

The Road to Equality? The Right to Equality in Kenya's New Constitution

Jim Fitzgerald¹

On 4 August 2010, the people of Kenya voted – by a margin of 67% to 31% - to adopt a new Constitution. After more than 20 years of debate, the constitutional review process which has taken place over the last three years has focused on addressing complex and contentious issues of governance, devolution and the separation of powers. This said, the Constitution which has emerged contains a substantially improved Bill of Rights and could represent a real step change in the protection of the right to equality and non-discrimination in Kenya.

Kenya's previous Constitution came into force in December 1964, with the country's establishment as an independent republic. Within a year of its adoption, the Constitution had been amended to remove the office of Prime Minister and vest power in the President. Subsequent amendments passed during the presidency of Daniel Arap Moi served to centralise power in the office of the President and institute single-party government.

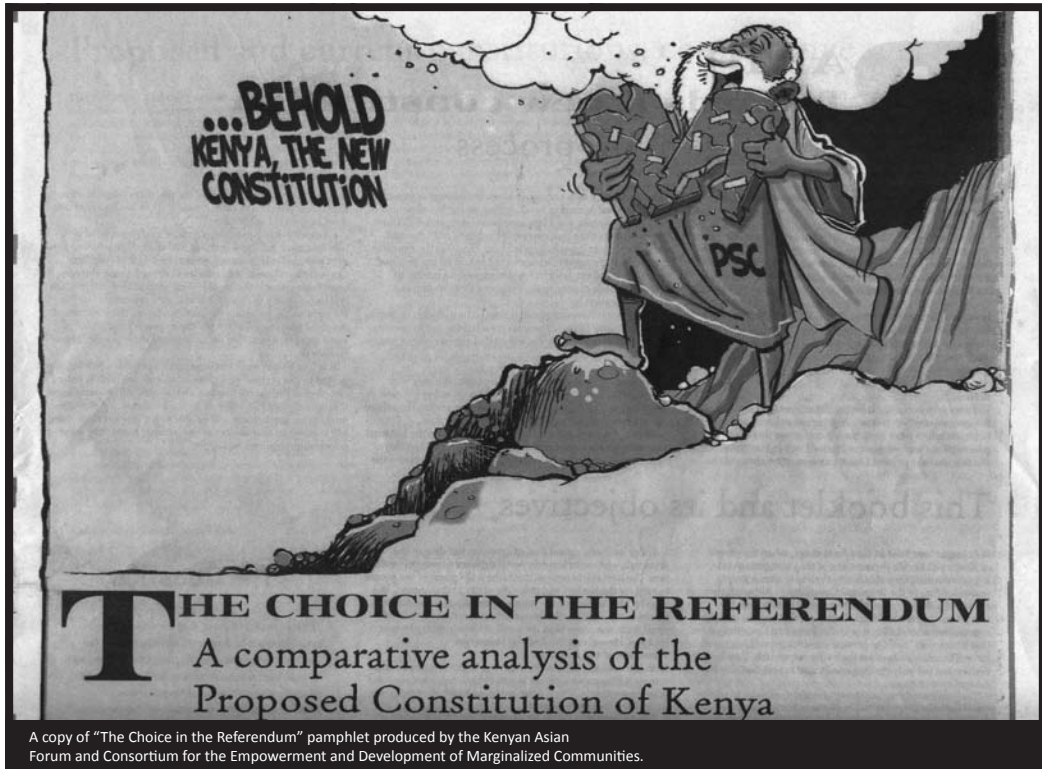
Efforts towards constitutional reform² began in earnest in 1997, with the passing of the Constitution of Kenya Review Commission Act. The Commission, chaired by respected constitutional lawyer Yash Ghai, produced a draft which was presented to a Constitutional Review Conference in Bomas in 2003. This process led to the emergence of three competing drafts: the original draft submitted to the Conference, the draft produced at the Conference (the Bomas draft) and a revised

draft produced by the Attorney General (the Wako draft). The Wako draft was submitted to a referendum in 2005 and was rejected, with 58% of the population voting against.

The current review process has its origins in the 2007 post-election violence which ravaged the country and left 1,133 people dead and a further 3561 injured after supporters of the two largest parties took to the streets in protest at the outcome of a disputed election.³ The review process was instituted as part of the Kenya National Dialogue and Reconciliation (KNDR) process which was established to seek resolution to the violence and instability. The KNDR framework identified four critical areas for addressing the causes of the crisis:

- Agenda 1: Immediate action to stop violence and restore rights and liberties;
- Agenda 2: Immediate action to address the humanitarian crisis and promote reconciliation;
- Agenda 3: Overcoming the political crisis; and
- Agenda 4: Addressing long term issues, including constitutional and legal reform.⁴

Under the auspices of Agenda 4, the Constitution of Kenya Review Act was adopted in 2008, setting out a detailed process for the development, drafting and adoption of a proposed Constitution. A Harmonized Draft Constitution written by a Committee of Experts was released to the public for consulta-



© Kenyan Asian Forum and Consortium for the Empowerment and Development of Marginalized Communities

tion on 17 November 2009. The consultation received almost 40,000 responses, making an estimated 1.7 million substantive recommendations.⁵ On 7 January, the Committee of Experts passed a revised draft to a Parliamentary Select Committee (PSC) to consider the draft and build consensus on contentious issues. The PSC submitted their recommendations to the Committee of Experts on 2 February and the Committee submitted a final draft to the National Assembly on 21 February. Following debate in the National Assembly, a final Proposed Constitution of Kenya was published by the Attorney General on 6 May 2010.

While the new Constitution contains a number of serious problems in terms of achieving equality in Kenya - including notably the definition of the right to life, which in-

cludes the phrase "life begins at conception",⁶ and prohibits abortion in all except emergency medical cases,⁷ it nevertheless represents a significant change for the better. This article aims to examine some of the ways in which the new Constitution could improve protection from discrimination and promote greater equality.

1. General Treatment of Equality

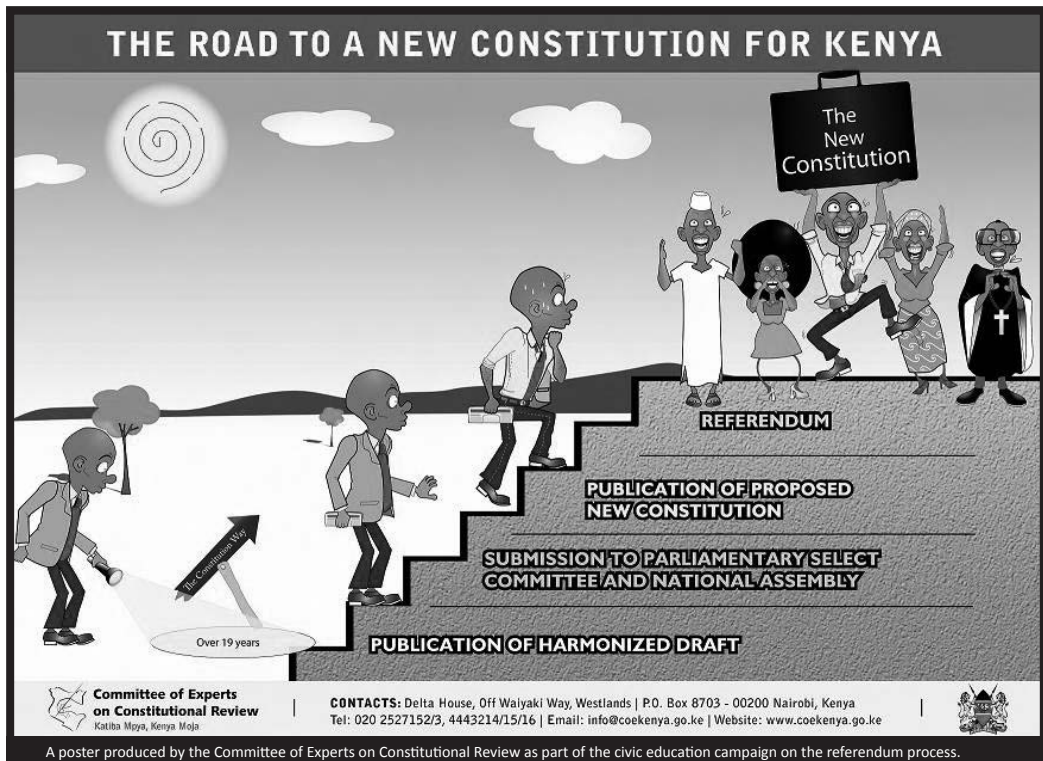
A commitment to the principles of equality and non-discrimination is woven throughout the Constitution, driven at least in part by a desire to counteract the ethnic and regional tensions which played such a decisive and destructive role in the 2007 post-election violence. The Constitution reflects a widely-held belief that guarantees of equality, equitable distribution of resources and balance

of power represent the best way to reduce the influence of ethnicity on political decision making and thereby secure a peaceful future for the country.

Thus, the preamble to the Constitution matches a recognition of Kenya's "ethnic, cultural and religious diversity" with a "determination to live in peace and unity", and equality is listed as one of six essential values upon which governance should be based.⁸ These expressions of principle are given legal force in Article 10, which includes equity, social justice, equality, non-discrimination and "protection of the marginalised" among the national values and principles of governance that are to be used in applying and interpreting the Constitution and other laws, and in making or implementing policy decisions.⁹ This is further emphasized in Article

20 (4)(a) which lists equality and equity as values to be promoted in interpreting the Bill of Rights and Article 21 (3) which creates a duty on state actors to address the needs of vulnerable groups in society.

Thus, it appears that the drafters believed that equality, the protection of groups vulnerable to discrimination and respect for ethnic, religious, cultural and linguistic diversity are fundamental principles to be taken into account both when interpreting the Bill of Rights and the wider Constitution. This stands in stark contrast to the previous Constitution, which presents – as is examined below – the right to non-discrimination in negative terms, largely defining it by reference to its non-application. Indeed, the very discussion of guiding principles in the new Constitution has been welcomed by those



A poster produced by the Committee of Experts on Constitutional Review as part of the civic education campaign on the referendum process.

who have argued that the previous Constitution placed too much emphasis on establishing the mechanisms of government rather than expressing vision or principles for governance.¹⁰

2. The Right to Equality and Non-Discrimination

The right to equality and non-discrimination as expressed in Article 27 of the new Constitution represents a substantial improvement on the right as provided in Article 82 of the previous Constitution. The Article begins with a guarantee of equality before the law and equal protection and benefit of the law,¹¹ a guarantee which is not present in the previous Constitution. Moreover, equality is defined as including “full and equal enjoyment” of all rights and freedoms.¹² These provisions provide important additional protection which goes beyond the protection from discrimination provided in Article 27 (4).

The new Constitution significantly expands the list of protected grounds from that found in the previous Constitution. Article 27 (4) prohibits discrimination on an extensive list of specified grounds: “race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth”). The list grants substantially increased protection to women, who are likely to benefit from protection on grounds of pregnancy and marital status. In addition, it prohibits discrimination on grounds of disability and age, neither of which is included in the list of protected grounds in the previous Constitution.¹³

Notably, the list does not include either sexual orientation or gender identity, issues which are highly sensitive in a country where

homosexual conduct remains illegal. The Gay and Lesbian Coalition of Kenya (GALCK) criticised the Harmonized Draft and in December 2009 issued a statement calling for these grounds to be recognised and for the protection of sexual minorities to be included in the mandate of the Equality and Human Rights Commission which the Constitution seeks to establish.¹⁴

Discrimination against LGBTI persons remains a serious problem in Kenya. Male homosexual sex is illegal and gay men report being harassed by police seeking to blackmail or extort money from them. As recently as February 2010, a number of sexual health workers and men suspected of being homosexual were attacked by members of the public in Mombasa and were subsequently arrested, ostensibly for their own protection.¹⁵

Further, Article 27 (4) does not provide an explicit protection for discrimination on grounds of albinism, something which has caused concern among those advocating greater protection for people with albinism. Ms Mumbi Ngugi of the Albinism Foundation of East Africa believes that the Constitution could have included a specific ground of “genetic inheritance” to cover people with albinism, whom she says suffer discrimination in employment and education, and as a result of denial of reasonable accommodation for their visual impairments.¹⁶

Yet it is clear that the list of protected grounds provided in the new Constitution is indicative rather than exhaustive, beginning with the phrase “The State shall not discriminate directly or indirectly on any ground, including...” This creates the possibility of legal challenge by those suffering discrimination on grounds which are not explicitly listed in

Article 27 (4), a possibility which is strengthened by the definition of “includes” provided in Article 259 (4)(b).¹⁷ However, the section does not establish a test for the inclusion of new grounds as has been adopted in South African anti-discrimination legislation,¹⁸ and established as best practice in the *Declaration of Principles on Equality*.¹⁹ Consequently, it remains to be seen how progressively the judiciary will interpret the provision and civil society actors have raised concerns about whether the judiciary will be prepared to make progressive judgments without reference to a test of this type.

In common with the previous Constitution, the new Constitution prohibits both direct and indirect discrimination, though no definition of either term is provided in the document. The Constitution does not cover segregation, harassment, or victimisation, despite the fact that some of these forms of discrimination are covered in other Kenyan legislation governing specific areas of life.²⁰ Article 27 (5) extends the prohibition on discrimination to natural and legal persons.²¹

Article 27 (6) creates a duty of affirmative action, a concept which is defined in Article 260, which states that “[...] the State shall take legislative and other measures, including but not limited to affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups as a result of past discrimination.” This represents a substantial improvement on the previous Constitution, which makes no reference to positive or affirmative action measures. While subsequent legislation has introduced positive action in certain areas of the law,²² the extension of affirmative action to all grounds under Article 27 (6) represents a significant increase in scope. Part 3 of the Bill of Rights in the new Constitu-

tion imposes specific affirmative action requirements on the state in relation to groups with particular characteristics, including the youth and marginalised groups.²³

3. Removal of Exceptions

Arguably the most important change introduced by the new Constitution arises as a result of exclusion, rather than inclusion. Article 27 (the right to equality and non-discrimination) takes a different approach to formulating the right than that adopted in Article 82, its parallel in the previous Constitution, which expressed the right to non-discrimination negatively, defining its scope by reference to exceptions and limitations. As such, Article 27 does not reproduce Article 82 (4), which provides significant exceptions to the application of the right to non-discrimination. Article 82 (4) limited the application of the right to non-discrimination significantly in four critical areas. Looked at in more detail, there was even greater cause for concern as one considers both the impact of and the motive behind limiting the law’s application in each case.

Paragraph 82 (4)(a) excluded all laws applying to non-citizens. This exclusion was particularly significant when viewed in light of the difficulties faced by some groups – such as Kenyan Nubians – in acquiring citizenship. As many as 100,000 Kenyan Nubians are effectively stateless as a result of discrimination in access to citizenship, including arbitrary denial and repeated delays in the provision of passports.²⁴ As a result of their ineffective nationality, Kenyan Nubians face severe challenges in the acquisition of land and property, employment and access to government services. While under the Citizenship Act (1963) these persons are entitled to full citizenship as naturalised residents of

Kenya, practical obstacles in obtaining land rights, proof of residence, permanent work and identity papers such as passports mean that this right is often denied.²⁵ The removal of this exception, in tandem with progressive changes to the law governing the acquisition of citizenship introduced in chapter 3 of the new Constitution, will ameliorate this situation, though some members of this group will still face difficulty in gaining citizenship.²⁶

Paragraph 82 (4)(b) of the 1964 Constitution excluded all matters of personal law, such as “adoption, marriage, divorce, burial, devolution of property on death”, while 82 (4)(c) exempted all systems of customary law from the application of the section. These provisions have had a significant impact in limiting the rights of women, particularly those living in rural or remote areas of the country, where traditional systems of law and justice are more likely to operate. Women’s land rights are largely guaranteed through marriage and in many rural communities, land is closely associated with livelihood, meaning that the death of a husband, separation and divorce can put women in a vulnerable position. For many of these women, therefore, inequality in areas subject to personal law and customary law are at the root of the disadvantage they face. Traditional views about women’s role in marriage and the inability to inherit property are sufficient in many cases to bind them into subservient relationships for life.²⁷ Extending the scope of the right to non-discrimination into these areas of law could therefore have a significant impact on the rights of rural women and the disadvantages they suffer.

Elsewhere, in Article 2 (4) of the new Constitution, the drafters have gone further in seeking to guarantee the supremacy of the Constitution’s rights over systems of custom-

ary law. Article 2 (4) expressly states that “any law, including customary law, which is inconsistent with this Constitution, is void to the extent of its inconsistency [...]”. This provision, together with the removal of specific exceptions provided under Article 82 (4)(b) and (c), offers a genuine opportunity to extend the protection from discrimination into areas which are of crucial importance to women.

Paragraph 82 (4)(d) of the previous Constitution provided a catch-all exception, excluding discrimination in cases where this is “reasonably justifiable in a democratic society”. While Article 27 does not contain any similar exception specific to the right to equality and non-discrimination, Article 24 of the new Constitution creates a public interest limitation applicable to almost all rights contained in the Bill of Rights.²⁸ It states:

“A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom [...]”²⁹

This provision is noteworthy in respect of the right to equality and non-discrimination in two principal ways. Firstly, it is not specific to the right to Article 27, but is part of a limitation provision which is deliberately narrow in scope. Indeed, Article 24 (2) and 24 (3) set out detailed requirements applicable to legislation, the state or persons seeking to justify the limitation of a freedom. Secondly, it includes dignity, equality and freedom as the bases of a democratic society, raising the possibility that the equality impact of an exception would be one of the key factors in determining its justifiability.

4. Specific Rights for Vulnerable Groups

In addition to the general protection from discrimination offered by Article 27, Part Three of the Bill of Rights makes specific provision for particular vulnerable groups and persons, with the aim of ensuring “greater certainty as to the application of those rights and fundamental freedoms to certain groups of persons”.³⁰ The part covers the application of rights to children, persons with disabilities, the youth, “minorities and marginalised groups” and older persons.

Articles 53, 55 and 57 provide specific rights for children, youth and older people respectively. Article 260 defines children as those under 18, youth as those between the ages of 18 and 35 and older persons as those over the age of 60. The articles provide a range of specific rights for each group, including guarantees of the right to access education (children and youth), access to employment (youth) and to receive reasonable care and assistance from their family and the state (older persons). The range of guarantees for each group represents a welcome addition to the protection from discrimination provided under Article 27 and should provide a useful basis to secure equal participation for each group in areas of particular concern.

Article 54 focuses on the rights of persons with disabilities, with 54 (1) providing a list of specific rights including the right to be treated with dignity and respect. Disability is defined in Article 260 as including physical, sensory, mental, psychological or other impairment that affects a person’s “ability to carry out ordinary day-to-day activities”. The range of impairments which are classified as forms of disability compares favourably to that presented in the UN Convention on the Rights of Persons with Disability, though the

reference to ability to conduct ordinary activities arguably results in a narrower definition than that provided by the Convention, which refers to “full and effective participation on an equal basis with others”.³¹

Article 54 creates specific rights of access to educational institutions and to public places, transport and information.³² It also contains a right to use sign language, Braille or other means of communication and to materials or devices to overcome constraints arising from disability.³³ This supplements provisions elsewhere in the new Constitution, where the state is required to promote Kenyan sign language, Braille and “other communication formats and technologies accessible to persons with disabilities”.³⁴ Article 54 confirms the duty on the state to ensure progressive implementation of the principle that persons with disabilities should occupy five percent of positions on appointed and elected bodies.³⁵ These provisions represent a substantial improvement to the previous Constitution, which does not recognise disability as a ground of discrimination. The specific rights supplement the protection guaranteed under the Persons with Disabilities Act, which prohibits direct discrimination in employment, education, health, accessibility and mobility, public buildings, public service vehicles, sports and recreation, polling stations and voting and creates reasonable accommodation duties in employment, education and access to public buildings.³⁶

Article 56 provides additional rights and protections for “Minorities and Marginalised Groups”, a classification which potentially encompasses all those vulnerable to discrimination. The term “Minority” is not defined by the Constitution but Article 260 defines “Marginalised Groups” as all those disadvantaged by discrimination on one or

more of the grounds provided in Article 27 (4).³⁷ The article requires the state to undertake measures – including affirmative action – to ensure the participation of these groups in governance, education and employment, to have access to water, health services and infrastructure and to develop their cultural values, languages and practices. As such, the article guarantees significant additional rights on all prohibited grounds and may form a useful guide to the interpretation of Article 27 (6) in specific areas of life.

Interestingly, Part 3 does not elaborate specific rights for the more tightly-defined “Marginalised Communities”, a group which is defined in Article 260 as including small, traditional, indigenous or pastoral communities.³⁸ Nor does this group feature in the list of protected grounds in Article 27, though it seems likely that most forms of discrimination against them could be related to an explicitly protected ground (race, ethnic or social origin, culture and language are all listed under Article 27) or through a legal challenge using the open list.

A section on the rights of women is notably absent from Part 3 of the Bill of Rights, though this may be because of the special place which gender equality occupies elsewhere in the new Constitution. Article 27 (3) provides a broad guarantee of equal treatment of women and men “including the right to equal opportunities in political, economic, cultural and social activities”. Elsewhere in the Constitution, gender equality features prominently: equal rights for men and women are guaranteed during a marriage and at its dissolution;³⁹ equality between male and female parents and spouses is guaranteed in the acquisition of citizenship through birth and marriage;⁴⁰ and the “elimination of gender discrimination in law, customs and

practices” related to land is included among the principles of land policy.⁴¹ As mentioned above, the supremacy of the Constitution as established under Article 2, in particular its supremacy over customary law, will significantly extend the right to non-discrimination in a range of areas of law governing personal and family relationships and property rights.⁴²

The new Constitution also introduces substantial guarantees to increase the representation of women in public life. Article 27 (8) requires the state to take measures to ensure that “not more than two-thirds of the members of elective or appointive bodies” are of the same gender. Separate provisions create reserved places for women in the National Assembly, Senate and County Assemblies.⁴³ These provisions should have a substantial positive effect on women’s representation and role in the decision-making process at all levels of government.

5. Ethnic, Religious and Cultural Diversity

Kenya is home to more than 40 different ethnic groups or tribes, including the Kikuyu (22%), Luhya (14%), Luo (13%), Kalenjin (12%), Kiisi (11%), Kamba (6%), Meru (6%) and Maasai (1%)⁴⁴ and ethnicity, tribe and region continue to play a decisive and divisive role in national politics. As Yash Ghai and Jill Cottrell Ghai state in a recent pamphlet comparing the previous and new Constitutions:

“Our politics have become largely the politics of ethnicity. Politicians find that an easy way to build support is by playing on ethnicity, by stirring up ethnic loyalties on one hand, and ethnic animosities on the other. [...] They promise their tribe development and other benefits if they have their vote [...] Ethnic politics have influenced peo-

ple's attitude to state institutions: either they are 'ours' or they are the 'enemy'. The lack of trust in government is pervasive."⁴⁵

The role of ethno-regional identity in the escalation of the 2007 post-election violence meant that providing a settlement which addressed the concerns of different ethnic groups, without heightening ethnic tensions, was central to the National Dialogue and Reconciliation process and therefore to the Constitutional review.⁴⁶ Attempts to provide an equitable settlement between different ethno-regional groups are therefore embedded throughout the new Constitution, in particular in provisions related to representation, devolution and access to resources. It is also reflected in the prominent place given to the prohibition of hate speech: Article 33 limits freedom of expression, stating that it does not extend to hate speech and "advocacy of hatred that constitutes ethnic incitement, vilification of others or incitement to cause harm".⁴⁷

The importance of recognising Kenya's cultural, ethnic and religious diversity is reflected in the Preamble to the new Constitution and throughout Chapter Two, which sets out the foundational principles of the Republic. The commitment to recognising diversity while emphasising unity is reflected in the sections on languages, which recognises two official languages (Kiswahili and English) but requires the state to promote and protect the "diversity of language of the people of Kenya",⁴⁸ and religion, which states that there shall be no state religion.⁴⁹ The new Constitution also recognises the importance of Kenya's varied cultural heritage, again emphasising national unity and diversity.⁵⁰

In respect of representation, the new Constitution requires that all political parties

should have a national character and states that parties shall not be founded on a religious, linguistic, ethnic, gender or regional basis or "seek to engage in advocacy of hatred on any such basis".⁵¹ The potential limits which this provision might place on ethnic minorities who feel their interests cannot be effectively represented by a larger party are somewhat mollified by the requirement under Article 100 (d) and (e) that Parliament pass legislation to promote the representation of ethnic minorities and marginalised communities, though how well these requirements function in practice remains to be seen.⁵² Parliament is also required to pass legislation to ensure that cultural and community diversity is reflected at county level and that mechanisms are put in place to protect minorities within counties.⁵³

Devolution to county governments is perceived as an important measure to ensure the fair distribution of resources throughout the country and reduce the role of ethno-regional factionalism in national politics. According to the new Constitution, state power will be executed at both the national and county level.⁵⁴ The Constitution establishes 47 powerful counties, with the objects of "fostering national unity by recognising diversity" and ensuring equitable sharing of resources.⁵⁵ The structure of counties is to reflect the structure of the national government, with an assembly of members representing wards, an executive Governor and an executive committee.⁵⁶ Counties are given a wide range of functions⁵⁷, though arguably many of these functions are either heavily regulated by central government or already performed at a local level.

Most importantly, the new Constitution contains a number of guarantees that counties should be properly resourced to undertake

their functions. Article 202 states that revenue will be shared “equitably” among national and county governments, and Article 203 establishes a detailed list of criteria for determining these equitable shares, including the need to ensure that county governments have adequate resources to perform their functions, economic disparities within and between counties and the need for affirmative action for disadvantaged areas and groups.⁵⁸ Article 203 (2) provides a minimum guarantee that 15% of annual national revenue should be allocated to county governments. In recognition of the disparities in the provision of basic services between different regions, the new Constitution establishes an Equalisation Fund to accelerate progress towards equality in marginalised areas. The Fund is established as 0.5% of annual national revenue and is established for twenty years from the Constitution coming into effect, though this period may be extended if parliament enacts legislation which achieves the support of half the members of the National Assembly and half the members of the Senate.⁵⁹

Equitable access to resources, public services and infrastructure is a highly contentious issue in Kenya, particularly given the role which regional patronage has played in national politics. The Equalisation Fund is therefore a particularly important development for the country’s most marginalised regions. Article 6 (3) also provides avenues to improve access for these areas and communities by creating a duty on the state to ensure reasonable access to government services throughout the country. Further, equitable access to land is listed as the first principle of land policy.⁶⁰

6. Establishment of a Regulatory Body

In practical terms, one of the most significant changes introduced by the new Constitution comes at Article 59, which establishes a Kenya National Human Rights and Equality Commission (KNHREC), which is set to supersede the Kenya National Human Rights Commission and the National Commission on Gender and Development.⁶¹ It remains to be seen whether the Act establishing the unified Commission would also dissolve the recently-formed Commission on Cohesion and Integration or the Council on Persons with Disability in order that the new body can effectively deal with all aspects of equality and non-discrimination. The government is required to bring forward legislation to establish the Commission within one year from the adoption of the Constitution.⁶²

Article 59 (2) sets out the extensive list of functions of the KNHREC, which include promotion of human rights and gender equality, monitoring and reporting and the power to receive and investigate individual complaints, undertake investigations on its own initiative and act as the “principle organ of the state in ensuring compliance with obligations and treaties relating to human rights”. The KNHREC’s powers largely replicate those of the current Kenya National Human Rights Commission⁶³ but are substantially broader than those of the National Commission on Gender and Development, which is an essentially advisory body, with no investigative powers.⁶⁴

Concerns remain over the lack of reference to the National Cohesion and Integration Commission, established in 2008, and the Council on Persons with Disability, and more generally over the lack of clarity about the role of the new Commission in enforcing the right to equality and non-discrimination. Despite the reference to equality in the Commission’s

title, Article 59 (2) makes scant reference to equality, save for a specific reference to gender equality in paragraph (b). No other ground of discrimination is referred to directly and the functions of the Commission are in almost all cases defined with reference to human rights rather than equality. As a result, the role of the KNHREC in promoting and enforcing the right to equality and non-discrimination will be largely defined in the legislation which is required to establish the Commission.

7. Problems

Despite the genuine improvements to the protection of the right to equality and non-discrimination introduced by the new Constitution, a number of areas remain seriously problematic. These include in particular the failure to address discrimination against LGBTI persons and a number of provisions which allow for continuing discrimination against women.

In addition to the failure to recognise sexual orientation as a prohibited ground of discrimination, the definition of marriage in Article 45 dealing with family life states that: “Every adult has the right to marry a person of the opposite sex”,⁶⁵ thereby denying the legitimacy of same-sex civil marriages. Further, despite the general commitment to equality evidenced in both the preamble and the interpretative articles, the law does not materially change the situation with regards to the criminalisation of consensual same-sex conduct between men.⁶⁶

As discussed above, the right to life states that life begins at conception and that abortion is only permitted in cases of medical emergency. The provision does not change the situation under the law as it is currently defined under the Penal Code,⁶⁷ despite evi-

dence which shows that as many as 300,000 women die every year in Kenya as a result of unsafe abortions.⁶⁸ Despite the fact that the new Constitution will not materially change the law in this area, the provision caused significant controversy, in particular attracting the opposition from the church, and abortion became a central plank of the “No” campaign.⁶⁹

Another cause of concern is the establishment, under Article 170, of *Kadhis’* courts with jurisdiction to determine questions of “personal status, marriage or divorce or inheritance” in proceedings in which all parties are Muslims. While Article 170 (5) states that all parties must submit to the jurisdiction of the *Kadhis’* courts, concerns remain over coercion of women to submit to these courts and research suggests that *Khadhi* judgments have discriminated against women in determining questions of family law.⁷⁰ Concern about the potential for discriminatory judgments in these courts is heightened by the specific qualification of the right to equality and non-discrimination “to the extent strictly necessary for the application of Muslim law before the *Kadhis’* courts” provided in Article 24.⁷¹

Conclusion

These and other not insignificant problems aside, the new Constitution contains a wealth of progressive measures in respect of the right to equality and non-discrimination. However, the new Constitution does not provide all of the answers. Rather, it presents a question: how will Kenyan civil society use this document to secure greater equality in practice?

The new Constitution presents an array of opportunities which must be seized if genuine progress is to be made. Public infor-

mation campaigns must begin to educate women that they have a constitutional right to non-discrimination which can be used to challenge the distribution of family property on their father's death. Strategic litigation must begin to challenge discrimination against LGBTI persons using the open list which could enable the admission of sexual orientation and gender identity as protected grounds through the courts. Training must begin for law students, lawyers and judges to help them understand how to interpret and apply these new provisions in line with the intention of the drafters and in a manner which is fair and consistent.

Arguably however, the greatest opportunity presented by the adoption of the Constitu-

tion also poses the greatest challenge. The 2010 Constitution provides a firm foundation for the right to non-discrimination and equality in 21st Century Kenya. However, it is - of necessity - light on detail. If the right to equality and non-discrimination is to be entrenched, comprehensive anti-discrimination legislation and progressive jurisprudence is needed to provide definitions of key terms and concepts, to provide detail on the right to non-discrimination in different areas of life, to create specific duties on government and other sectors and to establish the remit of the Kenya National Human Rights and Equality Commission.

The new Constitution represents a significant step. But a first step all the same.

¹ Jim Fitzgerald is Advocacy and Communications Officer at The Equal Rights Trust, and manages the Trust's Kenya project, "Empowering Disadvantaged Groups in Kenya through Combating Discrimination and Promoting Equality".

² For a detailed discussion of the history of Kenya's constitutional development, see Committee of Experts on Constitutional Review, *The Preliminary Report of the Committee of Experts on Constitutional Review Issued on the Publication of the Harmonized Draft Constitution*, November 2009, available at: http://www.coekenya.go.ke/images/stories/Resources/preliminary_report.pdf.

³ Kenya National Dialogue and Reconciliation, Report of the Commission of Inquiry into Post-Election Violence, October 2008 - February 2008, available at: <http://www.dialoguekenya.org/docs/PEVReport1.pdf>.

⁴ Kenya National Dialogue and Reconciliation, *Annotated Agenda for the Kenya National Dialogue and Reconciliation*, February 2008, available at: http://www.dialoguekenya.org/docs/Signed_Annotated_Agenda_Feb1st.pdf.

⁵ Committee of Experts on Constitutional Review, *The Report of the Committee of Experts on Constitutional Review Issued on the Submission of the Reviewed Harmonized Draft Constitution to the Parliamentary Select Committee on Constitutional Review*, January 2010, available at: http://www.coekenya.go.ke/images/stories/Resources/Final_Report_on_the_Reviewed_Draft.pdf.

⁶ Constitution of Kenya, Article 26 (2).

⁷ *Ibid.*, Article 26 (4).

⁸ *Ibid.*, Preamble.

⁹ *Ibid.*, Article 10 (2) (b).

¹⁰ Ghai, Y. and Cottrell Ghai, J., “The Choice in the Referendum: A comparative analysis of the Constitution of Kenya and the Current Constitution”, July 2010, p. 3.

¹¹ Constitution of Kenya, Article 27 (1).

¹² *Ibid.*, Article 27 (2).

¹³ Article 82 (3) of the 1963 Constitution of Kenya states: “In this section the expression “discriminatory” means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, place of origin or residence or other local connection, political opinions, colour, creed or sex”.

¹⁴ Gay and Lesbian Coalition of Kenya, *Memorandum to the Committee of Experts on the Constitution*, 11 December 2009, available at: http://galck.org/index.php?option=com_content&view=article&id=50:const&catid=18:constitution&Itemid=18.

¹⁵ Human Rights Watch, *Halt Anti-Gay Campaign*, February 2010, available at: <http://www.hrw.org/en/news/2010/02/17/kenya-halt-anti-gay-campaign>.

¹⁶ The Equal Rights Trust, Interview with Mumbi Ngugi, 18 July 2010.

¹⁷ Constitution of Kenya, Article 259 (4) (b): “the word ‘includes’ means ‘includes but is not limited to’”.

¹⁸ Promotion of Equality and Prevention of Unfair Discrimination Act 2000, Article 1 (xxii) (b).

¹⁹ The Equal Rights Trust, *Declaration of Principles on Equality*, London 2008, Principle 5, p. 6.

²⁰ The National Cohesion and Integration Act 2008 prohibits segregation, harassment and victimisation. The Sexual Offences Act creates a criminal offence for sexual harassment.

²¹ Constitution of Kenya, Article 260.

²² Including the Persons with Disabilities Act 2003, the National Cohesion and Integration Act 2008 and the Employment Act 2007.

²³ Constitution of Kenya, Part 3 of the Bill of Rights, Articles 52 – 57. These rights are discussed in the section “Specific rights for vulnerable groups”.

²⁴ Hussein, A., “Kenyan Nubians: standing up to statelessness”, *Forced Migration Review*, Vol. 32, April 2009, pp. 19-20.

²⁵ For a detailed discussion of the situation of stateless Kenyan Nubians, see: The Equal Rights Trust, *Unravelling Anomaly: Detention, Discrimination and the Protection Needs of Stateless Persons*, London, 2010, pp. 75-76.

²⁶ Under Article 15 (2) of the Constitution of Kenya, persons who have been “lawfully resident” for a continuous period of at least seven years may apply to be registered as a citizen, a requirement which may exclude Kenyan Nubians and others from acquiring citizenship.

²⁷ For a detailed discussion of women’s land rights and poverty, see Njoki Wamai, E., “Women and Poverty (Land Rights and Ownership)”, *African Women’s Rights Observatory (AWRO)*, 2008, available at: <http://awro.uneca.org/downloads/Women%20Land%20Rights%20and%20Poverty%20in%20kenya%20policy%20issue.doc>.

²⁸ Article 25 of the Constitution of Kenya states that the rights to freedom from torture, cruel, inhuman or degrading treatment or punishment, freedom from slavery or servitude, fair trial and the right to an order of *habeas corpus* cannot be limited.

²⁹ Constitution of Kenya, Article 24 (1).

³⁰ *Ibid.*, Article 52 (2).

³¹ United Nations Convention on the Rights of Persons with Disabilities, Article 1.

³² Constitution of Kenya, Article 54 (1) (c) and (d).

³³ *Ibid.*, Article 54 (1) (e) and (f).

³⁴ *Ibid.*, Article 3 (b).

³⁵ *Ibid.*, Article 54 (2).

³⁶ The Persons with Disability Act, Act 14/2003.

³⁷ Article 260 of the Constitution of Kenya provides: "...‘marginalised group’ means a group of people who, because of law or practices before, on or after the effective date, were or are disadvantaged by discrimination on one or more of the grounds in Article 27 (4)".

³⁸ *Ibid.*

³⁹ Constitution of Kenya, Article 45 (3).

⁴⁰ *Ibid.*, Articles 14 (1) and 15 (1).

⁴¹ *Ibid.*, Article 60 (1) (f).

⁴² *Ibid.*, Article 2 (4).

⁴³ *Ibid.*, Articles 97 (1) (b), 98 (1) (b) and 177 (1) (b).

⁴⁴ All statistics taken from the CIA World Fact Book, 2009, available at: <https://www.cia.gov/library/publications/the-world-factbook/geos/ke.html>.

⁴⁵ See above, note 10, p. 6.

⁴⁶ See for example: Kenya National Dialogue and Reconciliation Monitoring project, *Project Context and Summary of Findings*, 2009, available at: <http://www.dialoguekenya.org/docs/project%20context%20and%20summary%20of%20findings.pdf>.

⁴⁷ Constitution of Kenya, Article 33 (2) (c) and (d).

⁴⁸ *Ibid.*, Article 7 (3) (b).

⁴⁹ *Ibid.*, Article 8.

⁵⁰ *Ibid.*, Article 11 (2).

⁵¹ *Ibid.*, Article 91 (2) (a).

⁵² Schedule 5 of the Constitution of Kenya requires that such legislation must be passed within 5 years of the Constitution coming into force.

⁵³ Constitution of Kenya, Article 197 (2).

⁵⁴ *Ibid.*, Article 1 (4).

⁵⁵ *Ibid.*, Article 174 (b) and (g).

⁵⁶ *Ibid.*, Chapter 11, Part 2.

⁵⁷ *Ibid.*, Schedule 4, Part 2.

⁵⁸ *Ibid.*, Article 203 (1)(d), (g) and (h).

⁵⁹ *Ibid.*, Article 204.

⁶⁰ *Ibid.*, Article 60 (1)(a).

⁶¹ Schedule 6, Article 26 of the Constitution of Kenya states that the commissioners of the Kenya National Human Rights Commission and National Commission on Gender and Development will become members of the unified Commission created under Article 59.

⁶² Constitution of Kenya, Schedule 5.

⁶³ The Kenya National Commission on Human Rights Act 2002, Section 16 (1).

⁶⁴ Act 13/2003, National Commission on Gender and Development 2003, Section 6.

⁶⁵ Constitution of Kenya, Article 45 (2).

⁶⁶ Penal Code 1963, Sections 162, 163 and 165.

⁶⁷ Penal Code 1963, Sections 158, 159 and 160 prohibit “procurement of miscarriage” by a woman herself or by any other person. Section 240 provides an exception on health grounds: “A person is not criminally responsible for performing in good faith and with reasonable care and skill a surgical operation upon any person for his benefit, or upon an unborn child for the preservation of the mother’s life, if the performance of the operation is reasonable, having regard to the patient’s state at the time and to all the circumstances of the case.”

⁶⁸ Federation of Women’s Lawyers, *Shadow Report to the 5th and 6th Combined Report of the Government of Kenya, On the International Convention on the Elimination of All Forms of Discrimination Against Women*, 2007, p.22, available at: <http://www.iwraw-ap.org/resources/pdf/Kenya%20SR%20final.pdf>.

⁶⁹ See, for example, Poghio, S., “The proposed constitution has too many flaws to pass the test of time”, *The Nation*, 17 July 2010, p. 13.

⁷⁰ See above, note 10, p. 9: “[i]ssues likely to arise are things like favouring the father in custody [...] limited provision for maintenance of wives after divorce, and the difference in inheritance by women and men under Muslim law”.

⁷¹ Constitution of Kenya, Article 24 (4).