister may, on the recommendation of the Board of Trustees, by order in the Gazette (a) specify any class or description of employees as persons who are to be registered as members of the Fund; (b) specify any class or description of employers as contributing employers: *Provided that an order shall not apply to employees who are casual workers unless the order expressly provides that it shall so apply.*"
- b) Similarly, Section 6(1) provides that "regulations may provide, subject to such terms and conditions as may be prescribed therein, for (a) the voluntary registration of any class or description of employees as members of the Fund; (b) the voluntary registration as a contributing employer of any employer: *Provided that such regulations shall not permit the voluntary registration of any employee who is not employed by a contributing employer.*"
- c) Section 7(1) of the Act is even more explicit in its discrimination against casual workers. It states that "Notwithstanding the foregoing provisions of this Part, no person shall be registered as a member of the Fund at any time when - (b) he is a casual worker, unless there is in force an order made under section 5 specifying

²⁰ Section 19(1) of the NSSF Act

²¹ NSSF Website <http://www.nssfkenya.com/nssfContent.asp?pcat=AboutUS&cat=INTRODUCTION>
last visited on 26 October 2007

²² Ibid.

casual workers generally, or casual workers of a class or description to which he belongs, as persons who are to be registered as members of the Fund”.

- d) The proviso to Section 10 provides that “no contribution shall be paid under this section in respect of any wages earned by a person at any time when he is (i) an exempt person; or (ii) *a casual worker*, unless there is in force an order made under section 5 specifying casual workers generally, or casual workers of a class or description to which he belongs, as persons who are to be registered as members of the Fund”.

This emphasis on employees discriminates against the unemployed, the self-employed or persons who, by virtue of the precarious nature of their ‘employment’ such as casual labourers, cannot volunteer or meet the criterion of membership and contribution. As at October 2007, the number of people *employed* in the informal sector stood at 6.4 million compared to about 1.95 million in the formal sector.²³

Second, although the NSSF was, for many years, the only national social security provider in the country, its efficacy in promoting the realisation of the right to social security was undermined by (allegations of) operational malpractice including political interference in its management, nepotism in the hiring of Fund staff, corruption and embezzlement of funds etc.

Third, the NSSF Act does not make any provision for refugees, asylum seekers, stateless persons or persons who are not ordinarily resident in Kenya but are unemployed. The Second Schedule to the NSSF Act only recognises “persons not ordinarily resident in Kenya who are employed in Kenya for periods not exceeding three years at any one time...” ‘exempt persons’²⁴, meaning persons to whom the Act does not apply.

Fourth, there is no provision for workers employed in domestic situations such as ‘domestic workers’, ‘house-helpers’ etc.

2.4 The Pensions Act

The Pensions Act Cap. 189 provides “for the grant and regulating of pensions, gratuities and other allowances in respect of the public service of officers under the Government of Kenya”. It makes provision for retirement benefits for Government employees. The Act has a number of normative shortcomings that affect the workers’ right to pensions and other retirement benefits:

1. It bestows enormous, even draconian, powers on the Government and the President to, among other things, determine whether or not an employee should get his/her pension, gratuity or other benefit at all or in the event of bankruptcy or insolvency (Section 5); imprisonment (Section 15) etc.

²³ This is according to the U.S Department of State. See <http://www.state.gov/r/pa/ei/bgn/2962.htm> visited on 4th November 2007.

²⁴ ‘Exempt persons’ are provided for under Section 7 of the NSSF Act and the Second Schedule under that Act as persons who shall not be registered as members of the NSSF.

2. The Act places unconscionable, unjust, unjustifiable and discriminatory conditions on the dependants an officer, who dies in the course of discharge of duty or other related cause, who can access the deceased officer's pension or other benefits e.g. that the deceased's children should not be more than six; the widow should 'be of good character' and should not remarry; in the case of a female child, the pensions cease upon her marriage under the age of 21 years etc. (Section 19). These conditions violate the rights of the dependants, not just to social security, but to other entitlements as well.

3. Conclusion and recommendations

From the foregoing discussion, a number of conclusions can be reached on the policy and legislative framework on social security in Kenya:

- The social security system in Kenya is not a product of a broad-based, participatory, all-inclusive and human rights-centred policy processes.
- The social security system under Kenyan laws is 'employment-centred'. Almost all the benefits that are derivable from the various social security schemes- healthcare, unemployment, sickness etc. benefits- can only be accessed by persons or dependants of persons who were or are in employment.
- The system of social security in Kenya privileges employees and employers who can make periodic contributions to the social security schemes. In the process, it discriminates against certain categories of employees such as casual workers and others in the 'informal sector' where the majority of Kenyans work.
- The social security protection envisaged under Kenyan laws does not recognise or make any provision for vulnerable groups such as refugees, asylum seekers, internally displaced persons etc.
- The National Social Security Fund and the National Hospital Insurance Fund, which are the two statutory flagship national social security schemes that ought to be based on the principles of affordability and solidarity as opposed to profit, have a lot of operational problems.

It is thus apparent that the policy and legal framework in Kenya as relates to the right to social security is fraught with shortcomings and is largely inconsistent with international human rights standards and principles. Thus the Government of Kenya must address the following concerns:

1. What measures is it taking to ensure that the Constitution of Kenya Review process, which held a lot of promise since the draft bill of rights contains the right to social security, is revived and concluded?
2. What measures is it taking to ensure that it puts into place a policy framework that would recognise and provide for the right to social security for all Kenyans especially the poor, women, the vulnerable workers, the unemployed, older persons, persons with disabilities, refugees and other marginalised groups?
3. What measures are in place that would ensure that all the laws on social security and protection are coherent and consistent?

4. What measures it is taking to reform the laws that discriminate against the unemployed and other vulnerable groups that need social protection?
5. What institutional measures it is taking to ensure that these groups are brought within the ambit of social security protection in Kenya?
6. How will it ensure that social security institutions will effectively implement such measures in practice and be accountable to Kenyans?

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