

Empowering Disadvantaged Groups in Kenya through Combating Discrimination and Promoting Equality - First Year Project Report

In July 2009, The Equal Rights Trust (ERT) started work on a two-year project based in Kenya, “Empowering disadvantaged groups through combating discrimination and promoting equality”. The project is funded by the Department for International Development (DFID) through its Civil Society Challenge Fund which aims to build the capacity of civil society organisations (CSOs) in developing countries through partnership with organisations based in the UK. ERT is working with two local partner organisations: the Federation of Women Lawyers (FIDA), a national association of female advocates and other legal professionals undertaking a range of advocacy, training and legal advice services on behalf of women, and the Kenya Human Rights Commission (KHRC), the leading non-governmental human rights organisation in Kenya.

The aim of the project is to enable Kenyan civil society organisations (CSOs) to become key players in building a national anti-discrimination regime. ERT and its partners are cooperating on a range of activities with a view to supporting Kenyan civil society to develop, draft and advocate the adoption of comprehensive anti-discrimination legislation in the country. In meeting this overall objective, the partners have a number of complementary aims and objectives, including the development of expertise in anti-discrimination law among civil society actors, raised awareness of the prevalence of discrimination among political and other

stakeholders and the fostering of collaboration and cooperation between CSOs.

Background and Context

In planning for the project, ERT and its partners aimed to build on a civil society-led initiative to introduce an Equal Opportunities Bill in 2009. The Bill emanated from the work of a 1993 Legal Taskforce established to review laws relating to women, which recommended the introduction of legislation to give effect to the equality provisions of the Constitution and institute affirmative action measures. Subsequently, an Equality Bill was drafted by a group of civil society organisations in 2001. This draft did not make significant progress, incurring opposition from Christian and Muslim leaders who condemned it as being “based on western values.” However the Kenya Law Reform Commission (KLRC) took up the Bill, making several changes including changing the title to the “Equal Opportunities Bill.”

In 2008, the Committee on Equal Treatment was formed to facilitate further discussions on the content of the Bill. The Committee, which was made up of a broad coalition of civil society organisations, held monthly meetings from February to December 2008. However, meetings of the Committee on Equal Treatment ceased in 2009 while members awaited information from the Kenya National Human Rights Commission and the Law Reform Commission on the Bill’s



Interactive game during ERT training, Nairobi 2010

progress. The Bill was among the group of 4 “Gender Bills” which were presented to the Minister for Gender, Children and Social Development in order that they might be presented in cabinet for debate. Among the Gender Bills (Family Protection Bill, 2007; Matrimonial Properties Bill, 2007; Marriage Bill, 2007), only the Equal Opportunities Bill was not introduced to Cabinet.

The ERT project was launched against the backdrop of an ongoing Constitutional review process instituted by a 2008 Act of Parliament.¹ A Harmonised Draft Constitution was published by a Committee of Experts six months after the project’s start, in November 2009. The draft was subjected to public consultation, review by a specially-constituted Parliamentary Select Committee and debate in the National Legislature before a final draft was published on 6 May 2010. On 4 August 2010 Kenyans have voted in a referendum to accept the draft Constitution.

Baseline Study and Legal Audit

The partners began the project by undertaking desk-based research and meetings in September 2009 to fully understand the context in which the project activities would take place. This led to the development of two papers, an Audit of Laws relating to equality and non-discrimination and a Baseline Study assessing civil society attitudes and competence and the role and attitude of other key stakeholders.

The Legal Audit confirmed the view of ERT and its partners that Kenyan anti-discrimination law is underdeveloped and that there is significant scope for legal reform. The assessment revealed that while in some areas – such as the National Cohesion and Integration Act, Employment Act and the Persons with Disability Act – there are robust legal protections, a number of gaps and inconsistencies remain. In particular, significant exceptions to the Constitutional right to non-



Barbara Cohen, ERT Consultant, conducting training seminar, Nairobi, January 2010

discrimination, the continuing operation of discriminatory laws on citizenship, succession and sexuality and the lack of protection in key areas such as health and education highlighted the need for the introduction of comprehensive anti-discrimination law.

The Baseline Study identified a large number of organisations which had been involved in attempts to develop and adopt the Equal Opportunities Bill, in the period 2005-7. The study revealed three inter-related problems: 1. Lack of knowledge about the content of the draft Bill; 2. Lack of information about the process by which the Bill was developed, finalised and proposed to Cabinet, even among the key stakeholders; and 3. Lack of involvement of some key stakeholders in the process of developing the Bill. Together with identifying this “knowledge gap”, the Baseline also provided important insight into the reasons for the failure of the attempts to secure adoption of the Bill. The key finding in this respect was that among members the Committee on Equal Treatment, engagement was not at a sufficiently senior level to ensure continued organisational commitment. This lack of senior endorsement led to insufficient human, financial and organisational resources being dedicated to the advocacy effort, which was further exacerbated by high staff turnover at some of the key organisations.

Initial Roundtable – January 2010

Taking into account the findings of the Baseline Study in respect of civil society needs, the partners convened a roundtable event in Nairobi in January 2010 to discuss challenges, priorities and opportunities for legal reform on equality. The roundtable was intended as an opportunity to engage senior civil society, political and governmental stakeholders in discussions about the need for legislative re-

form to improve protection from discrimination in Kenya and the role of participants in bringing about such reform. It was intended that this event would provide the foundation for establishing a broad-based coalition of actors to cooperate on these issues, thereby avoiding the difficulties which affected the Equal Opportunities Bill. The roundtable was attended by over 30 people from 15 different organisations, including the Law Reform Commission, the Parliamentary Equal Opportunities Committee and a range of civil society organisations. The objectives of the meeting were four-fold:

1. To develop a common understanding of the effectiveness of existing law for combating discrimination in Kenya;
2. To consider the potential of proposed draft law (including the Harmonised draft Constitution, the Gender-related bills and the Equal Opportunities Bill) in combating discrimination in Kenya;
3. To identify needs for legislative reform in the field of equality and seek agreement on priorities;
4. To identify opportunities for legislative reform in the field of equality.

In the first session of the day, Tom Kagwe, Deputy Executive Director of KHRC, presented a paper which provided an overview of the legal framework on discrimination in Kenya. Using the Legal Audit as a basis, Mr Kagwe discussed, *inter alia*, Kenya’s obligations under international treaties, the right to non-discrimination in the Constitution, specific anti-discrimination laws and non-discrimination provisions in other areas of law and discriminatory laws and regulations.

Participants discussed the presentation and agreed that discrimination is a major issue in Kenya and is a root cause of other serious

societal problems, including poverty and political tension. It was generally agreed that inconsistent laws, weak enforcement and a lack of common agreement about the content of key concepts, such as reasonable accommodation or what constitutes a ground of discrimination all contributed to poor protection from discrimination. Participants were of the view that despite the multiplicity of remedies and enforcement mechanisms available to victims of discrimination, in many ways legal protections were ineffective. They agreed on the need for Kenya to develop comprehensive anti-discrimination law, with clear legal concepts and definitions and strong, effective remedies. The group also agreed that a working group should be appointed to take forward the outcomes of the roundtable, developing policy or drafting amendments to the Equal Opportunities Bill.

In the next session, Hilary Muthui, Programmes Officer at FIDA, introduced a paper on recent legal and policy developments and forthcoming opportunities which would be of relevance to the discussions. Participants discussed Mr Muthui's presentation and agreed that two fundamental opportunities presented themselves: the Constitutional review process and the draft Equal Opportunities Bill. It was agreed that the Constitutional review process presented both immediate threats and a significant opportunity in presenting a number of avenues for consequential legal reform. Participants agreed that the right to equality and non-discrimination in the draft Constitution produced by the Committee of Experts was strong and that existing attempts to alter the equality protections in the Constitution should be opposed. It was felt that the draft Equal Opportunities Bill should be the basis for any new legislation and that the decision by Cabinet not to table the Bill in parliament presented an excellent

opportunity for civil society to review, revise and re-table the Bill.

In the final session of the day, participants were invited to engage in a round-the-table discussion, in which participants provided specific examples of discrimination affecting them or another vulnerable group. The discussion covered an extensive list of grounds and a wide range of areas of life, including employment, education, citizenship, access to services and criminal justice. It was agreed that the facilitators would use the results of this session to frame the discussion on discrimination law, needs and priorities in particular areas of life which would be the subject of the first session on day two.

The second day began with a session focussed on identification of specific needs in respect of protection from discrimination. The facilitators summarised the results of the discussion in the previous day's final session, and used the findings to generate a list of nine areas of life where participants had identified discrimination (Criminal Justice, Property, Politics and Public Office, Access to Justice, Employment, Policing, Health Services, Citizenship and Education). Participants were asked to form groups and consider each of the areas of discrimination which had been identified, analysing as many examples of discrimination as possible in the chosen area of discrimination and selecting one issue to investigate further. Each group was asked to identify what the current law prescribes on the particular issue and recommend how the law might be improved to address this issue.

The final session of the roundtable involved the development of an action plan for all participating organisations. It was agreed that participating organisations would continue to work together as part of an informal coa-

lition focussed on securing improved anti-discrimination law and that a working group should be established to review the Equal Opportunities Bill, undertake a study tour to the UK and lead the detailed development of comprehensive anti-discrimination law. Given the immediacy of the Constitutional review process, it was agreed that advocacy to maintain the equality provisions in the draft Constitution should begin immediately, in the form of a communiqué from KHRC, FIDA and ERT. It was agreed that KHRC and FIDA should establish and maintain links with the parliamentary committee on Equal Opportunity and with the media.

Training on Key Concepts in Anti-discrimination Law

Following the roundtable, the partners delivered an intense two-day training course to staff from over 20 Nairobi-based CSOs on how to apply discrimination law and concepts in their advocacy and awareness raising activities. Two further training courses were delivered in March 2010 for organisations based in and around Kisumu and Mombasa, taking the total number of CSO staff trained to 60. A variety of NGO staff, lawyers, human rights activists and representatives from statutory bodies attended the training workshops, representing a wide range of organisations, including the Gay and Lesbian Coalition of Kenya, Tomorrow's Child Initiative and the Law Society of Kenya.

Delivered by Barbara Cohen, ERT's consultant on the project, and Jacqueline Mogeni, a Kenyan consultant engaged through FIDA, the training used the Declaration of Principles on Equality² as the basis to familiarise staff from civil society organisations with some of the key concepts in anti-discrimination law. Topics covered in the training

included legal definitions of discrimination, analysing the concepts of direct and indirect discrimination, harassment, victimisation, reasonable accommodation, positive action, exceptions, access to justice, burden of proof and remedies.

Stakeholder Engagement

In the period January – May 2010, ERT's project partners undertook a number of meetings with key stakeholder groups to build on the achievements of the initial project roundtable. Among others, representatives from FIDA and KHRC met with Mohammed Affey MP, the Chair of the recently-formed Committee on Equal Opportunities and other members of the Committee. The Committee stated that legal reform on equality issues was one of their key strategic priorities and that they wished to cooperate closely with organisations involved in the initiative. The group also met with Nancy Baraza, Deputy Chair of the Law Reform Commission, who offered the support of the Commission and expressed a willingness to engage with CSOs on a review of the Equal Opportunities Bill.

UK Study Tour

Participants at the January 2010 roundtable agreed that a working group would be created to develop key concepts for comprehensive anti-discrimination legislation and a strategy for addressing difficult issues. The working group undertook a study tour to the UK in May 2010 in order to meet a range of equality law experts and undertake research on how a number of difficult issues in equality law had been addressed in the UK and other jurisdictions. The group met with respected equality law experts, including Professor Sir Bob Hepple QC, Lord Lester of Herne Hill QC and Karon Monaghan QC,

as well as the Equality and Human Rights Commission, Government Equality Unit and the Equality and Diversity Forum. The group also met with disability law expert Caroline Gooding and with Stonewall, the leading LGB rights organisation in the UK, to discuss how UK law had developed in these strands.

The objective of this visit was for the working group to generate recommendations for the wider coalition of CSOs in five key areas for a comprehensive anti-discrimination law: Legislative structure; Grounds; Prohibited Conduct; Material scope; and Enforcement and Institutions. Each of the individuals or organisations which the group met with was asked to provide their perspective on one or more of these issues. Participants were also provided with comparative examples from Canada, South Africa, Australia and the UK, showing how contentious or complex issues had been addressed in these jurisdictions.

At the end of the study tour, the working group met to consider their recommendations to the roundtable group on each issue. The group agreed to recommend that there should be a single, comprehensive Anti-Discrimination Bill which should set out both the substantive elements of anti-discrimination law and incorporate the legislative elements necessary for the establishment of the Kenya National Human Rights and Equality Commission as required under the draft Constitution. It was agreed that the provisions of the Bill when enacted should, in the event of any conflict or inconsistency, supersede the provisions of any other legislation relating or incidental to the prohibition of discrimination and the promotion of equality.

In respect of protected grounds, the group agreed that the Bill should use the list of grounds provided in the draft Constitution, with consideration to be given as to wheth-

er a ground of “genetic inheritance” should be added to the list to cover discrimination against people with albinism. The group agreed that the Bill should provide a conditionally open list, with the use of a test for admission of new grounds, to be based on Principle 5 of the Declaration of Principles on Equality.

The group agreed that any new legislation should prohibit direct and indirect discrimination, multiple discrimination, harassment, victimisation and failure to make reasonable accommodation, that these concepts should be defined in the Bill and that where possible, definitions of prohibited conduct should be adopted from existing Kenyan law. It was agreed that positive action should be permitted in the Bill and that exceptions should be limited and blanket exclusions of the type found in the current Constitution, should be avoided.

In respect of remedies, the group concluded that any new legislation should use a combination of civil and criminal remedies, with criminal remedies reserved for persistent offenders or gross offences. It was agreed that the Bill should provide the structure for a single new combined Commission for Human Rights and Equality, as envisaged under Article 59 of the draft Constitution.

The working group agreed that it was important to seek endorsement from the wider coalition on the content of the Bill before progressing further and that a workshop should be held in Nairobi to develop a complete “Legislative Map” outlining the content of a Bill. The group also felt that it was necessary to engage key stakeholder groups, including the Kenya National Human Rights Commission, the Gender and Development Commission and the Council for Persons with Disability, the judiciary and the parliamentary

Committee on Equal Opportunity at the earliest opportunity.

Legislative Map Workshop

In mid-July 2010, the partners convened a second roundtable for civil society and other stakeholders to discuss the recommendations made by the working group and undertake further work to develop a Legislative Map for an Anti-Discrimination Bill. Participation was high, with over 20 different organisations attending, including representatives the National Gender and Development Commission and the Council for Persons with Disability, as well as a diverse range of civil society organisations.

The workshop began with an initial presentation by Tom Kagwe of KHRC (and a member of the working group) who spoke about the UK study tour, the formulation of the working group's recommendations and the policy context in which the work was taking place, in particular the impending referendum on the draft Constitution. This was followed by a presentation from Nancy Baraza, Deputy Chair of the Law Reform Commission, who provided a critique of the Equal Opportunities Bill and re-iterated the Commission's willingness to seek the views of civil society on how the Bill could be improved.

In the next session, members of the working group presented the recommendations in each of the five areas of work which had been covered during the Study tour. Each set of recommendations was subjected to discussion and a number of amendments were made to the substance of the recommendations. It was agreed that these revised recommendations should form the basis of the Legislative Map.

In the third session, the participants split into four groups to engage in further discussion on elements of the law. Three of the groups focussed on issues of substance (exceptions, affirmative action and the establishment of an enforcement body) while the fourth group discussed advocacy strategy and tactics. Each group was asked to table recommendations for discussion.

The group focussed on exceptions proposed that the starting point of any legislation should be that all forms of discrimination are prohibited and that as such, exceptions should be limited. It was agreed that any exception, permitting discrimination on one or more grounds, must be reasonable and justifiable and that an exception will be justifiable only if it can be shown to be necessary for the achievement of a legitimate purpose and where there is no alternative which is less discriminatory.

The group examining affirmative action agreed that the Bill should permit affirmative action and should enshrine certain principles. It was agreed that affirmative action should be clear, targeted and specific; should be time-bound and subject to periodic review to assess its impact; should be designed to address past disadvantage and accelerate progress towards equality; should not disproportionately disadvantage others; should be targeted in areas of life where participation of disadvantaged groups is low; and should be used to meet particular needs of disadvantaged groups. It was agreed that affirmative action should be a requirement for all state bodies and that the Bill should encourage affirmative action by all non-state bodies.

The group discussing how the Bill should establish an independent equality body developed detailed recommendations. They

agreed that the Bill should provide for the establishment of independent and well-funded National Human Rights and Equality Commission as envisaged by the draft Constitution and that its powers and functions should be clearly defined. The group proposed that the Commission should have the power to hear complaints of discrimination or abuse of human rights, undertake investigations, make findings and require remedial action and that it should have the powers of a court. There was agreement that the Commission should be well funded, that it should have sufficient funds to operate effectively at a local level and that its funding should be a directly linked percentage of the national budget, not subject to government or departmental oversight.

The recommendations of the three working groups were agreed and the meeting went on to address a number of other issues of significance for the development of a Comprehensive Anti-discrimination Bill. Thus, it was agreed that the Bill should cover all areas of life regulated by law in the private and public sectors, that the burden of proof should shift to the respondent once a *prima facie* case of discrimination has been established and that it should provide for civil remedies which should be effective, proportionate and dissuasive.

The final working group discussed issues of advocacy strategy and recommended four areas of work. It was agreed that the partners should seek to establish a broad-based coalition of support for the introduction of a Comprehensive Anti-discrimination Bill in Kenya. This should include a range of civil society actors, but potentially also trade unions, academic institutions and others. In order to achieve this, it was proposed that a set of key principles should be developed ex-

pressing the position of the roundtable participants on the need for and requirements of a Bill and that this should be used to secure endorsements from potential allies.

It was agreed that the partners needed to understand the likely role and attitude of all potential stakeholders in an attempt to introduce a Bill and that a “stakeholder mapping” exercise should be undertaken to identify potential allies, opponents, partners, ambassadors and decision-makers. The participants agreed that attempts should be made to engage the government, commissions and other government bodies, and to ensure that civil society is engaged at every opportunity in the legislative process to lobby parliamentarians. These proposed approaches were agreed and KHRC, FIDA and ERT planned the necessary joint work.

Next Steps

The first year of ERT’s project in Kenya has exceeded expectations, as much because of highly favourable environmental factors as the work undertaken by ERT and its partners. The Constitutional review process and the ongoing referendum campaigns have created a zest for legal reform among civil society, parliamentarians and the wider public. ERT and its partners have been able to seize this opportunity, working with civil society to reinvigorate a moribund process around the Equal Opportunities Bill. What is more, the new Constitution adopted in August 2010 offers a number of opportunities to introduce comprehensive anti-discrimination legislation as part of the consequential legislation programme.

Over the course of the project’s final year, the partners intend to seek to build a broad-based coalition of civil society organisations, trade

unions, education institutions and development organisations to lobby for the introduction of comprehensive anti-discrimination law in Kenya. At the same time, the Legislative Map developed over the course of the UK Study Tour and Legislative Map session will

be further refined and used as the basis for direct engagement with government, parliamentarians and quasi-governmental bodies. It is hoped that a draft Bill will be published by the end of 2010 and that efforts to secure its adoption will be at an advanced stage.

¹ For a discussion of the Constitutional review process and the impact which the draft Constitution could have on the enjoyment of the right to non-discrimination and equality in Kenya, see Fitzgerald, J., "The Road to Equality? The Right to Equality in Kenya's New Constitution", in this issue.

² The Equal Rights Trust, Declaration of Principles on Equality, London 2008, available at: <http://www.equalrightstrust.org/ertdocumentbank/Pages%20from%20Declaration%20perfect%20principle.pdf>