

2. PATTERNS OF DISCRIMINATION AND INEQUALITY

This section discusses patterns of discrimination and inequality in Kenya. Based on analysis of existing research from a range of sources, including research undertaken by international organisations, governmental bodies, NGOs and academics, news reports and statistical data, as well as original direct testimony collected from a wide range of individuals, it seeks to grasp and present the principal patterns of discrimination and inequality which affect people in Kenya. As previously stated, it does not seek to provide an exhaustive picture, but rather to provide an insight into what appear to be the most significant issues. In respect of each ground, the report discusses the ways in which people experience discrimination and inequality in a range of areas of life, including as a result of discriminatory laws, actions of state actors carrying out public functions, exposure to discriminatory violence and discrimination in areas such as employment, education and access to goods and services.

This part of the report presents substantial evidence of discrimination and inequality affecting members of a number of identified groups or categories of persons. While there are clear differences between the problems experienced by those suffering discrimination and inequality on each of the grounds covered in this part – and unique problems affecting some groups – the research identified a number of common points and inter-relationships between the disadvantages experienced on different grounds.

First, there is a clear pattern of **lack of realisation of the rights to equality and non-discrimination**. As will be discussed in more detail in Part 3, legal protections from discrimination in Kenya are inconsistent, with levels of protection varying between grounds and across areas of life, gaps in protection and direct contradiction between legal provisions in some areas of life. Thus, there is a clear need to extend legal protections to ensure that all persons in Kenya have adequate protection from discrimination on all eligible grounds and in all areas of life regulated by law. Even where rights are available, enforcement is weak, knowledge of legal rights is poor among both right-holders and duty-bearers and access to justice is problematic. Thus, the communities which ERT and KHRC met in Isiolo, Wajir and Lodwar, for example, had little understanding of their legal rights under the legislation such as the National Cohesion and Integration Act or the new Constitution and no resources to mount a legal challenge against the discrimination which they suffered.

Second, the research identified the role of the **state as a discriminator and creator of inequality**. While this link is at its most obvious in respect of ethnicity, where the research identified patterns of both direct and indirect discrimination against particular ethnic groups, there is evidence in other areas as well. Women, for example, are subject to a range of discriminatory laws and laws which are open to discriminatory application, a situation which has only recently begun to change with the introduction of the new Constitution. Laws interpreted as criminalising same sex intimacy between men discriminate directly against gay and bisexual men, and give rise to extortion and other problems at the hands of state actors. Thus, the government appears to be failing to meet its most basic obligation to respect the right to non-discrimination under the international treaties to which Kenya is a party.

Third, research has confirmed that two key themes, **poverty and ethnicity**, are central to an understanding of discrimination and inequality in Kenya, both because of the scale of their impact as distinct causes of discrimination, and because of their cross-cutting nature, which results in multiple discrimination for many of those suffering disadvantage because of another aspect of their identity. In the course of the research, ERT found few people who testified to having experienced discrimination or inequality where either poverty or ethnicity – themselves closely linked – were not a factor in causing, perpetuating or increasing disadvantage.

The conclusion of this analysis is a clear recommendation for Kenya to do more to tackle discrimination and inequality. There is a need to legislate to provide comprehensive protection from discrimination – protection across all grounds and in all areas of life regulated by law. This must be supplemented by concerted action to improve access to justice where protections exist, through public education, training, legal assistance, strengthening specialised bodies and a review of procedures governing cases of discrimination. There is also a clear need to review discriminatory laws and repeal or amend them to bring them into line with the new Constitution and Kenya's legal obligations under international law. Again, this must be matched by efforts to ensure that discrimination by state actors is addressed. Finally, the government must take steps to promote substantive equality and to address the principal root causes of discrimination and inequality in Kenya through positive action and other measures.

2.1 Poverty, Inequality and Discrimination

Poverty is one of the major challenges facing Kenya as a society, and a decisive factor in determining the life chances of individual Kenyans. Poverty, inequality and discrimination are interwoven, often in complex and mutually-reinforcing ways. Thus, poverty is often a cause of discrimination, with the most economically disadvantaged experiencing discrimination, disadvantage and inequality of access to basic amenities and public services on grounds of their poverty alone. On the other hand, poverty is also often a consequence of discrimination, with a range of groups, including women, persons with disabilities and indigenous communities falling into poverty as a consequence of the status-based discrimination they suffer. Finally, poverty can act as an aggravating factor, increasing the exposure to discrimination of persons already vulnerable because of an aspect of their identity – for example, albinism, or disability.

On both aggregate and average measures of poverty, Kenya ranks in or just outside the bottom quartile globally. In 2010, for example, Kenya's gross domestic product (GDP) per capita was \$US775,⁹⁴ while World Bank data from 2005, the most recent year for which figures are available, showed that 19.7% of the population lived on \$1.25 a day or less.⁹⁵ According to UNDP data for 2011, Kenya ranks 143rd out of 187 countries for which the human development index (HDI) has been calculated.⁹⁶ However, the use of average or aggregate figures belies the level of income and wealth inequality in the country. An analysis of the impact of inequality on human development, undertaken by the UNDP in 2010, indicates that Kenya's HDI value reduces by 31.9% when it is adjusted for inequalities.⁹⁷ The HDI measures the average achievements in a country in three basic dimensions of human development: a long and healthy life, education, and a decent standard of living, so a drop in the value of close to one third indicates that inequality has a significant impact on the extent to which all Kenyan citizens enjoy a basic level of development. World Bank data from 2005 confirms the highly unequal distribution of income in

94 World Bank, *GDP Per Capita (Current US\$)*, 2010, available at: <http://data.worldbank.org/indicator/NY.GDP.PCAP.CD>.

95 The World Bank, *Poverty headcount ratio at \$1.25 a day (PPP) (% of population) for 2005*.

96 United Nations Development Programme, *International Human Development Indicators: Kenya*, 2011.

97 United Nations Development Programme, *Human Development Report 2010*, 2010, p. 142.

Kenya, showing that 38% of income accrues to the top 10%, compared with just 2% accruing to the poorest 10%.⁹⁸

A 2006 report by UNDP explicitly linked Kenya's weak progress against poverty reduction targets with income inequality, stating that reducing such inequalities would cut the time for the median household to pass the poverty line by 17 years, bringing "the country within touching distance of an otherwise unattainable Millennium Development Goal target of halving income poverty".⁹⁹ A submission by a coalition of Kenyan NGOs to the CESC in 2007 stressed the link between growing inequality in the distribution of income and wealth and the growth of both absolute and relative poverty, stating:

*[A]lthough the economy has registered growth attributable to economic reforms over the last five years, the ruthlessness of the economic growth is confirmed by increasing inequality in the distribution of income and wealth, or bluntly put, poverty. In the absence of social protection mechanisms, this has in turn negated equal protection and non-discrimination in access to and enjoyment of economic, social and cultural rights by all.*¹⁰⁰

As this suggests, poverty and discrimination are inextricably linked in Kenyan society. For those suffering identity-based discrimination, poverty is often a direct consequence. Interviews which ERT conducted with persons with disabilities underlined the impact which visual or mobility impairments, for example, have on an individual's ability to generate an income and thereby to participate in society on an equal basis.¹⁰¹ Similarly, for women in rural areas suffering discrimination in property and succession cases decided by customary courts, poverty is an immediate consequence of judgments against them.¹⁰² Ethnic minorities living in the country's arid and semi-arid land

98 The World Bank, *Income share held by lowest 10% for 2005*; idem, *Income share held by highest 10% for 2005*.

99 United Nations Development Programme, *Human Development Report: State of Human Development 2006*, p. 272.

100 Coalition of Non-Governmental Organizations on Economic, Social and Cultural Rights and Kenya Human Rights Network, *Taking These Rights Seriously: Civil Society Organisations' Parallel Report to the Initial State Report of the Republic of Kenya on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, 2008, p. 8, available at: http://www.2ohchr.org/english/bodies/cescr/docs/ngos/K-HURINET_Kenya_CESCR41_report.pdf.

101 See below, section 2.5.

102 See below, section 2.3.

(ASAL) districts, which have been – and in some cases continue to be – the subject of directly and indirectly discriminatory resource allocation policies, enjoy poorer access to infrastructure and basic amenities, public services, education and employment, and hence are more likely to live in poverty.¹⁰³

On the other hand, poverty is itself a cause, as well as a consequence, of discrimination and inequality, and there is extensive evidence to support the view that the country's poor are discriminated against, experience inequality in access to public services and access to basic amenities and have lower levels of participation in public life. As the aforementioned NGO coalition's report to CESSCR states:

*Many Kenyans continue to face ill treatment just because they are poor and unemployed. Discrimination abounds for poor people and vulnerable groups such as women, children, refugees and minorities (...) local government authorities and police disproportionately harass the poor and youths with security raids in the name of maintaining law and order.*¹⁰⁴

Statistical studies present evidence of *de facto* inequalities between income groups in access to public services, including education and health services. According to data collected in 2003, attendance ratios at primary and secondary school level vary significantly between the highest and lowest income groups: the attendance ratio at primary level is 86% for the highest income quintile, compared with 61.3% for the lowest.¹⁰⁵ Data collected by United Nations Children's Fund (UNICEF) indicate that drop-out rates are higher among the poorest children: while 87.4% of children from the richest quintile who enrol in standard 1 will reach standard 8, only 68.2% of children from the poorest quintile will complete standard 8.¹⁰⁶ Similarly, access to healthcare and health outcomes are highly unequal: the Society for International Development (SID) has established that infant mortality rates are significantly higher in the poorest 20% of the population than in the richest 20%, with 96

103 See below, section 2.2.

104 See above, note 100, p. 26.

105 Society for International Development, *Pulling Apart: Facts and Figures on Inequality in Kenya*, 2004, p. 5, available at: <http://www.sidint.net/docs/pullingapart-mini.pdf>.

106 United Nations Children's Fund (UNICEF), *Multiple Indicator Cluster Surveys 2 – National Reports: Kenya*, 2000, p. 9.

deaths per 1000 live births compared to 62.¹⁰⁷ UNICEF data indicates that only 28% of the poorest households have access to safe drinking water, compared with 93.7% of those in the richest quintile.¹⁰⁸

Furthermore, ERT's research suggests that women, persons with disability, ethnic minorities and members of other disadvantaged identity groups living in poverty are significantly more exposed to discrimination arising from their identity than those with access to more financial resources. Status-based discrimination is more likely to affect those from the poorest backgrounds, with lack of education, lack of access to resources and lack of political representation all playing a part. Indeed, participants at a roundtable convened by ERT, KHRC and the Federation of Women Lawyers Kenya (FIDA-K) in Nairobi in 2010 attested to the fact that socio-economic status was one of the most significant determinants of an individual's vulnerability – even where other factors, such as sexual orientation, created a significant degree of exposure to discrimination.¹⁰⁹

Two examples from ERT's research for this report illustrate how poverty, coupled with a lack of education and prejudice in their community, acts to accelerate the disadvantage suffered by those vulnerable to discrimination. Mumbi Ngugi, Director of the Albinism Foundation of East Africa, told ERT that poverty is a substantial exacerbating factor in the disadvantage suffered by people with albinism, both because the poor are less able to access spectacles and sunscreen, and because ignorance, prejudice and stigma are more common in poor communities.¹¹⁰ Similarly, Edah Maina, Director of the Kenya Society for the Mentally Handicapped told ERT that prejudice and discrimination against those with mental disabilities are more common in poor, rural communities, where ignorance and superstition about mental health and disability, combined with the lack of a social welfare structure, leads families and communities to ignore or treat cruelly those with disabilities.¹¹¹

107 See above, note 105, p. 6.

108 See above, note 106, p. 12.

109 Roundtable "Legislative Reform on Equality: Needs, Priorities and Opportunities", convened by ERT, FIDA-K and KHRC, 25-26 January 2010, Nairobi.

110 ERT Interview with Mumbi Ngugi, July 2010, via email.

111 ERT Interview with Edah Maina, April 2011, via skype.

Poverty and status discrimination also reinforce one another with respect to women. Women – as is discussed elsewhere in this report – are more likely to be poor than men, largely as a result of discrimination against them.¹¹² Historic inequalities, persistent gender stereotypes, low levels of property ownership and inequality of access to education and employment, all combine to the effect that women are poorer than men in their community. In its turn, women’s relative poverty plays an integral role in perpetuating discrimination and inequality in almost all areas of life, from access to healthcare to participation in civic and public life.¹¹³ As the government of Kenya stated in its recent report to the Committee on the Elimination of Discrimination against Women:

*Poverty remains a formidable challenge to the progress of rural women and their realization of equality with men in almost every sphere of life (...) In the midst of poverty, many women continue to suffer domestic violence which hinders their meaningful participation in subsistence and development activities. In addition, it appears that family planning programmes are becoming increasingly inaccessible to many women due to lack of finances which makes it difficult for many to travel to health care services, the places where such services are mostly offered.*¹¹⁴

One of the most compelling examples of the intersection between poverty and discrimination in Kenya arises in respect of ethnicity. The link between political power, ethnicity and poverty is evident throughout Kenya’s history. As discussed in more detail in section 2.2 below, Kenya’s pre- and post-independence politics have been dominated by ethnicity, as “wielders of political office have often afforded different and preferential treatment in making appointments to public positions, in allocating public land and other resources”.¹¹⁵ There is a perception that, over the course of decades, political leaders have sought the support of particular ethnic groups with promises of

112 See below, section 2.3.

113 *Ibid.*

114 Committee on the Elimination of Discrimination against Women, *Seventh Periodic Report of State Parties: Kenya*, UN Doc. CEDAW/C/KEN/7, 2010, Para 250.

115 See above, note 100, p. 17.

benefits for their region, and rewarded those who have voted for them with greater land, funding or infrastructure investment. SID, in its recent analysis of the government's Vision 2030 development policy, illustrates how inequalities in the allocation of public funds across Kenya's different regions have served to embed disadvantage for certain ethnic groups:

[There] is inequality across different regions, races and ethnic groups in Kenya. This takes two forms. One is the differences in regions that are rooted in the economic history of Kenya. Examples of such differences are the concentration by policy makers on "high productive" areas and the favouritism shown by different regimes to different areas of the country in provision of infrastructure such as schools, roads, health centres, etc. Because the vast majority of each ethnic group in the country often lives within a specific region, a regional disparity automatically becomes an ethnic disparity. Within this is also the inheritance of a colonial legacy in which racial groups favoured during colonialism at independence have a head start over others. The other difference occurs at the level of the individual and is captured via the favouring of individuals from specific communities for employment, education or credit opportunities.¹¹⁶

At the national level, the result of policies and decisions of the type cited by SID is that whole provinces – North Eastern province, for example – have remained marginalised and underdeveloped, while others, such as Central province, thrive by comparison. Data from another study by SID reveals substantial regional disparities in rates of employment, availability of "high potential land" for agriculture and access to water and electricity.¹¹⁷ In Western, North Eastern and Nyanza provinces, for example, only 1% of the population has access to piped water, compared to 12% in Central province and 33% in Nairobi.¹¹⁸ In 2011, the Committee on the Elimination of Racial Discrimina-

116 Society for International Development, *Kenya's Vision 2030: An Audit from an Income and Gender Inequalities Perspective*, 2010, p. 5.

117 See above, note 105, pp. 10-13.

118 *Ibid.*, p. 12.

tion (CERD) recommended that Kenya take steps to address ethnic and regional disparities:

[T]he Committee notes with concern that measures previously taken by the State party have not addressed the ethnic and regional disparities in the enjoyment of economic and social rights, which is one of the causes of resentment among ethnic groups (...) The Committee recommends that the State party address the question of ethnic and regional disparities and encourages the State party to allocate the necessary resources, in addition to those coming from the Equalisation Fund, to address the lack of provision of, and access to, public services in marginalized areas. (...) Moreover, the Committee calls on the State party to anchor the fight against inequality and the development of marginalized areas in its poverty reduction policy and strategies.¹¹⁹

ERT's field research from Wajir, in North Eastern province, and Lodwar, in Rift Valley Province, provides additional evidence of large regional disparities in access to infrastructure, basic amenities and public services.¹²⁰ Moreover, it identifies links between these *de facto* inequalities and discriminatory government policies. Those interviewed by ERT in both locations testified to the indirectly discriminatory impact of government policies, originating in economic policies established immediately after independence, which have channelled development funds towards the most developed parts of the country, rather than the least developed. Interviewees also claimed that their regions received less investment because of direct ethnic discrimination by those in positions of political power, who seek to bolster their position by directing investment towards the regions dominated by the ethnic groups that support them, at the expense of those groups that do not.

There is also a perception that ethno-regional discrimination in resource allocation occurs at the local level, where individual Members of Parliament and

119 Committee on the Elimination of Racial Discrimination, *Concluding Observations on Kenya*, UN Doc. CERD/C/KEN/CO/1-4, 2011, Para 23.

120 See below, section 2.2.

District Commissioners re-draw administrative boundaries and direct funding to “reward” particular communities and punish others. ERT’s research in Burat sub-location, Isiolo, Eastern Province, illustrates the connection between ethnic discrimination, political power and poverty.¹²¹ ERT met with members of the Turkana community resident in Burat, one of whom stated that the local MP has sought “to punish the Turkana community because they had fronted one of their own against him” while rewarding his political supporters by directing investment to areas where they are dominant.¹²² As a result, there is no health facility or secondary school in the immediate vicinity of Burat, and funds allocated for the construction of a new primary school have been allocated to another sub-location.

The result of this ethno-regional discrimination in resource allocation in each of the regions visited is to further entrench the poverty of the area and exacerbate the disadvantages of the population compared to other parts of the district, province or country as a whole. This means poorer access to education, healthcare and employment, which in turn means that these groups are less able to articulate their concerns and secure adequate political representation. Thus, the Turkana population in Burat is stuck in a vicious cycle of discrimination and deprivation which leaves them trapped in poverty and unable to participate in all areas of life on an equal basis.

Put simply, poverty is the unavoidable backdrop to any discussion of discrimination and inequality in Kenya. Throughout the research for this report, ERT found evidence that groups vulnerable to discrimination on the basis of their identity – women, persons with disability or particular indigenous communities, for example – were forced into poverty as a consequence. At the same time, research found repeated evidence of discrimination arising as a consequence of poverty. In a country where poverty is widespread and state provision of services, welfare support and resources is limited, socio-economic inequality has significant consequences for equality of participa-

121 Focus Group discussion conducted by ERT with members of the local community, 22 March 2011, Burat Sub-location, Isiolo District, Eastern Province. For a more detailed discussion of the Burat community, see below, section 2.2.

122 Interview conducted by ERT with X., 22 March 2011, Burat Sub-location, Isiolo District, Eastern Province. Throughout this report, ERT has withheld the names of individual respondents who have requested anonymity; or about whom ERT has grounds to believe that disclosing their identity would put them at risk.

tion in the different areas of life. Those in poverty are denied access to the educational and employment opportunities required to improve their situation, creating a vicious cycle. Poverty also acts as an accelerating factor, increasing exposure to prejudice and exacerbating disadvantage among those already exposed to discrimination. Thus, a multi-layered problem emerges. Poverty, inequality and discrimination are mutually reinforcing vulnerabilities, working in tandem to increase disadvantage and further marginalise the most vulnerable sections of society.

2.2 Tribe, Ethnicity and Region

Tribe and ethnicity are complex and controversial issues in Kenya, a country which has been described as a “composite of ethnic communities”.¹²³ Over decades, Kenya’s politics has become increasingly dominated by ethnicity, with politicians on all sides tending to use ethnicity as a means to secure and maintain political support, both drawing on and fuelling perceptions of inter-ethnic competition. This politicisation of ethnicity – combined with significant actual disparities in wealth, infrastructure and services between ethnic groups living in different parts of the country – contributes to a perception that when in government, politicians treat certain ethnic groups more favourably than others, particularly in respect to resource allocation.

It can be difficult to substantiate this perception of ethnic discrimination in public resources, given the absence of data disaggregated by ethnicity in areas such as employment, education and healthcare. Yet as Kenya’s major ethnic groups tend to be geographically divided, regional disparities provide a good framework to assess the presence or absence of ethnic discrimination. This section begins with an analysis of the link between ethnicity and political power, before assessing the evidence of *de facto* socio-economic inequalities, including regional disparities across a range of economic and infrastructure indicators, which have a direct impact on, *inter alia*, access to employment, education and healthcare. This is complemented by direct testimony collected from some of Kenya’s poorest districts which provide an opportunity to assess how regional inequalities arise as a consequence not only of inevitable variations in climate, agro-ecological conditions and economic productivity, but also of direct and indirect discrimination on grounds of ethnicity against those residing in these areas.

123 Minority Rights Group International, *Kenya: Minorities, Indigenous Peoples and Ethnic Diversity*, 2005, p. 9.

Kenya has no ethnic majority, and is home to more than 70 different ethnic groups or tribes,¹²⁴ including the Kikuyu (22%), Luhya (14%), Luo (13%), Kalenjin (12%), Kiisi (11%), Kamba (6%), Meru (6%) and Maasai (1%).¹²⁵ Ethnicity, tribe and regional origin play a decisive and divisive role in national politics, where questions of resource allocation, political patronage, corruption and electoral advantage all involve elements of ethnicity. As the Kenyan government itself notes in its recent report to CERD:

*Ethnicity in Kenya is highly politicised, resulting in insecurity, ethnic conflicts and exclusion, marginalization and governance problems. There is discernible tendency for people of African descent to be identified in terms of their ethnicity and not their citizenship. This becomes more pronounced every five years during national elections when voting along ethnic lines is largely exhibited. The public images of the political leaders are closely associated with their ethnic backgrounds and not the soundness of their policies.*¹²⁶

In some senses, the roots of this problem lie in the policies of the British administration during the colonial period and at the time of decolonisation. Some commentators have attributed the creation of “tribalism” to British policies of divide and rule aimed at preventing African unity,¹²⁷ while others suggest that “geographical accident” made certain parts of the country more suited to the kind of agricultural expansion favoured by the British, and created advantages for those residing in these areas.¹²⁸ John Oucho, in a 2010 article on Kenya’s 2007 post-election violence, identifies four aspects of the colonial legacy, including the expropriation of land from certain communities under the colonial administration and the decision, at the point of decoloni-

124 University of Pennsylvania Africa Studies Centre, *Kenya - Ethnic Groups*, undated.

125 Ministry for Planning, National Development and Vision 2030, *2009 Population & Housing Census Results*, 2010.

126 Committee on the Elimination of Racial Discrimination, *Reports submitted by States parties under article 9 of the Convention: Initial to Fourth Periodic State Reports: Kenya*, UN Doc. CERD/C/KEN/1-4, 2011, Para 9.

127 See, for example, Abonyo, S., “‘Tribe’ and tribal statistics in Kenya”, *Pambazuka News*, Issue 446, 2009, available at: <http://www.pambazuka.org/en/category/comment/58457>.

128 Lonsdale, J., “Kenya: ethnicity, tribe, and state”, *OpenDemocracy.Net*, 2008, available at: http://www.opendemocracy.net/article/kenya_ethnicity_tribe_and_state.

sation, to divide the country into seven provinces, all but two of which were “coterminous ethnic-administrative units” as factors which contributed to the politicisation of ethnicity.¹²⁹

It is clear, however, that since independence, power and ethnicity have become increasingly intertwined. Political parties in the independence era were formed along ethnic, rather than ideological lines and each of the country’s three Presidents has used ethno-regional identity as a means to secure and maintain support. Under Kenyatta, there were perceptions that the Kikuyu received a disproportionate share of political power and reaped the greatest benefits from settlement schemes in the “white” highlands, i.e. those lands settled by Europeans and subsequently vacated under the “willing-buyer-willing-seller” arrangements subsidised by the UK government in the immediate aftermath of independence.¹³⁰ Under Moi, the link between ethnicity and political power strengthened. Lonsdale states that the regime would “attract and reward one’s ethnic followers with officially-deniable opportunities for thuggery at the expense of those who were now tribal rivals in land, urban property, or petty trade”.¹³¹ According to Oucho, Moi also used development planning policy as a tool for ethno-political manipulation, as his regime:

*[p]erfected the system of polarisation by adopting the famed but short-lived District Focus for Rural Development (DFRD) in 1983/84. Sadly, the DFRD turned out to be a complete fiasco as the country’s political leadership manipulated it for political ends, directing development to selected districts in Rift Valley Province and others with the leaders closest and most loyal to President Moi.*¹³²

Those hoping for change following the election of President Mwai Kibaki in 2002 were disappointed, and following a tightly contested election between Kibaki

129 Oucho, J., “Undercurrents of Post-Election Violence in Kenya: Issues in the Long-Term Agenda”, in Society for International Development, *Democratic Gains and Gaps: A Study of the 2007 Kenyan General Elections*, 2010, pp. 3-5.

130 Minorities at Risk Project, *Assessment for Kikuyu in Kenya*, 2000, available at: <http://www.unhcr.org/refworld/docid/469f3aa432.html>.

131 See above, note 128.

132 See above, note 129, p. 6.

and the ODM's Raila Odinga in 2007, political tensions spilled over into ethnic conflict. While the immediate causes of the post-election violence were political, evidence from the period suggests that at the root were issues of discrimination and inequality between different ethno-regional groups. Oucho suggests that the post-election violence arose because of widespread feelings of disaffection, disenfranchisement and distrust toward those in power. As he states:

By the time of the 2007 election, independent governance had failed to respond appropriately to Kenya's diversity, which is its greatest asset if judiciously exploited. Successive governments have tended to develop areas from which the top leadership hails and to neglect those perceived to be opposition strongholds, making the scramble for leadership turn into an opportunity for eating chiefs at the expense of starving subjects. The verdict which the voters were deemed to pass in the highly polarised country in 2007 was no change for the better in their lives and, therefore, their desire to embrace change by trying to vote in another party, failing which they would revolt.¹³³

A fact-finding mission on behalf of the Office of the High Commissioner for Human Rights in February 2008 to investigate the post-election violence identified three underlying causal factors: "long-standing conflict over land rights, prevailing impunity for human rights violations and highly unsatisfactory fulfilment of economic and social rights".¹³⁴ The Mission's analysis suggests that each of these factors has a strong ethno-regional element arising directly from the systematic use of ethnicity by political leaders to establish and maintain support. Participants at an ERT focus group in Ugenya, Nyanza Province, a Luo-dominated area, supported the view that ethnicity was the decisive factor in the post-election violence. One Luo man said:

It came about because of imbalances of distribution of resources and there was also the issue of domination.

133 *Ibid.*, p. 7.

134 United Nations High Commissioner for Human Rights, *Report from OHCHR Fact-finding Mission to Kenya 6-28 February 2008*, 2008, p. 5.

*Some communities became dominant of all the leadership (...) you can talk about hierarchies. When they have all the positions of power, you realise that there must be that kind of imbalances towards that community (...) My experience is that things are getting worse. It's about the system, about the politics. When I see someone from Central or Eastern, he is a PNU guy. Anyone who is a Luo is an ODM – whether I subscribe to ODM or not, I'm an ODM person.*¹³⁵

Afrobarometer, an independent, nonpartisan research project which measures the social, political, and economic atmosphere in Africa, carried out a survey three weeks before the disputed 2007 election which provides interesting insights into the role of ethnicity and tribal identity in political decision-making, as well as into the causes of the post-election violence. While only 20% of the survey respondents chose to identify themselves according to ethnic criteria, 50% of respondents said that the ethnicity of candidates in the election was “an important consideration for their fellow citizens”.¹³⁶ The survey authors state that Kenyans are likely to “regard ethnicity as a source of political and economic division” and conclude that:

*[V]oters refer to the institutional reputation of their opponent's party in deciding, defensively, to vote as an ethnic bloc. They do not need to be primarily motivated by their own ethnic origins in order to behave in this fashion; they only need fear that their opponents will rely on formulae of ethnic exclusivity. Where voting blocs are polarized, and where polarization revolves around ethnicity, voters are hard pressed to maintain a commitment to policy issues above ethnic origins as a basis for voting.*¹³⁷

135 Focus Group discussion conducted by ERT with human rights activists, 24 March 2011, Uganda, Nyanza Province.

136 Kimenyi, M., and Bratton, M., “Voting in Kenya: Putting Ethnicity in Perspective”, *Afrobarometer Working Paper 95*, 2008, pp. 5, 9. The survey grouped a number of different identification categories together – clan, tribal, linguistic, racial, and regional identities – to create a group who primarily identified themselves by aspects of ethnicity, as opposed to “non-ethnics” who defined themselves by other criteria and “Kenyans” who defined themselves primarily by their nationality.

137 *Ibid.*, p. 10.

Despite progress on a number of fronts by the current coalition government, the ethnicisation of politics continues largely unabated. As Yash Ghai and Jill Cottrell Ghai stated in a pamphlet about the new Constitution in mid-2010:

[P]oliticians 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.¹³⁸

In its 2011 review of Kenya's implementation of the International Convention on the Elimination of all forms of Racial Discrimination (ICERD), CERD expressed concern about the continued use of "ethnic lines for political purposes" and called on the state "to strictly enforce the legislation on hate speech and incitement to hatred, and to investigate all allegations brought to its attention".¹³⁹ CERD recommended that hate speech is properly prosecuted "when it is committed for political propaganda, insofar as it can lead to violence", and that Kenya should "strictly enforce the relevant laws on the liability of the media when reporting or publishing racist statements".¹⁴⁰

The aforementioned Afrobarometer survey provides a good insight into the population's perceptions of ethnic discrimination. When asked – with reference to a number of characteristics – how often people were discriminated against, 25% said people were likely to be discriminated against on the basis of their ethnic group.¹⁴¹ The survey also found a significant variation in perceptions between ethnic groups. When asked about discrimination by the authorities, interviewees from two of the country's largest ethnic groups, the Kikuyu and the Luo, provided markedly different responses. 66% of Luo respondents said that their treatment by the government was worse than that of other groups, compared with only 6% of Kikuyu respondents, while 64% of Luo said their economic conditions were worse or much worse than those of other groups, compared with only 12% of Kikuyu.¹⁴²

138 Ghai, Y. and Cottrell Ghai, J., *The Choice in the Referendum: A Comparative Analysis of the Proposed Constitution of Kenya and the Current Constitution*, July 2010, p. 6.

139 See above, note 119, Para 13.

140 *Ibid.*

141 See above, note 136, p. 8.

142 *Ibid.*, p. 9.

ERT's research indicates that such perceptions of ethnic discrimination persist. In March 2011, ERT conducted focus groups with human rights activists and victims of discrimination in Mombasa, Coast Province, where participants expressed anger about what they perceived as widespread discrimination against "Coastarians" by the national government.¹⁴³ Despite their various origins in a range of different tribal groups, the people of Coast region retain a unique collective identity, defined in part by the different features of life in the province: "Coastarians" are more likely to speak Swahili as a common language, rather than English, and are more likely to be Muslim; the area also has a distinctive culture combining influences from Arab and South Asian immigrants with indigenous African groups. Participants in the focus group were adamant that people in the region suffered ethnic discrimination, and the animosity towards the majority Kikuyu and their influence over national politics was evident throughout, not least in the consistent references to them as "WaKenya" (the Kenyans), a term which emphasises the extent to which "Coastarians" feel marginalised from national public life.

A lack of data disaggregated by ethnicity, a problem highlighted by CERD,¹⁴⁴ makes it difficult to substantiate claims of systemic discrimination on grounds of ethnicity. However, as many of Kenya's ethnic groups reside in distinct geographical areas, regional variations in access to infrastructure, amenities and services will disproportionately disadvantage those ethnic groups which predominate in the least developed regions. Thus, examining regional imbalances provides a useful basis to assess the presence of *de facto* inequalities between ethnic groups and to suspect ethnic discrimination, whether direct or indirect, in resource allocation. However, in so doing, it is important to bear in mind the impact of other factors, such as pre-existing variations in the relative productivity of different regions, in giving rise to these imbalances.

The presence of large regional disparities in levels of development in Kenya is a well-established fact. According to a 2008 World Bank report, there is a "striking provincial variation in incomes, poverty and human development".¹⁴⁵ The report states that "spatial disparities in poverty arise

143 Focus Group discussion conducted by ERT with human rights activists, 25 March 2011, Mombasa.

144 See above, note 119, Para 26.

145 World Bank Poverty Reduction and Economic Management Unit (Africa Region), *Kenya Poverty and Inequality Assessment*, 2008, Para 13.

for a range of reasons. Naturally, there are climatic and agro-ecological differences, but there are also different levels of access to service".¹⁴⁶ M. J. Gitau, writing for Action Aid, identifies a range of contributing factors which give rise to disparities in development, including political patronage, but also geographical disparities in agricultural productivity and post-independence development policies which directed investment to areas of high potential productivity. As he states:

*One can make a causal link between Central Province – the least poor province in Kenya – and the fact that it produces three export crops (tea, coffee, horticulture) and has relatively good development indicators. Agro-ecological conditions of a region therefore seem to be a relevant factor in explaining regional disparities in Kenya, holding other factors constant.*¹⁴⁷

It is undeniable, as Gitau states, that there are substantial variations in the natural resources, climate and population of Kenya's region which predispose certain parts of the country to higher economic development than others. Kenya's ASAL districts – hot and dry, with erratic rainfall – have the lowest agricultural productivity. The 14 districts with the highest levels of aridity (those which are classified as 100% or 85-100% arid) are concentrated in the north of the country, and include the whole of North Eastern Province, together with a number of districts in Eastern, Rift Valley and Coast Provinces.¹⁴⁸ As a result, there is a significant disparity in the availability of "high potential land" for agriculture, with North Eastern, Eastern, Rift Valley and Coast Provinces having the highest proportions of land classified as low potential.¹⁴⁹

However, variations in agricultural productivity alone do not explain the wide disparity between Kenya's provinces. SID, in its audit of the government's Vision 2030 development, pointed out that the concentration by policy makers on "high productive areas" in provision of infrastructure such as schools,

146 *Ibid.*

147 Gitau, M. J., "How to Understand Inequality in Kenya", *Action Aid Partner News*, Vol. 8(1), 2005, available at: <http://www.ms.dk/sw7605.asp>.

148 Oxfam, *Delivering the Agenda: Addressing Chronic Under-development in Kenya's Arid Lands*, 2006, p. 6.

149 See above, note 105, table 3.1, p. 11.

roads, health centres, etc., has exacerbated the deprivation of the country's most marginalised areas.¹⁵⁰ According to SID, this policy focus can be traced right back to Kenya's early independence, and Sessional Paper no. 10 of 1965, "African Socialism and its Application on Planning",¹⁵¹ which stated that resource allocation preference should be towards "high potential areas", which together account for only 20% of Kenya's total land coverage. Elsewhere in the SID audit, the authors cite ethnic bias as a key factor in determining levels of infrastructure and development:

*Kenyans have always known of the impact of the biases of central government allocation, but it was not until the UNDP (2001) and SID (2004) reported the issue that a careful accounting of the impact was done. Both of these publications highlighted the difference in infrastructure and the resultant differences in health, education and income. What is particularly insidious about the regional differences in the basic provision of infrastructure is that after a time even if government were to treat all regions equally the early boost given to those in previously favoured regions gives them a head start, particularly in market-based activities.*¹⁵²

A range of data broken down by province illustrates the under-development of the ASAL-dominated North Eastern Province, and to a lesser extent Eastern, Rift Valley and Coast Provinces, which each contain a significant number of high-aridity districts. Wealth and poverty data shows wide regional disparities. In 2008-2009, 75.9% of the population of North Eastern Province fell into the lowest wealth quintile compared with only 2.2% of the population of Central Province.¹⁵³ World Bank data shows that there are also pockets of significant deprivation at a local level, with particular districts being far

150 See above, note 116, p. 5.

151 Government of Kenya, *African Socialism and its Application on Planning*, 1965, available at: <http://www.ncck.org/largedocs/Socialism%20print%20version-1.pdf>.

152 See above, note 116, p. 22.

153 Kenya Central Bureau of Statistics, *Kenya Demographic and Health Survey 2009*, 2009, table 2.10, p. 26, available at: <http://www.measuredhs.com/pubs/pdf/FR229/FR229.pdf>.

below the average in their respective provinces: in the Turkana district of Rift Valley Province, for example, poverty incidence is 94%.¹⁵⁴

Data from the aforementioned SID study “Pulling Apart: Facts and Figures on Inequality in Kenya” also reveals substantial regional disparities across a range of economic and infrastructure indicators, including employment. According to the study, the urban areas of North Eastern Province had the highest rate of unemployment at 35%, a rate which was almost six times higher than that in Central Province (6%).¹⁵⁵ Even so, these figures may understate the difference between the two provinces, as data from the rural parts of North Eastern Province – where unemployment may be higher – are not included. In addition, these figures are based on the Integrated Labour Force Survey 1998/1999. Yet this appears to be the most recent data which is available on the respective employment rates in different provinces. Given the significant disparities which the data reveals and the fact that these regional disparities are likely to translate into inequalities between ethnic groups, it is regrettable that more up to date information is not available. The World Bank has raised concerns about “the timeliness of the data from national surveys”, and in particular the “the absence of recent data on labour market issues, whether on firms or workers”.¹⁵⁶ In its 2008 Kenya Poverty and Inequality Assessment,¹⁵⁷ the lack of available data led World Bank staff to develop estimated projections of unemployment rates in different provinces on the basis of data from the Kenya Integrated Household Survey 2005-2006.¹⁵⁸ These 2008 estimates show a similar disparity between North Eastern Province, which had an unemployment rate of 40%, and Central Province, where unemployment was 10%, to the earlier Integrated Labour Force Survey.¹⁵⁹ Youth unemployment data from the same World Bank Assessment paints a similarly stark picture of disparity, with youth unemployment rates at 55% in North Eastern Province compared to 15% in Central.¹⁶⁰

154 World Bank, *Kenya Poverty and Inequality Assessment Volume I: Synthesis Report*, 2008, p. 22.

155 See above, note 105, Figure 3.4, p. 11.

156 See above, note 154, p. 188.

157 See above, note 154.

158 *Ibid.*, p. 55.

159 *Ibid.*, p. 55, Table 2-13.

160 *Ibid.*, p. xvii, Figure 7.

The SID study also identifies large regional disparities in access to water and electricity, though there is no discernable pattern of particularly low access in those provinces which are otherwise marginalised, with the exception of the consistently low levels of access in North Eastern Province.¹⁶¹ Other data confirms a pattern of deprivation which corresponds to the presence of ASAL districts. UNICEF statistics on the proportion of children under-five who are malnourished indicates that in 2000, the last year for which it published data on the country as whole, rates of malnutrition in Eastern and Rift Valley Provinces doubled those in Central Province and Nairobi.¹⁶² The rate for the marginalised North East Province was surprisingly low, though this may be because the data was only collected from the urban part of the Province.

In terms of education, a 2010 study by Uwezo Kenya, an NGO focused on improving educational outcomes in East Africa, reveals a stark regional variation in school attendance, with a consequential impact on outcomes.¹⁶³ The authors identified what they term a “red strip” covering North Eastern Province and the arid districts of Rift Valley and Eastern Provinces, where high proportions of children were out of school: in 2009, 16% of all children aged 6-16 years were out of school in North Eastern Province, and 22% of children were out of school in other arid districts.¹⁶⁴ This compares to the high attendance rates in other provinces: in Central Province, for example, only 1% of children in this same age group were out of school.¹⁶⁵ The report found that these areas consistently performed worse across the indicators identified by the study:

[These areas also had] low literacy and numeracy rates, low schooling levels of mothers, wide gender gaps in favour of boys (...) What is evident is that, beyond the most publicized aspects of access and equity, NEP [North East Province] and other arid districts are lagging behind the rest of the country, in terms of literacy and numeracy...¹⁶⁶

161 See above, note 105, pp. 12-13, Figures 3.6 and 3.7.

162 See above, note 106, Table 15: Percentage of under-five children who are severely or moderately undernourished, 2000, showing the percentage of children with weight for age - 2: Eastern: 29.6%; Rift Valley: 24.9%; Central: 15.4%; Nairobi: 12.4%; North Eastern (urban only): 16.6%.

163 Uwezo Kenya, *Are Our Children Learning: Annual Learning Assessment Kenya 2010*, 2010, p. 16.

164 *Ibid.*, p. 17.

165 *Ibid.*, pp. 16, 40.

166 *Ibid.*, p. 17.

The findings of the Uwezo study, and its identification of a “red strip” covering North Eastern Province and parts of Rift Valley and Eastern Provinces, tallies with other data on access to public services. Statistics from the Kenya Integrated Household Budget Survey for 2005-2006 show that the proportion of people living more than 5 km from the nearest health facility is substantially higher in North Eastern Province, where 85.7% of the population falls within this category, and Eastern and Coast Provinces, than elsewhere.¹⁶⁷ Only 28.6% of the population in Central province fall into this category, for example.¹⁶⁸ Wide disparities in access to maternal health care are also reported. Data from 2008-2009 shows that in North Eastern Province, only 69.5% of women who had had a live birth in the previous five years had received antenatal care from a skilled provider, compared with 96.4% and 92.7% of women in Nairobi and Central provinces respectively.¹⁶⁹ There is also evidence of regional disparities in health outcomes, though in this area, the pattern is not as clearly linked to ASAL districts. Statistics produced by the Kenya Demographic and Health Survey in 2009 indicate that despite progress in recent years, alarming regional differences in child mortality exist. The 2008-2009 data shows that Nyanza and Western Provinces, despite not being arid areas, have extremely high levels of child mortality, at 149 and 121 deaths per 1,000 children under five. Again, however, the level of child mortality in North East Province is higher than the most developed areas of the country, at 80 deaths per 1,000 compared with 51 per 1,000 in Central Province.¹⁷⁰

Access to justice is also a significant problem in the ASAL districts. According to the Kenyan government’s report to CERD, this has a particular impact on efforts to tackle racial discrimination and marginalisation:

*The mechanisms for access to justice in the ASALs where most cases of racial discrimination and/or marginalization occur are inadequate. There are very few courts and which (sic) are mostly found at the district headquarters. Further, there is increased insecurity in these areas and the area is not easily accessible by security agencies due to a poor infrastructural network.*¹⁷¹

167 See above, note 114, p. 58, Table 24.

168 *Ibid.*

169 See above, note 153, p. 114.

170 *Ibid.*, p. 107.

171 See above, note 126, Para 197.

In order to better understand the role of discrimination in producing these substantial regional variations in poverty, development and access to amenities and services, ERT and KHRC undertook field research in three of Kenya's most marginalised areas, all of which are classified as among the eight most arid districts in the country: Isiolo, Turkana and Wajir.¹⁷² In two of three cases – Turkana and Wajir – those interviewed were from distinct ethnic minorities, the indigenous pastoral Turkana community and ethnic Somalis. In Isiolo, ERT met with ethnic Turkana whose progenitors had migrated to the area from Turkana district in the first half of the 20th Century, and who are considered as “outsiders” by the local Borana tribe.

In late 2010, ERT undertook field research in Lodwar and other locations in the Turkana district of Rift Valley Province (see Box 1). The Turkana are an indigenous, pastoral community, but the increasing aridity of the area has reduced their ability to practice their traditional lifestyle. They face many disadvantages arising from the economic marginalisation of the area in which they reside. When asked about the root causes of the disadvantage they suffer, interviewees cited a combination of pre- and post-independence government policies and direct ethnic discrimination by those in positions of political power. They said that the government's strategy was to develop regions that were more likely to become economically productive, so areas which are resource-poor like Turkana district had not been an investment priority. The region had been neglected by the central government since the 1960s and there had been a lack of investment in the area. In addition, the persons interviewed identified colonial agrarian policy, post-independence land and citizenship policies, and corruption as critical factors in perpetuating the cycle of poverty, marginalisation and under-representation which they were experiencing.

In April 2011, ERT and KHRC visited and interviewed residents, local government officials and staff from the Kenya National Commission on Human Rights (KNCHR) in Wajir, in the arid and marginalised North Eastern Province.¹⁷³ The majority population in the area are of Somali ethnic origin and suffer significant discrimination by the state in access to identity cards, where they are required to meet additional conditions, undergo vetting procedures and provide documentation not required of other Kenyan citizens. They are

172 See above, note 148.

173 See below, section 2.2.2 for further discussion of ERT's research in Wajir, North Eastern Province.

Box 1:**Case Study*****The Turkana – A Marginalised Community***

In late 2010, ERT and KHRC, helped by GALCK, undertook field research in Lodwar, Turkana district in Rift Valley Province. Representatives of the Turkana Youth Council (TYC) spoke of the many and various ways in which the Turkana community is disadvantaged, largely because of the lack of employment, infrastructure and public services in the area.

The Turkana are a nomadic pastoralist community living in the semi-arid Turkana district in northern Kenya. The region in which the Turkana reside has very poor infrastructure and basic amenities. As a result, the community suffers significant poverty and is unable to access basic services, while the region's increasingly arid climate prevents them from living their traditional pastoral lives. Roads in the area have not been repaired for many years, and many people die in road accidents. The majority of people in the district live without electricity. While other areas of the country have rural electrification schemes, the Turkana region does not. TYC representatives stated that since the 1980s, the area has become increasingly arid, and that access to water is a growing problem; since the privatisation of water services in 2002, the situation has worsened and the price of water (45 shillings per cubic metre) has become prohibitively high for most people.

Reportedly, there was only one surgeon in the county, one gynaecologist who visits from time to time, and several medical officers and volunteers who are not doctors. The two doctors and most other health professionals were not locals. The interviewees stated that people were dying from curable diseases such as malaria and the flu because there is a shortage of medical facilities, personnel and medicines. The lack of local health facilities means that travel times and cost play a critical factor in health outcomes. Just in the last couple of days, two people had reportedly died in transit to the nearest hospital: a man had died because he was unable to pay the price of transport to the nearest hospital or chemist, while a pregnant woman had died on the road to the hospital after being bitten by a scorpion.

Although free primary education is available, lack of staff, facilities and infrastructure have led to overcrowding and classes with children of varying

ages. TYC activists complained that in some cases one teacher could have a class of 120 students at varying academic stages. Though enrolment at primary level is high, it drops significantly at the secondary level.

Policing and security in the region were also seen as presenting major challenges to the local population. People in the area have been vulnerable to violence arising from cross-border cattle raids undertaken both by the Turkana and by tribes living on the Sudanese side of the border. Interviewees had just learned about and provided to ERT the details of an incident that had happened in Naita, near the Sudanese border, in the early morning hours of the same day: Sudanese raiders had allegedly attacked pastoralist Turkana people, leaving ten men dead. The interviewees stated that most people feared the police and that intimidation and extortion by armed police, especially at night, was common. ERT was told of several cases of police abuse of the last few days. Ten days before the visit, a youth had been beaten by police and refused access to medical services until representatives from TYC visited and made arrangements for access to a doctor and a lawyer. In an earlier case of May 2010, a man had been shot and wounded during an arrest conducted at the instruction of the local chief, and was then deceived into giving false information and a confession. Some TYC activists expressed hope that the adoption of the new Constitution would go some way towards addressing these problems, but others expressed a view that the police were simply "adjusting" to the new rules while seeking ways to subvert them.

also abused by state security services, ostensibly engaged in fighting terrorism, unchecked migration and banditry in the area bordering Somalia. The area of Wajir suffers from significant underdevelopment: there are no tarmac roads and no sewerage system, the hospital is under-staffed and under-equipped, schools are in poor condition, and approximately four out of five adults are illiterate. The testimony of those interviewed points to direct and indirect discrimination in policy and decision making, with examples including the lack of investment in public services, lack of government support for local agricultural production, and lack of political representation.

Aside from these cases of apparent discrimination in resource allocation by central government authorities, the research found evidence of a link be-

tween corruption, ethnic discrimination and poverty operating at a local level. ERT visited Burat sub-location, on the outskirts of Isiolo, Eastern Province, where a small Turkana community, descendent from labourers who migrated to the area in the early 1900s, suffer profound discrimination from the local authorities (see Box 2). The experiences of this community provide a good insight into how colonial and post-independence land and economic policies, coupled with ethnic discrimination and corruption among the political class, can lead to severe marginalisation of a minority ethnic group in a particular locale. Indeed, in some senses, the situation in Burat is a microcosm of the interplay between political power, ethnicity and poverty at the national level. Seen as outsiders by the dominant Borana population, the Turkana population in Burat is in the minority in the Isiolo district, meaning that their political power is limited. According to those interviewed, the local Member of Parliament has practiced ethnic discrimination in resource allocation, seeking to “reward” those from areas which supported his election, at the expense of the Turkana minority community living in Burat.

Box 2.**Case Study**

Dispossession and Discrimination in Burat Sub-location, Isiolo, Central Province

The Turkana community in Burat sub-location began migrating to the area from the Turkana district of north-western Kenya in 1912 to provide labour for the local Somali population and the district colonial administration. In the 1950s, the district administration made two attempts to relocate the population to Turkana District, in preparation for the adoption of a new land-use policy. According to a written statement provided to ERT by Burat community leaders, “ever since that time [the] Turkana community are not considered as bona fide residents of Isiolo (...) and post-independence governments have used the same policy to deny Turkana community services”.

According to members of the community, they are subject to discrimination in access to resources by the local District Commissioner and the area’s Member of Parliament. A local councillor said to ERT:

The local Member of Parliament has discriminated against some areas in his constituency because he per-

ceives these as areas which never voted for him (...) It is based on ethnicity. There are people in one village in this area which voted for him, so he made sure that the village became a sub-location. He has given these people a chief (...) A small village (...) but he has rewarded them.

The question of administrative boundaries is a critical one for the people of Burat. In their written statement, Burat community leaders said that the local MP intervened to prevent the creation of a new Ngare Mara division which would have incorporated Burat, “to punish the Turkana community because they had fronted one of their own against the Minister in the election of 2007”. Mr Esekom Kiriu expressed the anger of the community that the local authorities had imposed a new chief on them from another community, without consultation.

Burat has no dispensary or medical facilities, the local primary school is in a state of disrepair and children from the area cannot attend secondary school as the nearest one is on the other side of Isiolo. Individuals interviewed by the authors pointed to the fact that funds intended for a school in Burat had been diverted to the Gambera sub-location, which is populated by the Borana, a group known to support the local MP. They stated that they are vulnerable to attacks and robberies which are then not investigated by the police.

The position of the community had been exacerbated in recent years by an increasingly bitter dispute with the Kenyan army over land around Burat. Following years of gradual encroachment on land claimed by the local community as theirs, in 2008 the army formally demarcated a large area of land around Burat (estimated at approximately 10,000 hectares) for the construction of a base, claimed ownership of the whole area surrounding Burat, and threatened eviction. When ERT visited the area, despite evidence of property demarcation, there were no signs of active construction. As a result of this process of dispossession, the local population was not able to farm the land and the local administration had not provided basic amenities in the area, using the disputed ownership as an official pretext to deny investment and redirect allocated funds. The community was mobilising in an attempt to stop their eviction from land which they consider to be theirs. In their written statement, they wrote: “We are not moving. Won’t move. Can’t move.”

The preceding examples indicate the extent to which Kenya's ethnic politics have taken hold, and the discontent of those who feel that their poverty is engendered and compounded by discriminatory policy decisions made by those of a different ethnicity. This link between ethnicity and political power manifests itself in two ways. The first is the tendency of political leaders to use ethnicity as a means to secure and maintain political support, the second, arising directly from the first, is a perception that when in power, politicians treat certain ethnic groups more favourably than others, particularly when questions of resource allocation arise. Both of these factors in turn feed the belief that individuals and communities must vote defensively along ethnic lines, in order to prevent other ethnic groups from gaining power and thus the capacity to direct funds towards their regional base.

Moreover, the research also illustrates how deeply regional – and therefore ethnic – inequalities are ingrained in Kenya. The significant disparities in amenities, infrastructure and services between different regions translate into great inequalities in participation in all areas of civil, political, economic, social and cultural life between those living in the marginalised areas and those outside them. While the data and testimony from the country's most arid districts presents arguably the starkest example of these variations, other data corroborate the general pattern. Thus, while North Eastern province has generally the worst indicators in terms of provision of and access to infrastructure and services, Nairobi and Central province have consistently the best. Similarly, such data as is available at a district level indicates that while a region such as Nyanza province tends to lie in the middle of any provincial distribution, particular districts have greater poverty or poorer access to infrastructure, amenities and public services.

Most importantly, the research presents strong evidence that regional inequalities are not solely a consequence of the climatic and ecological disadvantages of these regions, but are also a result of discrimination. The testimony of the residents of Burat and Wajir corroborates the perception that those with political power *directly discriminate* against ethnic groups who oppose them, or whose support they do not need to cultivate. Further, there is clear evidence that policies and decisions which appear neutral on their face – in particular those which channel development and infrastructure spending towards areas of the country that are already most developed – have a disproportionate impact on those ethnic groups residing in the least developed areas, and thus constitute *indirect discrimination* on grounds of ethnicity.

As a result of these directly and indirectly discriminatory decisions and policies, the distribution of public resources in Kenya is significantly distorted, with the effect that ethnic communities already living in areas which are arid, underdeveloped and marginalised are forced deeper into poverty. Once this pattern is established, these communities are vulnerable to spiralling marginalisation, as lack of development and infrastructure restricts access to education and jobs, which in turn limits opportunities to overcome poverty, further weakening these communities' ability to challenge policies or decisions which restrict their development. These discriminatory decisions and policies have enormous impact in all other areas of life, denying equality of participation to entire communities with the ill-fortune to be numerically small, geographically isolated or both.

This is arguably the central, overriding pattern of inequality which has emerged from the research for this report. It is not suggested that discrimination based on poverty and ethnicity is more important than discrimination on other grounds in Kenya. Rather, the emphasis here is on the extent to which poverty and ethnicity, and particularly the combination of the two, define each individual's position in Kenyan society, irrespective of their other characteristics. For example, women from particular ethnic groups are more likely to live in poverty, which in turn limits the realisation of equality with men in almost every sphere of life, while persons with disabilities are less likely to be able to access special educational opportunities, public facilities and assistive devices if they live in a poor, marginalised ethnic community. Ultimately, widespread poverty and regular discrimination on grounds of ethnicity by those in positions of authority mean that there is significant vulnerability to multiple discrimination on grounds intersecting with both poverty and ethnicity.

The conclusion that there is a direct link between ethnic discrimination and regional disparities in development has two implications. First, it necessitates a re-evaluation of policies for poverty reduction and measures towards the achievement of Millennium Development Goals in Kenya. The necessary implication is that, if it is to be effective, poverty alleviation must take place within a non-discrimination framework, to ensure that investment is properly directed to the areas with highest need. This would represent a departure from approaches which have tended to focus on either addressing problems at the national level, for example through the provision of free primary educa-

tion, or on meeting the needs of specific communities not exposed to ethno-regional disadvantage.

The second implication is the potential for those living in the poorest areas of the country to challenge their disadvantaged situation using equality provisions in the law. Both the Constitution of Kenya 2010 and the National Cohesion and Integration Act 2008, as is discussed in Part 3 of this report, prohibit discrimination by state actors on grounds which include ethnicity. Indeed, section 11 of the National Cohesion and Integration Act introduces important provisions for “ethnically equitable” distribution of public resources and stipulates that distribution of public resources should take into account Kenya’s diverse population and poverty index. The section prohibits public officers from distributing resources in an ethnically inequitable manner and states that resources shall be deemed to have been so distributed when, *inter alia*, specific regions consistently and unjustifiably receive more resources than other regions or more resources are allocated to regions that require remedial resources than to areas that require start up resources.¹⁷⁴

The Constitution also provides a number of avenues for marginalised ethnic communities to challenge their situation. Article 27(4) of the Constitution explicitly prohibits direct and indirect discrimination on grounds including race and ethnic or social origin. Article 27(6) creates a duty of affirmative action, a concept which is defined in Article 260 as including “any measure designed to overcome or ameliorate an inequity or the systemic denial or infringement of a right or fundamental freedom”. In addition, Article 56 provides further protections for “minorities and marginalised groups”, defined as all those disadvantaged by discrimination on one or more of the grounds in Article 27(4).¹⁷⁵ This article provides for the state to undertake measures – including affirmative action – to ensure the participation of minorities and marginalised groups in governance, education and employment, to have access to water, health services and infrastructure, and to develop their cultural values, languages and practices. The Constitution also provides an opportunity to ameliorate the position of marginalised ethnic communities through

174 National Cohesion and Integration Act 2008, subsections 11(2) and (3).

175 Constitution of Kenya 2010, Article 260: “‘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)”.

policy and resource decisions. In a wider sense, measures establishing county governments and the creation of an Equalisation Fund to accelerate progress towards equality in marginalised areas, amounting to 0.5% of annual national revenue, provide a means to address disparities in the provision of basic services between different regions. Article 6(3) also provides an avenue to improve equality in these regions by creating a duty on the state to ensure reasonable access to government services throughout the country.

Thus, the recent legal improvements in this area provide a number of avenues both for policy makers to ensure that resources are distributed more equitably between regions and ethnic groups, and for disadvantaged ethnic communities to challenge policies and decisions which have the intent or effect of denying them equal participation.

2.2.1 Indigenous Pastoralist and Traditionalist Groups

The question of how to define indigenous communities in Kenya is contentious, as in the literal sense, all Kenyans of African origin descending from tribes that have been in today's Kenya for centuries are indigenous to the country.¹⁷⁶ Indeed, the UN Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People began his 2006 report on Kenya by noting that "in Kenya all Africans are indigenous to the country, as many Kenyans are inclined to point out".¹⁷⁷ Kanyinke Sena argues, however, that this position is overly simplistic and that it is possible to develop a distinct concept of indigeneity, associated with both the "negative experience of discrimination and marginalisation from governance" and the "positive aspects of being holders of unique knowledge".¹⁷⁸ In fact, this view is shared by the Special Rapporteur, who elaborated further:

176 Sena, K., "Africa Indigenous Peoples: Development with Culture and Identity: Article 2 and 32 of the United Nations Declaration on the Rights of Indigenous Peoples", paper submitted for the International Expert Group Meeting on Indigenous Peoples: Development with Culture and Identity Articles 3 and 32 of the United Nations Declaration on the Rights of Indigenous Peoples (New York, 12 - 14 January 2010), UN Doc. PFII/2010/EGM, 2010, p. 3.

177 Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen, Mission to Kenya*, UN Doc. A/HRC/4/32/Add.3, 2007, Para 8.

178 See above, note 176, p. 5.

*Within this perspective, pastoralists and hunter-gatherers are normally regarded as indigenous peoples in the international context, and they increasingly come to identify themselves as such in many countries, including in Africa.*¹⁷⁹

While the issues affecting these indigenous groups vary between communities, some patterns of discrimination and inequality are common. In his 2006 report, the Special Rapporteur stated that Kenya's indigenous communities "have been traditionally discriminated against" and that they are socially, politically and economically marginalised.¹⁸⁰ Yash Ghai, writing in the preface to the report "Kenya: Minorities, Indigenous Peoples and Ethnic Diversity" by the Minority Rights Group, offered further insight into the common experiences of pastoralist and hunter-gatherer communities, based on their testimony to the Constitution of Kenya Review Commission (2000-2004), of which he was Chair:

*Pastoral communities and hunter-gatherers have defined themselves as minorities or indigenous peoples on the basis of their lifestyles or mode of social and economic organization. They complain that the regime of land, legal structures and values, which are necessary for their existence as communities, are not permitted by the state, and demand the recognition of communal land tenures. Their sense of marginalization is aggravated by what they claim are historical injustices. They feel that their culture and values are misunderstood, and denigrated (...) This sets them apart from the rest of Kenyans, living in enclaves of their own, with values and patterns of existence vastly different from other communities.*¹⁸¹

Indigenous communities have often been blocked from living on or accessing their traditional lands, with a significant impact both upon their traditional sources of subsistence and on their capacity to enjoy their religious,

179 See above, note 177, Para 10.

180 *Ibid.*, p. 2.

181 Minority Rights Group International, *Kenya: Minorities, Indigenous Peoples and Ethnic Diversity*, 2005, p. 4.

cultural and social rights. In addition, these communities often share experiences of political marginalisation, finding it impossible to secure adequate representation both because of their small numbers and because of policy decisions exacerbating their minority status. Decisions about constituency sizes and boundaries, denial of access to citizenship documents and exclusion from census collection have all contributed to situations where these communities remain in a minority in their respective localities. Indigenous communities are commonly affected by severe poverty, are not active in the formal economy and have limited access to basic services such as education and healthcare. Indeed, the research for this report contains evidence that concerns about economic marginalisation – which are common to both indigenous and other ethnic minority communities – are in some cases more pronounced than those related to the preservation of traditional culture.

On the issue of land, the Special Rapporteur stated that almost all of the communities he interviewed raised issues of land restitution with him, and concluded that access to and control over land is a key factor in other human rights violations suffered by indigenous communities:

*Most of the human rights violations experienced by pastoralists and hunter-gatherers in Kenya are related to their access to and control over land and natural resources. The land question is one of the most pressing issues on the public agenda.*¹⁸²

Land loss is an issue which affects different indigenous communities in different ways, but in all cases it impacts directly on communities' ability to practice their traditional forms of subsistence – either hunting and gathering or pastoralism – and limits access to places of cultural or religious significance. The case of the Maasai provides a good example of the impact of land loss on nomadic pastoral groups and of the cumulative effect of colonial and post-independence policies in alienating these communities from their land. In the colonial era, Maasai lands were divided between Uganda and Kenya, and estimates suggest that as much as a third of Maasai land was lost through “coercive treaties (...) imposed by the colonial regime”.¹⁸³ Following independ-

182 See above, note 177, Para 25.

183 *Ibid.*, Para 30.

ence, the government began to divide Maasai land into registered “ranches”, passing ownership first to groups and later to individuals, with the effect that the integrity of the land for nomadic grazing was significantly reduced. This problem was exacerbated by corruption and “land grabbing”, which resulted in the loss of Maasai land to settlers from other parts of the country.¹⁸⁴ Thus, over the course of many years, the total area of Maasai land has been significantly reduced, while remaining lands have been divided in such a way that the traditional nomadic grazing patterns of the Maasai are no longer possible.

The Ogiek, a hunting and gathering people living in the Mau Forest in Rift Valley Province, provide another example of a community which has faced eviction from their traditional land, in this case as a consequence of more recent conservation efforts made by the Kenyan government. In *Kemai & 9 others v Attorney General & 3 others*, members of the Ogiek community sought a declaration that their eviction by the government from the Tinnet Forest (part of the larger Mau Forest) contravened their right to life, the protection of the law and the right to non-discrimination.¹⁸⁵ This was based on the claim that they had “been living in the Tinnet Forest since time immemorial”, that they relied on the forest for subsistence through the gathering of food, hunting and farming and that if they were evicted they would be left landless.¹⁸⁶ The community argued that the Tinnet Forest was their ancestral home and that the government had accepted their right to live there by issuing letters of allotment for specific parcels of land to members of the community. They also argued that they were being subjected to discrimination, as they were the only group being evicted from the said forest. The government argued that the Tinnet Forest was not the Ogiek’s ancestral home, as the community had been resettled at Sururu, Likia and Teret, and stated that the community had misunderstood the meaning of the letters which had been provided to them. The government argued that eviction was necessary as the forest formed a natural reserve and water catchment area. The government denied allegations of discrimination, stating that the eviction was applied to all those dwelling in the Tinnet Forest. The Court found for the government and against the Ogiek

184 Kimpei Ole, J. G. and Munei, G., “Maasai Land, Law, and Dispossession”, *Cultural Survival Quarterly*, 22.4 (Winter 1998) *Uprooted: Dispossession in Africa*.

185 *Kemai & 9 Others v Attorney General & 3 Others*, Civil Case 238/1999 (OS).

186 *Ibid.*, pp. 4-5.

on all counts.¹⁸⁷ On the issue of ancestral land, the Court reasoned that because the Ogiek community members founded their right to remain in the Tinnet Forest on letters of land allotment issued to them by the government, the community had recognised the government as the owner of the land, as the government could not allocate to them what it did not own. It further concluded that the applicants had alternative land to go to – Sururu, Likia and Teret – where the rest of the Ogiek community was settled. As regards means of livelihood, the Court concluded that like all other Kenyans, the applicants would still have access to the Tinnet Forest under licences and permits and that to grant otherwise would be to deny the rights of non-Ogiek. The Court found that there was no evidence of discriminatory treatment. It stated:

With regard to the complaint that there is discriminatory action by the government against the plaintiffs, the applicants said that while the respondents say that they are taking the action complained of because it is a gazetted forest area which they seek to protect by evicting the plaintiffs from it, there are other persons who are allowed to live in the same forest. It is said that it is the plaintiffs alone who are being addressed. This assertion if true, and it has been denied, would obviously give the plaintiffs cause for feeling discriminated against unless other lawful and proper considerations entered the picture. The trouble here is that this was a matter of evidence (...) [T]he actual acts and words complained of were not placed before us. What we have before us are copies of newspaper cuttings. They bear headlines "Government to evict the Ogiek", and "Ogiek notice stays, says DC". The plaintiffs have told us that there are in the forest people from other communities. The newspapers did not mention anything about such people, and whether the quit notice covered them. The accuracy of those headlines was not guaranteed. The Ogiek people might have been the dominant community to capture the newspaper headlines, but that did not necessarily exclude from the quit order other persons.

187 *Ibid.*, pp. 13-14.

*So, there is no evidence before us proving discriminatory treatment against the plaintiffs.*¹⁸⁸

Thus, it appears that the Court did not consider whether sufficient evidence had been provided to necessitate a transfer of the burden of proof to the respondent. Nor did it consider whether the eviction from the forest would have a disproportionate impact on the Ogiek, as a distinct ethnic group, than on other groups, and therefore whether there was evidence of indirect discrimination against them.

Despite this ruling, the Ogiek have continued to fight against their eviction, while the government has pursued the implementation of the judgement. In 2008, the government established a taskforce to examine ways to preserve the Mau forest and combat deforestation and in July 2008, the taskforce recommended evictions.¹⁸⁹ In October 2009, the taskforce released an eviction timetable setting out a phased eviction process to be completed by the end of that year.¹⁹⁰ However, in November 2009, members of the Ogiek called for a government response to their claim that the taskforce had admitted to part of their claim to ownership of the land.¹⁹¹ In 2010, the Ogiek succeeded in having their plight recognised by the African Commission on Human and People's Rights when it urged the Kenyan authorities to halt the proposed eviction as part of its Resolution on the Deteriorating Situation of Indigenous People in some parts of Africa.¹⁹² The Ogiek have also tried to secure political representation through direct election or nomination of Ogiek representatives. However, these efforts suffered a severe setback in March 2010, when the dominant ethnic groups in the existing Molo constituency rejected the proposals.¹⁹³

188 *Ibid.*, p. 18.

189 Minority Rights Group International, "Illegal Eviction of Ogiek Indigenous Community from Ancestral Home in Mau Forest, Kenya", 28 October 2009.

190 *Ibid.*

191 Kiplagat, S., "Govt to Answer Ogiek Mau Suit", *The Daily Nation*, 13 November 2009.

192 African Commission on Human and Peoples' Rights, *Resolution on the Deteriorating Situation of Indigenous People in Some Parts of Africa*, ACHPR/Res.176(XLVIII)2010, 2010.

193 Kavilu, S., "Ogiek's Effort for Own Constituency Hits a Snag as Major Communities Block Plea", *Gáldu*, 17 March 2010, available at: <http://www.galdu.org/web/index.php?odas=4413&giella1=eng>.

Box 3.

Case Note

Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya

(African Commission on Human and Peoples' Rights,
Communication 276/2003)

This case concerned the Endorois indigenous community who were evicted from their traditional lands by the Kenyan government in the 1970's to make way for the Lake Bogoria National Reserve. The Centre for Minority Rights Development and Minority Rights Group International lodged a complaint with the African Commission in 2003 and the decision of the Commission was adopted by the African Union on 2 February 2010.

In a landmark decision, the Commission found in favour of the Endorois. Firstly, they stated that the Endorois were a people entitled to the protection of their collective rights in the African Charter on Human and Peoples' Rights. It went on to find that the Kenyan government was in breach of a number of articles of the African Charter:

- Article 8 – freedom of religion – The eviction of the Endorois from their lands amounted to a violation of this right as they were unable to access sacred sites, an essential part of their religious practice.
- Article 14 – right to property – The Endorois were found to have the right to legal ownership of their traditional lands. This right was violated by their eviction as the Kenyan government had failed to provide compensation and had no lawful justification for the eviction.
- Article 17 – right to culture – The eviction of the Endorois also removed them from resources, such as water, which were vital to maintaining their pastoralist way of life. This amounted to a violation of their right to culture.
- Article 21 – right to natural resources – The Kenyan government had granted mining rights on Endorois land without consulting the Endorois or sharing the benefits of the mining with them, thus violating their right to natural resources.
- Article 22 – right to development – The eviction of the Endorois without the provision of adequate alternative land where they would be able to continue their way of life, and without providing compensation, amounted to a violation of their right to development.

The Commission recommended that the Kenyan government return the land to the Endorois, provide them with legal title, and compensation for losses suffered.

There are, however, reasons to hope that the land rights of indigenous peoples – and, as a consequence their cultural rights – may be better protected in Kenya in the future. A recent case, decided in 2010 by the African Commission on Human and Peoples’ Rights, found in favour of the Endorois community which were forcibly removed from their ancestral lands around Lake Bogoria following the gazetting of these lands as game reserves in 1978. In this case, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, the Commission agreed that the Endorois are an indigenous community and found violations of each of the rights cited by the Endorois (see Box 3).¹⁹⁴ In its recent Concluding Observations CERD highlighted the importance of the implementation of the decisions of the African Commission.¹⁹⁵

Aside from loss of land resulting from eviction or dispossession, many indigenous groups have suffered increasingly in recent years as a result of environmental degradation of their traditional land. As Special Rapporteur Stavenhagen concluded, “indigenous peoples’ reliance on natural resources and their disproportionate poverty make them more vulnerable to the effects of environmental threats such as cyclical droughts and floods, deforestation, soil erosion and pollution”.¹⁹⁶ Myriad examples testify to the severe impact which environmental degradation has on indigenous communities. The El Molo, described as Kenya’s smallest indigenous group, have suffered as the waters of Lake Turkana – upon which they rely for fish – have receded as a result of drought and the damming of tributary rivers;¹⁹⁷ forest-dwelling communities have suffered as a result of deforestation which has reduced the area in which they can hunt and gather food; and pollution of land and waterways has impacted on communities such as the Endorois and Maasai.¹⁹⁸

In addition to land rights, lack of political representation is a principal determinant of the disadvantage faced by indigenous communities. ERT’s field research in Turkana district and Wajir highlights the far-reaching impact

194 *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, African Commission for Human and Peoples’ Rights, Comm 276/2003. (See Box 3.)

195 See above, note 119, Para 17.

196 See above, note 177, Para 42.

197 Kavilu, S., “Kenya’s Smallest Indigenous Tribe Faces Extinction”, *Gáldu*, 31 August 2010.

198 See above, note 177, Para 45.

which direct discrimination in the process for obtaining identity cards, and the consequent undercounting of population can have both on the political representation of affected communities and on the allocation of development funds, where this is undertaken on the basis of population size. The Special Rapporteur also had encountered this problem, together with two other policies: the assimilation of smaller communities within other dominant groups for the purposes of census data collection, and the division of indigenous communities between different constituencies, as factors which severely limit indigenous communities' ability to participate in political life.¹⁹⁹ Operating alone or in combination, these policies have the effect of ensuring that indigenous communities are in an ethnic minority in the constituencies and districts where they reside, thus restricting their ability to elect community representatives who will focus on their concerns. The results of these policies – which themselves constitute denial of the right to equal participation in civil and political life – are far-reaching. Without representation, these communities face greater obstacles in challenging alienation from the traditional land, and discrimination in economic and social life. ERT research corroborated the Special Rapporteur's finding that this lack of political representation has severe consequences for the affected communities, leading to "unequal access to development resources and government employment"²⁰⁰ – a problem which indigenous communities share with a number of other minority ethnic groups.

The importance of effective political representation to indigenous communities is attested to by the lengths to which some communities have gone to secure either specific constituencies or nominated members of parliament to represent their interests. Both the Ogiek and the Il Chamus communities have launched legal challenges to secure effective representation, on the grounds that the division of their communities by constituency boundaries has had the effect of silencing their democratic voice. In both cases, claims for representation have been motivated in part by concerns about land ownership and usage. While the Ogiek case, as has been discussed, has faced opposition from other ethnic groups in their area and has thus far been unsuccessful, the Il Chamus have secured a significant victory. In the case *Lemeiguran v Attorney General* (see Box 4), the High Court of Kenya found that the Il Chamus consti-

199 *Ibid.*, Paras 21-23.

200 *Ibid.*, Para 24.

Box 4.**Case Note*****Lemeiguran and Others v Attorney-General and Others (2006)***

(Misc. Civil Application 305, 2004, High Court, 18/12/2006)

The case concerned the Il Chamus, an indigenous community who live on the banks of Lake Baringo in the Rift Valley Province. The applicants argued that due to the electoral boundaries of the Baringo Central constituency in which they reside, no Il Chamus candidate would be elected, noting that none had been so elected since 1963. They argued that this amounted to a violation of the right to representation in the National Assembly provided under Article 1 and 1A of the Constitution of Kenya 1963 and was also a violation of their rights to freedom of expression (Article 79) and freedom of conscience (Article 78). Further, they argued that they constituted a “special interest” or an indigenous minority and sought a declaration that the Baringo Central constituency should be divided into separate constituencies “taking into account the appropriate demographic and numerical considerations (...) so as to prevent the present electoral marginalisation of the Il Chamus from continuing”.

In relation to the Il Chamus, the Court found that they were an indigenous group and that they were “a unique cohesive homogenous and a cultural (sic) distinct minority”. As such they had “the right to influence (...) public policy, and to be represented by people belonging to the same social cultural and economic context as themselves”. The Court further found that they, and other minority groups in Kenya, constituted a “special interest” and were entitled to a benefit from a nominated Member of Parliament as contemplated by Article 33.

The Court asserted that in the spirit of Article 1A of the Constitution, minorities must be given a voice to articulate their specific concerns and interests. The Electoral Commission of Kenya had a duty to vet party nominations to ensure compliance with the requirement of Article 33 of the Constitution that special interests be represented. The Court reiterated that the Commission was empowered and required to take into account all the requirements of Article 42, including the need to ensure adequate representation of minorities, in the drawing of electoral boundaries.

tuted a special interest under Article 33 of the 1963 Constitution of Kenya, and as such were entitled to a nominated member of parliament.²⁰¹

Thus, it is clear that different indigenous communities share concerns which distinguish them from other, larger ethnic groups. These concerns are largely related to the relationship with traditional land, whether forests, grazing lands or lakes, and the impact that alienation from land has both on livelihoods and on the ability to live in keeping with specific cultural and religious traditions. For many of these groups, concerns over land loss are compounded by a lack of effective political representation, arising because of the small size of their communities, and because of what appear to be both directly and indirectly discriminatory policies and decisions in identity registration, the delineation of district boundaries and the collection of census information, which have the effect of reducing the affected communities to invisible minorities in their local area.

In these specific ways, the experience of indigenous groups appears to set them apart from other ethnic groups. In other areas however, the concerns and problems of indigenous communities bear remarkable similarity to those expressed by other weak ethnic groups. Many indigenous communities live in the poorest and most marginalised areas of the country, with poor access to infrastructure, amenities and public services. Despite government efforts to reduce poverty in these areas, many challenges remain and the availability of public services is extremely low. ERT's interviews with residents of Wajir, in North Eastern Province, which is home to both indigenous communities and the largest concentration of ethnic Somalis in Kenya, and with the Turkana community in Lodwar and surrounding areas indicated barriers on their participation in the mainstream economy and lack of access to employment, education and healthcare. Indeed, according to testimony collected in Turkana district, participation in the formal economy and equal access to social and public services is considered more important than the preservation of cultural traditions. The Special Rapporteur report also showed that the Turkana's overwhelming concern about lack of access to basic amenities and public services was shared by other indigenous communities. His report emphasized the limited impact of the government's free primary education programme in isolated areas with specific

201 *Lemeiguran & Others v Attorney General*, Misc. Civil Application 305, 2004, High Court, 18/12/2006.

educational needs,²⁰² and the significant distances which many indigenous community members need to travel in order to access healthcare.²⁰³

From this research, it appears that each of the different problems and concerns facing indigenous communities – whether concerning access to traditional community land and the impact which this has on livelihood and cultural life, lack of effective political representation and participation, or lack of access to employment, education and healthcare – has a strong connection to past or present discrimination. The root causes behind the alienation of indigenous communities from their traditional lands can often be linked to discrimination against their community. Thus, historic cases of land-grabbing, gazetting of land for construction or other purposes or re-allocation of land to other groups can be linked to direct ethnic discrimination, while present cases of eviction for development or conservation purposes appear to disproportionately disadvantage those indigenous communities which have long resided in these areas, and may therefore constitute examples of indirect discrimination. In either case, the affected communities may have valid claims under the new Constitution or the National Cohesion and Integration Act, in much the same way as other ethnic communities discussed above. Moreover, whether or not a discriminatory cause can be identified, the denial of access and use of traditional lands constitutes a barrier to equal participation in both economic and cultural life. Thus, were Kenya to adopt the concept of reasonable accommodation into its domestic law, these communities may be in a position to claim an obligation on the state to provide reasonable accommodation in respect of access to sacred or other culturally significant sites.

Policies which have the effect of denying effective political participation to indigenous communities – as appears to be the case with decisions to delineate constituency boundaries in a way denying effective representation of indigenous communities – may constitute indirect discrimination, against the affected group and contravene the obligation to ensure equal participation in political life. As has been discussed above, where *de facto* inequalities in access to employment, education and healthcare can be shown to be based on ethnicity, they may constitute violations of the equality provisions in the Constitution and the National Cohesion and Integration Act. Affirmative action provisions under both of these instruments provide a further potential basis for redress. In particular, Article 56 of the Constitution creates addition-

202 See above, note 177, Para 69.

203 *Ibid.*, Para 75.

al rights for “minorities and marginalised groups”, requiring 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.

2.2.2 Kenyan Somalis and Somali Refugees

The Somali population in Kenya is made up of two distinct groups: those who are Kenyan citizens, following accession of Somali territory at the time of Kenyan independence (Kenyan Somalis), and refugees who have fled to Kenya to escape violence, famine and insecurity which has affected Somalia at various times since the mid-1980s, but have no citizenship rights in Kenya (Somali refugees). In 1963, part of the disputed Ogaden region between Southern Somalia, Ethiopia and British Kenya was claimed as Kenyan land, and this area today contains the majority of the Kenyan Somali community. The exact number of Kenyan Somalis is currently contested. The 2009 Census recorded the total population of Kenyan Somalis as 2.3 million persons, up from the 900,000 registered in 1989.²⁰⁴ However, the census was criticised for inconsistencies in the data regarding some of the northern areas of the country in which most Kenyan Somalis live.²⁰⁵

The Somali refugee population is by far the largest refugee group in Kenya, and it has continued to grow in recent years, including a continuing influx in 2011.²⁰⁶ UNHCR figures indicate that there were 385,000 Somali refugees in the country in January 2011 (of a total refugee population of 970,300).²⁰⁷ The number of registered Somali refugees in Kenya rose to 520,352 by November 2011 and is expected to rise to 623,100 by December 2012.²⁰⁸

Kenyan Somalis

The research for this report found substantial evidence to suggest that Kenyan Somalis suffer direct discrimination in respect of citizenship and identity

204 Teyie, A., “Kenya: 2009 Census Delayed over Somali Numbers”, *Nairobi Star*, 9 January 2010.

205 Basse, M., “Census: Kenya has 38.6m people”, *The Daily Nation*, 31 August 2010.

206 United Nations High Commission for Refugees, *2011 UNHCR Country Operations Profile – Kenya*, 2011.

207 *Ibid.*

208 United Nations High Commission for Refugees, *2011 UNHCR East and Horn of Africa Update – Somali Displacement Crisis at a Glance*, 24 November 2011.

registration. ERT conducted interviews with Kenyan Somalis in Isiolo, Eastern Province and in Wajir, North Eastern Province, during which interviewees testified to the application of different criteria and conditions when Kenyan Somalis apply for identity documents. C., a young ethnic Somali man from Isiolo, told ERT that when applying for an identity card, Kenyan Somalis were required to answer questions about Kenyan politics, law and history which citizens of non-Somali origin were not required to answer:

*They say, bring the title deeds, or birth certificate (...) They ask us, who is Chief here, who is the colonial ruler here, who is the D.O [District Officer] here - many hard questions. (...) We have the birth certificates from Isiolo and our parents' IDs here in Isiolo but they didn't look.*²⁰⁹

C. suggested that the use of tests and the requirement that Kenyan Somalis produce additional documentation are part of a deliberate policy motivated by political calculations and designed to ensure that Kenyan Somalis cannot obtain identity cards. As identity cards are required to participate in the national census and to register to vote, the effect of denying cards to large numbers of ethnic Somalis is to reduce the number of voters in areas which they dominate. It also leads to biased resource allocation decisions that depend on population numbers. C. stated:

*We are discriminated even politically (...) When we are properly registered they fear that we can beat them politically (...) because we will have a majority (...) We can't get any seats, any government representatives, even on the CDF [Community Development Fund].*²¹⁰

Kenyan Somalis and KNCHR officials interviewed in Wajir confirmed that ethnic Somalis have been required to meet more difficult criteria when applying for identity cards and passports.²¹¹ In both Isiolo and Wajir, applicants had to produce their parents' and grandparents' identification documents, a re-

209 ERT Interview with C., 21 March 2011, Isiolo, Eastern Province.

210 *Ibid.*

211 Focus Group discussion conducted by ERT with local people, 28-30 March 2011, Wajir, North Eastern Province.

quirement which does not been applied with respect to other ethnic groups. Further, in order to obtain a passport, persons who appeared to be of Somali or Arab origin had to go through a vetting interview undertaken by the National Security Intelligence Service in Nairobi. Local officials in Wajir justified these practices by stating that as the region lies on Kenya's "porous" border, additional procedures were required to identify foreign citizens masquerading as Kenyan citizens and curb the registration of illegal immigrants.²¹²

Evidence from other organisations corroborates these findings. According to a 2006 report by the group Minorities at Risk, Kenyan Somalis were the only ethnic group which was routinely required to produce two forms of identity when applying for citizenship,²¹³ while Refugees International reported in 2008 that Kenyan Somalis were subjected to "vetting" before obtaining proof of citizenship and that bribes were often needed to complete the process.²¹⁴ CERD recently highlighted its concerns about the "discriminatory and arbitrary extra requirements" applied to Kenyan Somalis and other groups in the "recognition of nationality and in accessing identity documentation such as Kenyan identity cards, birth certificates and passports",²¹⁵ CERD called on the government to make the necessary amendments to its legislation and administrative procedures in order to ensure that these did not discriminate.²¹⁶

The different conditions for application for citizenship documents, in the form of a screening process applied only to persons of Somali origin, was examined in the 2004 case *Hersi Hassan Gutale and Abdullahi Mohamed Ahmed v Principal Registrar of Persons and the Attorney-General* (see Box 5).²¹⁷ The Court found that the differential treatment of ethnic Somali Kenyans was permissible in that it had a rational connection to the legitimate purpose of maintaining security and public order.²¹⁸

212 *Ibid.*

213 Minorities at Risk, *Assessment for Somalis in Kenya*, 2006, available at: <http://www.cidcm.umd.edu/mar/assessment.asp?groupId=50106>.

214 Refugees International, *National Registration Process Leaves Minorities on Edge of Statelessness*, 2008.

215 See above, note 119, Para 21.

216 *Ibid.*

217 *Hersi Hassan Gutale and Abdullahi Mohamed Ahmed v Principal Register of Persons and the Attorney-General*, Misc. Civil Application 774, 2003, High Court, 24/05/2004.

218 *Ibid.*

Box 5.**Case Note*****Hersi Hassan Gutale and Abdullahi Mohamed Ahmed v Principal Registrar of Persons and the Attorney-General***

(Misc. Civil Application 774 of 2003, High Court, 24/05/2004)

This case concerned the requirement, in Gazette Notice No. 5320, dated 7 November 1989, that all persons of Somali origin attend before a task force with documents to prove they were legally in Kenya. The applicants claimed *inter alia* that the issuance of the notice, the constitution of the task force, the subsequent screening procedure and the denial of “new generation” identity cards to them amounted to discriminatory treatment because the process was based on the ethnic classification of Kenyans of Somali origin. The government argued that the notice and subsequent process was necessary due to an influx of illegal Somali immigrants following unrest in Somalia. The government also argued that the applicants themselves were not entitled to the new identity cards as the task force had concluded that they were not Kenyan citizens, despite their having Kenyan birth certificates.

The judge found that the notice and subsequent process amounted to differential treatment on the ground of ethnicity. However, he found this differential treatment was justified by the need to “differentiate and hence classify Somalis of Kenyan origin as against those of neighbouring regions” because of the upheaval in neighbouring Somalia. Relying upon jurisprudence from the USA and South Africa, the judge found that the differential treatment had a rational connection to the legitimate purpose of maintaining security and public order following an influx of Somalis fleeing the unrest in their country. This constituted an allowable restriction on the right to non-discrimination contained in Article 82(4)(d) of the Constitution of 1963.

The judge’s discussion of justification does not consider the issue of proportionality. In fact, towards the end of the judgement the judge states:

I hold therefore that if a State demonstrates as it has done in this case, substantial interest that may legitimately be justified by such factors as security and maintenance of law and order, consideration of ethnicity notwithstanding, whatever actions it takes in furtherance thereto will not be in violation of the Constitution.

In addition to the problems facing Kenyan Somalis in terms of citizenship and identity registration, they are vulnerable to harassment and abuse by state authorities. Those interviewed by ERT in Wajir testified that, in part because of North Eastern Province's proximity to Somalia, and the aforementioned concern about the "porous border", and also because of stereotypes which portray those of Somali origin (both Kenyan citizens and refugees) as potential terrorists, the security forces arbitrarily arrest Kenyan Somalis. In interviews with ERT, Kenyan Somali residents of the region claimed that they were treated differently by agents of the security forces during investigations, with arrests made based on ethnic profiling using physical appearance or lack of a BCG vaccine mark to select those who appear to be of Somali origin.²¹⁹ There were also claims that arrests made by the security agents on the pretext of terrorism investigations had been used to extort money from Kenyan Somalis, with agents demanding bribes from those wishing to avoid arrest.

Another consequence of the government's efforts to combat terrorism is the presence of travel restrictions for those coming from North Eastern Province, which interviewees stated were applied in a manner that discriminated against them. Interviewees told ERT that a public service vehicle from Wajir to Nairobi has to go through an average of 40 police roadblocks for security checks, with passengers required to raise their hands while showing their identification cards, while those travelling the same route from Nairobi to Wajir are not subjected to road blocks or security checks. Flights originating in Somalia heading to Nairobi reportedly had to first land in Wajir for security checks. L., a man from Wajir, used the a frequent turn of speech suggesting that Wajir is outside "Kenya"

*All flights from Somalia must land in Wajir first, so if there are any bombs or other forms of security threats, they are to land in Wajir before going to Kenya.*²²⁰

The proximity to Somalia also means that Kenyan Somalis residing in North East Province are vulnerable to the recurring violence in the border area

219 Residents of Wajir who are of Somali origin are distinct from the rest of the Kenyan population, as they are typically fairer-skinned. Additionally, as almost all Kenyan residents possess the BCG vaccine mark on the left arm, lack of such a mark is used to identify Somalis.

220 ERT Interview with L., 30 March 2011, Wajir, North Eastern Province.

associated with cross-border cattle raids and armed insurrection. Pastoral Somali communities in this region are often blamed for cattle theft, armed violence and other acts described as “banditry”, which are in fact committed by foreign Somalis crossing the border with the impunity characterising the on-going insecurity in the region.

In common with other groups residing in the arid North Eastern Province, the Kenyan Somali population suffers because of the significant poverty and marginalisation of the region. As discussed above, the Province has the poorest quality land, highest unemployment, poorest educational outcomes and lowest level of access to healthcare.²²¹ KNCHR staff in Wajir expressed concern about the low level of education in the area: schools are in a state of disrepair, and many children have to walk many miles to access them. Many Kenyan Somalis prefer their children to attend Islamic classes (*Madrassa*), rather than formal education. Where children do attend school, many start at the late age of 12-13, as opposed to the recommended age of 6-7. ERT spoke with a number of Somali elders who complained of lack of government support for the area’s economic development. They claimed that while the government supports the main agricultural products of other parts of the country through the establishment of government-funded boards (such as the Coffee, Tea, Sugar and Pyrethrum Boards), there are no such boards for beef or camel milk, the main agricultural produce of their region. Local people also expressed their concern at the provisions in the new Constitution which state that minerals are the property of the state, not the county in which they are discovered.²²² This is a significant area of concern as some surveys indicate that the region may contain oil reserves.

In addition to the inequalities affecting the Kenyan Somali community in North East Province, there are also complex patterns of ethnic discrimination between different groups living within particular regions. Participants at a focus group in Wajir testified to discrimination against the smaller clans in the region, particularly in respect of the allocation of relief food and the sup-

221 See discussion at section 2.2 above.

222 Constitution of Kenya 2010, Article 62(1)(f), read together with Article 62(3), states that minerals and mineral oils shall vest in and be held by the national government in trust for the people of Kenya.

ply of water, a critical issue in an arid area with high food insecurity.²²³ The five major clans, commonly known as the Fai, comprise approximately 90% of the population and as such, these groups dominate local politics. Those interviewed claimed that political leaders allocate relief food, illegally award government tenders and other contracts and direct water supplies to their clansmen, discriminating against other communities. Further, the residents testified that these dominant clans controlled most of the devolved funds, and misused them by benefiting only their respective communities, to the detriment of the rest. Some of those interviewed stated that members of the ethnic Somali community look down upon the non-Somalis, labelling them “the inland Africans”, “the down people”, “ngozi nyeusi” (dark skins), “nywele ngumu” (hard hair) and “matho matho” (slaves).

Somali Refugees

Somalis seeking refuge in Kenya experience significant hardship. The majority of Somali refugees live in designated camps, including notably the now famous Dadaab camp.²²⁴ In mid-2011, CERD noted “with concern the grave conditions at the Dabaab camp caused by overcrowding and lack of basic necessities faced by refugees”.²²⁵ Facilities in Dadaab which were originally designed to house around 90,000 people were, as of November 2011, home to over 460,000 Somali refugees, more than 150,000 of whom had arrived in the previous 12 months.²²⁶ With this massive increase in numbers, conditions in camps have worsened, with considerable overcrowding and poor sanitation and hygiene.²²⁷ Some refugees were forced to stay on land outside the camps, and around 30,000 were awaiting registration.²²⁸ Aid agencies re-

223 Kenya Food Security Steering Group, *Food Security District Profile: Wajir District, North Eastern Province*, 2010, p. 3, available at: http://www.kenyafoodsecurity.org/images/stories/files/dps/north_eastern/wajir.pdf.

224 See above, note 206.

225 See above, note 119, Para 25.

226 Aguilar, S., “Dadaab: Walking the Fine Line between Helping Refugees and Risking Lives”, *UNHCR News Stories*, 28 November 2011.

227 “UN Officials Voice Concern over Poor Camp Conditions for Somali Refugees in Kenya”, *UN News Centre*, 3 April 2011.

228 Lindley, A., “Unlocking Protracted Displacement: Somali Case Study”, *Working Paper Series No. 79*, Refugee Studies Centre, University of Oxford, August 2011, p. 28.

ported “emergency levels of malnutrition and infant mortality”, as well as disruption to the distribution of food.²²⁹ Security problems in Dadaab escalated throughout 2011, forcing humanitarian agencies to reduce their services in October 2011. According to a UNHCR news report of November 2011, “life-saving aid such as food distribution, water trucking and urgent medical aid is continuing, but less urgent services have been temporarily suspended”.²³⁰ UNHCR reported that the combination of floods and scaling down of aid work was taking its toll on conditions in the camp: outbreaks of diarrhoea and cholera followed soon after and malnutrition of children worsened, with at least 300 being brought to health posts each day.²³¹

Already before the latest influx into the area, human rights monitors had been reporting police abuse of refugees in the Dadaab region.²³² This includes unlawful detention of refugees in appalling conditions, failure to investigate violence and rape in camps, as well as violence and rape committed by police officers themselves. Security is a major concern and women and children in particular are exposed to the threat of physical and sexual violence. Police have also been found to threaten Somalis with deportation if they are unable to pay bribes: estimates suggested that thousands of Somali refugees unable to pay bribes were illegally sent back to Somalia in 2010.

The mass influx of refugees in recent years has resulted in steps to review law and policy governing refugee issues. A Refugees Bill 2011 has been drafted which will, if passed, replace the existing Refugees Act 2006. The changes introduced in the Bill reflect the increasing perception of refugees as a security problem and mean tougher control over refugees in relation to registration and the penalties for non-compliance.²³³

While there are substantial differences between the disadvantage suffered by Kenyan Somalis and Somali refugees, this research identified a number of important parallels and links. The first of these is an increasing exposure to arbitrary arrest and detention, harassment, violence and abuse at the hands of

229 *Ibid.*

230 See above, note 226.

231 *Ibid.*

232 Human Rights Watch, *Welcome to Kenya: Police Abuse of Somali Refugees*, 17 June 2010.

233 See above, note 228, p. 25.

the police and security forces, apparently motivated by fears of terrorism and the recent influx of refugees into the Dadaab region. For Kenyan Somalis, this manifests itself in the form of discrimination in the process of citizenship and identity registration, while for Somali refugees it is most evident in practices of arbitrary detention and ill-treatment. Secondly, both groups are vulnerable to violence, disruption and insecurity, in large part as a consequence of residing in the North East Province, in close proximity to the Somali border, but also because of a lack of effective protection from the police and security services. Finally, both groups suffer as a result of the region's poor infrastructure and low agricultural productivity, experiencing serious inequalities of access to employment, education and healthcare.

2.2.3 Kenyan Nubians

Nubians – so called because of their origins in the Nuba mountain region of present-day Sudan – were forcibly recruited into the British colonial army in the 1880s and first came to Kenya in the early 1900s.²³⁴ In the first years of the 1900s, the British colonial government revised its plans to repatriate the Nubians to Sudan and as a result, most were settled in Kenya after being decommissioned, in particular on the land provided for them by the government in the area which was to become the Kibera slum of Nairobi.²³⁵ There are no official figures on the size of the Kenyan Nubian population, but estimates are of around 100,000 people.²³⁶ Kenyan Nubians are not recognised as a separate ethnic group by the Kenyan government, and CESCRC has recommended that such recognition should take place.²³⁷

Research conducted by ERT, as well as other organisations including Open Society Justice Initiative and KHRC indicates that most Kenyan Nubians are *de facto* stateless as a result of discrimination in access to citizenship, which includes arbitrary denial and repeated delays in the provision of national identity cards and passports. ERT's research revealed that, similar to

234 Constantine, G., "Kenya's Nubians: Then and Now", 2011, available at: <http://www.nubian-sinkenya.com/index.php#mi=1&pt=0&pi=2&s=0&p=0&a=0&at=0>.

235 Hussein, A., "Kenyan Nubians: Standing up to Statelessness", *Forced Migration Review*, Issue 32, 2009, p. 19.

236 *Ibid.*

237 Committee on Economic, Social and Cultural Rights, *Concluding Observations on Kenya*, UN Doc. E/C.12/KEN/CO/1, 2008, Para 35.

Kenyan Somalis, when applying for identity cards, Kenyan Nubians are subjected to a vetting process that is not applied with respect to other ethnic groups. ERT interviewed Kenny, among other Kenyan Nubians, who stated that there is an assumption that Nubians must “prove” that they are Kenyan before being granted an identity card, in addition to providing documentary evidence such as their parents’ identity cards and their own birth certificate.²³⁸ Kenyan Nubians applying for identity cards are required to appear before vetting committees commonly made up of two to three village elders, the local Chief, and district officers in charge of registration, who seek to verify the applicant’s country of origin. Interviewees stated that the vetting process is inconsistent and arbitrary, with no set questions or procedure. As these vetting committees are neither mandated by law nor a formal part of the application procedure, much is left to the discretion of individual committee members, with the result that corruption and prejudice are common. For example, Kenny testified that a fee of 300 Kenyan Shillings was charged to facilitate the proceedings of the vetting committee. These findings corroborate the concluding observations of CERD which, in its 2011 assessment of Kenya’s compliance with ICERD, raised concerns about discrimination in relation to citizenship and passports.²³⁹

The national identity card acts as proof of citizenship and is, in many respects, a passport required to access a wide range of political, economic, social and cultural activities. As such, discriminatory denial of identity documents has far-reaching effects on the ability of Kenyan Nubians to participate in life on an equal basis with others. Those without identity cards lack proper recognition before the law and as such are unable to register to vote, to own and transfer property or to engage in business. Lack of an identity card can result in refusal of admission to colleges and universities and prevent access to banking or administrative services. As many employers require identification documents from prospective employees, the lack of an identity card can result in unemployment, leading to economic deprivation. Adam Hussein, a Nubian and a Project Co-ordinator of the Open Society Initiative for East Africa, has spent years advocating for Nubian rights. On the basis of his own experience, Hussein gives a good insight into life without identity documents:

238 ERT Interview with Kenny, 27 March 2009, Kisii, Nyanza Province.

239 See above, note 119, Para 21.

*Although I am well-educated, I have experienced serious difficulties in interacting with government officials (...) I applied unsuccessfully for a passport five times, losing jobs in the process. One manager once asked me why I did not have a recognisable ethnic identity and that this was why I could not be promoted. (...) Mine may as well be the story of most Nubians. It is a story characterized by the need to survive through challenges that are never explained to you. Today I understand that Kenyan Nubians, whether citizens or not, do not belong.*²⁴⁰

ERT's research also found evidence of police harassment of Kenyan Nubians who do not have identity cards. The Nubian group interviewed in Kiisi informed ERT that they had to leave town by 6pm in the evening in order to avoid police harassment as they did not have ID cards.²⁴¹ Those stopped without identity documents have been detained for short periods by police officers who only released them on payment of a bribe. As Kenny stated in his 2009 interview to ERT, "this has turned the Nubians into a quick and unlawful source of money".²⁴²

Due to their lack of documentation and *de facto* stateless status, Kenyan Nubians are denied equality of participation in many areas of economic, social and cultural life. In particular, those without documentation cannot generally acquire land or property. As land, together with ethnicity, continues to define belonging in Kenya today, the effective landlessness of Kenyan Nubians has profound effects. As Mohammed Gore, a Kenyan Nubian resident of the Kibera slum in Nairobi, explains in testimony provided to the Open Society Justice Initiative:

We cannot have citizenship without a home. All Kenyan tribes derive their citizenship from the fact that they belong to a certain part of Kenya. Settlement and citizenship in Kenya are tied together. Even if Nubians get Ken-

240 See above, note 235.

241 The Equal Rights Trust, *Unravelling Anomaly: Detention. Discrimination and the Protection Needs of Stateless Persons*, 2010, p. 76.

242 *Ibid.*

*yan citizenship today, without having land we will feel insecure. Land was one of the factors that lead people to fight for independence. We, the Nubians, were in the past concentrating on the deprivation of land, thinking that if the land question were settled, it would be the same as recognition of citizenship. Yet if citizenship were recognized for all the Nubians, it would be like a recognition that they must have their own land. Many Nubians, as individuals, have been able to get citizenship and enjoy all the rights of Kenyan citizenship – except they don't have land. The link between these two things explains the government's resistance to recognize the citizenship of the Nubians.*²⁴³

Additionally, many Kenyan Nubians have difficulty accessing employment and government services, as a result of which they are forced to live in temporary settlements, suffering the extremes of poverty, slum clearances and forced evictions. As indicated by the testimony of Halima, a Kenyan Nubian girl living in the Kibera slum in Nairobi, who was interviewed by UN-HABITAT, conditions in slums significantly undermine enjoyment of the rights to housing and an adequate standard of living:

*There are eight of us living in a small one room shack where we have to sleep in shifts. There is a public toilet down the lane, but we have to queue for a long time. The toilet is broken, sewerage flowing everywhere. Several girls have been molested there, and some even raped, in broad daylight.*²⁴⁴

There have been some recent efforts to improve the realisation of the rights to equality and non-discrimination for Kenyan Nubians. In 2003, a case was

243 Quoted in: Open Society Justice Initiative, *The Nubian Community in Kenya v The State of Kenya, Communication 317/06: Arguments on the Merits Submitted by the Open Society Justice Initiative, the Institute for Human Rights and Development in Africa and the Centre for Minority Rights Development*, 2010, p. 19.

244 Quoted in: Okiooga, T., "The Unheard Voices of Women: Kenya", *Water for Cities Quarterly Newsletter*, UN-HABITAT, Issue Seventeen, January-March 2004, p. 2.

Box 6.

Case Note

Nubian Children in Kenya v Kenya

African Committee of Experts on the Rights and Welfare of the Child, Communication 002/2009, Decision at 17th Ordinary Session held 21-25 March 2011, full judgement yet to be published.

This communication was brought by the Institute for Human Rights and Development in Africa and Open Society Justice Initiative on behalf of Kenyan Nubian children. The complaint concerned the practice of the Kenyan government of not recognising children born to Nubian parents in Kenya as Kenyan citizens. When Kenyan Nubian children reach 18 they are required to apply for an ID card. Unlike for other Kenyan children, this involves a long and complex vetting process which has uncertain results. ID cards are often arbitrarily delayed or denied. The complainants argued that “a vetting process that is applicable to children of Nubian descent is extremely arduous, unreasonable, and de facto discriminatory”.

The complainants alleged violations of Articles 3 (prohibition of unlawful/unfair discrimination) and 6(2), (3) and (4) (the right to have a birth registration and to acquire nationality at birth) of the African Charter on the Rights and Welfare of the Child. They further argued that as a result of these two violations, Nubian children were exposed to a range of “consequential violations”, including of Article 11(3) (equal access to education) and Article 14 (equal access to healthcare).

The Committee of Experts found Kenya in violation of these rights. With respect to the right to non-discrimination, the Committee concluded, at Para 57:

The current practice applied to children of Nubian descent in Kenya, and in particular its subsequent effects, is a violation of the recognition of the children’s juridical personality, and is an affront to their dignity and best interests. For a discriminatory treatment to be justified, the African Commission has rightly warned that “the reasons for possible limitations must be founded in a legitimate state interest and ... limitations of rights must be strictly proportionate with and absolutely necessary for the advantages which are to be obtained”. The African Committee

is not convinced, especially in relation to a practice that has led children to be stateless for such a long period of time, that the current discriminatory treatment of the Government of Kenya in relation to children of Nubian descent is “strictly proportional with” and equally importantly “absolutely necessary” for the legitimate state interest to be obtained. The Committee is of the view that measures should be taken to facilitate procedures for the acquisition of a nationality for children who would otherwise be stateless, and not the other way round. As a result of all the above, the African Committee finds a violation of Article 3 of the African Children’s Charter.

The Committee also found that this discriminatory treatment had resulted in further “long standing and far reaching effects on the enjoyment of other Charter rights”.

lodged in the High Court seeking a range of orders in relation to the discrimination experienced by Kenyan Nubians and a declaration that Nubians are Kenyan citizens entitled to registration.²⁴⁵ The case, *Ali v Kenya*, has been referred to the African Commission on Human and Peoples’ Rights, where it is awaiting decision.²⁴⁶ A separate but related case, *Nubian Minors v Kenya* (see Box 6), taken on behalf of Kenyan Nubian children, was recently decided by the African Committee of Experts on the Rights and Welfare of the Child. The Committee of Experts found that Kenya had violated the rights of Nubian children to non-discrimination and nationality.²⁴⁷

The findings of the Committee of Experts in the *Nubian Children in Kenya v Kenya* case underline the huge ramifications which discrimination in access

245 *Yunis Ali & 100,000 others v Principal Registrar of Persons, Principal Immigration Officer & the Attorney General*, Misc. Case No. 467/2003, High Court, judgment pending. For information on the case see above, note 243.

246 Open Society Justice Initiative, *Litigation: Ali v Kenya*, 2011, available at: <http://www.soros.org/initiatives/justice/litigation/ali>.

247 *Nubian Children in Kenya v Kenya*, African Committee of Experts on the Rights and Welfare of the Child, Communication 002/2009, ruling made during the Committee’s 17th Ordinary Session held 21-25 March 2011 (full judgement yet to be published). See African Committee of Experts on the Rights and Welfare of the Child, *Report of the 17th Session*, OAU Doc. ACERWC/RPT. (XVII), 22-25 March 2011. (See Box 6.)

to identity cards has on the lives of Kenyan Nubians. In common with the Kenyan Somali population, lack of identity documentation leaves the Nubian population invisible, uncounted in the national census and unable to register to vote and participate in public life. Indeed, the ultimate effect of denial of identity documentation – or persistent obstruction and delay in the application process that equates to effective denial – is to render Nubians *de facto* stateless, a status which then bars their equal participation in all other spheres of life, including education, healthcare, housing and employment.

2.3 Women

Relations between men and women in Kenya are deeply unequal and – despite a vibrant civil society movement and a range of policy measures taken by successive governments – women remain subject to serious disadvantage and discrimination in all spheres of life. Women are vulnerable to a number of remaining discriminatory laws or laws which can be applied in a discriminatory way. Gender-based violence and harmful cultural practices remain significant problems despite efforts by the government, civil society and other groups. Women experience discrimination, inequality of access and inequality of outcome in education, employment and healthcare, together with low levels of participation in public life, while a range of data show that women experience greater exposure to poverty and landlessness than men.

Gender discrimination and inequality persist in a cultural environment based on patriarchal attitudes and stereotypes about women's role in society, a matter of concern raised repeatedly by the Committee on the Elimination of Discrimination against Women, including in its 2011 Concluding Observations on the state report of Kenya to the Committee:

While noting some efforts made by the State party, the Committee reiterates its concern at the persistence of adverse cultural norms, practices and traditions as well as patriarchal attitudes and deep-rooted stereotypes regarding the roles, responsibilities and identities of women and men in all spheres of life. The Committee is concerned that such customs and practices perpetuate discrimination against women, and are reflected in women's disadvantageous and unequal status in many

*areas, including in public life and decision-making and in marriage and family relations.*²⁴⁸

Women are subject to a number of discriminatory laws and laws which are open to being applied in a discriminatory manner, in areas ranging from matters of civil procedure and criminal prosecution to matters of family law and succession. This remains the case despite Kenya having ratified the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), which contains, as part of the obligation to respect the right to non-discrimination, a duty “to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.”²⁴⁹ In 2007, the Committee urged the government of Kenya to complete an audit of discriminatory laws and introduce legislation amending or repealing those discriminatory laws or provisions which exist,²⁵⁰ but to date, this task remains unaccomplished.

The Law of Succession Act discriminates against women in respect of inheritance rights. The Act’s basic provisions guarantee equal inheritance rights for male and female children, and the equal right to produce a will by both male and female parents. However, sections 32 and 33 of the Act expressly exclude all agricultural land, cattle and crops in areas designated by Ministerial notice from legislated inheritance and instead place their succession under the purview of customary law. For a range of reasons, it is likely that decisions under these customary laws will discriminate against women and girls. The Committee on the Elimination of Discrimination against Women has expressed its concern that law and practice governing inheritance can result in discrimination against women, citing the disposal of unequal shares of the estate and the granting of limited or controlled rights – both of which could arise as a result of sections 32 and 33 – as particular issues.²⁵¹

248 Committee on the Elimination of Discrimination against Women, *Concluding Observations of the Committee on the Elimination of Discrimination of Women: Kenya*, CEDAW/C/KEN/CO/7, 2011, Para 17.

249 Convention on the Elimination of All Forms of Discrimination against Women, G.A. Res. 34/180, 1979, Article 2(f).

250 Committee on the Elimination of Discrimination against Women, *Concluding Observations on Kenya*, UN Doc. CEDAW/C/KEN/CO/6, 2007, Para 18.

251 Committee on the Elimination of Discrimination against Women, *General Recommendation 21: Equality in marriage and family relations*, 1994, Para 35.

In addition, rules under the Law of Succession Act which govern intestate succession create a hierarchy for inheritance which directly discriminates against women. Under section 39 of the Act, priority in the absence of children or spouse is given to the father of the deceased over the mother. Under sections 35 and 36 of the Act, which govern intestate succession in respect of married couples, a life interest in the estate is created for the surviving spouse, which terminates on remarriage in the case of widows, but not widowers. Similarly, under the Pensions Act, the Widows and Children's Pensions Act and the Widows and Orphans' Pensions Act, a widow can only receive her deceased husband's pension if she does not remarry or cohabit with another man.²⁵² These provisions constitute a violation of Article 16(1)(h) of CEDAW, in that they do not reflect the "principles of equal ownership of property acquired during marriage".²⁵³ Given the clearly discriminatory nature of these provisions, and the impact which they have on women's ability to enjoy the same property rights as men, it is welcome that in 2011 the government of Kenya made a commitment to the Committee on the Elimination of Discrimination against Women that it would review the Law of Succession Act with a view to eliminating discriminatory provisions.²⁵⁴

Tax law also directly discriminates against women: section 45 of the Income Tax Act provides that the income of a married woman residing with her husband will be treated as the income of the husband for tax purposes, unless the woman chooses to file a separate return. This provision represents a potential violation of women's rights to equality in respect of the "ownership, acquisition, management, administration, enjoyment and disposition of property", as guaranteed under Article 16 of CEDAW.²⁵⁵

Kenyan marriage law is governed by a number of separate Acts which apply to different groups depending on their religion or ethnicity. The Mohammedan Marriage, Divorce and Succession Act states that "Mohammedan marriages (...) shall be deemed to be valid marriages throughout Kenya,

252 Pensions Act 2009 (revised), section 19(1)(c)(i); Widows' and Children's Pensions Act 1977, section 8(1)(b); Widows' and Orphans' Pensions Act section 20(1).

253 See above, note 251.

254 See above, note 248, Para 45.

255 See above, note 249, Article 16(h).

and the parties thereto shall, subject to the provisions of this Act, be entitled to any relief by way of divorce or otherwise which can be had, granted or obtained according to Mohammedan law, and such law shall apply accordingly".²⁵⁶ While this provision does not directly discriminate against women, evidence suggests that decisions made in Khadis' courts, which apply Islamic laws in Kenya, may discriminate against women. The Hindu Marriage and Divorce Act directly discriminates in the provisions on marital age, allowing marriage of women at 16, compared to 18 for men.²⁵⁷ The Committee on the Elimination of Discrimination against Women considers such provisions to be incompatible with CEDAW, and has stated that the minimum age for marriage should be 18 years for both man and woman.²⁵⁸ Section 30 of the Matrimonial Causes Act states that in the event of divorce, male African, Arabian or Baluchi children will receive support until they reach 16 years of age, while female African, Arabian or Baluchi children will only receive support until the age of 13. In addition, the Matrimonial Causes Act does not provide for no-fault divorce, which is often called for by the Committee in its concluding observations.²⁵⁹ In 2007, the Committee expressed its concern both about the existence of multiple marriage regimes in general and the persistence of discriminatory provisions in the relevant laws, such as those listed here, and called on Kenya to:

*[H]armonize civil, religious and customary law with article 16 of the Convention and to complete its law reform in the area of marriage and family relations in order to bring its legislative framework into compliance with articles 15 and 16 of the Convention.*²⁶⁰

Until 2010, many of the laws which discriminate against women were exempted from the application of the constitutional non-discrimination provision because of specific exceptions in the areas of personal and family law,

256 The Mohammedan Marriage, Divorce and Succession Act 1920 (Cap.156), section 3(1).

257 The Hindu Marriage and Divorce Act 1960 (Cap.157), section 3(1)(c).

258 See above, note 251, Para 36.

259 See, for example, Committee on the Elimination of Discrimination against Women, *Concluding Observations on Sri Lanka*, UN Doc. CEDAW/C/LKA/CO/7, 2011, Para 45.

260 See above, note 250, Para 44.

and decisions made under customary or traditional systems of justice.²⁶¹ An exception in Article 82(4)(b) of the 1963 Constitution of Kenya meant that it was not unconstitutional for legislation in the area of personal law to discriminate. The importance of this exception was illustrated by the case of *Rose Moraa & Another v Attorney General*, in which the High Court held that a mother bears sole parental responsibility for a child born out of wedlock.²⁶² The Court, in applying the provisions of the Children Act, found that neither the mother nor the child could claim against the father for support. The applicant had claimed that these provisions were discriminatory against children born to unmarried mothers, arguing that this constituted discrimination either on grounds of “social origin, birth and status”, as provided in Article 82 of the Constitution, or on grounds of illegitimacy, which she argued was a form of “other status”. The Court found that the “invitation that we call a woman’s ‘womb’ ‘a place of origin’ strains the language or the wording used in the Constitution” and stated that to expand the list of grounds provided in section 82(3) of the Constitution would amount to “unacceptable judicial activism”. It also stated that as the subject of the case was a matter of personal law, it fell within the exemption contained in Article 82(4) of the 1963 Constitution.

An exception in Article 82(4)(c), which applied to all decisions made in accordance with customary law, has also had a significant impact on women, particularly in rural and marginalised areas. A report published by FIDA-K provides a range of examples of discriminatory rulings handed down in customary settings, including gender discrimination in succession of agricultural land, crops, or livestock, eviction of widows from their matrimonial homes and child marriage.²⁶³ These findings were strongly corroborated by ERT and KHRC during a 2010 roundtable for civil society actors,²⁶⁴ and by male and female participants in focus groups discussions conducted by ERT in various

261 Constitution of Kenya 1963 (repealed), Article 82(4): “Subsection (1) shall not apply to any law so far as that law makes provision (...) (b) with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law; (c) for the application in the case of members of a particular race or tribe of customary law with respect to any matter to the exclusion of any law with respect to that matter which is applicable in the case of other persons...”

262 *Rose Moraa & Another v Attorney General*, Civil Case 1351, 2002, High Court.

263 Federation of Women Lawyers – Kenya, *Kenyan Laws and Harmful Customs Curtail Women’s Equal Enjoyment of ICESCR Rights*, 2008, pp. 12-21.

264 See above, note 109.

locations.²⁶⁵ Indeed, in its own submission to the CESCR, the Kenyan government admitted that decisions made in customary settings are in some cases inherently discriminatory against women:

*The Constitution of Kenya prohibits discrimination on the basis of sex. It recognises customary law for the determination of matters of adoption, marriage, divorce, and burial, devolution of property on death or other matters of personal law. This recognition of customary laws brings with it customary practices that are, in some cases, discriminatory in their very nature.*²⁶⁶

The adoption of a new Constitution, in August 2010, has radically improved this situation. Article 27 of the Constitution of Kenya 2010 does not replicate the exceptions found in Article 82(4)(b) and (c) of the previous Constitution, in effect extending protection from discrimination to legislation regulating matters of personal law and to decisions made under customary legal systems. These changes should have a significant impact on the lives of many Kenyan women, substantially enhancing their legal protection from discrimination in areas which have a significant impact on their lives. The effect of removing the aforementioned exceptions is strengthened by Article 2(4), which states explicitly that “any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency”. However, issues of enforcement and implementation remain, in particular with regards to customary courts operating in marginalised, remote and rural communities, where awareness of legal rights and responsibilities is low.

In contrast to the changes which the Constitution of Kenya 2010 introduced in respect of other customary courts, the legitimacy of the Kadhis’ courts, which apply Islamic law and operate under the Kadhis’ Court Act, was reaffirmed.²⁶⁷ Some commentators have suggested that Kadhis’ judgments have

265 Focus Group discussions conducted by ERT on 22 March 2011 in Burat Sub-location, Isiolo District, Eastern Province; 24 March 2011 in Ugenya, Nyanza Province; 25 March 2011 in Mombasa, Coast Province, 8 August 2011 in Kisumu, Nyanza Province, and 9-10 August 2011 in Nairobi.

266 Committee on Economic, Social and Cultural Rights, *Initial reports submitted by States parties: Kenya*, UN Doc. E/C.12/KEN/1, 2007, Para 40.

267 See above, note 222, Articles 169 and 170.

discriminated against women in determining questions of family law.²⁶⁸ In addition, while Article 170(5) of the Constitution states that all parties must voluntarily submit to the jurisdiction of the Kadhis' courts, concerns remain over coercion of women to submit to these courts. Most worryingly, Article 24(4) of the Constitution provides a specific exception for Kadhis' courts from the provisions of Article 27 guaranteeing the right to equality and non-discrimination. It states that the application of "provisions of this Chapter on equality shall be qualified to the extent strictly necessary for the application of Muslim law before the Kadhis' courts, to persons who profess the Muslim religion, in matters relating to personal status, marriage, divorce and inheritance". The Committee on the Elimination of Discrimination against Women has expressed its concern that this provision "is not in line with the Convention, in particular contravening articles 2 and 16".²⁶⁹

In respect of other discriminatory laws however, the introduction of the Constitution of Kenya 2010 provides three reasons to be hopeful. First, the right to non-discrimination under Article 27 taken together with Article 20(1), which states that the Bill of Rights applies to all law and binds all state organs, and Article 2(4) which states that laws are void to the extent of their inconsistency with the Constitution, provide a strong basis for constitutional challenge of existing discriminatory laws. Moreover, Schedule 6, paragraph 7 states that "all law (...) shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution". Second, as discussed above, the scope of Article 27 does not retain exceptions in the areas of personal law and customary law provided in its predecessor, Article 82 of the Constitution of Kenya 1963. Third, Article 2(6) of the Constitution states that "any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution", such that the obligation to modify or abolish discriminatory laws under Article 2 of CEDAW – in the spirit of the recommendations by the Committee on the Elimination of Discrimination against Women – have direct effect, providing another potential avenue for challenge through the courts.

268 See above, note 138, p. 9: "issues 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".

269 See above, note 248, Para 11.

Gender-based violence – in particular sexual violence – is prevalent and a cause for significant concern. Rape remains a serious a problem. The most recent crime statistics published by the Kenyan police recorded 735 cases in 2008,²⁷⁰ 729 cases in 2009 and 785 cases in 2010,²⁷¹ though this is likely to be a significant underestimate of actual cases, due to low reporting rates. Indeed, the Gender Violence Recovery Centre at Nairobi Women’s Hospital – which receives only a fraction of cases nationally – reported that it treated 2357 people for rape or defilement in the period April 2008 to March 2009.²⁷² A 2008 report on the incidence and prevalence of rape in Nairobi estimated that “only 1 out of 20 women in Kenya will report a rape and only 1 in 6 will seek medical assistance”.²⁷³ For some women, being raped is a cause of significant stigma in their local community, something which accounts for under-reporting. ERT interviewed P.A., a woman living with HIV who was raped in the 2008 post-election violence. Her testimony indicates the severity of social stigma surrounding rape:

I was raped by four people during the post-election violence. I reported the matter to Kondele Police Station. Two officers were appointed to undertake the investigations. They said that we women loved teasing men and that I enjoyed having sex. I was so offended, as I went to the government for help but they instead teased me. I was offended and did not go to hospital. The rape became a laughing stock to my neighbours and they said the rapists were my boyfriends and that I am deliberately spreading HIV/AIDS. I feel the world is rejecting me, what I underwent was a joy to other people.²⁷⁴

270 Kenya Police, *Crime Statistics*, 2008, p. 6, available at: <http://www.kenyapolice.go.ke/resources/CRIME%20STATI2008.pdf>.

271 Kenya Police, *Crime Statistics*, 2010, p. 19, available at: <http://www.kenyapolice.go.ke/resources/Crime%20report%202010.pdf>.

272 Nairobi Women’s Hospital - Gender Violence Recovery Centre, *Medical and Psychosocial Support of Survivors of Sexual and Domestic Violence Project: Annual Report 2008-2009*, 2009.

273 Crime Scene Investigation Nairobi, *Quantitative Research Findings on Rape in Kenya between December 2007 to June 2008*, 2008, p. 4, available at: <http://www.dnakenya.com/Docs/Rape%20Statistics%20in%20Kenya.pdf>.

274 ERT Interview with P.A., 24 March 2011, Kisumu.

The Sexual Offences Act 2006 introduced stronger penalties for rape and attempted rape,²⁷⁵ in an effort to reduce the level of sexual crime in the country. However, the law is not without significant problems. Section 43(5) states that all acts described in the Act as unlawful and intentional “shall not apply in respect of persons who are lawfully married to each other”.²⁷⁶ The resulting lack of protection for victims of marital rape is something which has caused concern among civil society actors working on women’s issues²⁷⁷ and UN treaty bodies.²⁷⁸ The Committee on the Elimination of Discrimination against Women has stated that “family violence is one of the most insidious forms of violence against women” and that state parties should introduce “criminal penalties where necessary” to prohibit family violence.²⁷⁹ Another serious problem is that section 38 of the Act provides that any person making false allegations of any of the offences under the Act will be liable to punishment equal to that provided for commission of the alleged offence itself. As FIDA-K has commented, “this provision itself can make a survivor of sexual assault not to (sic) report to the Police for fear of being punished if the case fails”.²⁸⁰ CESCR has urged that the provision should be immediately relaxed as it discourages women who have been raped from taking their cases to court,²⁸¹ while the Committee on the Elimination of Discrimination against Women has called for it to be repealed in full.²⁸²

Kenyan Women suffer high levels of domestic violence, something which a study by FIDA-K attributes to traditional patriarchal attitudes where men are “recognized as having a right to ‘chastise’ their wives”.²⁸³ 74.5% of those

275 Sexual Offences Act 2006, sections 3 and 4. Under these provisions, the minimum prescribed penalty is ten years for rape and five years for attempted rape.

276 *Ibid.*, section 43(5).

277 The Federation of Women Lawyers – Kenya, *A Shadow Report to the 5th and 6th Combined Report of the Government of the Republic of Kenya, on the International Convention On The Elimination of All Forms of Discrimination against Women (CEDAW)*, 2007, p. 30.

278 See above, note 248, Para 21.

279 Committee on the Elimination of Discrimination against Women, *General Recommendation No. 19: Violence against women*, 1992, Paras 23 and 24(r)(i).

280 See above, note 277.

281 See above, note 237, Para 22.

282 See above, note 248, Para 22(a).

283 The Federation of Women Lawyers – Kenya, *Gender-Based Domestic Violence in Kenya*, p. 12.

interviewed for this study reported having been the victim of gender-based domestic violence or intimate partner violence.²⁸⁴ While this figure includes responses from both male and female respondents to the survey, responses on the major perpetrators indicate that women are disproportionately vulnerable to violence, with 79.2% of respondents indicating that the “male spouse” was the major perpetrator of violence.²⁸⁵ The Kenyan government, in its report to the Committee on the Elimination of Discrimination against Women, cited research showing that “at least 47% of women who have ever been married have reported some form of domestic violence against them, including physical violence, marital rape and strangling”.²⁸⁶ Girls are particularly vulnerable to abuse: of the women and girls interviewed for the FIDA-K study, 83% reported one or more episodes of physical abuse in childhood, and 46% reported one or more episodes of sexual abuse in childhood.²⁸⁷

The National Gender and Development Commission has undertaken substantial work to highlight and tackle domestic violence through a national campaign which is supported by a range of civil society organisations. However, ERT research revealed that state agencies in some parts of the country do not act on complaints of domestic violence. In Ugenya, Nyanza Province, activists told ERT that the police and local chiefs do not take complaints of domestic violence seriously.²⁸⁸ In Isiolo district, Eastern Province, a group of women told ERT that domestic violence was widespread in their community, and indicated a worrying abdication of responsibility by local police:

*Gender-based violence is common as battery is entrenched in our culture. Such disputes are taken to the village elders, chief and police as a last resort. I have reported domestic violence to the Isiolo Police Station but the police have advised me not to pursue this matter and solve it domestically.*²⁸⁹

284 *Ibid.*, p. 26.

285 *Ibid.*, p. 31.

286 See above, note 114, Para 206.

287 See above, note 283, p. 7.

288 See above, note 135.

289 ERT Interview with women, 22 March 2011, Burat Sub-location, Isiolo District, Eastern Province.

Female genital mutilation (FGM) persists, though prevalence rates are falling. Data collected for the 2008-2009 Kenya Demographic and Health Survey indicates that 27% of women have undergone some form of FGM, a fall from 38% in 1998 and 32% in 2003.²⁹⁰ The survey found that the proportion of women who had undergone FGM increased with age: while 49% of women in the age group 45-49 had undergone FGM, only 15% of women in the age group 15-19 had.²⁹¹ The report found strong correlations between FGM and education status, with women with no education 2.8 times more likely to have undergone FGM than those with a secondary education; and between FGM and poverty, with poor women much more likely to have undergone FGM.²⁹² It also identified significant variations across religious and ethnic groups, Muslims and the Kisii and Somali ethnic groups recording much higher prevalence rates than other groups.²⁹³ According to Kenya's state report to the Committee on the Elimination of Discrimination against Women, the Department for Gender and Social Development's research found that FGM was taking place earlier in life than in the past, and increasingly under medication.²⁹⁴

As in other areas of gender-based violence and gender inequality, the government is making efforts to tackle the continued practice of FGM, both through legislation and through public education programmes. FGM has been prohibited since 2001 under the Children Act 2001.²⁹⁵ In October 2011, the Prohibition of Female Genital Mutilation Act 2011 entered into force, establishing new offences and penalties and providing for the establishment of an Anti-Female Genital Mutilation Board. The Act creates specific offences of committing, aiding and abetting, and procuring a person to perform female genital mutilation in another country.²⁹⁶ The Act provides a penalty of not less than

290 See above, note 153, p. 264.

291 *Ibid.*

292 *Ibid.*, p. 265. 53.7% of women with no education had undergone FGM, compared with only 19.1% of women with a secondary education. 40.2% of women in the lowest wealth quintile had undergone FGM, compared with only 15.4% of those in the highest quintile.

293 *Ibid.*

294 See above, note 114, Para 48.

295 Children Act 2001, section 14: "No person shall subject a child to female circumcision, early marriage or other cultural rites, customs or traditional practices that are likely to negatively affect the child's life, health, social welfare, dignity or physical or psychological development."

296 Prohibition of Female Genital Mutilation Act 2011, sections 19, 20, 21 and 29.

three years imprisonment or a fine of not less than two hundred thousand shillings, or both, for any of these offences.²⁹⁷ It is also an offence under the Act to knowingly allow the use of premises for which one is responsible for the purposes of performing FGM, to be in possession of tools or equipment for a purpose connected with performing FGM, to fail to report an offence of FGM and to use derogatory or abusive language to ridicule, embarrass or harm a woman who has not undergone FGM or a man for marrying or supporting a woman who has not undergone FGM.²⁹⁸

Other discriminatory traditional practices, such as the practice of widow inheritance, persist, particularly in marginalised communities where reliance on traditional beliefs remains strong. Human rights activists in Ugenya, Nyanza Province explained that when women enter into marriage with their deceased husbands' relatives, societal pressure plays a key role in their decisions. The threat of dispossession or financial abandonment by the husband's family, coupled with the power of traditional beliefs, means that in some cases, women from marginalised communities accept inheritance practices that disadvantage them, because they fear the alternatives. One participant in the Ugenya focus group told ERT:

*These people still have traditional beliefs, that if you are not inherited, your children will have bad omens. So they are forced into it, but due to the fact that they are not aware.*²⁹⁹

Women are disproportionately affected by poor access to employment, lower rates of pay and higher unemployment, despite important legislative and policy reforms designed to tackle discrimination and inequality in employment. The Employment Act 2007 created a duty on the Minister for Labour, labour officers, the Industrial Court and employers to promote equal opportunity in employment and strive to eliminate discrimination in any employment policy or practice.³⁰⁰ It prohibited both direct and indirect discrimination on a wide

297 *Ibid.*, section 29.

298 *Ibid.*, sections 22, 23, 24 and 25.

299 See above, note 135.

300 Employment Act 2007, sections 5(1) and (2).

range of grounds including sex and pregnancy in all aspects of employment including recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment.³⁰¹ The scope of protection extends to employees and prospective employees.³⁰² The Act also specifically provided for equal remuneration for work of equal value.³⁰³

However, testimony provided by two women taking claims for discrimination in employment on grounds of pregnancy illustrate that gender discrimination and sexual harassment in employment persist. Ms Okumu Millicent Atieno told KHRC that when her employer discovered that she was pregnant, he began behaving differently towards her, making the working environment unbearable in the hope that she would quit.³⁰⁴ She stated that this treatment included the instigation of arguments by the employer and delays in processing her pay compared with other staff. Ms Atieno's employer later hired a new staff member whom he asked her to train, which she did. He then proceeded to dismiss Ms Atieno, claiming that business was poor, but chose to retain the new employee. Ms Nancy Anyango told KHRC that her employer had been making unwelcome sexual advances towards her for two years, and that she had repeatedly turned down his advances.³⁰⁵ In early 2011, she requested two weeks leave to get married; the leave was granted and she married. Later in the year, her employer asked her whether she was pregnant. When Ms Anyango answered in the affirmative, the employer instructed her to take a pregnancy test, and when the test confirmed her pregnancy, she was told not to report to work. Ms Anyango was later given a termination letter which did not state the reasons for her termination.

Statistics on labour force participation suggest that despite significant progress in the last 50 years, full gender equality in employment remains some way off. In the period 1966 to 2006, female participation in employment increased as a proportion of the total from 18% to 30%, a significant improve-

301 *Ibid.*, section 5(3).

302 *Ibid.*, section 5(8).

303 *Ibid.*, section 5(5).

304 KHRC Interview with Okumu Atieno, August 2011, Nairobi.

305 KHRC Interview with Nancy Anyango, August 2011, Nairobi.

ment but still short of full equality of participation.³⁰⁶ In its audit of Kenya Vision 2030, SID examined the rate of increase in women's participation in employment compared with that of men and projected continuing improvement. SID's projection indicated that by 2007, female employment as a proportion of male employment would be 43.8%.³⁰⁷ Data released by the Kenyan government shows that the actual proportion for that year was 43.1%.³⁰⁸

In its 2010 state report to the Committee on the Elimination of Discrimination against Women, the Kenyan government provided data on the distribution of wage employment by sex and income which shows that while there have been net increases in the number of women in employment, the overall proportion of those in wage employment who are female only increased marginally. The data show that women's participation in employment rose to 30.1% in 2007, compared with 29.5% in 2004.³⁰⁹ Looking at the data for women's representation in different income brackets, there is relatively little variation from this average 30.1% participation rate between different brackets. The data indicates that women occupy 17.3% and 30.1% of positions in the two lowest income brackets, compared to 26.5% and 32.3% in the two highest income brackets.³¹⁰ However, it is possible that this data masks significant disparities within income brackets, and ignores women's greater participation in the informal economy and non-wage employment. Other sources reveal gender disparities in access to senior positions. According to a joint NGO submission to the Committee regarding the civil service, while female staff account for just 16% of those in senior civil service positions, females account for 74% of those in the lower cadre.³¹¹ The Committee, in its 2011 concluding observations on Kenya's state report, expressed concern about the "low rate of female engagement in paid work (30%), a wide wage gap between women and men and occupational segregation".³¹² The Committee called upon the state to

306 See above, note 116, p. 21.

307 *Ibid.*, p. 22.

308 See above, note 114, p. 47,

309 *Ibid.*

310 *Ibid.*

311 Federation of Women Lawyers – Kenya and others, *Joint Submission Shadow Report to the United Nations Committee on the Elimination of Discrimination against Women*, 2011, p. 23.

312 See above, note 248, Para 33.

eliminate horizontal and vertical occupational segregation and to take steps to guarantee the principle of equal pay for work of equal value.³¹³

Women are more likely to work in the informal and agricultural sectors, where they account for more than 80% of those in employment.³¹⁴ This leads to a large gender disparity in respect of participation in employment in rural areas, where 77.1% of women were employed, compared with only 70.3% of men. According to a report by a coalition of NGOs coordinated by FIDA-K, the difference “could be explained by the fact that a majority of women who reside in the rural areas are engaged mostly in agricultural activities”.³¹⁵

Women are more likely to be affected by poverty and under-development than men. According to the government’s own statistics, only 3% of women own title deeds.³¹⁶ The state’s report to the Committee notes that “there is a significant gap in the poverty levels between female headed and male headed households” with 50% of female headed households in rural areas, and 46% of those in urban areas classified as poor, compared with 48% and 30% of male headed households respectively.³¹⁷ As in other areas however, the government is making efforts to improve the position of women. In 2007, the government established a Women’s Enterprise Fund (WEF), which aims to improve the economic empowerment of women through the provision of loans. But concerns remain about levels of awareness of the scheme among women and women’s skills in managing loans. FIDA-K conducted an appraisal of the scheme in 2008 which highlighted lack of skills in managing loans, poor governance, corruption and lack of a clear government policy on management of the funds as major obstacles to wider participation in the WEF.³¹⁸

The picture in respect of education is mixed. Participants at a civil society roundtable organised by ERT, FIDA-K and KHRC in Nairobi in January 2010 attested to the fact that a range of factors, including patriarchal attitudes, lack

313 *Ibid.*, Para 34.

314 See above, note 311, p. 22.

315 *Ibid.*, p. 23.

316 See above, note 114, Para 95.

317 *Ibid.*

318 Government of Kenya, *Women Enterprise Fund: Empower a Woman. Empower a Family. Empower a Nation*, 2010.

of financial resources and fears for the safety of girls resulted in parents refusing to send their female children to school.³¹⁹ In addition, the group expressed their concerns at the prevalence of sexual violence by teachers, and the impunity with which such abuse often takes place, because parents cannot overcome their shame. In its report to the Committee on the Elimination of Discrimination against Women, the government acknowledged that poverty plays a major role in limiting girls' access to education, and thus reducing their prospects of employment:

*Poverty hinders many parents from educating their daughter beyond primary school. In some cases, where resources are scarce, parents still prefer boys' education over girls' meaning that fewer women would qualify for meaningful wage employment.*³²⁰

Data on attendance rates also supports the contention that some parents choose not to send their children to school, despite a range of policy measures designed to increase access to education for all and positive action measures aimed at increasing female participation. Indeed, some statistics indicate a worrying regressive tendency which has emerged in recent years. In 2003, the government of Kenya introduced free primary education, supplemented in 2008 by subsidy for secondary education. The government has adopted a Gender Policy in Education and has also included a number of affirmative action measures in the national Education Policy. Yet in the period 2000-2008, despite net gains in the absolute numbers of female children enrolling and completing education at various stages, the ratio of female to male children declined at both primary and secondary levels. At primary level, the rate of enrolment was lower for girls than for boys, and despite a narrowing of the gap in the first period 2000-2005, the ratio of female to male children declined in later years. The most recent data produced by the government indicates that girls made up 48.5% of those enrolling in primary school in 2008, compared with 48.9% in 2000.³²¹ The percentage of those enrolling in secondary education who were female declined significantly over the same period, from 47.0% of the total population to 44.6%.³²²

319 See above, note 109.

320 See above, note 114, Para 167.

321 See above, note 114, pp. 39-40, Table 10.

322 *Ibid.*, p. 42, Table 14.

Another cause for concern is the decline in completion rates among female children. Data for the period 2000 to 2008 shows a marked increase in the proportion of children completing primary education, from 50.5% to 74.1%, but over the same period, completion rates for female children have fallen behind those for male children. While data from 2000 showed that female children enrolled at grade 1 were more likely than male children to continue in education until grade 5,³²³ government data for 2008 shows a primary school completion rate of 72.3%, compared to 75.9% for male children.³²⁴ The impact of lower enrolment and completion rates for female children at primary level is compounded by lower rates of transition from primary to secondary school, with only 50% of female children continuing in secondary education, compared with 54.6% of male children.³²⁵ Again, while this represents an increase in transition rates for both genders since the beginning of the decade, the disparity between male and female children has grown. In terms of educational outcomes, a 2010 study by Uwezo Kenya examining the impact and quality of education found that female children were outperforming male children on literacy, but were performing worse on numeracy.³²⁶

In many respects, women's health outcomes are better than those for men. Female life expectancy is higher than male, with life expectancy at birth for females at 62, compared to 58 for males.³²⁷ Similarly, female children are less likely to be stunted or underweight as a result of malnutrition than male children.³²⁸ However, access to adequate health services for women presents a major problem, and a number of gender-specific health challenges – in particular in the area of sexual and reproductive health – remain. Access to adequately equipped maternal health facilities and trained personnel is poor: in 2003, only 42% of women were attended to by skilled personnel during labour and delivery, and only 40.1% of births took place in a health facility.³²⁹ There were also substantial geographical inequalities in access to facilities,

323 See above, note 106, Table 8.

324 See above, note 114, p. 41, Table 12.

325 *Ibid.*, p. 41, Table 13.

326 See above, note 163, p. 15,

327 World Health Organisation, *General Health Statistical Profile*, 2010.

328 United Nations Children's Fund (UNICEF), *Nutrition Profile: Kenya*, p. 2.

329 See above, note 100, p. 36.

with just 7.7% of women delivering their babies in health facilities in North Eastern Province, compared with 77.9% in Nairobi.³³⁰ In addition, access to family planning services remains low, at only 46% of married women,³³¹ despite a government claim that three quarters of all health facilities offer some form of family planning services.³³²

Abortion is prohibited under Kenyan law in all cases except medical emergencies, despite evidence which shows that 20,893 women were admitted to public hospitals in 2002 for abortion-related complaints.³³³ Article 26(2) of the Constitution provides a definition of the right to life which includes the phrase “life (...) begins at conception”.³³⁴ This is expanded in section (4) which prohibits abortion “unless, in the opinion of a trained health professional, there is need for emergency treatment, or the life or health of the mother is in danger, or if permitted by any other written law”. The Committee on the Elimination of Discrimination against Women has repeatedly expressed its serious concern about the impact which the criminalisation of abortion has had on women’s health, and in its 2011 concluding observations stated:

*The Committee further notes with concern that illegal abortion remains one of the leading causes of the high maternal mortality rate and that the State party’s restrictive abortion law further leads women to seek unsafe and illegal abortions. The Committee is further concerned at the number of deaths resulting from unsafe abortions and regrets that maternal health policies do not include sufficient attention to complications arising from unsafe abortion.*³³⁵

The provision in Article 26 of the Constitution, which entered into force in 2010, did not materially change the situation as it stood under the Penal Code, which prohibited “procurement of miscarriage”, subject to narrow excep-

330 *Ibid.*

331 See above, note 311, p. 24.

332 See above, note 114, Para 176.

333 Guttmacher Institute, *In Brief: Unsafe Abortion in Kenya*, 2008, p. 2.

334 See above, note 222, Article 26(2).

335 See above, note 248, Para 37.

tions.³³⁶ Even so, it caused significant controversy during the Constitutional reform process, attracting opposition from the church, and abortion became a central plank of the “No” campaign during the referendum.³³⁷

Women are badly affected by other problems of access to adequate health-care, including low doctor-patient ratios and physical inaccessibility of healthcare facilities. According to data provided in the government’s report to the Committee on the Elimination of Discrimination against Women, there were only 6271 doctors working in the country and 32 nurses per 100,000 persons in Kenya, figures which the government itself admits are very low.³³⁸ Similarly, there are a “limited” number of health facilities to meet the needs of the population, and 46% of these are non-government run, putting them out of the reach of the poorest.³³⁹ Of even greater concern is the fact that 47.7% of the population live more than five kilometres away from the nearest health facility, a significant distance in those parts of the country with poor roads and limited public transport.³⁴⁰

Participation of women in political and public life is low, despite concerted efforts by successive governments to increase women’s democratic participation and the representation of women in parliament. Women are less likely to vote in national elections than men, with almost 1 million fewer women registered to vote in 2007 than men.³⁴¹ In the parliament elected in 2007, approximately 10% of seats were held by women (21 of 222 seats), a modest improvement on the representation of women in the previous parliament elected in 2002.³⁴² FIDA-K and others, in their joint submission to

336 Penal Code 2009 (revised), sections 158, 159 and 160. These sections 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.”

337 See, for example, Poghisiso, S., “The Proposed Constitution Has Too Many Flaws to Pass the Test of Time”, *The Nation*, 17 July 2010, p. 13.

338 See above, note 114, Para 197.

339 *Ibid.*, Paras 197 - 198.

340 *Ibid.*, p. 58, Table 24.

341 *Ibid.*, p. 30, Table 3.

342 *Ibid.*, p. 31, Table 5.

the Committee on the Elimination of Discrimination against Women, stated that legal guarantees of equal participation in public life do not fully extend to women, who still experience discrimination in nomination and election into political offices.³⁴³ The submission cited violence, threat of violence and abusive language as obstacles contributing to “the erosion of women’s confidence to venture into the political arena”.³⁴⁴ Indeed, despite presenting the increase in the number of women elected to parliament as a significant positive step, the government acknowledged some of these challenges in its state report to the Committee:

*Factors contributing to women’s unequal representation include the patronage nature of Kenya’s politics and cultural attitudes and stereotypes of women’s roles as being that of supporters, rather than actual leaders.*³⁴⁵

However, the enactment of a new Political Parties Act, and the adoption of the Constitution of Kenya 2010 represent a significant positive step towards increasing the representation of women. Article 27(8) of the 2010 Constitution requires the state to take measures to implement the principle that “not more than two-thirds of the members of elective or appointive bodies” are of the same gender and separate provisions create reserved places for women in the National Assembly, Senate and County Assemblies.³⁴⁶ While women remain under-represented in decision-making positions, modest improvements were achieved following the 2007 elections: in February 2009, 16.7% of ministers and 11.5% of assistant ministers were women.³⁴⁷ However, the total proportion of senior civil service positions (Permanent Secretary) occupied by women fell slightly from 16.7% in 2006 to 15.9%, in 2009, despite an increase in the total number of such positions from 30 to 44.³⁴⁸ This is particularly concerning when viewed in light of the fact that women occupy almost three quarters (74%) of all positions at the lower levels of the civil service.³⁴⁹

343 See above, note 311, p. 16.

344 *Ibid.*, p. 17.

345 See above, note 114, Para 122.

346 See above, note 222, Articles 97(1)(b), 98(1)(b) and 177(1)(b).

347 See above, note 114, p. 32, Table 7.

348 *Ibid.*

349 *Ibid.*, Para 123.

Box 7.

Case Note

CREAW, CAUCUS, TCI, K, DTM, COVAW, YWLI and The League of Kenya Women Voters v the Attorney-General
(Petition No. 16 of 2011, High Court, 3/2/11)

In this case, a group of seven NGOs working on behalf of women brought a claim that Presidential appointments to the positions of Chief Justice, Attorney-General, Director of Public Prosecutions, and Controller of the Budget, made by President Kibaki, were unconstitutional on a number of grounds. The petitioners argued that two of the four appointments violated provisions of the Constitution of Kenya 2010 regarding consultation and that the President had acted contrary to obligations to respect the Constitution and the values and principles provided therein. One of the main arguments put forward was that, as all four appointees were men, the nominations breached sections 27(3), guaranteeing equal treatment between men and women, and 27(4) prohibiting discrimination.

The judge was called on to grant interlocutory relief to prevent the appointments from proceeding and found that the petitioners had a *prime facie* case. In relation to discrimination the judge stated:

To the extent that all the nominees to the offices of the Chief Justice, Attorney General, Director of Public Prosecutions and Controller of Budget were all men, the spirit of equality and freedom from discrimination was not given due consideration. While it may be argued that in future appointments to public offices women were likely to be included as submitted by Mr. Kihara, no reasonable explanation was given by the respondent why none of the four appointees was a woman.

The judge declared “that it will be unconstitutional for any State officer or organ of the State to carry on with the process of approval and eventual appointment to the offices of the Chief Justice, Attorney General, Director of Public Prosecutions and Controller of Budget based on the nominations made by the President on 28th January, 2011.”

The Constitutional provisions on gender equality in public life were employed relatively soon after the promulgation of the Constitution, when a group of NGOs challenged appointments to four senior judicial and administrative positions made by President Kibaki on the grounds that all four appointees were male (See Box 7).³⁵⁰ In *CREAW and 7 others v the Attorney-General*, the claimant NGOs sought interlocutory relief on the grounds that the presidential appointments were unconstitutional, for reasons including gender discrimination. The court found that the claimants had a *prima facie* case, and the President was forced to withdraw his nominees.

Thus, it is clear that in almost all spheres of life, women in Kenya are effectively second class citizens. They are still subject to a number of discriminatory laws and to the operation of customary legal systems where the government itself acknowledges that practice is often inherently discriminatory. The prevalence of gender-based violence and harmful cultural practices remains high, despite efforts by the government to legislate, train police and other actors and raise awareness. The testimony of those interviewed indicates that women also experience direct and indirect discrimination in education and employment, a position which is also indicated by data revealing significant actual disparities in participation rates between the sexes. Lower rates of participation in education and employment combined with discrimination in inheritance and ownership of family property increase the likelihood for women to be poorer than men. These problems persist in a legal framework which is often defective or inadequately enforced.

While there are a number of specific causes for these persistent patterns of discrimination and disadvantage, some general root causes should be highlighted. Traditional perceptions of women's position in society are a major root cause to many problems, ranging from the refusal of parents to educate their female children to the retention of discriminatory provision which appear to reflect views of women as essentially the dependents of men, such as the Law of Succession Act. In addition, the lasting impact which decades of overt gender discrimination has had on relative levels of education, employment and income mean that many women start their lives from a position of entrenched inequality. As a result, while efforts to increase overall

350 *CREAW and 7 Others v the Attorney-General*, Petition 16/2011, High Court, 3 February 2011. (See Box 7.)

participation in primary education or employment, for example, have tended to increase the total numbers, they have been less effective in addressing the gender disparity. There is also evidence to suggest that the different forms of discrimination and disadvantage experienced by women are mutually-reinforcing: the denial of access to education, for example, can have ripple effects throughout a woman's life. Finally, it appears that efforts to address gender discrimination have tended to focus on relatively specific problems, including notably gender-based violence and political representation, at the expense of a more holistic approach. Indeed, it is noteworthy that, beyond the Constitution, there is no legislation providing a general right to non-discrimination on grounds of sex or gender in all areas of life regulated by law.

Yet women have arguably the most to gain as a result of the introduction of the new Constitution in 2010. The Constitution provides protection from direct and indirect discrimination on grounds including sex, gender, marital status and pregnancy. In addition, as discussed above, a number of exceptions to the prohibition on discrimination which existed under the previous Constitution are not replicated in the new Constitution – with the effect that law in areas such as marriage, adoption, inheritance and the decisions of customary courts is now within the scope of the prohibition. Finally, the Constitution specifically provides for gender equality in a number of areas, including land policy and rights during marriage, and provides for minimum levels of female participation in parliament and other representative bodies. Thus, as the *CREAW* case cited above illustrates, the Constitution provides a range of opportunities for women and civil society organisations working on their behalf to challenge discriminatory laws and discrimination by state and private actors, and to push for effective positive action measures to address substantive inequalities.

2.4 Lesbian, Gay, Bi-Sexual, Transgender and Intersex Persons

Discrimination against LGBTI persons is a serious problem in Kenya, and one which has a strong impact on the lives of those affected. While there are substantial differences between the situation and disadvantages faced by different groups and individuals within the “LGBTI community”, there are also a number of common issues, a point which has been highlighted by the Gay and Lesbian Coalition of Kenya (GALCK), among others, during the field research for this report. Moreover, there are common causes of the disadvantage suffered by these different groups, including notably stigma fuelled by the dominance of traditional religious and social attitudes towards gender, marriage

and family. For these reasons, this section of the report assesses the situation of LGBTI persons together, discussing areas of common experience together with problems which are specific to sub-categories of LGBTI people.

Among the root causes of the disadvantages faced by many LGBTI individuals are the high levels of stigma and prejudice which prevail against those whose sexual orientation or gender identity does not conform to societal norms. The absence of explicit protection from discrimination in Kenyan law and the existence of legal norms which have been interpreted as criminalising further entrench stigma and discrimination against LGBTI persons. Moreover, criminalisation makes LGBTI persons vulnerable to police harassment and extortion. Prejudice and a lack of legal protections together contribute to a climate where LGBTI persons are disproportionately vulnerable to physical violence, verbal abuse, the destruction of property, as well as discrimination in access to public services – including healthcare in particular – and employment. Many LGBTI people feel they cannot be open about their sexual orientation or gender identity for fear of prejudice, discrimination, harassment and violence, and the openly gay, lesbian, bisexual and transgender population is small and geographically concentrated in the largest cities.

There is substantial evidence to indicate that the Kenyan state does not respect the right to non-discrimination on grounds of sexual orientation and gender identity. LGBTI persons are subject to a number of discriminatory laws and to discrimination at the hands of state actors, including notably the police. Provisions of the Penal Code have been interpreted as criminalising same-sex intimacy between men.³⁵¹ Section 162 of the Penal Code states:

Any person who: (a) has carnal knowledge of any person against the order of nature; or (b) has carnal knowledge of an animal; or (c) permits a male person to have carnal knowledge of him or her against the order of nature, is guilty of a felony and is liable to imprisonment for fourteen years: Provided that, in the case of an offence under paragraph (a), the offender shall be liable to imprisonment for twenty-one years if - (i) the offence

351 Penal Code 2009 (revised), sections 162, 163 and 165.

was committed without the consent of the person who was carnally known; or (ii) the offence was committed with that person's consent but the consent was obtained by force or by means of threats or intimidation of some kind, or by fear of bodily harm, or by means of false representations as to the nature of the act.

Section 162 bears a close similarity to section 377 of the Indian Penal Code,³⁵² and is an example of what Human Rights Watch has called the “descendants” of section 377 which exist in a number of countries formerly under British rule.³⁵³ Thus, while section 162 does not make explicit reference to consenting sexual conduct between males, it has generally been interpreted as criminalising such conduct, as have these other colonial-era laws. The UN HRC has repeatedly expressed its concern that laws criminalising same-sex relations between consenting adults constitute both a violation of the right to privacy and the right to non-discrimination as provided in the ICCPR,³⁵⁴ and in 2005, it specifically called upon Kenya to repeal section 162.³⁵⁵

Section 163 of the Penal Code sets out the penalty for an attempt to commit any of the offences under section 162, providing a penalty of “imprisonment for seven years, with or without corporal punishment”. Section 165, which covers acts of gross indecency, makes direct reference to conduct involving two men. It states:

Any male person who, whether in public or private commits any act of gross indecency with another male

352 Indian Penal Code, section 377: “Unnatural Offences - Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.”

353 Human Rights Watch, *This Alien Legacy: The Origins of “Sodomy” Laws in British Colonialism*, 2008, pp. 6, 7.

354 See, for example, Human Rights Committee, *Concluding Observations on Chile*, UN Doc. CCPR/C/79/Add.104, 1999, Para 20; Human Rights Committee, *Concluding Observations on Cyprus*, UN Doc. CCPR/C/79/Add.88, 1998, Para 11.

355 Human Rights Committee, *Concluding Observations on Kenya*, CCPR/CO/83/KEN, 2005, Para 27.

person, or procures another male person to commit any act of gross indecency with him, or attempts to procure the commission of any such act by any male person with himself or with another male person, whether in public or private, is guilty of a felony and is liable to imprisonment for five years, with or without corporal punishment.

Though there have been few prosecutions under any of these Penal Code provisions in recent years,³⁵⁶ gay men interviewed by ERT reported being harassed by police seeking to blackmail or extort money from them. While same-sex conduct between women is not interpreted as prohibited under the Penal Code, lesbians – like gay men – face considerable prejudice, discrimination and disadvantage, in part as a consequence of the stigma associated with the perceived criminalisation of same-sex relationships. In addition to the aforementioned discriminatory provisions in the Penal Code, Article 45 of the Constitution, which states that “every adult has the right to marry a person of the opposite sex”, defines marriage in a way which discriminates against male and female same-sex couples.

Transgender persons also face significant marginalisation and ill-treatment arising from discriminatory laws and from abuse by state officials. Audrey Mbugua, of Transgender Education and Advocacy (TEA), testified that discrimination against transgender individuals in Kenya is widespread.³⁵⁷ Ms Mbugua highlighted a number of discriminatory laws and policies, such as the absence of legal recognition for sex reassignments and the lack of a legal mechanism to change one’s name and personal details in identity documents. Transgender persons also experience discriminatory treatment at the hands of state officials: in 2007, TEA noted several instances of what they have termed “state-sponsored terror” against transgender persons, including the arrest and humiliation of a transgender person identified by TEA as “Rose”.³⁵⁸ Rose was arrested by plain-clothes policemen after using the female toilet in

356 See, for example, US Department of State, *2009 Human Rights Report: Kenya*, 11 March 2010, which states that no prosecutions were undertaken in 2009.

357 ERT Interview with Audrey Mbugua, 29 November 2010, Nairobi.

358 Kenya Transgender Education and Advocacy, *Human Rights Violations on Kenya’s Transgender Community*, 2009.

a cafe, threatened and taken to a police station where her gender was forcibly checked by violating her genitalia. Rose was later released without charge thanks to the intervention of a friend who was a police officer.

TEA's research was corroborated by others interviewed by ERT, including David Kuria, then General Manager of GALCK, who told ERT of the difficulties experienced by LGBTI persons when dealing with the police:

Because they are criminalised, LGBTI persons are often forced by the law enforcement officers to prove their innocence rather than the other way round – the burden of proof is always on the LGBTI persons. Since the law provides the police with ability to arrest an individual on suspicion of having criminal intentions, LGBTI persons are easy targets. This form of police harassment is very common. Recently a transgendered person was arrested as she waited for a Matatu (a form of public transport in Kenya) at 9 p.m. to report to work on a night shift. She was arrested together with a group of other people, but everyone else was released. She has spent the last three weeks under police remand, until we called for a doctor's examination which revealed that she had a "Gender identity disorder".³⁵⁹

ERT interviewed A.B., a police officer from Kisumu, who gave further insight into the relationship which LGBTI persons have with the police. A.B.'s testimony highlights the way in which fear of discrimination, harassment or mistreatment by the police leads LGBTI persons to avoid contact with them when they are the victims of crime:

The worst discrimination is against MSM [men who have sex with men]: the community claims that this isn't acceptable and most of the time they tend to beat, stone, sometimes kill and eliminate them from the community. Gay and lesbian individuals as a rule don't report viola-

359 The Equal Rights Trust, "ERT Interview with David Kuria, Chairman of the Gay and Lesbian Coalition of Kenya (GALCK)", *The Equal Rights Review*, Vol. 5 (August 2010), pp. 86-87.

*tions of their rights to the police. This is because of the homophobia they fear they will get from the police force. Even approaching a police officer is dangerous from their point of view.*³⁶⁰

Unlike the other disadvantaged groups, LGBTI persons do not enjoy explicit protection from discrimination under Kenyan law, as Article 27(4) of the Constitution 2010 includes neither sexual orientation nor gender identity among the listed protected grounds. In October 2009, the Committee of Experts on Constitutional Review ruled out the explicit inclusion of these characteristics in the list of protected grounds of discrimination in the draft Constitution, citing fears that the draft would be rejected by a majority of Kenyans if it did so.³⁶¹ GALCK criticised this decision and in December 2009 issued a statement calling for sexual orientation and gender identity to be recognised as grounds of discrimination and for the protection of sexual minorities to be included in the mandate of the specialised equality and human rights body which would be established pursuant to the Constitution. Shortly before the referendum however, David Kuria, then General Manager of GALCK, told ERT that, despite the lack of explicit mention of sexual orientation or gender identity in the draft Constitution, GALCK would be encouraging its members to vote for it, “because it is the right thing to do for Kenya at this time”.³⁶²

While the Constitution does not explicitly provide for non-discrimination on grounds of sexual orientation and gender identity, there is scope for this to be rectified through the courts or subsequent legislation. Article 27(4) of the Constitution of Kenya 2010 provides that the “state shall not discriminate directly or indirectly on any ground, including [listed characteristics]”, while Article 27(5) states that persons shall not discriminate on any of the grounds “specified or contemplated in clause (4)”. Thus defined, the prohibition on discrimination by both the state and non-state actors should be read as inclu-

360 ERT interview with A.B., 8 August 2011, Kisumu.

361 Ringa, M. S., “Law Review Experts Rule out Rights for Homosexuals”, *The Daily Nation*, 18 October 2009.

362 See above, note 359, p. 90. Mr Kuria stated: “[w]e shall be encouraging our members to vote for the passage of the draft, because it is the right thing to do for Kenya at this time. It is true that not all our interests are covered in the draft and that in some cases there are deliberate efforts to exclude us, for example in the area of marriage. But LGBTI Kenyans will benefit from a stable and prosperous Kenya, and the draft Constitution lays the ground for this.”

sive of sexual orientation and gender identity. Such an interpretation would be in line with the view of the CESCR that both sexual orientation and gender identity are forms of “other status” contemplated by Article 2(2) ICESCR.³⁶³ Similarly, in other jurisdictions where the legislation includes an “open ended” list of protected grounds, sexual orientation and gender identity have been found to be characteristics which are analogous to those grounds which are explicitly listed.³⁶⁴

Thus, while it does not include sexual orientation and gender identity among the listed grounds, the definition of the right to non-discrimination under Article 27(4) and (5) of the Constitution represents an improvement on the “closed list” of grounds provided under Article 82 of the previous Constitution. The 2008 case of *R. M.* – an intersex person who identifies as a man – provides an interesting insight into how the increased flexibility provided by the definition in Article 27 could benefit LGBTI persons (See Box 8).³⁶⁵ Supported by the KHRC, *R. M.* challenged the circumstance of his incarceration and various laws, policies and practices which discriminated against him as an intersex person. *R.M.* argued, *inter alia*, that “intersex” should be included as a form of “other status” under Article 82, but this argument was rejected by the court.

Testimony collected by ERT indicates that traditional social and religious attitudes play a significant role in perpetuating homophobia and transphobia in Kenya. Participants at a Focus Group of LGBTI persons from the Nyanza province stated their view that religious leaders bear a great deal of responsibility for the stigma surrounding homosexual conduct, because of the tendency to interpret the Bible in ways which condemn homosexuality.³⁶⁶ Similarly, Wanja Muguongo, Executive Director of UHAI, the East African Sexual Health and Rights Initiative, told ERT that “religion is one of the root causes

363 See, for example, the Committee on Economic, Social and Cultural Rights, *General Comment 20: Non-discrimination in economic, social and cultural rights*, UN Doc. E/C.12/GC/20, 2009, Para 32, where the Committee states “‘Other status’ as recognized in article 2, paragraph 2, includes sexual orientation.”

364 See, for example, *Haig v Canada* (1992) 16 C.H.R.R. D/226 (Ont. C.A.).

365 *R. M. v Attorney General & 4 Others*, Petition 705 of 2007, High Court, 2 December 2010 (See Box 8.)

366 Focus Group discussion conducted by ERT with LGBTI persons from Nyanza province, 8 August 2011, Kisumu.

Box 8.**Case Note*****R.M. v Attorney General & 4 Others***

Petition 705 of 2007, High Court, 2/12/10

This case concerned the treatment of an intersex person convicted of a serious crime. The petitioner challenged the Births and Deaths Registration Act which make no provision for intersex, stating that this resulted in discrimination contrary to Article 84 of the Constitution of Kenya 1963 (repealed) and had the effect of denying intersex persons their rights in a range of areas, including health and education. Several aspects of the judgement in this case highlight the level of discrimination experienced by intersex people in Kenya. Firstly, the court found that the applicant had failed to present evidence that there are a definite number of intersex persons in Kenya as to form a class or body of persons in respect of whose interest the petitioner can bring a representative suit. Furthermore, the court was not convinced there was a public interest in the bringing of such a suit. Secondly, the court stated that all intersex persons could be classified as either male or female. In relation to the applicant they stated:

We are satisfied that in the case of the petitioner his ambiguous genitalia did not negate the fact that his biological sexual constitution had already been fixed at birth. In requesting for the particulars of the sex of the petitioner as either male or female, the Births and Deaths Registration Act did not therefore exclude the petitioner as an intersex person, because the petitioner in fact falls within one of the two defined categories. The challenge was to determine at birth which side of the divide the petitioner fell particularly, for purposes of registration of the birth, i.e. whether male or female.

Thirdly, the court was not willing to expand the meaning of “sex” in sections 70 and 82 of the Constitution of Kenya 1963 to include intersex or to include intersex as an “other status” on ground of which there should be equal protection of the law. The court opined that to “interpret the term sex as including intersex would be akin to introducing intersex as a third

category of gender in addition to male and female. As we have endeavoured to demonstrate above, an intersex person falls within one of the two categories of male and female gender included in the term sex.”

This analysis enabled the court to find that there had been no discrimination against the applicant in a number of areas:

- Education, employment or housing - the applicant had attended school to Class 3 but had experienced harassment. The court held that this attendance demonstrated that the applicant was able to gain access to education. It was the choice of the applicant to refuse to go to school after Class 3 which had made it difficult to attain employment.
- Voting – the applicant could be registered to vote because the applicant could register as either male or female.
- Marriage - the applicant could be classified as either male or female and so could marry.
- Prisons Act – there was no need to separately cover the housing of intersex prisoners as they could be classified as either male or female.

of homophobia”.³⁶⁷ The effects of stigma and prejudice are felt at all levels of society, including within the family, a point made strongly by Akinyi Achola, Chairperson of Minority Women in Action:

*For lesbian women, one of the worst sources of discrimination is the family: parents do not understand sexual orientation, and often withdraw support for education of their daughters once they find out that they are lesbians.*³⁶⁸

Rena, another lesbian activist and religious leader, gave further insights into the role which prejudice plays in motivating discrimination and preventing LGBTI persons from participating in life on an equal basis. She testified:

Discrimination against LGBTI persons is typical in family setting and takes place on a daily basis. One is excluded from family gatherings and parties, from decision making

367 ERT Interview with Wanja Muguongo, 10 August 2011, Nairobi.

368 ERT Interview with Akinyi Achola, 10 August 2011, Nairobi.

*and any other family related issues. In work places, there is always the cold shoulder and silent treatment that an LG-BTI individual experiences, even without verbal abuse. (...) The biggest obstacles to gay people asserting their right in Kenya are religion, the culture and the times: we live in such a time where people are conformists.*³⁶⁹

Homophobia and transphobia are evident in recent debates around homosexual conduct in the Kenyan media. In late 2009, gay rights became the focus of intense media scrutiny as a result of the high profile civil partnership ceremony of Kenyan citizens Charles Ngenji and Daniel Gichia in London on 17 October. As the first gay Kenyan couple to undertake a civil partnership, albeit outside of the country, the two men faced significant attention from the Kenyan press, spurring the debate about gay rights in Kenya. However, the men were concerned about the role and impact of the media, stating:

*Clearly the media simply decided to focus on the sensational side of the story and to make matters worse decided to put totally unreasonable pressure and embarrassment on our parents, immediate family and close friends in Kenya in order to whip up bad feelings and potential acts of violence towards them.*³⁷⁰

Further evidence of the pervasive influence of homophobia and transphobia in public life and the media arose during the 2010 constitutional referendum campaign. Despite the fact that neither sexual orientation nor gender identity was included in the list of protected grounds under Article 27 of the draft Constitution which was the subject of the referendum, the Constitution's treatment of LGBTI persons was among the most hotly debated issues during the campaign. Leaders of the "No" campaign – such as Linah Jebii Kilimo, MP – exploited homophobia in their attempts to convince people to oppose the adoption of the new Constitution:

You have heard it said that there are gay marriages; there is lesbianism, isn't it? And we know that according

369 ERT Interview with Rena, 8 August 2011, Kisumu.

370 The Star, "Charles Ngenji and Danial Gichia: Media Scandalised our Union as Gays", 2 November 2009.

*to our African culture (...) we don't even want to mention (...) but now it looks like they will be protected under the PCK [Proposed Constitution of Kenya]. They will have rights. That means we are introducing gay marriages in our Constitution, we are allowing lesbianism in our Constitution.*³⁷¹

Indeed, in November 2010, following adoption of the Constitution, Prime Minister Raila Odinga criticised the “No” campaign for engaging in deliberate misinformation about the legal status of homosexual conduct and same-sex unions under the new Constitution. But his comments – widely condemned by the international community – are indicative of the tenor of political discourse around homosexual conduct in Kenya:

*We will not tolerate such behaviours in the country. The constitution is very clear on this issue and men or women found engaging in homosexuality will not be spared (...) Any man found engaging in sexual activities with another man should be arrested. This kind of behaviour will not be tolerated in this country. Men or women found engaging in those acts deserve to be arrested and will be arrested (...) [There] were lies from leaders who wanted to confuse Kenyans to reject the new law; the Constitution is very clear on that matter. It does not state anywhere that same sex marriage is legal in Kenya.*³⁷²

Openly gay and transgender people are vulnerable to physical violence, harassment and intimidation. Denis Nzioka, of Gay Kenya, told ERT that he had received death threats because he was openly gay.³⁷³ Mr Nzioka said that at approximately 3:30 a.m. on 23 November 2010, he had been visited by a group of three men who told him to move out of the neighbourhood where he was living, or face retribution. Following the visit, an anonymous letter was delivered by hand to his home, which contained homophobic abuse and

371 Quoted in: Kenya Human Rights Commission, *Wanjiku's Journey: Tracing Kenya's Quest for a New Constitution and Reporting on the 2010 National Referendum*, 2010, p. 25.

372 Momanyi, B., “Arrest Gays, Kenyan PM Orders”, *Capital News*, 28 November 2010.

373 ERT Interview with Denis Nzioka, 29 November 2010, Nairobi.

Box 9.**Testimony***B. M.*

On the radio we heard that there is a wedding, a gay wedding, but it was just rumours. Where I was staying, we were two homosexual men. We came home from the club at around 4 a.m. I woke up at 7 and when I came out I saw policemen and a big crowd of villagers. They asked me, "Where are the visitors?" (...)

The crowd wanted to see the bride and the bridegroom. Because they heard there is a wedding and wanted to see the gays that were going to get married. They were shouting. If there were not police, I could have not been here. They could kill us, they could burn us. They went and broke into my house after we were taken by the police, they stole all my things, my property. (...)

There were some gay guys who were attacked by the mob. But for us, the police (...) protected me from the crowd. There is a guy known as George, and another one, Saidi. They were outside. George was coming from Shanzu, and when he alighted from the matatu the crowd said "Here is another one ... Here is another homosexual". Saidi was beaten and some people used him like an ashtray, burned him with cigarettes. He had a wound, and he's an asthmatic. He was taken to the hospital. George was beaten and he had injuries, he was the one they poured paraffin on. They poured paraffin on him and they wanted to burn him. (...) I was arrested around 7 a.m. and it was around 10 a.m. when George was beaten by the mob, on that same day. Saidi was beaten on the following day. He was beaten by the crowd, and then the police came and rescued him. (...)

The police came into my house. (...) Then they told us to put on [clothes]. We asked "where are you taking us?" They told us they were going to explain in the police station. We went to the police station; we stayed there until noon, around 2 p.m. Then they told us that we're going to be taken for a medical examination.

The police took us for testing in a health centre where we were clients. This is KEMRI [Kenya Medical Research Institute, in Kilifi] - it's the nearest government hospital to the police station where we were arrested. So when

we were taken there, the Head of KEMRI recognised us as his clients and he advised us not to consent to the anal swabs unless there is a court order to that effect. [The police] told us that when we refuse to be tested we will be charged (...) with other offences which are not related to sexual crimes. It was more like threatening us so that we would consent. It's what they do – trump up other charges.

We refused to be tested. When we came back to the police station after the hospital we were put in a cell for about five minutes. But then came somebody who was working at KEMRI. Then a lady and two men from the Kenya Human Rights Commission came. Then we were released. After being released we went to Mombasa for hiding.

[The police] said we are not arrested but kept for our safety.

threats. He told ERT that despite knowing who the perpetrators were, he did not go to the police, as he did not believe there was anything they could do. David Kuria referred to physical violence as the “ever-present risk” for gay people.³⁷⁴

In February 2010, a number of sexual health workers and men suspected of being gay were attacked by members of the public in Mombasa and were subsequently arrested, ostensibly for their own protection.³⁷⁵ The incident took place after an angry mob of approximately 200 persons surrounded a house known to be occupied by two gay men in response to rumours that a wedding was to be conducted between two men in Mtwapa. ERT interviewed B. M., one of those arrested by the police, who testified to how he had been arrested for his own protection and that he feared for his life had the police not intervened (See Box 8).³⁷⁶

Other persons interviewed by ERT reported cases of discrimination in employment. Ms Mbugua of TEA stated that discrimination against transgender per-

374 See above, note 359, p. 87.

375 Human Rights Watch, *Halt Anti-Gay Campaign*, February 2010.

376 ERT Interview with B. M., 30 November 2010, Mombasa. (See Box 9.)

sons in employment is widespread, while activists from Gay Kenya told ERT that openly gay men are much less likely to be considered for a job because of their appearance.³⁷⁷ I. P., a gay man from Mombasa, told ERT that he chooses not to reveal his sexuality to potential employers, and feels discouraged from applying for jobs at organisations which are not known to be “gay-friendly”.³⁷⁸

Discrimination in access to health services is a major concern for LGBTI persons. Activists from Gay Kenya testified that frequently when a gay person seeks health assistance they are refused treatment and instead lectured on how homosexuality is a “sin”. They also gave an example of nurses at a hospital, who had said they do not want to associate with or provide treatment to gay people while being trained to work with them. According to Gay Kenya activists, the problem is compounded by the fact that the prevalence of HIV among the gay community is high, particularly among sex workers. David Kuria cited a number of recent examples of prejudice, discrimination and unequal treatment experienced by LGBTI persons in healthcare settings. In one case, a nurse at Kenyatta Hospital called six other nurses to come to examine a gay male patient to whom she was administering treatment and the person was forced to narrate repeatedly how he got infected and to talk about his relations with other men. Another example given by Mr Kuria illustrates the prejudice which some LGBTI persons face when trying to access healthcare, and the impact which this treatment can have on their access to basic services:

*One of our GALCK staff members was forced to listen to a religious sermon from a doctor in Mater Hospital, even though she had a very high fever. The doctor wouldn't give her medical attention until after she promised to change – she said she was under a lot of pain and really needed medication.*³⁷⁹

There is evidence that ignorance also leads intersex persons to suffer substantial disadvantage in access to healthcare. David Kuria related a particularly disturbing example:

377 ERT Interview with Gay Kenya team members, 29 November 2010, Nairobi.

378 ERT Interview with I.P., 30 November 2010, Mombasa.

379 See above, note 359, p. 86.

We took an intersex person to the (...) hospital after he fainted at the office. In his state of unconsciousness and because of how he was dressed, it was possible to see that he was intersex, and the examining doctor asked insensitive questions, like “is this a man or a woman?” It so happened that although the family had brought him up as a girl, in puberty he identified as a man, and at the age of 21, the family realising he was now a man, forced him to undergo traditional circumcision and then abandoned him. At the time we took him to the hospital, the circumcision had not healed. It was bleeding, and he was also menstruating, from both organs. He was terribly anaemic, yet all the doctor was interested in was to find out whether he was a man or a woman and why we always brought strange cases to the hospital. The experience made a deep impression on my mind.³⁸⁰

Other individuals interviewed by ERT indicated that lack of appropriate training, facilities and medicines also present barriers for LGBTI persons trying to access health services. ERT interviewed Paul Ogendi, a lawyer from Nairobi who works on healthcare issues, who stated that medics’ lack of training in equal treatment and lack of “professional skills to address special needs” means that medical staff are not able to address the needs of LGBTI persons.³⁸¹ Audrey Mbugua told ERT that “limited access to, and high cost of necessary medicines, including especially hormones, as well as medical services” were extremely important concerns for transgender persons.³⁸²

As part of efforts to further combat the high incidence of HIV/AIDS, the Kenyan AIDS prevention programme has recently publicised the need to focus additional attention on Kenya’s homosexual population, proposing Africa’s first full census of gay and lesbian persons in June 2010.³⁸³ However, no further announcements about the timing of the census have been released. While the state’s acknowledgement of the importance of Kenya’s gay and lesbian popu-

380 See above, note 359, pp. 86-87.

381 ERT interview with Paul Ogendi, 9 August 2011, Nairobi.

382 See above, note 357.

383 BBC, *Kenya to Launch Homosexual Census*, 29 October 2009.

lation is welcome, and offers an opportunity for the LGBTI community to gain greater recognition, there are legitimate concerns about the move. These include fears that any such census would be unlikely to provide an accurate picture of gay life in Kenya given the exposure to social stigma and discrimination by state and private actors which are associated with being openly gay or lesbian. Additionally, there is concern that participation in the census could result in arrest and that, while efforts are being taken to avoid the assumed link between homosexuality and HIV, the census could further hamper efforts to separate the two, leading to a further increase of the stigma attached to LGBTI persons in Kenya.³⁸⁴

Despite the myriad challenges and difficulties faced by the LGBTI community in Kenya, efforts to secure rights for LGBTI persons are increasing, and Kenya has a vibrant civil society movement working on behalf of LGBTI rights. Six organisations work under the banner of GALCK³⁸⁵ and other civil society organisations, including notably KHRC, are seeking to mainstream gay rights issues into their other human rights work. In May 2010, GALCK member organisations came together with KHRC to celebrate the International Day Against Homophobia. KNCHR Commissioner, Lawrence Mute, attended the event and for the first time, media were invited. LGBTI activist Kate Kamunde emphasised the novelty of the event, stating that “spaces are (...) opening up to accommodate us, which was not possible two years ago”.³⁸⁶

As stressed in the introduction to this section, the LGBTI community is not homogenous, and to a significant degree, lesbians, transgender persons, gay men and intersex persons have different experiences of discrimination and inequality. Yet the research for this report has also identified significant links between the forms of disadvantage which these groups suffer. The effective criminalisation of gay men, though it is neither enforced through prosecution, nor applicable to lesbians or transgender persons, appears to lie at the heart of this shared experience of disadvantage. As the testimony of those inter-

384 See in particular the more critical evaluation by Mwangi, S., “Stand up, be counted and go to jail”, *The Guardian*, 4 November 2009.

385 These are Minority Women in Action (MWA); Ishtar MSM; Gay Kenya Trust; the Trans-gender Education and Advocacy Group (TEA); Persons Marginalised and Aggrieved (PEMA); and Artists for Recognition and Acceptance (AFRA-Kenya). For further information, see: <http://galck.org/>.

386 Barasa, L. and Wanja, J., “Kenya Gay Demand Recognition”, *The Daily Nation*, 18 May 2010.

viewed indicates, the threat of prosecution allows police officers and other state officials to discriminate against and harass LGBTI persons with near impunity and where LGBTI persons suffer discrimination, abuse or violence at the hands of private actors, they are less likely to engage the authorities.

Indeed, the avenues for LGBTI persons to challenge the discrimination they suffer are limited. Unlike almost all of the other groups reviewed in this report, LGBTI persons are not explicitly protected from discrimination under Kenyan law. As discussed above, the use of an “open-ended” list of grounds in Article 27 of the Constitution of Kenya provides an opportunity for LGBTI persons to challenge the discrimination which they suffer, using arguments which have been developed in international and other domestic jurisdictions to support the case that sexual orientation and gender identity should be considered analogous grounds to those listed. Recognition by the courts that LGBTI persons have a right to protection from discrimination under Article 27 would be a crucial step in addressing the patterns of discrimination and inequality which they experience.

However, while this lack of legal protection from discrimination persists, it contributes to an environment where LGBTI persons are exposed to severe discrimination, harassment and violence. Deep-seated social prejudice, coupled with the legal provisions which effectively criminalise same-sex conduct between men, create a social environment where many feel that they cannot be open about their sexuality or gender identity. For the small population of openly gay, lesbian, transgender and intersex persons, life is hard. Experiences of discriminatory violence, abuse and harassment testify to the hostility which many face every day, while the role of state actors – including not only police officers, but also health care professionals and others in positions of authority – speaks to the insecurity of life as an openly gay, lesbian or transgender person. In this environment, the significant discrimination and disadvantage which LGBTI persons face in education, employment and healthcare appears to be an inevitable consequence.

2.5 Persons with Disabilities

This section of the report examines the experience of persons with disabilities in a holistic manner, looking at all forms of disability together. This approach was adopted because of the common experiences of prejudice, discrimination and disadvantage which were identified through interviews with people

with different forms of disability. Of necessity, this approach limits the extent to which it is possible to focus on the problems specific to different disabilities. In recognition of this limitation, the report draws a basic distinction between the experiences of those with physical and sensory disabilities on the one hand and those with mental and intellectual disabilities on the other. In section 2.5.1, the report examines the particular problems facing those with physical and sensory disabilities, which often arise as a result of lack of access to assistive devices, lack of social welfare support and lack of reasonable accommodation. In section 2.5.2, the report examines problems facing those with mental and intellectual disabilities, including lack of legal personality and enforced medical treatment.

The legal position of persons with disabilities in Kenya has radically improved since the early 2000s. In 2003, Kenya enacted the Persons with Disabilities Act, which provided, for the first time, a right to non-discrimination on grounds of disability. In 2008, Kenya ratified the Convention on the Rights of Persons with Disabilities, which became part of Kenyan law with the promulgation of the Constitution of Kenya 2010. The Constitution provides enhanced rights for persons with disabilities, including protection from discrimination under Article 27 and additional rights of access and rights to assistive devices and tools of communication under Article 54. Yet despite these significant changes for the better, the lives of persons with disabilities remain “marked by experiences of discrimination, prejudice and inequality”.³⁸⁷ Those interviewed by ERT indicated that persons with physical, sensory, mental and intellectual disabilities are subjected to serious prejudice, including within their families, as a result of their disability. Limited access to assistive devices, specialist services and a lack of reasonable accommodations in public places present ongoing challenges for large numbers of persons with disabilities. Barriers to participation in education are held in place by prejudice, direct discrimination and problems of access. The area of employment is also rife with problems, due in part to relative lack of education compared to persons without disabilities, prejudice among employers about the capacities of persons with disabilities, and lack of reasonable accommodation in the workplace. As a result, many persons with disabilities live in poverty, and without welfare support.

387 African Union of the Blind, Kenya Union of the Blind, and Centre for Disability Rights Education and Advocacy, *State of Disabled Peoples Rights in Kenya*, 2007, p. 43.

No accurate figures are available on the number of persons with disabilities in Kenya. A 2008 report by the National Coordinating Agency for Population and Development estimated that 4.6% of the population had some form of disability,³⁸⁸ but these figures are disputed. The WHO estimates that in 2004, 2.9% of the world population was severely disabled and 12.4% was moderately disabled,³⁸⁹ which, if consistent across the Kenyan population, would suggest that there would be approximately six million persons with disabilities living in Kenya. However, the WHO also notes that “[a]t all ages, both moderate and severe levels of disability are higher in low- and middle-income countries than in high-income countries; they are also higher in Africa than in other low- and middle-income countries”, so it is likely that even this figure is an underestimate.³⁹⁰

Until 2003, Kenya’s legal system made little specific provision for persons with disabilities.³⁹¹ While Article 70 of the Constitution of Kenya 1963 provided that “[e]very person in Kenya is entitled to the fundamental rights and freedoms of the individual”, article 82(1) did not include disability as a prohibited ground of discrimination.³⁹² The Persons with Disabilities Act, enacted in 2003, represented the first attempt to protect persons with disabilities from discrimination.³⁹³ The Act does not contain a general prohibition on discrimination against persons with disabilities; instead it contains a series of separate provisions in relation to employment, education, health, accessibility and mobility, public buildings, public service vehicles, sports and recreation, polling stations and voting. The Act also established a National Council for Persons with Disabilities with enforcement, promotional, educational and policy responsibilities. The Constitution of Kenya 2010 substantially extended the legal protection available to people with disabilities. Disability – defined in Article 260 as including physical, sensory, mental, psychological or

388 National Coordinating Agency for Population and Development and Kenya National Bureau of Statistics, *Kenya National Survey for Persons with Disabilities*, March 2008, p. 8.

389 World Health Organisation, *Global Burden of Disease*, 2004, p. 34.

390 *Ibid.*

391 For a detailed discussion of the legal framework as it relates to persons with disabilities, including discussion of the Constitution of Kenya and the Persons with Disabilities Act, see Part 3 of this report.

392 See above, note 261, Articles 70 and 82.

393 The Persons with Disabilities Act 2003.

other impairment that affects a person's "ability to carry out ordinary day-to-day activities" – is included in the list of prohibited grounds of discrimination in article 27(4). Article 54 focuses specifically on the rights of persons with disabilities, with 54(1) setting out the right to be treated with dignity and respect. Article 54 creates specific rights of access to educational institutions and to public places, transport and information. 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.

Yet despite this recent progress, people with disabilities in Kenya face multiple forms of discrimination. A 2007 report produced by the African Union of the Blind (AUB), the Kenya Union of the Blind (KUB) and the Centre for Disability Rights Education and Advocacy (CREAD), entitled *State of Disabled Peoples Rights in Kenya*, presents a good insight into the views of persons with disabilities living in Kenya from a "cross-disability and holistic" perspective.³⁹⁴ The authors interviewed 95 persons with various forms of disability in three different regions of Kenya with the aim of identifying the barriers they faced and understanding the human rights situation of disabled people. 86% of respondents stated that they had experienced unequal treatment, 80% reported experiencing isolation, segregation and lack of support for their needs, and 74% felt they had been denied the right to make decisions on their own lives.³⁹⁵ The report identified three types of barriers preventing people with disabilities from participating in life on an equal basis: abuse and violence, discriminatory attitudes and limited access. 56.8% of participants in the study reported that they had experienced abuse and violence in the community or society at large,³⁹⁶ while almost three quarters (74.7%) of interviewees had experienced discriminatory attitudes in society.³⁹⁷

ERT's interviews with persons with different forms of disability found that prejudice, stigma and discriminatory attitudes towards disability prevailed within families, and that the discriminatory treatment which persons with disabilities experienced in the home often had far-reaching consequences for their ability to participate equally in other areas of life. This includes in par-

394 See above, note 387, p. 8.

395 *Ibid.*, p. 11.

396 *Ibid.*, p. 44.

397 *Ibid.*, p. 49.

ticular access to education: a number of those interviewed testified that their parents had refused to send them to school because of preconceptions about their disability. Findings of discriminatory treatment by family members are supported by the *State of Disabled Peoples Rights* report which provided a number of examples of discriminatory treatment within the family home, including being forced to undertake more housework or to sleep in a different part of the house to other family members.³⁹⁸

Regarding employment, ERT interviews with persons with physical, sensory, mental and intellectual disabilities and their representatives identified relative lack of education, prejudice among employers about the capacities of persons with disabilities and lack of reasonable accommodation in the workplace as the main barriers preventing equality in employment. As in respect of education, these findings corroborate other recent analyses. Of those interviewed for the *State of Disabled People's Rights in Kenya* report, 22.1% stated they had experienced barriers in accessing work.³⁹⁹ CESCR in its concluding observations on the Government of Kenya's 2007 state report drew attention to the fact that many persons with disabilities remained unemployed and had limited access to education.⁴⁰⁰ The National Coordinating Agency for Population and Development's *National Survey for Persons with Disabilities* found that when asked whether they had worked in the last seven days, 24.2% of respondents said they had not worked, while 7.2% had never worked.⁴⁰¹

2.5.1 Persons with Physical and Sensory Disabilities

Persons with physical and sensory disabilities interviewed by ERT testified to discriminatory treatment and other barriers affecting their equal participation in almost all spheres of life. A number of those interviewed stated that their experience of unequal treatment began in the family home. Lack of access to the assistive devices needed to enable their active and equal participation in life presented a particular problem for many of those with physical and sensory disabilities, which, in combination with direct discrimination

398 *Ibid.*, p. 59.

399 *Ibid.*, p. 52.

400 Committee on Economic Social and Cultural Rights, *Concluding Observations on Kenya*, UN Doc. E/C.12/KEN/CO/1, 2008, Paras 16, 34.

401 See above, note 388, p. 15.

against them, acted as a barrier to engagement in employment. This in turn left a number of those interviewed vulnerable to poverty and deprivation.

ERT's interviews with persons with disabilities revealed that in a significant number of cases, exposure to discrimination, including discriminatory

Box 10.

Testimony

Godfrey Odhiambo

I am a person with physical disability. I was not born with a disability but when I was in class 3, I suffered from polio. My parents did not understand and my mother thought I was bewitched. Due to lack of knowledge, my limbs became even weaker. I was never taken to hospital and only visited medicine men, which did not help.

By 1987 I was completely unable to walk. My mother sought advice from a medicine man who advised that a pit be dug and I be put in it. This happened, from sunrise to sunset: I was put in a pit standing and sand was thrown into the pit to support me so that I did not fall. I could not eat or go to the toilet. In the evening I was removed, washed and taken to the house. This took place for three months. When I was removed from the pit, two men would pull me out: it was painful and I would cry.

One Saturday, a former classmate came and found me in the pit. [My friend's mother] took the issue to the local Catholic Church. The priest took me to Nyabondo Missionary Hospital where I was diagnosed with polio. I had an operation on my legs in 1994. No member of my family came to support me.

In 2000 I had another operation. Prior to that I had sought consent but my mother refused and she rejected me, saying that I was not her son; my grandmother also refused to sign the consent. [Later,] I went home. No one wanted to be associated with me, even my siblings. I was taken by the missionary hospital to Joyland school. My family refused to support me, even with upkeep.

I am currently in college, Kenya Institute of Management. My family did fundraising for my younger brother to go to Kenya Polytechnic but have refused to pay for me. I am currently struggling with my education.

violence, began during childhood, with parents and other family members responsible for their ill-treatment. A particularly disturbing example was provided by Godfrey Odhiambo, who testified to the severe abuse which his family subjected him to.⁴⁰²

ERT interviewed a number of other individuals who had suffered hardship because of discrimination by family members. Frederick Minoda, a young man from Siaya, told ERT that he had been dispossessed because his brother believed his disability meant he did not deserve the parcel of land bequeathed to him by his father:

*I inherited a piece of land from my father when he passed away in 1995. My brother has problems saying my piece of land is bigger. As we were growing up my brother perceived that because of my disability I do not deserve to have the said land.*⁴⁰³

A significant number of those interviewed by ERT stated that familial prejudice about disability led their parents to prevent them from attending school. Elvis Jowi, a man with physical disabilities from Kisumu, stated that his father would not allow him to attend school “because I was of no use”.⁴⁰⁴ Eric Wade told ERT that he was the only one of his six siblings who did not attend school, while Mary Ogolla explained that she had been denied education both because of her disability and because “my father did not educate us girls as he said it was a waste of money”.⁴⁰⁵ This pattern is confirmed by other studies. A 2007 study by the KNCHR found that only a small percentage of disabled children attended school and that the needs of children with disabilities were not well met by school curricula.⁴⁰⁶ Just over one third (33.7%) of those interviewed for the *State of Disabled Peoples Rights in Kenya* report said they had

402 ERT Interview with Godfrey Odhiambo, 23 March 2011, Kisumu, Nyanza Province. (See Box 10.)

403 ERT Interview with Frederick Minoda, 24 March 2011, Siaya, Nyanza Province.

404 ERT Interview with Elvis Jowi, 23 March 2011, Kisumu.

405 ERT Interview with Eric Wade, 24 March 2011, Siaya, Nyanza Province, ERT Interview with Mary Ogolla, 24 March 2011, Siaya, Nyanza Province.

406 Kenya National Commission on Human Rights, *Objects of Pity or Individuals with Rights: The Rights to Education for Children with Disabilities*, 2007, p. vii.

experienced barriers in accessing education.⁴⁰⁷ One person interviewed for that report stated:

*I was not allowed to study there because I was disabled. I tried to find out why and all they could say was that the boys' dormitory was upstairs and that I could not manage to get there (...) The head mistress said that because I had a wheelchair I would have a problem in the school.*⁴⁰⁸

In many parts of the country, access to assistive devices and specialist services for persons with physical and sensory disabilities is low, creating substantial problems across all areas of life. Participants in an ERT focus group with persons with disabilities from the Nyanza province reported that persons with disabilities in rural areas were disadvantaged due to lack of access to services, assisted devices and community support.⁴⁰⁹ In Siaya, a person with a disability explained that the number of devices such as white canes, wheelchairs and crutches which were made available were never sufficient to meet demand.⁴¹⁰ A survey carried out by the government found that only 31.5% of persons with disabilities used some form of assistive device or supportive service,⁴¹¹ yet also found that 92.8% of those in rural areas and 87.3% of those in urban areas found life without assistive devices a “big problem”.⁴¹²

Some persons with disabilities interviewed by ERT did not see how they could access employment, given the physical or societal barriers. In Isiolo, ERT talked with a group of five students from a local school for the blind.⁴¹³ When asked what they intended to do for employment on completing their education, each student said they could not imagine finding a job. The students stated that because they did not expect to secure jobs elsewhere, they

407 See above, note 387, p. 52.

408 *Ibid.*

409 Focus group discussion conducted by ERT with persons with disabilities, 8 August 2011, Nyanza Province, Kisumu.

410 ERT Interview with R., 24 March 2011, Siaya, Nyanza Province.

411 See above, note 388, p. 9.

412 *Ibid.*, p. 11.

413 ERT Interview with five students, 21 March 2011, Isiolo, Eastern Province.

would like to set up a business together making furniture, with a grant from the Community Development Fund (CDF), but doubted whether they would be given a grant because of prejudice against persons with disabilities among those on the CDF board.

In addition to the barriers arising as a result of a lack of reasonable accommodation, ERT found evidence of direct discrimination in access to employment. ERT interviewed two women with visual impairments from different parts of the country who testified that they had not been appointed to a position because of the impairment, despite being fully qualified for the position in question in both cases. Gedo Ali Mumin, a woman with visual impairment from Wajir, told ERT:

I did telephone operator training in Machakos Vocational Centre. I came back to Wajir and went to the regional manager of Posta looking for a job. The manager responded by saying, "We do not employ blind operators".⁴¹⁴

Ahmina Hussein, a woman from Isiolo, told ERT that she had twice been denied a position for which she was qualified, including in one case where five other people were appointed as election observers, despite performing worse on the application test.⁴¹⁵ The *State of Disabled Peoples Rights in Kenya* report also identifies examples of discriminatory treatment in employment for those who succeed in securing a job. One teacher interviewed for the study reported discriminatory treatment in employment:

Yet, although I work very hard, appreciation is hard to come by. People think that normal people should be appreciated more and despise us. When anything good is happening it is awarded to the normal teachers while I am left out. They (the normal teachers) keep on progressing while we remain static or regress. For example, letters for admission for further studies are awarded to the normal teachers, usually without our knowledge.⁴¹⁶

414 ERT Interview with Gedo Ali Mumin, 29 March 2011, Wajir, North Eastern Province.

415 ERT Interview with Ahmina Hussein, 21 March 2011, Isiolo, Eastern Province.

416 See above, note 387, p. 59.

Many persons with physical and sensory disabilities live in poverty, in large part as a result of lack of education, lack of access to suitable employment and the limited welfare support available for those with disabilities. Physical and sensory impairments which restrict access to paid employment can result in significant poverty, which in turn makes it more difficult to secure the medical and social help needed to mitigate the impact of the disability itself. In Siaya, ERT interviewed T., a man with a serious visual impairment which had trapped him in a spiral of increasing poverty and deprivation. T. stated that his impairment had left him largely unable to tend to the crops on his land, which had become overgrown and unproductive over time, reducing the quantity, quality and diversity of what he was able to grow and thus driving him deeper into poverty. As a result of his increasing poverty, T. was unable to pay for replacement spectacles: the ones he had were obviously inadequate to give him clear vision, and were broken in such a way as to require him to tie the spectacles to his head with a string. As his poverty increased and his sight worsened, T.'s home fell into disrepair and he and his wife were left sleeping under a tree, on land which they owned but could not cultivate.⁴¹⁷

2.5.2 Persons with Mental and Intellectual Disabilities

In addition to facing many of the same disadvantages as persons with physical and sensory disabilities, persons with mental and intellectual disabilities are vulnerable to discrimination as a consequence of social prejudice about their condition, which manifests itself in discriminatory laws and discriminatory treatment by both state and non-state actors. Despite the fact that mental and intellectual disabilities are included within the scope of the non-discrimination and equality provisions of the Persons with Disabilities Act, the Constitution⁴¹⁸ and the Convention on the Rights of Persons with Disabilities (CRPD) (which has direct effect in Kenyan law by virtue of Article 2(6) of the Constitution), there remain several laws which discriminate against persons

417 ERT Interview with T., 24 March, 2011, Siaya, Nyanza Province.

418 Persons with Disabilities Act 2003, section 2, which states that: “‘disability’ means a physical, sensory, mental or other impairment, including any visual, hearing, learning or physical incapability, which impacts adversely on social, economic or environmental participation”; Constitution of Kenya 2010, Article 260 states that: “‘disability’ includes any physical, sensory, mental, psychological or other impairment, condition or illness that has, or is perceived by significant sectors of the community to have, a substantial or long-term effect on an individual’s ability to carry out ordinary day-to-day activities”.

with mental and intellectual disabilities. Most severe of these are laws which have been used to deny persons with such disabilities legal capacity. Coupled with the approach to mental and intellectual disability based solely on medical assumptions rather than human rights, they permit forced medical admission, treatment and confinement at medical facilities. Other problems affecting this group include under-provision of specialist facilities and services for persons with intellectual and mental disabilities and a lack of facilitation for Augmentative and Alternative Communications (AAC).

It is difficult to carry out accurate research on the situation of those living with mental and intellectual disabilities in Kenya due to the lack of official data and information. This challenge was identified by Edah Maina, Director of the Kenya Society for the Mentally Handicapped (KSMH) and a member of the UN Committee on the Rights of Persons with Disabilities in an interview with ERT.⁴¹⁹ KSMH has been working with persons with intellectual disabilities for almost 40 years; it operates across the country, with head offices in Nairobi and a network of 1,200 grassroots groups and 600 groups associated to special schools and units of persons with mental disabilities.⁴²⁰

There are no accurate figures available on the number of persons with intellectual disabilities. Estimates vary from 1.3 to 3.6 million, based on different interpretations of the average number of such persons in a given population.⁴²¹ No data is available on the estimated number of people with mental disabilities. No data had been collected on the geographical or demographic distribution of those with either intellectual or mental disability. Given the lack of reliable, verifiable data, Ms Maina stressed the need for a national government-led assessment of mental and intellectual disabilities in Kenya, examining both demographic and geographical dis-

419 ERT Interview with Edah Maina, 28 April 2011, via skype.

420 Kenya Society for the Mentally Handicapped, *National Leadership on Issues of Intellectual Disabilities*, available at: <http://www.ksmh.org/about-us/national-leadership>.

421 The Kenya Society for the Mentally Handicapped estimates that there are 3.6 million persons with intellectual disabilities living in Kenya, based on an estimate that 15% of the population has a disability, and of these 60-70% have an intellectual disability. It bases this high estimate on the fact that Kenya's poor suffer hunger, malnutrition and lack of access to healthcare, all of which can have a negative impact on brain development. (See: <http://www.ksmh.org/component/content/article/88/238-current-situation>.) The Kenya Association for the Intellectually Handicapped estimates that there are 1.3 million persons with intellectual disabilities living in Kenya, based on an estimate that 3% of the national population have an intellectual disability. (See: <http://www.kaihid.org/>.)

tribution and forms of disability, in order to guide policy and investment decisions. Ms Maina stated that KSMH's 40 years of experience suggests that there are persons with mental and intellectual disabilities in "every region and every community in Kenya".⁴²²

There remain several laws which appear to violate the non-discrimination and equality provisions of the Constitution and the Persons with Disabilities Act, in particular with regards to persons with intellectual disabilities. For example, the Mental Health Act provides for voluntary and involuntary treatment of persons with mental and intellectual disabilities.⁴²³ Under the Matrimonial Causes Act, a petition for divorce may be submitted on the ground that the respondent "is incurably of unsound mind and has been continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition".⁴²⁴ In addition, persons who have been found to be of "unsound mind" are denied legal capacity in some important areas, including voting in elections,⁴²⁵ and are disqualified from standing for election to Parliament⁴²⁶ or a County Assembly.⁴²⁷ These provisions are potentially in conflict with Kenya's obligations under the Convention on the Rights of Persons with Disabilities to ensure that persons with disabilities are able to enjoy political rights on an equal basis with others.⁴²⁸ The broad reach of these provisions, particularly when combined with the lack of clarity as to the meaning of "unsound mind" – a term which is not defined in Kenyan law – means that they are unlikely to comply with Kenya's obligations to recognise that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.⁴²⁹ Commissioner Lawrence Mute of the KNCHR has argued that "the bulk of persons with intellectual disabilities (...) are technically not unsound of mind; and indeed (...) even if they were adjudged to be of unsound mind, fundamental rights

422 See above, note 419.

423 Mental Health Act 1991.

424 Matrimonial Causes Act 1941, section 8(1)(d).

425 See above, note 222, Article 83.

426 *Ibid.*, Article 99(2)(e).

427 *Ibid.*, Article 193(2)(d).

428 Convention on the Rights of Persons with Disabilities, G.A. Res. A/RES/61/106, 2006, Article 29.

429 *Ibid.*, Article 12(2).

still accrue to them”.⁴³⁰ In an article published shortly after the promulgation of the Constitution, Mute discusses the extent to which mental ill health can create a situation where an individual is of “unsound mind” and the extent to which that condition constitutes intellectual disability:

The question, then, is whether or not mental ill health may on occasion translate into disability. The Convention on the Rights of Persons with Disabilities (CRPD) (United Nations 2006), which Kenya signed and ratified in 2007 and 2008 respectively, recognizes that disability “... results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others” (Preamble); and that “persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others” (Article 1).

Hence illness in and of itself may not be a disability. Nevertheless, if a person’s organ (in this case the mind) is so impaired as to undermine such person’s long-term effective interaction with his or her surroundings (social, economic, political, etc.), then that individual has a disability. This point may seem to be merely academic, but in fact it is not. If the law after declaring a person to be of unsound mind proceeds to disenfranchise him or her, that is discrimination on the ground of disability.⁴³¹

As Mute argues, provisions which have the effect of disadvantaging persons with intellectual disabilities may well be determined to be void by virtue of Article 27 of the Constitution, read with Article 2(4). However, while they re-

430 Mute, L. M., “Shattering the Glass Ceiling: Ensuring the Right to Vote for Persons with Intellectual Disabilities In Kenya”, *Thought and Practice: A Journal of the Philosophical Association of Kenya (PAK)*, New Series, Vol. 2, No. 2, December 2010, p. 6.

431 *Ibid.*, pp. 6-7.

main on the statute books, they create a risk of discrimination against persons with intellectual disabilities. Further, to the extent to which these provisions discriminate against persons with intellectual disabilities, Kenya will have failed to comply with its obligation under the CRPD to “take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities”.⁴³²

Regarding the major patterns of discrimination and disadvantage affecting persons with mental or intellectual disabilities, Edah Maina outlined three types of problems. First, problems of social attitudes, which tend to define approaches to people with mental and intellectual disabilities either as objects of charity and pity, or as medical problems, rather than people with inherent dignity and human rights. Second, the denial of legal capacity and the practice of forced medical treatment which this lack of capacity enables. Third, a lack of facilitation for AAC and lack of access to other specialist facilities. Ms Maina herself suffers from a mental (psycho-social) disability which caused her to have a serious breakdown a number of years ago. In seeking to explain the interaction between social attitudes towards psycho-social disability and discrimination, she told ERT of her own experience.

*People’s attitude is the biggest cause of discrimination and also the fear that one can suddenly present a very bad mental crisis (...) when there is no intervention. Also that has led to (...) people’s conviction that people like myself would have to be isolated, and heavily medicated (...) we would have to be kept away.*⁴³³

According to Ms Maina’s analysis, the general attitude of the government and health professionals towards persons with disabilities – that they should be treated with charity and that their condition can only be addressed through medical intervention – has created an environment where their rights can be ignored. Ms Maina highlighted the practice of forced medical treatment, admission and confinement at medical facilities as the most severe consequence

432 See above, note 428, Article 4(1)(b).

433 See above, note 419.

of this approach. Section 16 of the Mental Health Act makes provision for the involuntary admission of those suspected of suffering from a “mental disorder”. It provides senior police officers with the power to take into custody any person believed to be suffering from a mental disorder; any person believed to be a danger to themselves or to others, or who is believed likely to act in a manner offensive to public decency; and any person believed to be suffering from mental disorder who is not under proper care and control, or is being cruelly treated or neglected.⁴³⁴ The Act defines the conditions for admission to hospital and assessment of those taken into custody, and gives discretion to the person in charge of the facility to “detain the person in the mental hospital as an involuntary patient” should they think fit.⁴³⁵

In early 2011, a CNN documentary, *Locked Up and Forgotten*, produced with assistance from KSMH, highlighted the appalling conditions of those held in Mathari Hospital, Kenya’s main psychiatric hospital.⁴³⁶ The report revealed numerous instances of inhuman and degrading treatment of persons with psycho-social disabilities and allegations of sexual abuse of patients. The documentary also revealed a dead body in the hospital’s seclusion room. A number of international NGOs wrote to the government of Kenya expressing concern about the conditions evidenced in the documentary. The Mental Disability Advocacy Centre expressed serious concern that “patients are kept as inmates rather than being rehabilitated and discharged into the community”.⁴³⁷ In its letter of concern, the World Network of Users and Survivors of Psychiatry identified a direct link between the medical model of approaching persons with psycho-social disabilities, the practice of forced detention and the situation at Mathari Hospital:

We call on your government to immediately make the transition from the medical model to the human rights model for persons with psychosocial disabilities. It is the medical model which is responsible for

434 See above, note 423, section 16 (1).

435 *Ibid.*, section 16 (2), (3) and (4).

436 CNN, *Locked Up and Forgotten*, 26 February 2011.

437 Mental Disability Advocacy Centre, *Human Rights Violations against People with Disabilities*, 25 February 2011.

*the outcome of the terrible conditions highlighted in the CNN broadcast.*⁴³⁸

KSMH research has highlighted a significant under-provision of suitable specialist facilities and services for persons with intellectual disabilities. Despite an expansion of faith-based special schools and units for pupils with intellectual disabilities, there are still only approximately 1,200 such schools in the country, serving approximately 23,000 students.⁴³⁹ Facilities for those with psycho-social disabilities are similarly sparse: there is only one national psychiatric institution (the aforementioned Mathari Hospital) and a further seven psychiatric departments within provincial government hospitals. Services are only available in these facilities for those who can afford to pay.

Ms Maina suggested that one of the problems faced by organisations such as KSMH in advocating for the rights of persons with mental and intellectual disabilities is a marginalisation of their activities within the wider disability movement. She suggested that despite the fact that the Persons with Disabilities Act covers mental and intellectual disabilities, and the fact that persons with these conditions are eligible for protection from the National Council for Persons with Disabilities, persons with mental and intellectual disabilities have not enjoyed the benefits of these new legal rights or institutional mechanisms:

*There is a general assumption that, for example, the National Council for Persons with Disabilities is catering for all people with disabilities but in reality, there is nothing happening for people with mental and intellectual disabilities (...) The Persons with Disabilities Act does mention mental disabilities but it fails to ensure that the key aspects of discrimination that only persons with mental disabilities suffer – like the denial of legal personality, for example – are provided for.*⁴⁴⁰

438 World Network of Users and Survivors of Psychiatry, *The Violations of Human Rights in Your Country that Is Aired on CNN Today*, 26 February 2011.

439 Kenya Society for the Mentally Handicapped, *Current Situation*, available at: <http://www.ksmh.org/component/content/article/88/238-current-situation>.

440 See above, note 419.

KSMH has identified the transition from the medical to the human rights model of intellectual and mental disabilities in Kenya, and the development of new laws on mental and intellectual disability which conform with the UN Convention on the Rights of Persons with Disabilities as the main issues it needs to address in the near future. In addition, the group advocates the adoption of comprehensive anti-discrimination law, including protection from discrimination for those with mental and intellectual disabilities, as a major priority.

2.6 Persons with Albinism

Little information is available on the situation of persons with albinism in Kenya. There are no accurate estimates of the number of people living with the condition and little systematic research has been undertaken to identify the full range of obstacles and disadvantages which they face. However, it is clear that people with albinism face severe disadvantages, arising in part because of prejudice and superstition and in part as a result of failure to make reasonable accommodation for their particular health and social needs.

In common with other countries in the region – notably neighbouring Tanzania, as well as Burundi and the Democratic Republic of the Congo – albinism is the subject of significant superstition in Kenya, which in some cases has led to violence against those with the condition. Some people believe that the body parts of persons with albinism have special powers to confer prosperity or good health, while others believe that albinism is a curse which can be “cured”. Isaac Mwaura, a spokesman for the Albinism Society of Kenya (ASK) describes a wide range of contradictory superstitions held by Kenyans about albinism:

It is funny that even in cosmopolitan Nairobi where orientation to human diversity is assumed, there have been weird accounts of people losing their appetite at the mere sight of a person with albinism, associating the condition with disease. Many are people who are convinced that persons with albinism are sterile or barren, that they are immortal, that they are mentally handicapped, or that they can cure HIV/AIDS! Others think

*that acquiring some body parts of those with albinism brings good luck and instant riches.*⁴⁴¹

In some cases, superstition or stigma has led to violence against those with the condition. A 2009 news report on attitudes towards albinism in Kenya cites as typical the case of two brothers, John Brown Shamallah and his brother Collins Maikuva, whose parents were told by other villagers in their area that they should be placed in boiling water “so that they would become like other normal children.”⁴⁴² This said, Kenya had – until 2010 – appeared to be less affected than others by the wave of attacks, abductions and murders of persons with albinism in the region, which saw 19 people die in neighbouring Tanzania in 2007-8.⁴⁴³ However, in August 2010, this situation changed when a Kenyan man, Nathan Mutei, was sentenced to 17 years in prison in Tanzania and a fine after confessing to human trafficking. Mr Mutei was arrested while trying to sell a man with albinism to undercover police officers posing as businessmen.⁴⁴⁴ The case led the Parliamentary Equal Opportunities Committee to call for urgent government action to protect persons with albinism.⁴⁴⁵ ASK called on the government to provide bodyguards to protect people with albinism.⁴⁴⁶

Persons with albinism also experience serious problems in access to education as a result of failure to take steps to accommodate their visual impairments. Dr Prabha Choskey of the Albinism Foundation of East Africa (AFEA) has suggested that in excess of 90% of children with albinism are in schools for the blind as a result of government policy. AFEA argues that this approach fails to recognise their specific needs as individuals who are not blind but have severe visual impairments. It advocates the inclusion of children with albinism in standard schools, with large type text, high contrast written ma-

441 Masakhwe, P., “Dispelling Africa’s Myths about Albinism”, *Pambazuka News*, 10 September 2009.

442 “Albinos Decry Discrimination in Kenya”, *Xinhua News*, 11 September 2009.

443 “Witchdoctor Killings Condemned”, *Reuters*, 3 April 2008.

444 “Kenyan Jailed for Trying to Sell Albino”, *BBC News*, 18 August 2010.

445 “House Team Concerned over Security of Albinos”, *The Daily Nation*, 19 August 2010.

446 “Albinos Endangered by Religious Rituals”, *The Media Project*, 30 August 2010, available at: <http://www.themediaproject.org/article/albinos-are-not-safe-east-africa?page=0,1>.

terial and computers with large character display.⁴⁴⁷ ERT interviewed Mumbi Ngugi, also of AFEA, who explained the impact of the decision to send children with albinism to schools for the blind, rather than making accommodation for them in standard schools:

*[Because] they can see, albeit not as well as people without visual impairments, they tend to perform worse in school than even their blind schoolmates. This means that their access to tertiary education is limited, and without professional qualifications, access to employment is correspondingly limited. Negative perceptions of albinism further limit access to employment. While no employer will tell you directly that the reason you did not get a job was because of your genetic condition, you are left with the very strong impression that that is precisely the reason why.*⁴⁴⁸

Ms Ngugi explained that the categorisation of persons with albinism as blind has the effect of denying them access to appropriate healthcare, which addresses their particular problems, such as photo-sensitivity which increases vulnerability to skin cancer. In addition, she stated that the categorisation had the effect of making persons with albinism “invisible”, so that there is no data on the numbers or situation of those with albinism and the government has no basis to develop policies appropriate to the group’s particular needs. In her interview with ERT, Ms Ngugi stressed the importance of legal recognition of persons with albinism as a specific group under the law as a means to ensuring that adequate and appropriate policies can be developed:

*Policy changes that recognise persons with albinism as a group with special needs, inclusion in laws such as the Persons with Disabilities Act and prohibition of discrimination on the basis of genetic inheritance could have a major impact on persons with albinism as it would place them on the radar of the law.*⁴⁴⁹

447 “Albinos under Threat in Region”, *The Daily Nation*, 20 November 2008.

448 ERT Interview with Mumbi Ngugi, July 2010, via email.

449 *Ibid.*

In recent years, the government has begun to take steps to address the situation of persons with albinism. In August 2009, Mr Eugene Wamalwa, an MP from the Party of National Unity, tabled a petition calling on the government to take steps to protect people with albinism. The petition called for amendments to the Persons with Disabilities Act or the introduction of a new law to cater to the specific needs of persons with albinism, a specific category for albinism in the national census and a waiver of the duty charged on sunscreen for people with albinism.⁴⁵⁰ In August 2010, ASK pressed the government over its failure to address these issues and the government announced that it did plan to conduct a special census and that the National Council for Persons with Disabilities was in the process of drawing up amendments to the Persons with Disabilities Act to include albinism.⁴⁵¹ At the time of writing, no further announcements had been made regarding either the census or amendments to the Persons with Disabilities Act.

Discrimination against persons with albinism has, to date, enjoyed relatively little attention from politicians, government and the media in Kenya. Thus, albinism is not currently an explicitly prohibited ground of discrimination under Kenyan law, and has instead been treated as a form of disability. This has tended to mean that the law is ill-suited to addressing their specific needs, in two areas in particular. The first is that myths and superstitions about albinism and persons with albinism means that they are exposed to very particular types of prejudice, stigma, and in some cases physical danger. The second is that albinism gives rise to specific reasonable accommodation requirements, in particular in respect of education and health services, which the current legal framework is not well-placed to recognise.

This said, the introduction of an “open-ended” list of grounds of discrimination in Article 27 of the Constitution provides an opportunity for persons with albinism to challenge the lack of explicit recognition of their right to non-discrimination. The disadvantages which persons with albinism suffer, and the clear connection of these examples of discrimination to a characteristic which is inherent to the individual concerned, support the view that albinism is a characteristic analogous to those grounds explicitly protected by the Constitution. This, together with the evidence that the government

450 “MP Presents Petition for Albino Law”, *The Daily Nation*, 6 August 2009.

451 “Govt to Conduct Census for Kenyans with Albinism”, *The Daily Nation*, 31 August 2010.

is becoming increasingly sensitive to the needs of persons with albinism means there are good reasons to hope for improvements to the system of legal protection in the future.

2.7 Persons Living with HIV and AIDS

Kenya has a serious HIV epidemic, and the government is attempting, through legislative, policy and healthcare initiatives, to ameliorate the situation of persons living with HIV and AIDS. In 2006, Kenya enacted the HIV and AIDS Prevention and Control Act, which *inter alia* prohibits discrimination on the grounds of “actual, perceived or suspected HIV status” in employment, education, transport or habitation and healthcare services.⁴⁵² However, the stigma surrounding HIV/AIDS and prejudice against people living with HIV remains significant, particularly in rural or marginalised areas of the country. There is substantial evidence of inequality in the workplace, arising in many cases because of discrimination or a combination of discrimination and poor health.⁴⁵³ There is also evidence of discrimination and prejudice impacting on access to education and healthcare, the latter a problem with particularly serious consequences given the importance of access to healthcare for people living with HIV/AIDS.

In 2009 there were an estimated 1.3 – 1.6 million adults living with HIV in Kenya. Of these, between 650,000 – 860,000 were women and 110,000 were new infections.⁴⁵⁴ Although AIDS-related deaths are falling in number, an estimated 90,000 people died from the disease in 2009.⁴⁵⁵ Children are severely affected by HIV/AIDS, both as sufferers and as a result of the death of their parents from the disease. Kenya’s National AIDS Control Council estimates that the cumulative number of children infected was 184,052 by 2009 and

452 HIV and AIDS Prevention and Control Act 2006, sections 31, 32, 33(1) and 36.

453 Sprague, L. and Simon, S., “Employment Discrimination and HIV Stigma: Results from Two Surveys”, *3rd HIV/AIDS in the Workplace Research Conference*, 2010, p. 20, available at: http://www.wbs.ac.za/faculty/lecturing_staff/hr-management/996760.htm.

454 Joint United Nations Programme on HIV and AIDS (UNAIDS), *Report on the Global AIDS Epidemic 2010*, 2010, pp. 180, 182 and 184.

455 *Ibid.*, p. 185.

that 22,259 children were newly infected in 2009 alone.⁴⁵⁶ It is estimated that 15,000 babies are infected through mother-to-child transmission each year,⁴⁵⁷ and that as many as half of Kenya's estimated 2.4 million orphans have lost their parents due to HIV and AIDS.⁴⁵⁸ While treatment rates are improving, only 32% of children and 50% of adults requiring anti-retroviral treatment have access to it.⁴⁵⁹

UNAIDS data suggests that the HIV prevalence rate has fallen from a peak of around 14% in the mid-1990s to 5% by 2006.⁴⁶⁰ HIV prevalence rates vary significantly according to gender, age and region. Prevalence rates are significantly higher for women than men: according to the Kenya Demographic and Health Survey (KDHS) 2008-2009, prevalence among women between the ages of 15 and 49 is 8.0% compared to 4.3% for men in the same age group.⁴⁶¹ There are also significant regional disparities in prevalence rates. The KDHS estimates that prevalence among adults in rural areas is 6.0% against 7.2% in urban areas, and indicates that there are wide regional disparities: according to the survey, prevalence in North Eastern province is just 0.9%, compared to 13.9% in Nyanza province.⁴⁶²

A report by the National Aids Control Council for the United Nations General Assembly Special Session on HIV and AIDS (UNGASS) lists, among the "most at risk populations" (MARPS) for transmission of HIV in Kenya, sex workers, men who have sex with men (MSM), prisoners and injecting drug users.⁴⁶³ However, as the report notes, the actual prevalence rate for each of these groups is difficult to confirm because "surveillance for MARPS is weak".

456 National AIDS Control Council, *UNGASS 2010: United Nations General Assembly Special Session on HIV and AIDS, Country Report - Kenya*, 2010, p. 7.

457 Human Rights Watch, *Needless Pain – Government Failure to Provide Palliative Care for Children in Kenya*, 2010, p. 29. Mother-to-child transmission of HIV includes transmission during pregnancy, birth or breastfeeding.

458 See above, note 456, p. 17.

459 See above, note 454, p. 98.

460 *Ibid.*, p. 28.

461 Kenya National Bureau of Statistics, *2008–09 Kenya Demographic and Health Survey (KDHS)*, 2009, p. 214.

462 *Ibid.*, p. 217.

463 See above, note 456, p. 7.

Furthermore, data on modes of transition raises questions over the accuracy of this grouping of MARPS. The study indicates that the highest incidence of transmission – contrary to what would be expected based on the definition of MARPS – remains among heterosexuals in established partnerships.⁴⁶⁴ In addition, the study aggregates data for transmission from men who have sex with men and prisoners in a single group (indicating that the two groups together are the source of transmission in 15.2% of cases).⁴⁶⁵

The government is attempting, through legislative, policy and healthcare initiatives, to ameliorate the situation of persons living with HIV and AIDS. In 2006, the HIV and AIDS Prevention and Control Act was adopted by the national legislature, though some parts of the Act have yet to come into force. The Act regulates *inter alia* education and information, safe practices and procedures, and testing, screening and access to healthcare.⁴⁶⁶ The Act prohibits discrimination on the grounds of “actual, perceived or suspected HIV status” in employment, education, transport or habitation and healthcare services.⁴⁶⁷ In addition, section 35, which sets out detailed conditions aimed at addressing discrimination in the provision of credit and insurance services, states that up to an agreed limit, insurers should not be able to require an individual to take an HIV test, though above this threshold, a test may be required and the insurer may refuse to provide such additional cover. The Act also states that no-one shall be refused lawful entry or deported; prevented from standing for public office; or denied the right to be buried in a place of their choosing on the basis of their HIV status.⁴⁶⁸ A National HIV and AIDS Strategic Plan covering 2009-2010 to 2012-2013 was finalised in 2009. It sets out four priority areas of work: Health Sector HIV Service Delivery; Sectoral Mainstreaming of HIV; Community-based HIV Programmes; and Governance and Strategic Information.⁴⁶⁹

Discrimination against persons with HIV/AIDS is underlined by prejudice against them, particularly in rural or marginalised areas of the country. A

464 *Ibid.*

465 *Ibid.*

466 See above, note 452, Parts II, III and IV respectively.

467 *Ibid.*, sections 31, 32, 33 (1) and 36.

468 *Ibid.*, sections 33 (2), 34 and 37.

469 National AIDS Control Council, Kenya National Aids Strategic Plan, 2009, pp. 23-25.

2010 survey of 430 households in three districts of western Kenya undertaken by ActionAid International and Women Fighting AIDS in Kenya found significant evidence of prejudice. 74% of respondents felt that HIV was a punishment for morally unacceptable conduct and 70% stated that people with HIV were promiscuous.⁴⁷⁰ However, the government's UNGASS report indicates that levels of stigma are reducing among the general population, indicating that while in 2003, 26.5% of women and 39.5% of men revealed accepting attitudes towards people with HIV and AIDS, this had increased to 32.6% and 47.5% respectively by 2010.⁴⁷¹

Familial prejudice against HIV-positive individuals is widespread, and is particularly in evidence in respect of children whose parents have died as a result of AIDS. In its 2007 report *A Question of Life or Death: Treatment Access for Children Living with HIV in Kenya*, Human Rights Watch interviewed a number of children, including James, an HIV-positive orphan, whose testimony gives a good insight into the stigma associated with HIV/AIDS:

*An uncle took us, me and my sister, with him, to his house in Kibera. He was harassing and beating me, for example when I played for too long outside. He wanted me to stay inside. My sister [who was healthy] was not beaten; she stayed inside and worked as a domestic. My uncle often beat me on the back, with belts or other objects he could find. He would do it every couple of days. I ran away. But the uncle found me and brought me back. He would beat me then, too. He saw me as a burden after my parents passed away. He told me that I should have died instead of my parents.*⁴⁷²

Other testimonies presented in the Human Rights Watch report indicate that familial prejudice may be a wider problem. These include the case

470 "Kenya: HIV Carries Moral Stigma – Report", *Caring Christian Communities Ministering Reconciliation and Hope in a World with HIV*, 1 June 2010, available at: <http://www.cabsa.org.za/content/kenya-hiv-carries-moral-stigma-report-31510>.

471 See above, note 456, p. 14.

472 Human Rights Watch, *A Question of Life or Death: Treatment Access for Children Living With HIV in Kenya*, 2008, pp. 33-34.

of a 17-year-old orphan whose stepmother would leave her outside the house when leaving for work,⁴⁷³ and a widowed mother of an HIV positive girl in Kibera slum of Nairobi, whose husband's family took her land and household property.⁴⁷⁴

Prejudice and associated discrimination in the workplace is a significant problem for persons living with HIV. Thus, when ERT asked a group of men living with HIV who participated in a focus group in Nairobi to identify the worst examples of discrimination they experienced, the group stressed the frequent requirement by employers to take obligatory HIV tests and disclose HIV status.⁴⁷⁵ Further evidence of prejudice and discrimination in employment is provided by the results of the *People Living with HIV Stigma Index*, conducted in Kenya between December 2009 and March 2010. 40% of HIV-positive respondents to the survey said that they had lost their job in the last 12 months; of this group, 34% said they believed they had lost their job because of their HIV status, with another 37% stating they believed it was because of their HIV status, combined with another reason.⁴⁷⁶ The group answering that they had lost their job because of their HIV status were then asked whether it was because of discrimination, their own poor health, a combination of the two factors, or another reason. 24% answered that it was because of discrimination, while another 38% stated it was because of a combination of discrimination and poor health.⁴⁷⁷

The *People Living with HIV Stigma Index* found that disclosure of HIV status was a major concern, with 35% of respondents stating that they had not made

473 *Ibid.*, p. 39. Interview with Christine, age 17, 11 August 2007, Nyumbani orphanage: "Both my parents died. I had two stepmothers who were married to my father. I lived with them. Sometimes they gave me food, sometimes not. (...) Once, when we came to the stepmothers' from our grandmother's house, they took away all the food she had given us. (...) They put me outside the house during the day and left for work. I would stay like that until they come back. I just laid down, people used to pass."

474 *Ibid.*, p. 31. Interview with mother of Anna, age 6, 10 August 2007, Kibera slum, Nairobi: "My husband's family took the land and the household property. They left the whole house completely empty. (...) They isolated me and so I decided to go to Nairobi with the children. I am doing cash work [temporary work]; currently I am packing vegetables."

475 Focus group discussion conducted by ERT with men living with HIV/AIDS and sex workers, 10 August 2011, Nairobi.

476 See above, note 453, p. 19.

477 *Ibid.*, p. 20.

their employers aware of their status.⁴⁷⁸ In Kisumu, ERT interviewed P. A., a female teacher living with HIV, who explained her experience of disclosure, and the impact which it had on her career. She said:

*I was a qualified teacher, working at the Aga Khan Academy in Kisumu. My husband and I first became unwell in 1997-98. I thought we were bewitched. (...) In 2001, my husband passed away. He left me with one child. After the funeral, the headmistress took me to hospital and they informed me I was HIV+. When I went back to the school, I was removed from classrooms to clean the washrooms. I had been told that because of my condition, parents might remove their children. My health condition never affected my work, though my body was weak. Eventually I was dismissed, but I never reported the dismissal to any organisation.*⁴⁷⁹

Yet there is some evidence that attitudes are improving as education and awareness increases. In the *People Living with HIV Stigma Index*, when those who had disclosed their condition were asked to evaluate reactions from their employers and co-workers, a significantly higher proportion reported that these were “supportive or very supportive” than those indicating the reactions were “discriminatory or very discriminatory”.⁴⁸⁰ These findings shed an interesting light on a recent case study published by the Swedish Workplace HIV/AIDS Programme (SWHAP)⁴⁸¹ which examines Amazon Motors, where in 1999 an HIV-positive employee had been subjected to severe stigma and marginalisation. The company joined the SWHAP in 2005 and – through a process of gradual sensitisation – encouraged its employees to learn more about

478 *Ibid.*, p. 22.

479 ERT Interview with P. A., 24 March 2011, Kisumu.

480 See above, note 453, p. 23. The findings presented indicate that 32% of the employers showed a supportive or very supportive attitude, 14% showed no difference in their attitude, while 11% acted in a way perceived to be discriminatory or very discriminatory. Regarding co-workers, 32% showed a supportive or very supportive attitude, 12% showed no difference in the attitude, while 12% acted in a way perceived to be discriminatory or very discriminatory.

481 Swedish Workplace HIV/AIDS Programme - Kenya, *Stigma Reduction at the Workplace: The Case of Amazon Motors Kenya Ltd*, 2010.

HIV and to undergo HIV testing. The case study concludes with the story of Christine, an HIV-positive employee who had felt unable to disclose her status before the programme was launched:

Having witnessed the launch of the SWHAP, she decided to seek support and go for HIV/AIDS counselling. She regained her health and the company, which had embraced the programme and the policy, accepted her back to work!⁴⁸²

The aforementioned Human Rights Watch report on the situation of children with HIV and AIDS provides a number of examples of discrimination and prejudice in education. The report cites the example of the Nyumbani orphanage for children living with HIV which took the local high school to court when it refused admission to a number of children with HIV, and eventually succeeded. However, the report states that local schools then asked the orphanage not to disclose the HIV status of the children and to remove any symbols associating them with the orphanage from clothes or bags.⁴⁸³ The report concludes that many parents and children choose not to inform teachers or classmates about their status and includes the testimony of a 16 year old HIV-positive boy:

The children and teachers do not know my status. (...) If you tell your friends at school, you get a lot of rejection. I only have two friends at school. I have to find my time to take the medication when nobody is watching. I do it in the dormitory. In the morning, I do it when everybody is still asleep.⁴⁸⁴

Discrimination in healthcare is a significant problem, particularly given the consequential difficulties which arise in terms of access to healthcare. A detailed study, *Measuring the Degree of S&D [Stigma and Discrimination] in Kenya: An Index for HIV/Aids Facilities and Providers*, commissioned by USAIDS in 2007, examined discriminatory attitudes across a range of healthcare facili-

482 *Ibid.*, p. 4.

483 See above, note 472, p. 29.

484 *Ibid.*, p. 28.

ties, and investigated whether facilities had policies to prevent discrimination against persons living with HIV and whether these policies were implemented. In order to establish the prevalence of what they termed “discriminatory attitudes” among healthcare providers, the researchers asked respondents 11 questions to assess their behaviour in respect of HIV-positive patients. The responses provide an insight into the range of attitudes held by this key group. Thus, while only 1% of respondents felt that HIV-positive patients should be isolated, 57% stated that they took “special precautions” when dealing with HIV-positive patients and 46% stated that they would wear a mask when treating an HIV-positive patient.⁴⁸⁵ The report authors used the answers to the 11 questions to calculate an indicator of discriminatory attitudes among staff in healthcare facilities, arriving at a calculation of 30.43%. In contrast to this however, responses to questions designed to assess the level of discrimination in care practice were better than might be expected: 88% of providers indicated that they would provide the same care to someone with HIV as another patient, while only 7% indicated that they had witnessed HIV-positive patients receiving less care than other patients.⁴⁸⁶ The study found that 65% of all health facilities surveyed had non-discrimination policies; and encouragingly, 100% of public (as opposed to private or NGO-operated) facilities reported that such policies were in place.⁴⁸⁷ However, when those facilities with policies were asked four further questions to establish whether these policies were being enforced, only 30% answered positively, with the rate of enforcement being significantly poorer among public facilities (8%).⁴⁸⁸

Access to healthcare is a serious problem for persons living with HIV in Kenya and a number of factors – including fear of approaching service providers, societal prejudice, lack of education and absence of appropriate healthcare services – present barriers. Informal barriers, including finance, prejudice and lack of understanding also continue to impact on access to testing, treatment and care. ERT interviewed Victor, an HIV-positive man with severely limited mobility from Kisumu. Victor stated that he was unable to access anti-retroviral drugs because of difficulties he faced in travelling to the dispensary: he was unable

485 United States Agency for International Development (USAID), *Measuring the Degree of S&D in Kenya: An Index for Hiv/Aids Facilities and Providers*, 2007, p. 11.

486 *Ibid.*, p. 20-21.

487 *Ibid.*, p. 7.

488 *Ibid.*, p. 8.

to walk because of his disability, and unable to pay for transport because of his poverty. The result was that his access to the drugs was sporadic, leaving him more vulnerable to secondary infection and worsening health.⁴⁸⁹

Access to treatment and palliative care remains low, in large part because of the high number of HIV positive individuals who are not aware of their status. The Kenya AIDS Indicator Survey found that: (i) only 16.4% of the 1.42 million people with HIV knew of their status and that (ii) only 12.1% of the total 1.42 million HIV-infected adults receive co-trimoxazole daily. Significantly, co-trimoxazole usage rates are far better among adults who knew their status, with 76.1% receiving treatment. This demonstrates the need for effective education and testing.⁴⁹⁰ Palliative care represents a challenge in an environment where resources are limited. A Human Rights Watch Report on palliative care for children in Kenya expressed concern that “there is a widespread but incorrect perception that, since anti-retroviral therapy (ART) is now more widely available, palliative care should no longer be a priority in the HIV/AIDS response”.⁴⁹¹

The government is making efforts to improve access to healthcare for persons living with HIV and AIDS through increasing awareness and education, improving availability of counselling and testing, and increasing access to treatment. The Kenya Development and Health Survey 2008-09 indicates that public education programmes are successfully raising awareness, reporting that 75% women and 81% men are aware that condom use can reduce risk of getting HIV and that over 90% of both groups know that abstinence or limiting sexual intercourse to one uninfected partner can reduce the chances of getting HIV.⁴⁹² The 2010 National AIDS Council’s report to the UN suggests that testing has also significantly increased, reporting that almost 3.5 million adults were tested in 2009. The report indicates that by 2008-09, 40.4% of women and 56.5% of men had been tested at some point in their life, compared with 14.3% and 13.1% respectively in 2003.⁴⁹³

489 ERT Interview with Victor, 24 March 2011, Kisumu.

490 *Kenya AIDS Indicator Survey 2007 Final Report*, 2009, p. 12.

491 See above, note 457, p. 4.

492 See above, note 456, p. 14.

493 *Ibid.*, p. 11.

Despite the historically high prevalence of HIV and AIDS in Kenya, prejudice against those affected by the conditions remains a persistent problem. As the evidence above indicates, this prejudice manifests itself in all areas of life, and results in discrimination within the family, in access to education, in employment and in healthcare. Moreover, there is evidence that the discrimination which persons living with HIV and AIDS experience can exacerbate the health problems associated with the disease, with discrimination in access to healthcare a particular concern.

Discrimination against persons living with HIV and AIDS has received significant attention in recent years, as part of the government's efforts to address the country's significant HIV and AIDS problem. Indeed, in contrast with a number of the other groups whose situation has been assessed in preceding sections, it would appear that these efforts are beginning to bear fruit, as evidenced by the two surveys which indicated lower than expected levels of discriminatory treatment in employment and healthcare. Thus, though prejudice and discrimination remain challenges, there is evidence of a shift in attitudes towards greater acceptance.

2.8 Other Patterns of Discrimination and Disadvantage

Discrimination on Grounds of Religion or Belief

The preceding sections of this report do not make reference to discrimination and inequality on the basis of religion because the research did not find significant evidence on this issue. This finding is largely consistent with other reports, including notably the *2010 International Religious Freedom Report* published by the US State Department, which stated that:

There were few reports of societal abuses or discrimination based on religious affiliation, belief, or practice. (...) Some Muslims perceived themselves to be treated as second-class citizens in a predominantly Christian country and believed that the government and business communities deliberately impeded development in predominantly Muslim areas. Local Christian organizations reported that individuals who converted to Christianity from Islam, particularly individuals of Somali ethnic

*origin, were often threatened with violence or death by Muslim religious leaders and their families.*⁴⁹⁴

As this statement suggests, it appears that part of the reason for the lack of evidence of religious discrimination is that a number of Kenya's minority religious communities are also ethnic minorities, and as such the discrimination and inequality which they experience tends to be understood in relation to their ethnicity, rather than religion.

According to figures collected in the 2009 Census, one in ten Kenyans identify as **Muslim**.⁴⁹⁵ The majority of this population reside in Coast and North Eastern Provinces which are home to Kenyan Somalis and a number of indigenous communities vulnerable to ethno-regional discrimination, as discussed in section 2.2 above.⁴⁹⁶ These provinces are amongst the poorest and most vulnerable to famine, meaning that these communities are vulnerable to poverty and deprivation. ERT interviews with Somali Muslims in Isiolo, Mombasa and Wajir did not identify cases of discrimination on grounds of their religion, as opposed to their ethnicity. Similarly, when attempting to assess the existence of discrimination or inequality affecting **Hindus**, religion is eclipsed by ethnicity: as the Hindu population is largely Asian, the problems of marginalisation – particularly in political participation – faced by this group appear to arise because of their ethnicity, rather than their religion.

None of this suggests that discrimination on grounds of religion or belief is not a problem in Kenya, nor that the problems affecting Kenyan Somalis and Kenyan Asians are not examples of multiple discrimination on grounds of race and religion. Rather, it indicates that the perception of religiously based discrimination is weak, and that research did not reveal incidences of discrimination because of religion. Testimony collected from groups practicing minority religions indicated that their concerns were about racial or ethnic discrimination, rather than religious discrimination.

494 US State Department, *International Religious Freedom Report 2010: Kenya*, November 2010.

495 Ministry for Planning, National Development and Vision 2030, *2009 Population & Housing Census Results*, 2010.

496 See above, section 2.2 and note 123.

Discrimination on Grounds of Political Opinion

As discussed elsewhere in this report, notably in section 2.2, political life in Kenya is highly ethnicised. As the Kenyan government acknowledged in its 2011 report to CERD, “the public images of the political leaders are closely associated with their ethnic backgrounds and not the soundness of their policies”.⁴⁹⁷ Because political parties are largely defined by the ethnicity or ethnic affiliation of the principal actors, rather than by particular ideological or policy positions, party supporters are also more readily identified by their ethnicity than their adherence to a particular political viewpoint. Indeed, ERT found evidence that assumptions about political opinion or affiliation are made based on a person’s ethnicity or place of residence. As a Lou participant at ERT’s focus group in Ugenya stated, “when I see someone from Central or Eastern, he is a PNU guy. (...) Anyone who is a Luo is an ODM – whether I subscribe to ODM or not, I’m an ODM person”.⁴⁹⁸ For these reasons, ERT did not identify any evidence of discrimination on the basis of political opinion which was not more appropriately understood as ethnic discrimination.

Age Discrimination

ERT research identified little evidence of discrimination and inequality affecting **older persons**, either in respect of previous research published by academics, government or non-governmental organisations, or in interviews and focus groups. In particular, the absence of statistics disaggregating data on poverty, access to employment and access to services by age made any assessment of discrimination and inequality difficult. This was supported by findings from field research: ERT interviewed older persons in the course of our research in a number of different communities across Kenya but a significant majority stated that the disadvantage they experienced arose because of factors other than age, including in particular poverty, ethnicity and disability. This does not mean that age could not be a principal, or a contributing factor in the disadvantage suffered by some persons in Kenya. Rather, it indicates the lack of evidence identified during the desk and field research stages of producing this report. Moreover, several respondents, asked to list the five or six most disadvantaged categories of

497 See above, note 126, Para 9.

498 See above, note 135.

persons in Kenya, included the category “young people” and explained that all young people faced difficulties in employment.

Discrimination and Inequality Affecting Asian and White Kenyans

The **Asian** population in Kenya is a small but diverse community which includes different religious, ethnic and linguistic groups from the South Asian sub-continent. Current estimates suggest that Kenyan Asians make up 0.25% of the population.⁴⁹⁹ People of Asian descent have been present in Kenya for hundreds years, with large influxes during British colonisation, where Asians arrived both as indentured workers, brought to Kenya to build the Uganda Railway, and as free migrants.⁵⁰⁰ During the British Colonial period, Kenyan Asians developed a strong economic position compared to Kenyans of other ethnicities.⁵⁰¹ Following independence, Kenyan Asians experienced significant disadvantage as a result of changes to the law and the increase of anti-Asian prejudice which occurred in East Africa at that time. While the treatment of Asians in Kenya is generally considered to be better than in neighbouring Uganda, Kenyan politicians have engaged in public attacks on Asian traders.⁵⁰² At the same time, all people residing in Kenya were forced to choose a nationality with dual citizenship not possible, while laws were passed to prevent non-citizens from trading.⁵⁰³ As a result of both these changes to the law and the increased hostility to them, many Asians chose to retain British citizenship and sought to leave Kenya due to the discrimination they faced. Estimates suggest that at independence there were 180,000 Asians in Kenya, but by 1968, 80,000 had fled to the UK.⁵⁰⁴ At that time changes to UK laws removed Asian rights of residence in the UK due to a fear of further migration.⁵⁰⁵ Asian Kenyans experienced

499 See above, note 123, p. 13.

500 Herzig, P., *South Asians in Kenya: Gender, Generation and Changing Identities in the Diaspora*, Munster: LIT, 2006, pp. 9-10 and 13-15.

501 Patel, N., *A Quest for Identity: The Asian Minority in Africa*, 2007, p. 2, available at: http://www.federalism.ch/files/documents/Patel_FINAL%20VERSION.pdf.

502 *Ibid*, pp. 8-9.

503 See above, note 500, pp. 22-23.

504 See above, note 501, pp. 8-9.

505 See above, note 500, pp. 22-23.

further problems in 1982 during an attempted coup when their shops and homes were attacked and looted and women raped.⁵⁰⁶

There is limited independently verified information available about the current patterns of discrimination. However, Asian Kenyans continue to complain that they are politically marginalised, that their contribution to Kenya's political and economic development is not recognised, and they are under-represented in the civil service.⁵⁰⁷ Additionally, as CERD has highlighted, Asian Kenyans are subject to “discriminatory and arbitrary extra requirements (...) in the recognition of nationality and in accessing identity documentation”.⁵⁰⁸

ERT found little evidence of discrimination against **white Kenyans**. Prior to independence in 1963 Kenya was home to an estimated 60,000 white British settlers, but a large number of these departed the country shortly after independence under a subsidised “willing buyer willing seller” scheme, leaving an estimated 30,000 still resident in the country in 2006.⁵⁰⁹ There is very little current information about the status of white Kenyans, though one recent report suggests that their relative wealth, coupled with a decision to absent themselves from public life, means that the remaining population is largely shielded from any negative effects which might arise from their minority status.⁵¹⁰

506 Goldsmith, R., “Identity Problems in Kenya”, *BBC News*, 30 March 2001.

507 See above, note 123, pp. 4 and 9.

508 See above, note 119, Para 21.

509 McGreal, C., “A Lost World”, *The Guardian*, 26 October 2006.

510 *Ibid.*