3. THE LEGAL AND POLICY FRAMEWORK ON EQUALITY IN KENYA

This part of the report describes and analyses the legal and policy framework related to equality in Kenya, in order to assess its adequacy to address the patterns of discrimination and inequalities highlighted in the preceding part. It addresses both the international legal obligations of the state and the domestic legal and policy framework. In respect of domestic law, it examines the Constitution of Kenya, specific anti-discrimination laws, and non-discrimination provisions in other areas of law. Finally, this part examines the mechanisms for implementation and enforcement of the law, both through the courts and through specialised institutions.

In recent years, there have been a number of major improvements to the legal and policy framework with regards to discrimination in Kenya. The introduction of a new Constitution in 2010, with a strong focus on equality, a much improved right to non-discrimination, and special provisions on the protection of rights for particular groups vulnerable to discrimination is welcome. So too are the range of measures in the Constitution which are designed to address the long-standing issues of ethno-regional disadvantage identified in part 2 of this report. Similarly, the enactment in the last ten years of two specific anti-discrimination acts (on disability and race) and an Employment Act with generally robust equality provisions means that legal protection from discrimination has been significantly enhanced.

However, a number of serious problems persist. First, a number of discriminatory legal provisions and provisions which are open to discriminatory interpretation remain in force, including, notably, provisions in the Criminal Code which are perceived to penalise same-sex intimacy between men. While following the introduction of the new Constitution, a number of these provisions may be unconstitutional, at present they remain in force pending legal challenges. There appear to be no plans in place for the government to undertake an audit of laws to identify and amend those provisions which discriminate, despite the clear supremacy of the constitutional prohibition on discrimination.
Second, there are **gaps in legal protection**, both with regards to the absence of legislation prohibiting all forms of discrimination on particular grounds – such as sex and age – and the absence of provisions prohibiting discrimination on all grounds in particular areas of life – such as provision of education or health services. The new Constitution fills some of these gaps, as it extends protection from discrimination to a wide range of grounds and prohibits discrimination by both public and private actors. However, the current lack of specific anti-discrimination law providing protection in relation to all relevant grounds means that there is an absence of legislation giving clear definitions of important concepts and providing clarity about the scope of protection and its operation. Third, there are a number of **inconsistencies between provisions in different laws**, notably in the field of employment. For example, the scope of the protection from discrimination on grounds of race or ethnicity in employment appears to be different under the National Cohesion and Integration Act and the Employment Act, giving rise to uncertainty for both employers and employees. Finally, as should be evident from the preceding sections, there is a significant problem with the **poor implementation and enforcement** of existing laws. A host of factors – including low awareness of rights and obligations among both rights-holders and duty-bearers, financial and other barriers preventing access to justice for victims of discrimination, and the apparent lack of progress in tackling discrimination and inequality by public officials – mean that even in cases where legal protections exist, these are not effectively enforced.

### 3.1 International Law

**Core United Nations Human Rights Treaties Related to Equality**

Kenya is a party to seven of the eight UN human rights treaties which are most relevant to discrimination, with the exception being the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. However, it has a very poor record of ratification of instruments allowing individual complaints.
### United Nations Treaties

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<thead>
<tr>
<th>Treaty</th>
<th>Status</th>
<th>Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>International Covenant on Civil and Political Rights (1966)(^{511})</td>
<td>Ratified</td>
<td>1972</td>
</tr>
<tr>
<td>Optional Protocol I to the International Covenant on Civil and Political Rights (1966)(^{512})</td>
<td>No</td>
<td></td>
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<tr>
<td>International Covenant on Economic, Social and Cultural Rights (1966)(^{513})</td>
<td>Ratified</td>
<td>1972</td>
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<tr>
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<tr>
<td>International Convention on the Elimination of All Forms of Racial Discrimination (1965)(^{515})</td>
<td>Ratified</td>
<td>2001</td>
</tr>
<tr>
<td>Declaration under Article 14 allowing individual complaints</td>
<td>No</td>
<td></td>
</tr>
<tr>
<td>Convention on the Elimination of All Forms of Discrimination against Women (1979)(^{516})</td>
<td>Ratified</td>
<td>1984</td>
</tr>
<tr>
<td>Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (1999)(^{517})</td>
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<thead>
<tr>
<th>Convention</th>
<th>Ratification Year</th>
<th>Ratification Status</th>
</tr>
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<tbody>
<tr>
<td>International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990)</td>
<td>No</td>
<td></td>
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<tr>
<td>Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment (1984)</td>
<td>Ratified</td>
<td>1997</td>
</tr>
<tr>
<td>Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (2002)</td>
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</table>

Kenya has made a reservation limiting the application of the ICESCR, regarding Article 10(2) which requires that states make provision for paid maternity leave.\(^{524}\) The reservation states that “the present circumstances obtaining in Kenya do not render necessary or expedient the imposition of those principles by legislation.”\(^{525}\) Yet, in 2007, Kenya adopted a new Em-
ployment Act which makes provision for three months paid maternity leave and guarantees the right to return to work.\textsuperscript{526} Despite this new provision, the government has not withdrawn its reservation. In 2008, CESCR re-iterated its recommendation that Kenya do so and recommended the adoption of International Labour Organisation (ILO) Conventions 103 and 183 which concern maternity leave provision.\textsuperscript{527}

On signing Optional Protocol 1 to the Convention on the Rights of the Child (CRC), Kenya made a declaration stating that “the minimum age for the recruitment of persons into the armed forces is by law set at eighteen years” and that recruitment is “entirely and genuinely voluntary”. This is an interpretative declaration indicating that the government considers its obligation to ensure that those under the age of 18 are not recruited into the armed forces. The declaration goes on to state that the Government of Kenya reserves the right to “add, amend or strengthen the present declaration”.\textsuperscript{528}

Kenya has not signed the Optional Protocols to the ICCPR, ICESCR, CEDAW, or CRPD which recognise the competence of the Committees supervising the implementation of these Conventions to hear individual complaints against state parties, nor has it made a declaration under Article 14 of ICERD, which has the same effect in respect of CERD.\textsuperscript{529}

Kenya has signed but not ratified the International Convention for the Protection of All Persons from Enforced Disappearance and Optional Protocol II of CRC, which provides additional rights of protection from child trafficking, pornography and prostitution.\textsuperscript{530}

\textsuperscript{526} Employment Act 2007, section 29.
\textsuperscript{530} \textit{Ibid.}
**Other Treaties Related to Equality**

Kenya has adopted a number of key ILO Conventions prohibiting discrimination in employment, including the Equal Remuneration Convention 1951 (C100) and the Discrimination (Employment and Occupation) Convention 1958 (C111).\(^{531}\) It has not, however, signed the Indigenous and Tribal Peoples Convention 1989 (C169), a significant omission given the disadvantaged position of many of Kenya’s indigenous groups.\(^{532}\) Nor has Kenya signed the 1960 UNESCO Convention against Discrimination in Education.\(^{533}\)

Kenya is a party to the 1951 Convention relating to the Status of Refugees\(^{534}\) and the Protocol to the Convention, something which is particularly welcome given that the state has a large refugee population.\(^{535}\) However, Kenya has not signed the 1954 Convention Relating to the Status of Stateless Persons.\(^{536}\)

**African Union Treaties**

Kenya has adopted many of the conventions established by the African Union (AU).

**African Union Human Rights Treaties**

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<tr>
<th>Treaty</th>
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532  Ibid.


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<thead>
<tr>
<th>Treaty / Charter</th>
<th>Status</th>
<th>Year</th>
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**Status of Treaties in National Law**

Until 2010, Kenya adhered to a dualist legal system; as such, international treaties and obligations did not take immediate effect and required implementation through domestic legislation. However, under Article 2(6) of the 2010 Constitution of Kenya, any treaty or convention which is duly ratified “shall form part of the law of Kenya”, meaning that instruments which provide important protections from discrimination – including the ICCPR, ICESCR, ICERD and CEDAW – now have effect as part of Kenyan law.

**3.2 National Law**

**3.2.1 The Constitution of Kenya**

The Constitution of Kenya 2010 was approved by a referendum on 4 August 2010. 67% of those casting a vote supported the adoption of a new Constitution, which became effective on 27 August 2010.\(^5\) A strong commitment to the principles of equality and non-discrimination is evident throughout the Constitution, and both are invoked as values or interpretative principles at a number of points. Article 27, the provision enshrining the right to equality and freedom from discrimination, substantially expands the list of protected grounds and the scope of the right to non-discrimination compared to the previous Constitution. It is supplemented in part three of the Bill of Rights by a number of articles providing for the application of rights to particular groups. In addition, the Constitution introduces both a general permission for

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positive action and a number of specific requirements for positive action on particular grounds. Finally, through a series of measures designed to devolve power and re-distribute wealth between Kenya’s regions, the Constitution provides a possible means to address the long-standing patterns of ethno-regional discrimination which flared into conflict in 2008.

The preamble to the Constitution lists equality as one of six essential values upon which governance should be based. This expression of principle is given legal force in Article 10, which includes human dignity, equity, social justice, inclusiveness, equality, non-discrimination and protection of the marginalised among the national values and principles of governance that are to be used in applying and interpreting the Constitution and other laws, and in making or implementing policy decisions. This is further emphasised in Article 20(4)(a) which lists equality and equity as values to be promoted in interpreting the Bill of Rights and Article 21(3) which creates a duty on state actors to address the needs of “vulnerable groups” in society. Chapter Four – the Bill of Rights – states that the rights and fundamental freedoms in the Bill of Rights belong to each individual, and that every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom.

Article 27, which provides for equality and freedom from discrimination under the Bill of Rights, states:

1) _Every person is equal before the law and has the right to equal protection and equal benefit of the law._

2) _Equality includes the full and equal enjoyment of all rights and fundamental freedoms._

3) _Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres._

4) _The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth._

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539 Ibid., Article 20(2).
5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).

6) To give full effect to the realisation of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.

7) Any measure taken under clause (6) shall adequately provide for any benefits to be on the basis of genuine need.

8) In addition to the measures contemplated in clause (6), the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.

Article 27(4) prohibits discrimination on an extensive list of specified grounds – “race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth”. When compared with the 1963 Constitution of Kenya (previous Constitution), the list grants substantially increased protection to women, who are likely to benefit from explicit reference to pregnancy and marital status. In addition, it prohibits discrimination on grounds of disability and age, neither of which was included in the list of protected grounds in the previous Constitution. Notably, the list does not include either sexual orientation or gender identity, issues which are highly sensitive in a country where homosexual conduct remains allegedly illegal. Nor does Article 27(4) provide an explicit protection against discrimination on grounds of albinism, something which has caused concern among advocates. Yet it is clear that the list of protected grounds provided in Article 27 is indicative rather than exhaustive, beginning with the phrase “[t]he State shall not discriminate directly or indirectly on any ground, including...”. This creates the possibility of legal challenge by those suffering discrimination on grounds which are not explicitly listed in Article 27(4), a possibility which is strengthened by the definition of “includes” provided in Article 259(4)(b). The section does not establish a test for the inclusion of new grounds as has been developed in South African anti-discrimination legislation, and established as best practice in the Dec-

540 Ibid., Article 259(4)(b): “[T]he word ‘includes’ means ‘includes but is not limited to.’

laration of Principles on Equality. It remains to be seen how progressively the judiciary will interpret the provision. Civil society actors have questioned whether the judiciary will be prepared to make progressive judgments without reference to a test of this type.

Articles 27(4) and (5) prohibit both direct and indirect discrimination, though no definition of either term appears in the Constitution. The Constitution does not explicitly prohibit segregation, harassment, or victimisation, though some of these types of conduct are prohibited by other Kenyan legislation governing specific areas of life. The prohibition on discrimination in Article 27(5) applies to both natural and legal persons.

Kenya’s international obligations in respect of equality extend not only to eliminating discrimination, but also require it to take measures to promote substantive equality through positive action (in Kenya referred to as “affirmative action”). The UN HRC has stated that the “principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant”, while CESCR has stated that “states parties may be, and in some cases are, under an obligation to adopt special measures to attenuate or suppress conditions that perpetuate discrimination”. It is, therefore, particularly welcome that 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

544 See above, note 538, Article 260 which defines "person" as including "a company, association or other body of persons whether incorporated or unincorporated".
of a right or fundamental freedom”. In addition, Article 56 provides further protections for “minorities and marginalised groups”, a classification which encompasses all those vulnerable to discrimination. The term “minority” is not defined in the Constitution but Article 260 defines “marginalised groups” as all those disadvantaged by discrimination on one or more of the grounds in Article 27(4).\footnote{See above, note 538, Article 260: “[M]arginalised 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)”} The article provides for the state to undertake measures – including affirmative action – to ensure the participation of these groups in governance, education and employment, to have access to water, health services and infrastructure, and to develop their cultural values, languages and practices. As such, the article guarantees significant additional rights on all grounds and may form a useful guide to the interpretation of Article 27(6).

As stated above, positive action is an important tool for accelerating progress towards substantive equality for particular groups. Where properly designed and implemented, positive action is entirely consistent with the right to be free from discrimination, and is required to make the right to equality effective.\footnote{See above, note 542, Principle 3, p. 5.}

The only constitutional condition about the implementation of affirmative action is found in Article 27(7) which states that such measures “shall adequately provide for any benefits to be on the basis of genuine need”. Article 27(6) envisages that the state will take measures other than affirmative action. While not all of these measures will need to satisfy the conditions set out by UN treaty bodies, Kenya should ensure that any affirmative action measures taken in implementation of Article 27(6) are compatible with those conditions.

Article 33 of the Constitution explicitly excludes hate speech and advocacy of hatred that “constitutes ethnic incitement, vilification of others or incitement to cause harm” from the right to freedom of expression, in line with Kenya’s obligations under Article 4 of ICERD as elaborated in CERD’s Gen-
eral Recommendation on this matter.\textsuperscript{550} It also excludes advocacy of hatred based on any of the grounds of discrimination specified in Article 27(4). The Constitution states that political parties must have a “national character” and prohibits the creation of political parties founded “on a religious, linguistic, racial, ethnic, gender or regional basis or [which] seek to engage in advocacy of hatred on any such basis”,\textsuperscript{551} reflecting, in part, Kenya’s obligations under Article 4(b) of ICERD.

In addition to the general protection from discrimination offered by Article 27, Part Three of the Bill of Rights makes specific provision for particular vulnerable groups and persons, with the aim of ensuring “greater certainty as to the application of those rights and fundamental freedoms to certain groups of persons”.\textsuperscript{552} It covers the application of rights to children, persons with disabilities, the youth, “minorities and marginalised groups” and older persons.

Articles 53, 55 and 57 provide specific rights for children, youth and older people respectively. Article 260 defines children as those under 18, youth as those between the ages of 18 and 35 and older persons as those over the age of 60. These Articles provide a range of specific rights for each group, including guarantees of the right to access education (children and youth),\textsuperscript{553} access to employment (youth)\textsuperscript{554} and to receive reasonable care and assistance from their family and the state (older persons).\textsuperscript{555} Article 53 reflects many of Kenya’s obligations under CRC, including, importantly, the principle that the child’s best interests are of paramount importance in matters concerning the child.\textsuperscript{556} Article 57 enshrines the themes running through the United Nations Principles for Older Persons: independence, participation, care, self-fulfilment and dignity.\textsuperscript{557} The range of guarantees for each group represents a welcome addition to the protection from discrimination provided under Ar-

\begin{itemize}
\item \textsuperscript{551} See above, note 538, Article 91(2)(a).
\item \textsuperscript{552} \textit{Ibid.}, Article 52(1).
\item \textsuperscript{553} \textit{Ibid.}, Article 53.
\item \textsuperscript{554} \textit{Ibid.}, Article 55.
\item \textsuperscript{555} \textit{Ibid.}, Article 57.
\item \textsuperscript{556} \textit{Ibid.}, Article 53(2).
\item \textsuperscript{557} United Nations Principles for Older Persons, G.A. Res. 46/91, 1991.
\end{itemize}
article 27, recognising their specific needs, and should provide a useful basis to secure equal participation for each group in areas of particular concern.

Article 54 focuses on the rights of persons with disability. Disability is defined in Article 260 as including physical, sensory, mental, psychological or other impairment that affects a person’s “ability to carry out ordinary day-to-day activities”. The range of impairments which are classified as forms of disability compares favourably to that presented in the CRPD, save that there is no reference to “intellectual” impairments. The reference to ability to conduct ordinary activities arguably results in a narrower concept of disability than that provided by the Convention, which adopts a more “social model” by making clear that it is the interaction of those impairments with external barriers which creates a disability hindering “full and effective participation on an equal basis with others”. 558 Article 54 places a duty on the state to ensure progressive implementation of the principle that persons with disabilities should occupy five percent of positions on appointed and elected bodies. 559 It also creates specific rights of access to educational institutions “that are integrated into society to the extent compatible with the interests of the person” and to all places, public transport and information. 560 Article 54 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. 561 This supplements provisions elsewhere in the Constitution, where the state is required to promote Kenyan sign language, Braille and “other communication formats and technologies accessible to persons with disabilities”. 562 However, neither Article 27 nor Article 54 define a failure to make reasonable accommodations as a form of discrimination or grant a general right to reasonable accommodations outside specific areas – a right that is key to ensuring equality for persons with disabilities. 563 Notwithstanding this, by incorporating key aspects of accessibility, inclusiveness and participa-

558 See above, note 518, Article 1.
559 See above, note 538, Article 54(2).
560 Ibid., Article 54(1)(b) and (c).
561 Ibid., Article 54(1)(d) and (e).
562 Ibid., Article 7(3)(b).
563 See above, note 518, Article 5(3).
tion for disabled persons as entitlements, these provisions are a fundamental step towards compliance with CRPD.\textsuperscript{564}

A section on the rights of women is notably absent from Part 3 of the Bill of Rights, though this may be because of the special place which gender equality occupies elsewhere in the new Constitution. Article 27(3) provides a broad guarantee of equal treatment of women and men “including the right to equal opportunities in political, economic, cultural and social activities”. Elsewhere in the Constitution, gender equality features prominently: equal rights for men and women are guaranteed during marriage and at its dissolution;\textsuperscript{565} equality between male and female parents and spouses is guaranteed in the acquisition of citizenship through birth and marriage;\textsuperscript{566} and the “elimination of gender discrimination in law, customs and practices” related to land is included among the principles of land policy.\textsuperscript{567} Significantly, the supremacy of the Constitution as established under Article 2, in particular its supremacy over customary law, extends the right to non-discrimination to apply to a range of areas of law which affect women, including those governing personal and family relationships and property rights.\textsuperscript{568} In line with Kenya’s obligations under CEDAW,\textsuperscript{569} the new Constitution also introduces substantial guarantees to increase the representation of women in public life. Article 27(8) requires the state to take measures to ensure that “not more than two-thirds of the members of elective or appointive bodies” are of the same gender.\textsuperscript{570} Separate provisions create reserved places for women in the National Assembly,

\begin{itemize}
\item \textsuperscript{564} Ibid., Articles 3(c) and (f), 9, and 24.
\item \textsuperscript{565} See above, note 538, Article 45(3).
\item \textsuperscript{566} Ibid., Articles 14(1) and 15(1).
\item \textsuperscript{567} Ibid., Article 60(1)(f).
\item \textsuperscript{568} Ibid., Article 2(4).
\item \textsuperscript{570} In August 2011 the Parliament passed a number of Bills establishing elective and appointive bodies. In a positive step, these Bills contained provisions requiring that not more than two-thirds of the membership of these bodies is of the same gender. Many also contained provisions requiring that membership include persons with disabilities, ethnic minorities and marginalised groups. See, for example, Urban Areas and Cities Act 2011 (Act No. 13 of 2011), sections 13 and 14; National Police Service Commission Act 2011 (Act No. 30 of 2011), sections 5 and 6; Ethics and Anti-Corruption Commission Act 2011 (Act No. 22 of 2011), sections 4 and 6; Environment and Land Court Act 2011 (Act No. 19 of 2011), section 25; and Power of Mercy Act 2011 (Act No. 21 of 2011), section 10.
\end{itemize}
Senate and County Assemblies. These provisions should have a significant positive effect on women’s representation and role in the decision-making process at all levels of government.

Kenya’s international obligations relating to discrimination and equality require it not only to introduce legislation protecting individuals against discrimination, but also to introduce mechanisms through which they can seek redress for the harm suffered, and which are adequate to address any structural causes of discrimination. This is essential if the rights to equality and non-discrimination are to be effective in practice. Articles 22 and 23 regulate procedural aspects of bringing a claim under the Bill of Rights, which includes both the rights to equality and non-discrimination under Article 27, and the specific rights granted to different groups under Articles 53, 54, 55, 56 and 57. Article 22(1) states that every person has the right to institute court proceedings claiming that their rights under the Bill of Rights have been denied, violated, infringed or threatened. Subsection 2 extends this right to other interested parties, permitting proceedings by those acting on behalf of another person “who cannot act in their own name”, those acting as a member of, or on behalf of a group or class of persons, those acting in the public interest, and associations acting in the interests of their members. These provisions are important in recognising, and attempting to address, both the inherent disadvantages – in terms of resources and access to evidence – which victims of discrimination have when bringing a case, and the systemic nature of discrimination. Thus, rules on standing which permit proceedings undertaken by a class of people, or by an association on behalf of an individual or group, have been recognised as important elements of enforcement mechanisms relating to discrimination.

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571 See above, note 538, Articles 97(1)(b), 98(1)(b) and 177(1)(b). The Elections Act 2011 (Yet to commence), sections 35 and 36, reflect the requirements of Articles 97(1)(b) and 98(1)(b), as well as the requirements relating to youth, persons with disabilities and workers contained in Articles 97(1)(c), 98(1)(c) and 98(1)(d). These sections require political parties to submit their nominations of women, youth, persons with disabilities and workers for these reserved seats at the same time they are submitting the general nominations for election.

572 See above, note 547, Para 40.

573 See above, note 542, Principle 20, p. 12.
Article 22(3) requires the Chief Justice to make rules governing proceedings brought under the Bill of Rights, and sets out criteria for the validity of such rules. In addition to ensuring that the rights of standing in subsection (2) are “fully facilitated”, this subsection sets out three important criteria. First, it requires that any formalities relating to proceedings should be kept to a minimum, and that the court should not be “unreasonably restricted by procedural technicalities”, except as required by the rules of natural justice. Second, it requires that fees must not be charged for the commencement of proceedings, an important condition given the significant poverty which afflicts many victims of discrimination. Finally, it provides that interested parties with particular expertise may participate in proceedings as a friend of the court. Taken together, these three measures are important steps to ensuring that victims of discrimination are able to access justice and remedies, an obligation under a number of international instruments to which Kenya is party.

Article 23 states that the High Court has jurisdiction to hear and determine applications for redress under the Bill of Rights, and that parliament “shall enact legislation to give original jurisdiction in appropriate cases to subordinate courts”. Subsection (3) states that a court may grant appropriate relief, including an injunction, a declaration of invalidity of law, and an order for compensation. This extensive list of potential remedies – and in particular the provision for orders of compensation - is in line with Kenya's obligations under inter alia the ICCPR, ICESCR, CEDAW and CERD.

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574 See above, note 538, Article 22(3)(b) and (d).
575 Ibid., Article 22(3)(c).
576 Ibid., Article 22(3)(e).
578 Human Rights Committee, above note 577.
579 See above, note 547, Para 40.
580 Committee on the Elimination of Discrimination against Women, above note 577, Para 32.
In addition to the complaints procedure available under these articles, Article 59(3) provides that every person has the right to complain to the Kenya National Human Rights and Equality Commission established under Article 59 of the Constitution, alleging that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened. Article 59(1) provides for the establishment of the Kenya National Human Rights and Equality Commission, though Article 59(4) provides for the establishment of two or more commissions, should parliament pass legislation to this effect. Article 261 and the Fifth Schedule required Parliament to enact legislation for this purpose within one year of the promulgation of the Constitution. In August 2011, shortly before this deadline, parliament passed two Acts – the Kenya National Commission on Human Rights Act 2011 and the National Gender and Equality Commissions Act 2011. The effect of these Acts is to establish two separate commissions, one governing all human rights guaranteed in the Bill of Rights with the exception of the rights to equality and non-discrimination (Kenya National Commission on Human Rights, KNCHR), and one governing only the right to equality and non-discrimination (National Gender and Equality Commission). The powers and functions of the National Gender and Equality Commission are discussed in more detail at section 3.4 below.

National Human Rights Institutions (NHRIs) such as those formed under Article 59 and these two Acts have been recognised as an important way through which states can meet their obligations under Article 2 ICCPR and ICESCR. Such institutions should have appropriate powers including powers of investigation. At the time of writing, neither of the new Commissions has been accredited by the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights.

583 Human Rights Committee, above note 577, Para 15; Committee on Economic, Social and Cultural Rights, above note 582, Para 3.
However, given that the functions and powers defined under their constitut-
ing legislation – and the fact that the predecessor to both commissions, the
KNCHR was accredited with A status – it appears likely that such accredita-
tion will be obtained.

Article 24 strictly constrains any limitation of rights or fundamental free-
doms in the Bill of Rights, including the right to equality and freedom from
discrimination. Article 24(1) states:

(1) A right or fundamental freedom in the Bill of Rights
shall not be limited except by law, and then only to the
extent that the limitation is reasonable and justifiable in
an open and democratic society based on human dignity,
equality and freedom, taking into account all relevant
factors, including—
    a) the nature of the right or fundamental freedom;
    b) the importance of the purpose of the limitation;
    c) the nature and extent of the limitation;
    d) the need to ensure that the enjoyment of rights
       and fundamental freedoms by any individual
does not prejudice the rights and fundamental
       freedoms of others; and
    e) the relation between the limitation and its pur-
       pose and whether there are less restrictive means
to achieve the purpose.

This provision is noteworthy in respect of the right to equality and non-
discrimination in two distinct ways. Firstly, unlike in the previous Constitu-
tion, there is no specific limitation of Article 27 itself. Instead, limitations
are permissible only under this provision which is deliberately narrow in
scope. It is particularly welcome that the provision specifies those consid-
erations which should be taken into account in determining whether a re-
striction on a right is proportionate, including whether there are any less
restrictive means of achieving its purpose. Indeed, Article 24(2) and 24(3)
set out detailed requirements applicable to legislation, the state, or persons
seeking to justify the limitation of a freedom. Secondly, it includes dignity,
equality and freedom as the bases of a democratic society, raising the pos-
sibility that the equality impact of an exception would be one of the key
factors in determining its justifiability.
Article 24 permits Article 27 to be qualified “to the extent 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.” 585 Article 170 of the Constitution establishes Kadhis’ courts with jurisdiction to determine questions of “personal status, marriage or divorce or inheritance” in proceedings in which all parties are Muslims. Some commentators have raised concerns over coercion of women to submit to these courts and research suggests that Khadhi judgments have discriminated against women in determining questions of family law. 586 Concern about the potential for discriminatory judgments in these courts is thus heightened by the specific qualification of the right to equality and non-discrimination provided in Article 24.

Article 58, concerning a state of emergency, permits legislation enacted in consequence of a declaration of a state of emergency to limit a right or fundamental freedom in the Bill of Rights only to the extent that:

\[(i) \text{ the limitation is strictly required by the emergency; and} \]
\[(ii) \text{ the legislation is consistent with the Republic’s obligations under international law applicable to a state of emergency.} \]

While, in general, the Constitution of Kenya represents a welcome increase in the level of legal protection of the rights to equality and non-discrimination, it is not without problems. In particular, the Constitution includes a number of discriminatory provisions which merit analysis. In addition to the exception to Article 27 provided for Kadhis’ courts, three particular areas which are commented on in more detail in section 3.2.2 below are: the right to life, which prohibits abortion in all except strictly limited circumstances; the provisions on marriage which discriminate against same-sex couples; and a number of provisions which discriminate against persons of “unsound mind”.

585 This Article is discussed further at 3.2.2 below.

A further set of constitutional provisions which could have a significant impact on the equal enjoyment of rights and freedoms – in particular economic and social rights – are those which concern the devolution of power and the establishment of an “Equalisation Fund” to address the imbalances which have built up between regions. The Constitution provides that power will be executed at both the national and county level and establishes 47 counties, with the objects of “fostering national unity by recognising diversity” and ensuring equitable sharing of resources. Counties are given a wide range of functions, though arguably many of these functions are either heavily regulated by central government or already performed at a local level. The Constitution contains a number of guarantees that counties should be properly resourced to undertake their functions. Article 202 states that revenue will be shared “equitably” among national and county governments. Article 203 establishes a detailed list of criteria which must be taken into account in determining how these equitable shares should be calculated, including: the need to ensure that county governments have adequate resources to perform their functions; the need to address economic disparities within and between counties; and the different needs for affirmative action for disadvantaged areas and groups. Article 203(2) provides a minimum guarantee that 15% of annual national revenue should be allocated to county governments.

The need for states to address disparities in the enjoyment of economic, social and cultural rights between different regions and localities has been clearly set out by the CESCR. In recognition of the disparities in the provision of basic services between different regions, the new Constitution establishes an Equalisation Fund to accelerate progress towards equality in marginalised areas. The Fund is established as 0.5% of annual national revenue and is established for twenty years from the Constitution coming into effect, though this period may be extended if parliament enacts legislation which achieves the support of half the members of the National Assembly and half the members of the Senate. The Equalisation Fund is therefore a particularly im-

587 See above, note 538, Article 1(4).
588 Ibid., Article 174(b) and (g).
589 Ibid., Fourth Schedule (Part 2).
590 Ibid., Article 203(1)(d), (g) and (h).
591 See above, note 547, Para 34.
592 See above, note 538, Article 204.
important development for the country’s most marginalised regions. Two other provisions open potential avenues to address inequality in the enjoyment of economic and social rights: Article 6(3) creates a duty on the state to ensure reasonable access to government services throughout the country, while Article 60(1) lists equitable access to land as the first principle of land policy.\textsuperscript{593}

These developments are a welcome attempt to address the serious ethno-regional discrimination in the allocation of public resources highlighted above in this report. However, ERT’s research suggests that the law in this area may be insufficient to ensure full and equal enjoyment of economic and social rights as guaranteed under ICESCR unless more is done to ensure their effective implementation. The continuing problems of severe discrimination by state actors identified in ERT’s research indicate that measures introduced in the National Cohesion and Integration Act in 2008 to prohibit discrimination in the allocation of public resources\textsuperscript{594} are not adequately enforced, and that discrimination by public officials remains a serious problem. As such, questions remain over whether the necessary political will exists to ensure effective implementation of the measures to devolve power and enforce the Equalisation Fund.

\textbf{3.2.2 Specific Anti-Discrimination Laws}

In addition to its obligation to respect the right to non-discrimination by refraining from discrimination in laws or actions, Kenya is obliged to provide protection from discrimination by state and non-state actors, through the adoption of suitable legislation. Under the ICCPR, the HRC has stated that all states parties have an obligation to ensure that the “law shall guarantee to all persons equal and effective protection against discrimination on any of the enumerated grounds”,\textsuperscript{595} while the CESCR has stated that “[s]tates parties are therefore encouraged to adopt specific legislation that prohibits discrimination in the field of economic, social and cultural rights”.\textsuperscript{596} Thus, Kenya has a clear obligation to ensure that legislation providing protection from discrimination is in place on all grounds. In addition, under CEDAW, ICERD and

\begin{itemize}
\item \textsuperscript{593} \textit{Ibid.}, Article 60(1)(a).
\item \textsuperscript{594} National Cohesion and Integration Act 2008, sections 10, 11 and 12.
\item \textsuperscript{595} Human Rights Committee, above note 577, Para 12.
\item \textsuperscript{596} See above, note 547, Para 37.
\end{itemize}
CRPD Kenya has obligations to prohibit discrimination against women, racial or ethnic groups, and persons with disabilities by public and private actors in all areas of activity covered by these treaties. While, to some extent, the scope of protection provided under the Constitution meets these obligations by allowing individuals to bring proceedings against both state and non-state actors and access an extensive range of remedies, there still remain the need for specific anti-discrimination legislation providing definitions of key terms, measures to ensure access to justice and appropriate remedies.

Kenya lacks a single comprehensive anti-discrimination law or single equality enforcement body. However, two specific anti-discrimination laws – the Persons with Disabilities Act and the National Cohesion and Integration Act – address discrimination on particular grounds. Both have been introduced in the last decade, and despite a number of problems, represent good progress in addressing the pre-existing lack of legal protection from discrimination on the grounds of disability and race respectively. In general, these Acts go a long way towards meeting Kenya’s obligations under CRPD and ICERD respectively. However, the existence of these laws highlights the absence of comprehensive legislative protection in respect of other grounds, including not only gender – where Kenya has particular obligations under CEDAW – but also all other grounds covered by ICCPR and ICESCR.

**Persons with Disabilities Act**

The Persons with Disabilities Act is a welcome attempt to prohibit discrimination against and promote equality for persons with disability. However, it does not provide comprehensive protection by prohibiting all forms of discrimination in all relevant areas of life. Rather, it prohibits direct discrimination in employment, admission to learning institutions, and access to premises, services and amenities. In addition, the Act sets out a range of measures intended to promote equal participation in specific areas (education, health, public buildings, public service vehicles, sports and recreation, polling stations, voting, legal services, television programs, telephone, postal charges,

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credit), but without allowing for individual enforcement of those measures. While this gap in protection has been remedied in part by the general prohibition of discrimination on grounds of disability provided by Article 27(5) of the Constitution, gaps remain, most notably in respect of enforceable rights to reasonable accommodation.

Significantly, the Act establishes a National Council for Persons with Disabilities (NCPD)\(^{599}\) and provides it with the power to issue adjustment orders in respect of accessibility to the owners of premises and providers of amenities and services.\(^{600}\) However, the NCPD’s power to issue adjustment orders in respect of public service providers is restricted.\(^{601}\) The Act’s provisions are supplemented by further protections contained in Regulations.\(^{602}\)

The Act defines “disability” as “a physical, sensory, mental or other impairment, including any visual, hearing, learning or physical incapability, which impacts adversely on social, economic or environmental participation”,\(^{603}\) a definition which differs from the notion of disability found in the CRPD\(^ {604}\) in a number ways, but is generally a broad and more “social” definition than that found in the Constitution. The Act defines “discriminate” as according “different treatment to different persons solely or mainly as a result of their disabilities”, and therefore covers only direct discrimination.\(^{605}\) It does, however, cover some circumstances amounting to harassment, by stating explicitly that it “includes using words, gestures or caricatures that demean, scandalise or embarrass a person with a disability”.\(^{606}\) The Act does not cover indirect discrimination. Furthermore, adopted three years before CRPD, it did not benefit from the approach of the latter to define a failure to make reasonable accommodation as a form of discrimination. In 2006, CRPD defined discrimination

\(^{599}\) Ibid., section 3(1).
\(^{600}\) Ibid., section 24.
\(^{601}\) Ibid., section 27.
\(^{603}\) See above, note 598, section 2.
\(^{604}\) See above, note 518, Article 1.
\(^{605}\) See above, note 598, section 2.
\(^{606}\) Ibid.
on the basis of disability as including “all forms of discrimination, including denial of reasonable accommodation”. Nonetheless, the Act did make limited provision for reasonable accommodations, in the form of duties in certain areas (employment, education, public buildings, transport and detention facilities) and “adjustment orders” which can be issued by the NCPD in other areas. However, as discussed below, breach of these duties and orders does not give rise to individual rights and remedies.

Section 15(1) of the Act prohibits discrimination by both public and private employers in all areas of employment including advertisements, recruitment, the creation, classification or abolition of posts; the determination or allocation of wages, salaries, pensions, accommodation, leave or other such benefits; and the choice of persons for posts, training, advancement, apprenticeships, transfer and promotion or retrenchment. The section also contains a requirement for employers to make reasonable accommodation for persons with disabilities through the provision of facilities and modifications. Section 15(2) places an important restriction on the prohibition of discrimination and duty to make reasonable accommodations in cases where an act or omission was not wholly or mainly attributable to the disability of the person. Thus it fails to address cases in which disability played a role, but not the main role, in a discriminatory employment decision. The Act provides incentives favouring the employment of disabled persons, by making employers of persons with disabilities eligible for tax incentives. In addition, section 13 requires that the NCPD endeavour to reserve five percent of all casual, emergency and contractual positions in employment in the public and private sectors for persons with disabilities. These measures reflect favourably on the state’s adherence to its obligations under CRPD to promote the employment of persons with disabilities in the private sector and to employ persons with disabilities in the public sector. The Act also exempts persons with disability from income tax.

607 See above, note 518, Article 2.
608 See above, note 598, section 15(5).
609 Ibid., section 16.
610 See above, note 518, Article 27(1)(h) and (g).
611 See above, note 598, section 25.
Section 25(1)(b) of the Act provides important protection from discrimination in access to premises, services or amenities which are available to the public, though it is not without problems. It states:

No person shall, on the ground of disability alone, deny a person with a disability
- admission into any premises to which members of the public are ordinarily admitted; or
- the provision of any services or amenities to which members of the public are entitled, unless such denial is motivated by a genuine concern for the safety of such person.

The proprietor of premises referred to in subsection (1)(a) shall not have the right, on the ground of a person’s disability alone, to reserve the right of admission to his premises against such a person.

A person with a disability who is denied admission into any premises or the provision of any service or amenity contrary to subsection (1) shall be deemed to have suffered an injury and shall have the right to recover damages in any court of competent jurisdiction.

Without prejudice to subsection (3), damages awarded under that subsection shall be recoverable summarily as a civil debt.

The potential scope of section 25—particularly subsection (1)(b)—is broad, providing a degree of protection from discrimination in access to all premises, services or amenities available to the public. However, the prohibition is limited to direct discrimination, including neither indirect discrimination nor failure to make reasonable accommodation. Thus, the section fails to meet Kenya’s obligations under Article 5(2) and 5(3) CRPD and seriously undermines Kenya’s ability to secure the equal participation of persons with disabilities. Second, the protection is limited to cases where denial of access is based on “disability alone”, a serious limitation which excludes all cases where disability is a factor in decisions about access. Finally, section 25(1)(b) provides an exception to the obligation in respect of access to services or amenities where denial of access “is motivated by a genuine concern for the safety of such a person”. This exception conflicts with the first of the general principles enumerated in CRPD which states that “respect for inherent dig-
nity, individual autonomy including the freedom to make one’s own choices, and independence of persons” is a principle of the Convention.\(^{612}\)

In respect of education, section 18(1) prohibits all persons and learning institutions from denying admission to any course of study to any person on the basis of their disability, if the person has the ability to acquire substantial learning in that course. In addition, learning institutions are obliged to “take into account the special needs of persons with disabilities” with respect to, \textit{inter alia}, entry requirements, curriculum and the use of school facilities.\(^{613}\) Thus, section 18 responds to a number of Kenya’s obligations under Article 24 CRPD to prevent discrimination in education. Section 18(1) provides protection from direct discrimination, but restricted to only those cases where disability is the sole reason for denial of admission, and subject to a subjective judgement of whether the person “has the ability to acquire substantial learning in that course”. Furthermore, the only explicit protection from discrimination is in relation to admissions, so does not provide protection from discriminatory treatment in areas such as the curriculum, exclusions or discipline, where instead the obligation rests with the education provider to “take account” of particular needs. Aside from the problems posed by the lack of protection from discrimination in these areas, the scope of the obligation to “take account” is unclear. However, provisions contained in Regulations require that “[e]very institution shall ensure that students with disabilities are reasonably accommodated within that institution” and refer specifically to, \textit{inter alia}, the provision of learning materials in alternative media.\(^{614}\)

In line with its underlying principle of inclusiveness, CRPD emphasises that persons with disabilities should not be segregated within the education system. Article 24 CRPD provides that the education system should be inclusive and that persons with disabilities should not be excluded from the general education system on the basis of disability. Sections 18(3) and 19 of the Act, focused as they are on the establishment of “special schools”, fail to guarantee such inclusiveness. Subsection 18(3) provides that “special schools and institutions, especially for the deaf, blind and the mentally retarded shall be established” and section 19 creates a duty on the NCPD to work to make provision

\(^{612}\) See above, note 518, Article 3(a).

\(^{613}\) See above, note 598, section 18(2).

\(^{614}\) See above, note 602, Regulation 9(2), (3) and (4).
for an “an integrated system of special and non-formal education for persons with all forms of disabilities”. However, the Act’s provisions concerning education do seek to address some of Kenya’s obligations under Article 24(3) CRPD to facilitate the learning of, inter alia, Braille, alternative scripts and sign language. Section 19 creates a duty on the NCPD to work to make provision for “the establishment where possible of Braille and recorded libraries for persons with visual disabilities”.

In relation to health, in addition to the limited prohibition of discrimination in service delivery discussed above, section 20 establishes a special consultative role for the NCPD in the implementation of national health programmes, with two types of purpose: the prevention and identification of disability and the rehabilitation of persons with disabilities; and ensuring that persons with disabilities receive appropriate healthcare. In this second respect, the section makes specific reference to ensuring essential health services are available at an affordable cost and provides for the availability of field medical personnel. These provisions do not appear to create an obligation on either the NCPD or the Ministry of Health to undertake particular measures, nor to give rise to specific rights. Thus, it is questionable whether the Act creates sufficiently strong obligations on the NCPD and the Ministry of Health to meet their obligations under CRPD in respect of ensuring persons with disabilities enjoy the highest attainable standard of health without discrimination and enabling persons with disabilities to attain and maintain independence through provision of habilitation and rehabilitation services.

Sections 29 and 30 of the Act relate to participation in elections, and provide, respectively, that persons with disabilities are entitled to assistance from any person they choose in order to enable them to vote, and that polling stations should be made accessible for persons with disabilities, including through the provision of assistive devices. These represent important protections in respect of Kenya’s obligation to ensure equal participation in political and public life under the CRPD, including specific obligations under Article 29(a)(i) and (iii). The Act does not provide specific measures to enable persons with disabilities to stand for election, hold office and perform

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615 See above, note 598, section 25(1)(b).
616 See above, note 518, Article 25.
617 Ibid., Article 26.
functions in government to reflect Article 29(a)(ii) of CRPD, though new provisions introduced in the Constitution guaranteeing reserved places in elected and appointed bodies for persons with disabilities are a positive development on this issue.

Section 38 makes a number of provisions regarding access to legal services. It requires the Attorney General to introduce regulations providing for free legal services for persons with disabilities with respect to, inter alia, violation of rights, deprivation of property and cases involving capital punishment. It also requires the Chief Justice to exempt persons with disabilities from fees in respect of these types of legal action and for the provision of free sign language interpretation, Braille services and physical guide assistance for persons with disabilities who attend court. As required by the CRPD, subsection 38(3) requires persons with disabilities to be held in custody in facilities which are modified to provide reasonable accommodations. Subsection 38(4) states that the Chief Justice “shall endeavour to ensure that all suits involving persons with disabilities are disposed of expeditiously having due regard to the particular disability and suffering of such persons”. These provisions are to be commended.

In sports and recreation, all persons with disabilities are entitled, free of charge, to the use of recreational or sports facilities owned or operated by the government during social, sporting or recreational activities. These provisions are further supplemented by Regulations aimed at ensuring “optimum access and use of recreation, culture, sport and tourist events and services for persons with disabilities” through, inter alia, the adaptation of the physical environment and the provision of information in special formats. These measures represent a welcome attempt to give effect to Kenya’s obligations under Article 30 CRPD, which require states to ensure that persons with disabilities have access to cultural, sporting and recreational activities. Section 41 provides a special exemption from postal charges for “printed and recorded literature, articles, equipment and other devices” sent by mail for the use of persons with disability.

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618 Ibid., Article 14(2).
619 See above, note 518, section 28(1).
620 See above, note 602, Regulation 9.
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The absence of provisions defining a failure to make reasonable adjustments as discrimination is addressed to some extent through powers of the NCPD. Sections 22 and 23 require that all public buildings and public service vehicles “shall [be adapted] to suit persons with disabilities in such manner as may be specified by the [NCPD]“. Furthermore, the NCPD has a power to issue an adjustment order to the owner of any premises, or the provider of any service or amenity, that is usually provided or open to the public, if the Council deems that the premises, service or amenity is inaccessible to persons with disabilities by reason of any structural, physical, administrative or other impediment. Adjustment orders apply to public and private premises, amenities and services, in line with the accessibility obligations under Article 9 CRPD. Significantly, however, restrictions apply in relation to public services: the NCPD cannot issue an adjustment order against any public health facility or education or training institution without the consent of the relevant government Minister. While in theory this provision would not necessarily restrict the issuing of adjustment orders, such a provision appears difficult to justify, when viewed in the light of the accessibility obligations under Article 9 CRPD and the obligations to ensure equal access to education and to the highest attainable standard of health under Articles 24 and 25. Further a person with a disability cannot make a civil claim in respect of a failure to adjust buildings, vehicles or services.

The need to secure equal access to information and communications, including through promoting access to information and communication technologies and systems, is one of the themes which run strongly throughout the CRPD and is specifically required by Article 9(1)(b) and 9(2)(f), (g) and (h). This requirement is addressed in part by section 40 of the Act which states that organisations providing public telephone services shall “as far as possible install and maintain” services with adjustments for persons with hearing and visual disabilities and by section 39, which requires the use of sub-titles or sign language in all television programmes providing news, educational programmes and programmes “covering events of national significance”.

621 See above, note 598, sections 7(a) and 24.
622 Specifically, the Council cannot issue an adjustment order to any hospital, nursing home or clinic controlled or managed by the Government or registered under the Public Health Act or to any school or educational or training institution controlled or managed by the Government or registered under the Education Act, except with the consent of the Government Minister responsible for the institution or Act concerned (section 27).
These provisions are supplemented by Regulations which require information to be made available in accessible formats in a variety of contexts.\textsuperscript{623}

Under subsection 26(1), it is an offence for any person to fail to comply with an adjustment order; contravene the prohibition on discrimination in employment; deny entry to premises or use of services or amenities on grounds of disability alone, and discriminate against a person with disability on the ground of any ethnic, communal, cultural or religious custom or practice. Subsection 26(2) establishes minimum fines and sentences for offences, while under subsection 26(3), any person found guilty of an offence may also be ordered to pay the injured person compensation. In addition, subsection 25(3) provides that any person denied entry to premises, or use of services or amenities on sole grounds of disability has the right to recover damages in any court of competent jurisdiction. Subsection 15(3) makes similar provision with respect to discrimination in employment.

Section 32 of the Act establishes a fund, the National Development Fund for Persons with Disabilities, which its trustees are empowered to use for a range of purposes including to contribute to: the expenses of organisations of, or for, persons with disabilities; institutions that train persons in the care of persons with disabilities; and projects undertaken by the government for the benefit of persons with disabilities.\textsuperscript{624} In addition, the Fund can be used to provide or contribute to the cost of assistive devices and services and to pay allowances to those with severe disabilities, “aged persons with disabilities”, and single parents with children with disabilities.\textsuperscript{625} The Fund, and in particular the powers of trustees, are a welcome innovation, in particular as the Fund could be utilised to address standards of living and social protection, as required by Article 28 CRPD.

In addition to its functions in respect of adjustment orders, the NCPD also has functions in respect of policy formulation, service delivery, access and awareness-raising. This includes a mandate to formulate and develop “measures and policies designed to achieve equal opportunities for persons with disabilities by ensuring to the maximum extent possible that they obtain education

\textsuperscript{623} See, for example, above note 602, Regulations 8, 9(4), 14(c), 15, 16 and 17.
\textsuperscript{624} See above, note 598, section 33(2)(a), (b) and (c).
\textsuperscript{625} Ibid., section 33(2)(d) and (e).
and employment, and participate fully in sporting, recreational and cultural activities and are afforded full access to community and social services”. In policy terms, its functions also include cooperating with the government during the census, advising on the provisions of treaties relating to welfare or rehabilitation of persons with disabilities and recommending measures to prevent discrimination against persons with disabilities.  

Section 7 states that the NCPD’s functions include establishing schemes and projects for self-employment or sheltered employment for persons with disabilities; encouraging and securing the community rehabilitation of persons with disabilities and the establishment of vocational rehabilitation centres and other rehabilitation institutions; and co-ordinating services provided in Kenya for the welfare and rehabilitation of persons with disabilities. Elsewhere, the section states that the NCPD will consult government on curricula for vocational rehabilitation centres and training facilities; make provision for assistance to students with disabilities in the form of scholarships, loan programmes, fee subsidies and other similar forms of assistance; report to the government on the welfare and rehabilitation of persons with disabilities; and consult with the government in the provision of suitable and affordable housing for persons with disabilities. Taken together, these functions provide important additional measures with respect to ensuring access to education, employment and rehabilitation services. Yet again, however, the lack of enforceable rights is problematic, particularly in light of the severe disadvantage and acute lack of access which many persons with disabilities in Kenya suffer.

Paragraph 7(1)(c) of the Act requires the Council to register persons with disabilities and institutions, associations and organisations which provide rehabilitation and welfare services. Subparagraph 7(1)(d)(i) states that the NCPD’s functions will include the provision – to the maximum extent possible – of assistive devices, appliances and other equipment, as required by Article 20(b) of CRPD. Paragraph 7(1)(i) requires the Council “to carry out measures for public information on the rights of persons with disabilities and the provisions of this Act”, providing a limited mandate in respect of Kenya’s obligations under Article 8(1) CRPD, which requires states to “raise awareness throughout society,

626  Ibid., section 7(1)(b)(i).
627  Ibid., section 7(1)(b)(ii), (iii) and (iv).
including at the family level, regarding persons with disabilities, and to foster respect for the rights and dignity of persons with disabilities”. However, the Act does not make specific reference to the other obligations under this Article to undertake measures to “combat stereotypes, prejudices and harmful practices relating to persons with disabilities” and to “promote awareness of the capabilities and contributions of persons with disabilities”.628

The National Cohesion and Integration Act

The National Cohesion and Integration Act adopted in the wake of the post-election violence in 2008 is the principal legislation through which the government of Kenya seeks to prohibit racial and religious discrimination by state and non-state actors. In general, it provides protection across a range of areas of life, though it does contain a number of gaps, exceptions and inconsistencies which limit its scope and effectiveness.

The Act’s definition of discrimination is broad, reflecting many of the elements found in Article 1(1) of ICERD. Thus, section 3 covers both direct discrimination on “ethnic grounds” and indirect discrimination disadvantaging persons from a particular “ethnic group”.629 The Act’s notion of prohibited conduct also explicitly includes segregation630 as required by Article 3 of ICERD, harassment on ethnic grounds,631 and victimisation by reason of action taken against the discriminator.632 “Ethnic grounds” is defined as “any of the following grounds, namely colour, race, religion, nationality or ethnic or national origins”.633

Section 7 prohibits discrimination in employment, both during recruitment (in respect of the recruitment process, the terms of employment and the appointment process) and in the course of employment (in respect of the terms of employment, opportunities for promotion, transfer, training or other ben-

628 See above, note 518, Articles 8(1)(b) and 8(1)(c).
629 See above, note 594, sections 3(1)(a) and 3(1)(b).
630 Ibid., section 3(3).
631 Ibid., section 6.
632 Ibid., section 4.
633 Ibid., section 2.
Thus, it meets the basic state obligation to guarantee the rights, without distinction as to race, colour, or national or ethnic origin, to work, to free choice of employment, to just conditions of work and to equal pay for equal work. The section also prohibits harassment by an employer, or an employer’s representative, of employees and those applying for employment. In addition, the section creates a duty on all public establishments to ensure representation of Kenya’s diversity and to employ no more than one third of staff from the same ethnic community, a requirement which is particularly welcome, given the prevalence of discriminatory decision-making by public officials discussed in the part 2 of this report.

Significantly, however, subsection 7(6) limits the application of a number of other protections found in the section to employment in the public sector; it states that the provisions prohibiting discrimination in the course of employment (ss7(4)) and harassment (ss7(5)) do not apply to employment for the purposes of a private enterprise “except in relation to discrimination falling within section 4 [concerning victimisation] or discrimination on ethnic grounds”. While the scope of this exception is unclear, any attempt to exclude private organisations from the prohibition on race discrimination is at odds with the state’s obligations to ensure enjoyment of the right to work without discrimination on grounds of race or ethnicity under both ICERD and ICESCR. Furthermore, the exception appears to contradict the Employment Act, which provides a general protection from discrimination in all forms of employment – both public and private – on a list of grounds which include race, colour, nationality and ethnic or national origin. In addition to the exception in respect of employment in the private sector, subsection 8(1) provides an exception to the prohibition of discrimination in employment where differentiation is based on a genuine and determining occupational requirement in respect of particular artistic or cultural activities, or in respect of personal services promoting the welfare of a particular ethnic group where services can be most effectively provided by persons of the same ethnicity. Subsection 8(2) provides that this exception will not apply where an employer already has a suf-

634 Ibid., sections 7(3) and (4).
635 See above, note 515, Article 5(e)(i).
636 See above, note 594, section 7(5).
637 Ibid., sections 7(1) and (2).
ficient number of employees of the required ethnic group who are capable of carrying out the specified duties.

Section 9 prohibits discrimination against those applying for membership of organisations (in respect of the terms of membership or denial of membership) and members of organisations (in respect of access to benefits, facilities and services, varying the terms of membership or denying membership, and any other form of detriment). Subsection 9(4) provides an exception to this provision in cases where membership is limited to a given religious persuasion or profession. While this limitation may be justifiable to the extent that it allows religious persons to associate with others of their religion, it appears too broad in scope, effectively excluding cases of discrimination by religious organisations on grounds of race, colour, nationality and ethnic or national origin from the application of the prohibition in section 9.

Section 10 prohibits discrimination in the provision of services by any “qualifying body, licensing authority, planning authority, public authority, employment agency, educational establishment or body offering training”. Notably, this definition excludes non-state providers of services other than employment, education or training, such as those which provide goods and services for sale. This exclusion gives broad scope for discrimination in a range of settings and limits the government’s ability to effectively combat discrimination. Similarly, land and property transactions in the private sphere are not covered by the Act. Sub-paragraph 10(2)(b)(iii) provides a broad exception in respect of discrimination in the exercise of immigration functions. It states:

*Subsection (1) shall not apply [to...]*

iii. An action undertaken by the Minister for Immigration under the Immigration Act, in relation to cases relating to immigration and nationality.

This provision appears to allow discrimination in the administration of the immigration and nationality system beyond the scope of permitted differentiation between citizens and non-citizens provided in Article 1(2) of ICERD. As CERD has stated, states must “ensure that immigration policies do not have the effect of discriminating against persons on the basis of race, colour,
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descent, or national or ethnic origin”. Concern about this exception is further heightened by research undertaken by ERT which shows that certain ethnic groups within Kenya – such as Kenyan Somalis and Kenyan Nubians – are subject to discrimination in the process of acquiring citizenship documents. ERT research indicates that these groups face barriers to registering their citizenship, in terms of requirements for the production of additional evidence, “vetting” procedures and bureaucratic obstacles – which render many de facto stateless. Furthermore, the denial of citizenship documents restricts the ability of those affected to enjoy a range of civil and political rights guaranteed by ICERD, including in particular the right to participate in elections, the right to freedom of movement within the state, and the right to leave and return to the country.

The need for states to address disparities in the enjoyment of economic, social and cultural rights between different regions and localities has been clearly set out by CESCR. Section 11 of the National Cohesion and Integration Act introduces important provisions for the “ethnically equitable” distribution of public resources and stipulates that distribution of public resources should take into account Kenya’s diverse population and poverty index. It provides that it is unlawful for any public officer to distribute resources in an ethnically inequitable manner and 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. Section 12 prohibits discrimination on ethnic grounds in the acquisition, management or disposal of public property. These measures are a commendable attempt to address the problems posed by ethnic discrimination in the allocation of public resources, and the associated ethno-political tensions. However, as discussed above, ERT research found significant regional imbalances in wealth, coupled with significant inequality in infrastructure and access to public services. Testimony from communities interviewed by ERT provided evidence of indirect discrimination in development policy, which, as

640 See above, note 515, Articles 5(c), 5(d)(i) and (d)(ii).
641 See above, note 547, Para 34.
642 See above, note 594, sections 11(2) and (3).
noted by SID, among others, arises as a result of the “concentration by policy makers on ‘high productive’ areas (...) in provision of infrastructure such as schools, roads, health centres, etc.” – which further disadvantages those ethnic groups in the poorest areas of the country.643 Thus, it appears that these measures to prohibit discrimination in the allocation of public resources are not adequately enforced.

As required by Article 4 of ICERD, section 13 of the Act provides, inter alia, that a person using words, publishing written material “which is threatening, abusive or insulting” commits an offence if such person intends thereby to stir up ethnic hatred, or having regard to all the circumstances, ethnic hatred is likely to be stirred up. Subsection 13(2) provides a maximum punishment for the criminalised acts of either or both a fine of Kshs 1 million or three years imprisonment. In addition to these provisions, Article 33 of the Constitution of Kenya 2010 explicitly excludes hate speech and advocacy of hatred that constitutes ethnic incitement, vilification of others or incitement to cause harm from the scope of the right to freedom of expression, in line with CERD General Recommendation on this matter.644

The Act establishes the National Cohesion and Integration Commission (NCIC) with a mandate to “facilitate and promote equality of opportunity, good relations, harmony and peaceful co-existence between different ethnic and racial communities of Kenya”.645 CERD has recommended that states establish national commissions or other appropriate bodies, in line with the Paris Principles.646 CERD recommends that such bodies should “promote respect for the enjoyment of human rights without any discrimination”, review government policy on racial discrimination, monitor legislative compliance, undertake public education and assist the government in the preparation of reports submitted to it. The NCIC’s powers include, inter alia, to: promote equal access and enjoyment by persons of all ethnic communities and ra-

644 See above, note 550, Para 4.
645 See above, note 594, section 25(1).
cial groups to public services; investigate complaints of ethnic or racial discrimination and make recommendations to the Attorney-General, the Human Rights Commission or any other relevant authority; determine strategic priorities in all the socio-economic political and development policies of the government impacting on ethnic relations and advise on their implementation; and initiate policy, legal or administrative reforms on issues affecting ethnic relations. Section 43 of the Act makes provision for any aggrieved person to lodge a complaint regarding contravention of the Act to the Commission. In such cases, the Commission has the power to refer the case for conciliation, or issue a notice of compliance setting out duties on the responsible party. Section 59 creates a power for the Commission to investigate instances of discrimination on its own initiative.

**Other Laws Providing Specific Anti-discrimination Protections**

In addition to the Persons with Disabilities Act and the National Cohesion and Integration Act, two other laws exist which – while their focus is broader than discrimination and inequality – provide general protection from discrimination. The Children Act 2001 provides a general prohibition on discrimination for all children on a range of grounds, while the HIV and AIDS Prevention and Control Act 2006 provides specific protections on one ground – HIV status – in a range of areas of life.

The **Children Act 2001** states that no child “shall be subjected to discrimination on grounds of origin, sex, religion, creed, custom, language, opinion, conscience, colour, birth, social, political, economic or other status, race, disability, tribe, residence or local connection”. While the Act lacks detail on the material scope of the protection, lacks clarity on whether “discrimination” covers indirect discrimination or harassment and does not include provisions on procedural matters or remedies, it does provide an important basic level of protection for all children on an extensive range of grounds, which appears to apply in all areas of life. However, the list of grounds provided in the Act is limited, omitting grounds, including notably sexual orientation and gender identity, and

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647 See above, note 594, section 25(2).
648 Ibid., section 49.
649 Ibid., sections 56 and 57.
650 Children Act 2001, section 5.
providing a closed list of prohibited grounds. The Act provides a range of other protections for children in relation to abuse, parental care, armed conflict, forced labour, harmful cultural practices and religious discrimination.651

The HIV and AIDS Prevention and Control Act 2006, enacted for the appropriate treatment, counselling, support and care of persons infected or at risk of being infected with HIV,652 contains one part – Part VII – focussed on the prohibition of discrimination on the basis of actual, perceived or suspected HIV status. Section 31 prohibits denial of access to employment, transfer, denial of promotion or termination of employment based on HIV status, though this is limited by subsection 31(2) which states that the prohibition shall not apply “where an employer can prove (...) that the requirements of the employment in question are that a person be in a particular state of health or medical or clinical condition”. Other sections in this part of the Act expressly prohibit discriminatory conduct and policies in schools, transport, or choice of abode, in seeking elective or other public office, in accessing credit facilities or insurance, health care services and burial services.653 Section 38 provides that any person who commits these prohibited acts will be liable to a penalty. Section 25 of the Act establishes an HIV and AIDS Tribunal with the jurisdiction to hear and determine complaints, appeals and any matters arising out of the contravention of the Act.654 On finding a contravention, the Tribunal has the power to make orders for payment of damages in respect of proven financial losses and to direct that specific steps be taken to address the discriminatory practice among other orders.655 Orders for damages can be filed in the High Court and shall be deemed as a decree of the High Court.656

3.2.3 Non-Discrimination Provisions in Other Legislation

Beyond the protections provided by the Constitution, the Persons with Disabilities Act and the National Cohesion and Integration Act, protection from

651 Ibid., sections 6-15.
653 Ibid., sections 32-37.
654 Ibid., section 25 and 26.
655 Ibid., section 27(7)(c).
656 Ibid., section 29(2).
discrimination in other legislation is patchy and inconsistent. While some Acts, such as the Employment Act, the Universities Act and the Children Act, contain provisions which prohibit discrimination based on a range of grounds, legislation in other fields – such as healthcare and education – does not contain non-discrimination protections. The result is that there are significant gaps in the legal protection available under Kenyan legislation. While individuals have protection from discrimination on grounds of race and disability in respect of education, for example, no such protection exists on grounds of sex or sexual orientation. While discrimination is prohibited in employment on a wide range of grounds, no such protection exists in family law or health law.

These omissions raise questions about the ability of Kenya to meet its international obligations. Under the ICCPR, Kenya has an obligation to ensure that “the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground” under Article 26.657 Furthermore, under ICESCR, Kenya has an obligation to ensure that all persons can enjoy their rights to inter alia education, or to the highest attainable standard of physical and mental health without discrimination under ICESCR.658 Finally, as stated in section 3.2.2 above, Kenya has specific obligations in respect of discrimination against women under CEDAW, which are not met through specific gender discrimination legislation. These omissions are particularly problematic in the light of the evidence of discrimination affecting a number of groups, as discussed in Part 2 of this report.

This said, the general prohibition on discrimination by state and non-state actors provided by Articles 27(4) and 27(5) of the Constitution does offer a certain level of protection. This is bolstered by the provisions in Articles 22 and 23 which enable individuals, groups of individuals and associations to bring proceedings in cases of discrimination and to receive relief including compensation. However, these provisions alone are insufficient to meet Kenya’s obligations in respect of providing effective protection from discrimination in law. As CESCR has stated:

> Adoption of legislation to address discrimination is indispensable in complying with article 2, paragraph 2. States parties are

657 See above, note 511, Article 26.

658 See above, note 513, Article 12 with Article 2(2); Article 13 with Article 2(2).
therefore encouraged to adopt specific legislation that prohibits discrimination in the field of economic, social and cultural rights. Such laws should aim at eliminating formal and substantive discrimination, attribute obligations to public and private actors and cover the prohibited grounds discussed above.\textsuperscript{659}

Thus, despite the introduction of new constitutional provisions, the level of protection is inadequate to meet the needs of victims for certainty about the scope of their legal rights, measures to ensure access to justice, and appropriate provisions for remedies.

**Nationality, Citizenship and Immigration Law**

The Kenyan law on citizenship has recently been revised through the adoption of the new Constitution and the adoption, pursuant to Article 18 of the Constitution, of the *Kenya Citizenship and Immigration Act 2011*, bringing it into line with a number of recommendations made by the Committee on the Elimination of Discrimination against Women. Prior to the introduction of these instruments, the law on the acquisition of citizenship through birth and marriage discriminated against female parents and spouses.\textsuperscript{660} Both the Constitution and the Kenya Citizenship and Immigration Act 2011 provide for legal equality between the sexes in respect of acquisition of citizenship through marriage\textsuperscript{661} and through birth.\textsuperscript{662} The Committee welcomed the Constitutional changes in its Concluding Observations on Kenya’s periodic report under CEDAW.\textsuperscript{663}

The Act also provides for citizenship to be attained by stateless persons (those who do “not have an enforceable claim to the citizenship of any recog-

\textsuperscript{659} See above, note 547, Para 37.

\textsuperscript{660} Constitution of Kenya 1963 (repealed), Articles 90 and 91.

\textsuperscript{661} See above, note 538 Article 15(1); see also Kenya Citizenship and Immigration Act 2011, (Cap. 12), section 11.

\textsuperscript{662} See above, note 538, Article 14(1); see also Kenya Citizenship and Immigration Act 2011, (Cap. 12), section 6.

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and migrants who have been living in Kenya since independence and meet various other conditions. While these provisions may offer a potential avenue to citizenship for communities – such as Kenyan Somalis and Nubians residing in the country at the time of independence – the findings of this report indicate that many of the problems for these groups relate not only to their legal status but to a greater extent to the practical barriers in acquiring citizenship documents.

Despite introducing positive changes in respect of gender equality, the Kenya Citizenship and Immigration Act does not contain any provision prohibiting discrimination. Under CEDAW, ICERD, and CRPD, Kenya has an obligation to ensure that women, persons of all races, ethnicities and colours and persons with disabilities enjoy the right to a nationality without discrimination. While the general prohibition on discrimination by state actors contained in Article 27(4) of the Constitution does apply in this respect, a specific non-discrimination provision in respect of the acquisition of citizenship would enhance the effectiveness of this right.

The Refugees Act 2006 provides protection from discrimination for asylum seekers, refugees and the families of refugees upon entering Kenya. Section 3 defines the term “refugee” in line with the definitions provided in the UN Convention Relating to the Status of Refugees of 1951 and the 1967 Protocol to the Convention. Section 11 sets out a process for recognition as a refugee. Section 12 contains a basic level of protection for those seeking recognition as a refugee, providing leave to remain pending determination of their application and any appeals. In other areas, however, protections are restricted to recognised refugees, and are not extended to all persons within the jurisdiction of the state: section 16 states that every recognised refugee and every member of their family in Kenya shall be entitled to all rights contained in international treaties to which Kenya is a party while they reside in the country. Subsection 18(a) of the Act provides that no person shall be refused entry into Kenya, expelled, extradited from Kenya or returned to any other coun-

665 Ibid., section 16.
666 See above, note 516, Article 9(1).
667 See above, note 515, Article 5(d)(iii).
668 See above, note 518, Article 18(1).
try where he would be persecuted on account of race, religion, nationality, membership of a particular association or political opinion. As well as implementing Kenya’s obligation of non-refoulement, an essential protection given Kenya’s status as a major destination for refugees from other African countries, this provision enhances the protection against the most severe forms of extraterritorial discrimination.

**Family Law**

The family law regime in Kenya, which covers marriage, divorce and the division and disposal of matrimonial property on separation or death, is governed under various pieces of legislation applicable to different religious communities, and in a large number of cases by reference to traditional customary law norms. There are concerns that the diversity of legal regimes might give rise to discrimination or inequality between different groups. The scale and impact of discrimination against women in the operation of family law regimes means that provisions guaranteeing formal legal equality are particularly important in this area. A number of laws contain such provisions.

The law governing marriage is typical of the diversified legal regime in this area of law. There are four Acts, the **Hindu Marriage and Divorce Act**, the **Mohammedan Marriage and Divorce Act**, the **African Christian Marriage and Divorce Act** and the **Marriage Act**, the latter governing marriage for those who choose to marry without reference to their particular cultural or religious affiliations. This range of different legal systems gives rise to a number of concerns about discrimination, principally affecting women. As a party to CEDAW, Kenya has obligations to “take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations”, while as a party to ICCPR, it has an obligation “to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution”. Unfortunately however – as discussed above in this report – a number of laws governing marriage contain provisions which discriminate or are open to discriminatory application.

The **Matrimonial Causes Act**, which governs divorce, provides some elements of basic formal equality between men and women. Both parties are

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669 See above, note 516, Article 16(1).
670 See above, note 511, Article 23(4).
able to petition for divorce on grounds of adultery, desertion, cruelty or unsound mind.\(^\text{671}\) Similarly, provisions governing decrees of nullity, decrees of presumption of death and decrees of judicial separation treat petitions from either partner equally.\(^\text{672}\) Thus, the basic requirement under Article 16 of CEDAW to guarantee “the same rights and responsibilities” at the dissolution of marriage appears to be met.\(^\text{673}\) Elsewhere however, as discussed in section 3.2.2 above, the Act discriminates against women.

Similarly, the general provisions governing intestate succession under the \textbf{Law of Succession Act} guarantee equal inheritance rights for male and female children, and the equal right to produce a will by both male and female parents.\(^\text{674}\) However, a number of provisions in the Act, discussed in section 3.2.2 above, discriminate against women, in direct violation of Article 16(1)(h) of CEDAW.

Given the number of discriminatory provisions and the complexity of the law in this area, it is welcome that the government of Kenya made a commitment to review the Law of Succession Act with a view to eliminating discriminatory provisions during its recent review by the Committee on the Elimination of Discrimination Against Women.\(^\text{675}\) However, it appears that efforts to harmonise and improve family law have stalled in recent years. In September 2009, three “Gender Bills” – the Family Protection Bill (discussed below in respect of the Criminal Law), the \textbf{Marriage Bill} and the \textbf{Matrimonial Property Bill} – were presented to the Cabinet by the then Minister for Gender and Children Affairs, Esther Murugi. Following Cabinet discussions, the Bills were returned to the Minister’s department and no progress has been made since.

The \textbf{Marriage Bill} sought to harmonise the range of existing legislation relating to marriage by consolidating all marriage laws in Kenya, updating laws and removing the grey areas which have been the cause of significant inequality, especially affecting women. If enacted, the law would have replaced its predecessors and would govern marriages between Muslims, Christians,

\begin{itemize}
\item \(^\text{671}\) Matrimonial Causes Act 1941, (Cap. 152), section 8.
\item \(^\text{672}\) \textit{Ibid.}, sections 13, 14, 22, and 17.
\item \(^\text{673}\) See above, note 516, Article 16(1)(c).
\item \(^\text{674}\) Law of Succession Act 1981, sections 38 and 5(2).
\item \(^\text{675}\) See above, note 663, Para 45.
\end{itemize}
Hindus, those married by a registrar, and by customary marriage. The Bill proposed to introduce a minimum age for marriage of 18 years, in accordance with Kenya’s obligations under the African Charter on the Rights and Welfare of the Child.\textsuperscript{676} The Bill also makes it illegal to sue a person for damages for adultery, a change to the current law which allows a husband to sue for compensation from a man who has been adulterous with his wife. The Bill recognises the civil effects of domestic partnerships between non-married couples – it states that if a man and a woman who have the capacity to marry have lived together openly for at least two years and have acquired the reputation of being husband and wife, there will be an assumption that the two are married unless proved otherwise. The Committee on the Elimination of Discrimination against Women has stressed the need to protect women in de facto relationships: “Women living in such relationships should have their equality of status with men both in family life and in the sharing of income and assets protected by law”.\textsuperscript{677} The Bill also provides that a marriage will not be held as invalid for the sole reason that there was non-compliance with any customs relating to dowry or the giving or exchanging of gifts before or after the marriage. Under current customary laws, one is expected to prove that all customary ceremonies were performed in order for it to be considered a legal customary marriage. Unlike in current practice under customary marriage, the Bill states that upon divorce one may not approach the courts for the return of dowry paid. The Bill also seeks to bring polygamous marriages under the purview and control of legislation.

The \textbf{Matrimonial Property Bill} sought to define what constitutes matrimonial property and ensure that once property has been determined as matrimonial it will be shared equally between the spouses. Thus, it seeks to implement the legal provisions necessary to comply with Kenya’s obligations under Article 16(1)(h) of CEDAW which requires states to ensure that the law provides “the same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property”. The Bill states that contribution to the acquisition of matrimonial property may be monetary or non-monetary and, crucially, includes domestic


work, child care and companionship as contributions. It sets out that where property is acquired before the marriage by one spouse and the other spouse contributes to its development, the contributing spouse will acquire a benefit equivalent to the contribution made. The Bill states that no matrimonial property shall be sold, leased or mortgaged by either spouse during the subsistence of the marriage and that a spouse cannot be evicted from the matrimonial home during the subsistence of a marriage except by a court order. The Bill provides that in polygamous marriages a first wife and husband will equally own the property acquired before the second wife was married and that property acquired after the husband marries a second wife shall be regarded as equally owned by all three parties.

Both of these Bills, if enacted, would significantly enhance equality in matters relating to family and marriage, and go a long way towards implementing Kenya’s obligations under Article 16 of CEDAW, as elaborated in the Committee’s General Recommendation 21.678

Criminal Law

While the non-discrimination provisions in the Kenyan Constitution offer protection against discrimination by state agents, there are no specific civil-law provisions in Kenya that prohibit discrimination by law enforcement officials, the courts and other actors involved in the criminal justice system. The criminal legislation does, however, offer significant protection against discriminatory harassment, speech and violence.

Section 77 of the Penal Code criminalises the commission of actions with a subversive intention including activities “intended or calculated to promote feelings of hatred or enmity between different races or communities in Kenya”.679 The section states that this does “not extend to comments or criticisms made in good faith and with a view to the removal of any causes of hatred or enmity between races or communities”.680 This offence has recently been supplemented by an offence in the National Cohesion and Integration Act which criminalises words, publications, or public performances, which

678  Ibid.
679  Penal Code 2010 (Rev.), (Cap. 63), section 77(3)(e).
680  Ibid.
are threatening, abusive or insulting (or involve the use of threatening, abusive or insulting words or behaviour), and are undertaken with the intention to stir up ethnic hatred, (or in circumstances in which ethnic hatred is likely to be stirred up). 681 Taken together, the provisions address Kenya’s obligation to prohibit “advocacy of national, racial or religious hatred, that constitutes incitement to discrimination, hostility or violence” under the ICCPR 682 and to declare illegal the “dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin” under ICERD. 683

The Sexual Offences Act 2006 introduced a number of new offences which broaden the protection against sexual abuse and harassment beyond that provided under the Penal Code. While the Act is not gender-specific, it has the effect of protecting women from violence as required by CEDAW. 684 The Act creates a number of new offences including gang rape and trafficking for sexual exploitation and introduces mandatory minimum sentences for rape, sexual assault and sexual harassment. Section 3 defines rape as intentionally and unlawfully penetrating another person with a genital organ, without consent or with consent obtained by force, threats or intimidation. 685 “Intentionally and unlawfully” is defined as any act committed in coercive circumstances, under false pretences or by fraudulent means and in respect of a person “who is incapable of appreciating the nature of an act”. 686 Persons found guilty of the offence of rape are liable to conviction to between ten years and life imprisonment. 687 Section 4 creates an offence of attempted rape, punishable by a prison term of between five years and life. Section 10 creates an offence of gang rape, punishable by a prison term of between fifteen years and life. Section 5 creates an offence of sexual assault, defined as penetration with a non-genital organ or other object (in the second case, with an exception for

681 See above, note 594, section 13.
682 See above, note 511, Article 20(2).
683 See above, note 515, Article 4.
685 Ibid, section 3(1).
686 Ibid, section 43(1).
687 Ibid., section 3(3).
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medical purposes). Persons found guilty of the offence are liable to conviction to between ten years and life imprisonment.\textsuperscript{688} Elsewhere, the Act prohibits compulsion of others to perform indecent acts, indecent acts within the view of a family member, child or person with mental disabilities, and defilement and attempted defilement of children.\textsuperscript{689} While these provisions go some way towards complying with Kenya’s obligations to eliminate all forms of gender-based violence under CEDAW,\textsuperscript{690} it should be noted, as discussed above in section 3.2.2, that subsection 43(5) of the Act states that all acts described as unlawful and intentional in the Act “shall not apply in respect of persons who are lawfully married to each other”.

In line with Article 6 of CEDAW, section 17 prohibits exploitation of prostitution, defined as intentionally causing or inciting a person to become a prostitute and controlling the activities of that person for or in expectation of gain. The offence is punishable with a minimum prison term of five years or a fine of five hundred thousand shillings. Section 19 provides special protection for persons with mental disabilities, stating that in addition to committing any other offence under the Act, any person who in relation to a person with mental disability, for financial or other reward, favour or compensation to such person with mental disability or to any other person, intentionally commits any offence under this Act with such person with disabilities will be guilty of prostitution of that person, and will be liable to a minimum prison term of ten years.

Section 23 creates an offence of sexual harassment (which occurs when any person in a position of authority or holding a public office persistently makes sexual advances or requests which he or she knows or ought reasonably to know, are unwelcome), punishable by imprisonment of not less than three years and/or a fine of not less than one hundred thousand shillings.\textsuperscript{691} This definition is somewhat narrower than that outlined by the Committee on the Elimination of Discrimination against Women, which states that sexual harassment includes such “unwelcome sexually determined behaviour as physi-

\textsuperscript{688} Ibid., section 5(2).
\textsuperscript{689} Ibid., sections 6, 7, 8 and 9.
\textsuperscript{690} See above, note 684, Para 24(a).
\textsuperscript{691} See above, note 685, section 23(1).
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cal contact and advances, sexually coloured remarks, showing pornography and sexual demand, whether by words or actions” 692 The Committee has not expressly commented on this provision in its Concluding Observations. However, in 2011 the Committee called on Kenya to “enforce a zero tolerance policy with respect to sexual abuse and harassment in schools and ensure that perpetrators are punished appropriately”. 693 Proper enforcement of section 23 goes in the right direction to addressing sexual abuse and harassment. However, the necessarily narrow definition of harassment as a criminal offence means that there is still a need for a civil provision in employment – and indeed in other areas of life – which reflects the standards of the Committee’s General Recommendation 19.

Section 31 of the Act provides protection for vulnerable witnesses – defined as the alleged victim, a child or a person with mental disability – in court proceedings brought under the Act. While this is welcome, serious concerns, discussed above, have been expressed over the protection of alleged victims in respect of section 38 of the Act, which provides that anyone making a false accusation of sexual offences is liable to penalties “equal to that for the offence complained of”.

Under the current law, there is no offence of domestic or family violence and as such when domestic violence is reported to the police, it is recorded as one of the common law offences of assault, assault with intent to do grievous bodily harm, or indecent assault among other offences. This fails to address the specific needs of victims and survivors of domestic and family violence, including in relation to protection mechanisms, support services, penalties and remedies. 694 In 2009, attempts were made to introduce a new Family Protection Bill, previously called the Domestic Violence (Family Protection) Bill in order to introduce more effective protection. The Bill sought to provide protection for the young and elderly, women and men from the violence of family members, through the creation of a new offence of domestic violence which is defined to include physical violence, psychological abuse and sexual abuse. Had it been enacted, the Bill would have allowed victims who are or have been in a domestic relationship with another person to apply to court

692 See above, note 684, Para 18.
693 See above, note 663, Para 32(c).
694 See above, note 684, Paras 24(b), (k) and (r).
for a protection order, and would have provided compensation for domestic violence victims in case of injury, loss of property or financial loss as a result of domestic violence. Unfortunately, however, the Bill – which was presented with two other Bills in the area of family law, was returned to the Minister’s department for further consultation with “MPs and other stakeholders” and for revisions to be made. No progress has been made since.

**Employment Law**

The **Employment Act 2007** provides significant protection from discrimination in all aspects of employment. It reflects Kenya’s obligations to provide protection against discrimination in all areas of life contained in Article 26 ICCPR, to ensure, without discrimination, the enjoyment of the rights to work and to just and favourable conditions of work guaranteed under ICESCR and those provisions relating to work found in CEDAW, CPWD and ICERD. However, the Act is not without problems, including in particular a number of broad exceptions which appear disproportionate and inconsistent with the provisions of other legislation, such as the National Cohesion and Integration Act.

Subsection 5(3) of the Act prohibits discrimination on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, mental status or HIV status. Thus the list does not include a number of grounds – property, birth, health status, sexual orientation, or civil, political or social status – protected under ICESCR. Nor does the Act prohibit discrimination on any “other status” – as do ICESCR, and Article 27(4) of the Constitution – with the effect of providing a closed list of grounds and thereby limiting future claims to only those grounds specified. The list of specified grounds is similar to that provided in the Constitution,

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695 See above, note 513, Articles 6 and 7 read with Article 2(2).

696 See above, note 513, Article 2(2), with Articles 7 and 8; Committee on Economic, Social and Cultural Rights, *General Comment No. 18: The Right to Work*, UN Doc. E/C.12/GC/18, 2006, Para 12(b)(i), which states: “Under its article 2, paragraph 2, and article 3, the Covenant prohibits any discrimination in access to and maintenance of employment on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, physical or mental disability, health status (including HIV/AIDS), sexual orientation, or civil, political, social or other status, which has the intention or effect of impairing or nullifying exercise of the right to work on a basis of equality.”
with some exceptions, including notably health status (though it includes HIV status), marital status and age. In addition, it suffers the same deficiencies as the Constitution in respect of non-inclusion of sexual orientation, gender identity and genetic inheritance.

The Act covers both direct and indirect discrimination and harassment, though no definitions are provided for these forms of conduct. 697 In line with the rest of the Act – which governs all forms of employment – discrimination is prohibited in both public and private sector employment. 698 As discussed above, this creates an inconsistency with the National Cohesion and Integration Act, adopted a year after the Employment Act, which does not apply to certain discrimination occurring in private sector enterprises. The prohibition on discrimination applies to all aspects of employment including recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment. 699 Thus, the scope of the prohibition compares favourably with CEDAW and CRPD, which both list aspects of employment where the state should introduce measures to eliminate discrimination. 700 The scope of protection extends to employees and applicants for employment. 701 Subsection 5(5) specifically provides for equal remuneration for work of equal value, as required by ICESCR 702 and CEDAW. 703

The Act provides a number of exceptions to the protection against discrimination in employment. Subsection 5(4) provides an occupational requirement exception, which stipulates that it does not constitute discrimination to distinguish, exclude or prefer any person on the basis of an inherent requirement of a job. This exception is in line with that specified under the 1958 ILO Discrimination (Employment and Occupation) Convention. 704 However,

697 Employment Act 2007, section 5(3).
698 Ibid., section 3(1), which states: “The Act shall apply to all employees employed by any employer under a contract of service.”
699 Ibid., section 5(3)(b).
700 See above, note 516, Article 11(1)(b), (c), (d) and (f); and note 518, Articles 27(1)(a) and (b).
701 See above, note 697, section 5(8)(a).
702 See above, note 513, Article 7(a)(i).
703 See above, note 516, Article 11(1)(d).
704 See above, note 531, Article 1(2).
further exceptions which state that it is not discrimination to employ a citizen in accordance with the national employment policy, or to restrict access to limited categories of employment where it is necessary in the interest of state security are far too broad.

Further concerns arise in respect of the general exceptions which apply to the Act as a whole. Thus, the Act does not apply to either the armed forces or reserve, or to the police, the Kenya Prisons Service or the Administration Police Force, exceptions which, while potentially justified in respect of the Act’s general provisions, appear too broad when applied to the non-discrimination protections provided in section 5.\textsuperscript{705}

Subsection 5(6) of the Employment Act states that contravention of the provisions elsewhere in section 5 constitutes an offence, while section 88 provides that any person found guilty of an offence under the Act for which no penalty is expressly provided (which includes the prohibition on discrimination), is liable to a fine and/or term of imprisonment not exceeding one year. The burden of proof where contravention is alleged lies with the employer, who must prove that the discrimination did not take place as alleged, and that the act or omission is not based on any of the protected grounds,\textsuperscript{706} a provision which is in line with acknowledged best practice for civil proceedings.\textsuperscript{707} While the transfer of the burden of proof is necessary to ensure that victims of discrimination are able to successfully bring civil cases, shifting the burden of proof in criminal proceedings, particularly where imprisonment is possible, is likely to conflict with fair trial rights.

The legal provisions dealing with sexual harassment are inadequate. While the Sexual Offences Act 2006 criminalises sexual harassment, there is no separate civil law prohibition on such behaviour. The Employment Act simply requires employers to institute policy measures to address sexual harassment, without giving rise to individual rights for victims. Section 6 of the Employment Act defines sexual harassment as a situation in which an employer or employee:

\begin{itemize}
\item \textsuperscript{705} See above, note 697, section 3(2).
\item \textsuperscript{706} Ibid., section 5(7).
\item \textsuperscript{707} See above, note 542, Principle 21, p. 13.
\end{itemize}
a) directly or indirectly requests that employee for sexual intercourse, sexual contact or any other form of sexual activity that contains an implied or express –
   a. promise of preferential treatment in employment;  
   b. threat of detrimental treatment in employment; or  
   c. threat about the present or future employment status of the employee;

b) uses language whether written or spoken of a sexual nature;

c) uses visual material of a sexual nature; or

d) shows physical behaviour of a sexual nature which directly or indirectly subjects the employee to behaviour that is unwelcome or offensive to that employee and that by its nature has a detrimental effect on that employee’s employment, job performance, or job satisfaction.

It goes on to require employers of more than 20 staff to develop, issue and publicise a policy statement on sexual harassment. No requirement is made on organisations employing fewer than 20 persons. Interestingly, despite providing a definition of sexual harassment, the Act does not prohibit it. Under the Sexual Offences Act 2006, section 23(1) provides that any person in a position of authority or holding a public office who persistently makes sexual advances or requests which he or she knows or ought reasonably to know, are unwelcome, is guilty of the offence of sexual harassment. This offence is punishable by imprisonment of not less than three years or a fine of not less than one hundred thousand shillings, or both.708 As discussed above, in the section on Criminal Law, the section 23 definition of sexual harassment is narrower than that outlined by the Committee on the Elimination of Discrimination Against Women in General Recommendation 19.709 While the Committee has not expressly commented on this provision in its Concluding Observations, it appears that there remains a need for a civil provision on sexual harassment – particularly in relation to employment – which fully

708 See above, note 685, section 23(1).
709 See above, note 684, Para 18.
reflects the standards of the Committee’s General Recommendation 19. Due to the differences between criminal and civil trials, particularly in relation to responsibility for the bringing of an action, burden of proof, and compensation it is arguable that the existence of a criminal offence under the Sexual Offences Act does not provide access to justice or adequate remedies for victims of sexual harassment in an employment setting.

Section 29 sets out entitlements to paid maternity leave, as required by both CEDAW and ICESCR\textsuperscript{710} while, as noted above, discrimination on grounds of pregnancy is prohibited by section 5, as required by CEDAW.\textsuperscript{711} Subsection 29(1) provides that female employees are entitled to three months maternity leave with full pay. Subsection 29(2) states that a woman has the right to return to the job which she held immediately prior to her maternity leave or to a “reasonably suitable job on terms and conditions not less favourable than those which would have applied had she not been on maternity leave”. The period of maternity leave can be extended with the consent of the employer, or where a woman goes on sick leave, or, with the consent of the employer, on annual leave; compassionate leave; or any other leave.\textsuperscript{712} Women are required to give notice, in writing\textsuperscript{713} no less than seven days in advance of their intention to take maternity leave\textsuperscript{714} and may be required to produce a medical certificate.\textsuperscript{715} Subsection 29(7) protects women’s annual leave entitlement whilst on annual leave. Under subsection 29(8), male employees are entitled to two weeks paternity leave with full pay.

It is particularly welcome that the first part of section 5 (Discrimination in Employment) of the Act creates a positive duty on the Employment Ministry, labour officers and the Industrial Court to “promote equality of opportunity (...) in order to eliminate discrimination in employment”.\textsuperscript{716} Significantly, subsection 5(2) places a general obligation on employers – albeit narrower

\textsuperscript{710} See above, note 516, Article 11(2)(b) and note 513, Article 10(2).
\textsuperscript{711} See above, note 516, Article 11(2)(a).
\textsuperscript{712} See above, note 697, section 29(3).
\textsuperscript{713} Ibid., section 29(5).
\textsuperscript{714} Ibid., section 29(4).
\textsuperscript{715} Ibid., section 29(6).
\textsuperscript{716} Ibid., section 5(1).
in scope – which requires them to promote equal opportunity and “strive to eliminate discrimination in any employment policy or practice”. Further, subsection 5(4)(a) permits affirmative action measures “consistent with the promotion of equality or the elimination of discrimination in the workplace”. However, while subsections 5(1) and 5(2) create duties on the Ministry of Employment and employers to promote equality of opportunity in employment in order to eliminate discrimination, neither creates a definite obligation of positive action. Thus, it appears that while various forms of positive action are permitted, there is no requirement on either the state or employers to undertake positive action. It should be noted however, that under the National Cohesion and Integration Act, all public establishments are required to ensure representation of Kenya’s diversity and to employ no more than one third of staff from the same ethnic community.717

**Health Law**

While the non-discrimination provisions in the Constitution guarantee protection from discrimination by those providing health services and provide mechanisms for individuals to bring claims and secure remedies, the **Public Health Act 1961** itself does not contain any non-discrimination provisions.718

**Education Law**

The **Education Act 1968**, which governs primary and secondary educational institutions, contains no non-discrimination provisions and does not expressly prohibit discrimination.719 This raises some concerns about the ability of Kenya to meet its obligations to provide effective protection from discrimination under Article 26 of ICCPR and to ensure enjoyment, without discrimination, of the right to education under ICESCR.720 Similar questions are raised over Kenya’s ability to comply with the provisions relating to education found in CEDAW, CRPD and ICERD. As discussed in the introduction to this section, however, these obligations are in part discharged through the provisions in the Constitution of Kenya 2010.

717  See above, note 594, sections 7(1) and (2).
718  Public Health Act 1961 (Cap. 242).
719  Education Act 1968 (Cap. 211).
720  See above, note 513, Article 13 read with Article 2(2).
Further, as discussed above, the Children Act 2001 contains a single general provision prohibiting discrimination against children on a range of grounds which would apply in all areas of life, including in education. There is a limited degree of legal protection from discrimination in respect of higher education institutions. Public universities in Kenya are constituted via legislation which contains an identical prohibition of discrimination on grounds of ethnic origin, sect or creed in relation to admissions and appointment of academic staff at the university. For example, subsection 7(2) of the University of Nairobi Act states that admissions and appointments should be made “without distinction of ethnic origin, sect or creed and no barrier based on any such distinction shall be imposed”. It should be noted that the Universities Act and the Universities Rules (1989) contain no protection from discrimination in respect of private universities.

**Political Participation**

The Political Parties Act 2011 contains a number of provisions which seek to ensure that parties reflect Kenya’s diversity. Among the conditions for registration of a political party are that the membership of the party must reflect regional and ethnic diversity, gender balance, and must include representatives of minorities and marginalised groups. Additionally, the memberships of the governing body of the party must reflect these requirements and not more than two-thirds of the membership of the governing body can be of the same gender. Parties can be deregistered if they contravene Article 91 of the Constitution, which requires parties to respect and promote human rights, gender equality and equity, and prohibits them from seeking to advocate hatred on religious, linguistic, racial, ethnic, gender or regional basis.

721 The University of Nairobi Act 1985, (Cap. 210). See also the Egerton University Act 1987, (Cap. 214), section 4(2): “Admission to the University as candidates for degrees, diplomas, certificates or other awards of the University shall be open to all persons accepted as being qualified by the Senate, without distinction of ethnic origin, sect or creed and no barrier based on any such distinction shall be imposed upon any person as a condition of his becoming, or continuing to be, a professor, lecturer, graduate or student of the University, or of his holding any office therein, nor shall any preference be given to, or advantage be withheld from, any person on the grounds of ethnic origin, sect or creed.”

722 Political Parties Act 2011, (Cap. 11), section 7(2)(b).

723 Ibid, sections 7(2)(c) and 7(2)(d).

724 Ibid, section 21(1)(a).
They can also be deregistered if they fail to uphold national values and principles of the Constitution (provided in Article 10) which include equality and non-discrimination.\textsuperscript{725} It should be noted, however, that some smaller minority groups may be disadvantaged by the registration requirement that a party have no less than 1000 members in more than half the counties.\textsuperscript{726}

To conclude this review of Kenyan legislation related to equality, beyond the protections provided by the Constitution, the Persons with Disabilities Act and the National Cohesion and Integration Act, protection from discrimination in other legislation is patchy and inconsistent. While the general prohibition on discrimination by state and non-state actors provided by Articles 27(4) and (5) of the Constitution offers a basic level of protection – which is bolstered by the provisions in Articles 22 and 23 enabling individuals, groups of individuals and associations to bring proceedings in cases of discrimination and to receive relief including compensation – these provisions alone are insufficient to ensure that victims of discrimination are able to access justice and obtain appropriate remedies for discrimination. The primary problem in this respect is a lack of legislation defining key forms of prohibited conduct, such as direct and indirect discrimination, harassment and a failure to make reasonable accommodations, and setting out how protections against discrimination should operate in practice.

In addition to these problems, there is significant variation between provisions in existing legislation. Definitions of key concepts, forms of prohibited conduct and the treatment of protected grounds of discrimination are inconsistent. Furthermore, there are direct inconsistencies where several different statutes govern the same area of life. For example, the protection provided in private sector employment against discrimination on grounds of race and ethnicity is found in both the Employment Act and the National Cohesion and Integration Act, which contradict one another. The lack of comprehensive protection means that multiple discrimination is inadequately addressed. Finally, there are gaps, limitations and definitional difficulties in such legislation as exists, meaning that on the whole, it is inadequate to provide the comprehensive and effective protection required by Kenya’s obligations under international law.

\textsuperscript{725} Ibid., section 21(1)(d).
\textsuperscript{726} Ibid., section 7(2)(a).
The result is a legal system which provides differing levels of protection, in different areas of life and on different grounds. This means that the scope of protection available to individual victims can be unclear, which has the potential to create confusion not only for rights holders, but also for duty bearers and law enforcement agencies. Indeed, it is widely accepted that there is a close correlation between the clarity of legal rights and duties and the extent to which duty-bearers comply. The range of competing legal norms suggests that there is a need for harmonisation.

3.3 National Policies

The Kenyan government has developed a number of national policies relevant to equality and non-discrimination, including both general policies which contain strong non-discrimination themes such as the national development policy, *Vision 2030*, and policies aimed at combating discrimination against and accelerating progress of particular “vulnerable groups”, such as the *National Policy on Gender and Development*.

**Vision 2030**

Vision 2030 provides a long-term development blueprint for Kenya. It is both comprehensive and detailed. However, it provides only limited recognition of the importance of non-discrimination and racial harmony in Kenya’s near future. Section 1 of the Vision specifies an aim to introduce comprehensive policies that include the “elimination of extreme poverty and hunger; universal primary education; gender equality; reduction in child mortality; improvement in maternal health; lower HIV/AIDS and major disease incidence; environmental sustainability; and better partnerships with International development partners”. Sections 5.6 and 5.7 are of particular relevance in efforts to promote protection from discrimination, dealing respectively with “Gender; Youth and Vulnerable Groups” and “Equity and Poverty Reduction”. These sections of the Vision state that strategies will be developed with the aim of “increasing the participation of women in all economic, social and political decision-making processes”, “improving access to all disadvantaged groups (e.g. business opportunities, health and education services, housing

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and justice); “minimising vulnerability through prohibition of retrogressive practices” and “training for people with disabilities and special needs.”

**National Policy on Gender and Development**

The National Policy on Gender and Development was published in 2000.\(^{728}\) It has a number of general objectives including: to guarantee Kenyan men and women equality before the law, and to enable men and women to have equal access to economic and employment opportunities.\(^{729}\) The specific objectives of the Policy include:

- facilitate the review of laws that hinder women’s access to and control over economic resources. Undertake gender sensitization geared towards changing customs and traditions that perpetuate these hindrances;
- enhance measures that guarantee equity and fairness in access to employment opportunities, in both formal and informal sectors;
- develop and improve vocational and technical skills of disadvantaged groups, notably unemployed youth, disabled women, poor urban and rural women, and street dwellers, for improved access to employment opportunities;
- re-orientate the extension of services to emphasize gender sensitization and participatory planning, and enhancing the responsiveness of services to the needs of women;
- intensify existing programmes aimed at developing and introducing appropriate technologies targeted at the role of women in agriculture, food production, storage, processing, and preparation;
- promote gender responsive agricultural research and dissemination of agricultural research findings;


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- develop indicators to monitor the participation of women in economic development;\textsuperscript{730}
- address areas of Personal Law, Law of Succession (1981) and any other laws that discriminate against women;
- ensure protection of men and women against all forms of violence;
- promote gender sensitive research into the laws of Kenya and ensuring legal literacy amongst men and women.\textsuperscript{731}

As part of this policy, the National Commission on Gender and Development was established. It aims to be “the leading national institution central to the realisation of gender equality and equity in all aspects of development for a fair and just society”.\textsuperscript{732} Its mission is:

*To coordinate, implement and facilitate gender mainstreaming in national development through advice to the government and stakeholders, participation in policy formulation, advocacy, research, education, investigation of gender based violations, establishment of partnership, monitoring and evaluation in order to achieve gender equity and equality.*\textsuperscript{733}

The Commission has published a Gender Directory and a Desk Survey on Gender Issues in Kenya. In 2009 the Government published a Monitoring and Evaluation Framework for Gender Mainstreaming.\textsuperscript{734}

\textsuperscript{730} Ibid., pp. 9-10.
\textsuperscript{731} Ibid., p. 16.
\textsuperscript{733} Ibid.
\textsuperscript{734} Ministry of Gender, Children and Social Development, Department of Gender and Social Development, *Monitoring and Evaluation Framework for Gender and Development*, March 2009.
**Kenya National Youth Policy**

The National Youth Policy (NYP)\(^{735}\) is a framework that endeavours to address issues affecting young people. It defines youth as those 15-30 years old and acknowledges that 75% of the Kenyan population is under the age of 30. It envisions a society where youth have equal opportunity to realise their fullest potential, productively participating in economic, social, political, cultural and religious life. It recognises that many young people remain unemployed, suffer from poor health, and lack sufficient support, as well as recognising that certain sub-groups, such as young people living on the streets, young women and young persons with disability who have special needs require special attention.

The policy identifies the most important youth issues as unemployment and underemployment; health; school and college drop-outs; crime and deviant behaviour; limited sports and recreational facilities; abuse and exploitation; limited participation and lack of opportunities; limited and poor housing; and limited access to information and communication technology. The policy is underpinned by the principles and values of equity and accessibility; gender inclusiveness; respect for cultural and belief systems and ethical values; mainstreaming youth issues; and good governance.

It establishes a National Youth Council to ensure effective implementation. The Council’s mandate includes the co-ordination of youth-serving organisations, design and continuous review of the NYP, and developing an “integrated national youth development plan” in collaboration with the Ministry of Youth Affairs and Sports. The Council acts at an advisory, research and policy institution on youth affairs in the country.

**Public Sector Workplace Policy on HIV and AIDS**

The Public Sector Workplace Policy on HIV and AIDS\(^{736}\) puts in place a national policy that defines an institutional framework and intensifies intervention measures for the prevention, management, control and mitigation of impact.

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of HIV and AIDS. The policy was formulated to address the need to develop a clear, consistent, coherent and harmonised policy framework on HIV and AIDS for all public sector organisations. One of the specific objectives of the policy is to establish structures and promote programmes to ensure non-discrimination and non-stigmatisation of those with HIV and AIDS. The policy specifically states that:

- **All employees have the same rights and obligations as stipulated in the terms and conditions of service.**
- **No employee or job applicant shall be discriminated against in access to or continued employment, training, promotion and employee benefits on the basis of their actual or perceived HIV status.**
- **Employees shall not refuse to work or interact with fellow colleagues on the grounds that the latter are infected or perceived to be infected. Such refusal shall constitute misconduct.**

The National AIDS Control Council is charged, within this framework, with resource mobilisation, policy development and co-ordination of multisectoral HIV and AIDS response campaigns. In addition, the Government established a Cabinet Committee on a National Campaign against HIV and AIDS under the Chairmanship of the President.

**National Land Policy**

The National Land Policy aims to “guide the country towards efficient, sustainable and equitable use of land for prosperity and posterity”. The policy recognises that women, children, minority groups and persons with disabilities have been denied access to land rights as a result of discriminatory laws, customs and practices. It is based on certain principles, including the protection of human rights for all, gender equality and equity. The government commits to ensuring that men and women have equal access to land and to facilitating the enforcement of the legal rights of access, control, ownership and inheritance, access to credit and co-registration. The policy affirms that


access to land shall be assured for all Kenyans on the basis of equity and fairness. The policy proposes an institutional framework to oversee implementation. This includes the establishment of a Land Reform Unit within the Ministry of Lands and Housing, and a National Land Commission.

**Draft National Policy on Protecting and Assisting Internally Displaced Persons in Kenya**

The draft National Policy on Protecting and Assisting Internally Displaced Persons is a response to the complexity of challenges regarding internal displacement in Kenya. It aims to prevent future displacement, to be better prepared, to mitigate and respond to situations of displacement and to adequately address the particular needs of internally displaced persons (IDPs), as well as to find sustainable durable solutions for them, irrespective of the cause of their displacement. The IDP policy is founded on several overarching principles, chief among them being that of equality and non-discrimination. In this regard, the policy relies heavily on the United Nations Guiding Principles on Internal Displacement and on the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa.

**Draft National Policy and Action Plan on Human Rights**

In 2010 the government published a Draft National Policy on Human Rights in recognition of the need to develop a comprehensive framework to protect and promote the realisation of human rights for all Kenyans. The draft policy aims to enhance the realisation of human rights in Kenya by providing a framework for the integration and mainstreaming of human rights in development planning, implementation and evaluation in all sectors. The draft policy envisages review every five years to take into account current and future needs of Kenya in view of the social, economic, political and global dynamics in the human rights arena.


The draft policy is based on key human rights principles that include equality and non-discrimination. The key issues it addresses include discrimination against women, lack of access to justice and respect for the rule of law, abuse of children's rights, limited access to services by persons with disabilities, disparities in land ownership, inadequate health services, youth unemployment and internal displacement of persons.

**Draft National Policy on Older Persons and Ageing**

Kenya has prepared a Draft National Policy on Older Persons and Ageing\(^{741}\) in line with the Madrid International Plan of Action on Ageing and the African Union Framework Guidelines. At the time of writing, this policy is in draft form, awaiting Cabinet approval.\(^{742}\) The draft policy has the overall objective of facilitating the integration and mainstreaming of the needs and concerns of older persons in the national development process. The vision of the draft policy is to create an environment in which older persons are recognised, respected and empowered to actively and fully participate in society and development. The priority issues are to ensure that the rights of older persons are protected especially in the constitution, legal and administrative frameworks. This should include the protection of older persons from discrimination, neglect, abuse and violence.

In the draft policy, the Government recognises that the implementation of the policy will require the establishment and strengthening of institutions and organisations responsible for the welfare of older persons. It is therefore proposed in the policy document that a fully-fledged division in the Ministry responsible for social services be established. Secondly it is proposed that a National Council for Older Persons be established to spearhead activities in support of older persons in collaboration with other stakeholders.

**Other Departmental Policies**

The Official Mission and Vision of the Ministry of Education contains a number of key priorities aimed at increasing equality and addressing disadvantage.

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This includes a commitment to secure “universal primary education (UPE) by 2005 and education for all (EFA) by the year 2015” and “enhanced access, equity and quality in primary and secondary education”\textsuperscript{743} However, unlike the Ministry of Planning and National Development which is responsible for Vision 2030, it lacks a publicly accessible plan of action stating how it will achieve these goals.

The main government policy on persons with disabilities is the Persons with Disabilities Programme\textsuperscript{744} within the Gender and Social Development Department. The Programme’s objective is to identify, train and facilitate access to employment and self-employment for persons with disabilities to ensure they are economically independent and are able to participate fully in national development. It aims to achieve this objective by increasing the level of public awareness on the needs, aspirations and capacities of persons with disabilities so as to enhance their acceptance, participation and integration into society at the family, school and community levels; and enhancing the ability of rehabilitation programmes, facilities, services and delivery strategies to accommodate the needs of all children and adults with disabilities.

### 3.4 Implementation and Enforcement

Kenya does not meet its obligation to protect people against discrimination by simply prohibiting discrimination in the law. It must also ensure that the rights enshrined in laws are practical and effective, rather than theoretical and illusory. Having enshrined the right to equality in its Constitution, and provided protection against discrimination in its legislation as described above, Kenya must also put in place the legal and administrative mechanisms which guarantee victims of discrimination effective access to justice,\textsuperscript{745} appropriate remedies and accountability for its obligation to promote substantive equality.

Access to justice will only be effective where victims of discrimination are able to seek redress unhindered by undue procedural burdens or costs. Rem-


\textsuperscript{745} See, for example, Human Rights Committee, \textit{General Comment 31: The nature of the general legal obligation imposed on states parties to the Covenant}, above, note 577, Para 15.
edies must be “affordable, accessible and timely” and “legal aid and assistance” must be provided where necessary.\textsuperscript{746} Rules on standing which allow organisations to act on behalf, or in support, of victims of discrimination are particularly important in overcoming the disadvantages faced by individuals in the justice system. It is also important to allow groups of victims who have experienced similarly discriminatory treatment to bring claims as a group, if the systemic nature of discrimination is to be effectively addressed.

International human rights law requires that Kenya:

\textit{[E]nsure that individuals also have accessible and effective remedies to vindicate those rights. Such remedies should be appropriately adapted so as to take account of the special vulnerability of certain categories of person, including in particular children.}\textsuperscript{747}

It is essential that remedies are designed so as not only to address the needs of the individual bringing claim, but to address more structural causes of the discrimination experienced by the individual in the case, which are likely to affect others. In this respect, the Committee on the Elimination of Discrimination Against Women has said:

\textit{This obligation requires that States parties provide reparation to women whose rights under the Convention have been violated. Without reparation the obligation to provide an appropriate remedy is not discharged. Such remedies should include different forms of reparation, such as monetary compensation, restitution, rehabilitation and reinstatement; measures of satisfaction, such as public apologies, public memorials and guarantees of non-repetition; changes in relevant laws and practices; and bringing to justice the perpetrators of violations of human rights of women.}\textsuperscript{748}


\textsuperscript{747} See above, note 578, Para 15.

\textsuperscript{748} See above, note 746, Para 32.
Sanctions imposed on discriminators must be effective, proportionate and dissuasive. Importantly, they must serve to compensate not only material damage suffered by the victim, but also the injury to feelings caused by the particularly humiliating experience of discrimination.

In addition to judicial remedies, Kenya is required to establish effective administrative mechanisms such as a national human rights institution or an independent equality body. HRC notes that:

> Administrative mechanisms are particularly required to give effect to the general obligation to investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies. National human rights institutions, endowed with appropriate powers, can contribute to this end.

Such mechanisms should also promote respect for the enjoyment of human rights without any discrimination, review government policy, monitor legislative compliance, and educate the public. This section of the report considers the extent to which Kenya has complied with its obligation to make the rights enshrined in law effective.

**Proceedings, Access to Justice and Remedies**

Due to the range of different constitutional and legislative provisions extending some form of protection from discrimination, there is significant inconsistency between provisions governing the bringing of proceedings, access to justice and remedies. Under the Constitution – which provides a general right to protection from direct and indirect discrimination on a range of grounds in either the public or private sphere – individuals can bring a complaint seeking a range of remedies including compensation. The Constitution also provides a

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750 See above, note 578, Para 15.
number of guarantees in terms of access to justice. Under the National Cohesion and Integration Act individuals can bring complaints to the National Cohesion and Integration Commission, which can issue orders for compliance. However, there is no individual complaints procedure for victims of discrimination under either the Persons with Disabilities Act or the Employment Act, both of which provide for discrimination to be a criminal offence.

As discussed above, the Constitution of Kenya provides all persons with a right to institute court proceedings for a violation of their rights under the Bill of Rights, including the rights to equality and non-discrimination under Article 27. This includes the capacity to challenge direct and indirect discrimination by both state and non-state actors, on all grounds specifically listed under Article 27(4) and on “any ground”, a term which has yet to be defined by Kenya’s courts. Furthermore, these provisions permit proceedings to challenge violations of the specific rights set out in Part 3 of the Bill of Rights. The Constitution provides that rules regulating court proceedings must satisfy key criteria for ensuring effective access to justice, including rights of standing, provision for formalities to be kept to a minimum and a requirement that no fee can be charged to commence proceedings. It also provides a list of potential remedies in line with those required by various international treaties to which Kenya is party. Thus, the Constitution provides a potential means of redress for those suffering discrimination by the state and by individuals, on a range of grounds across a range of areas of life.

In addition, the two specific anti-discrimination laws discussed above provide for enforcement in respect of violations of the rights contained therein. There are no provisions for individual victims of discrimination or interested parties to bring civil proceedings against an alleged discriminator under the Persons with Disabilities Act, which instead creates criminal offences for violations of the rights provided in the Act. Under subsection 26(1), it is an offence for any person to fail to comply with an adjustment order; contravene the prohibition on discrimination in employment; deny entry to premises or use of services or amenities on grounds of disability alone; and discriminate against a person with disability on the ground of any ethnic,

752 See above, section 3.2.1.
753 See above, note 538, Article 22(3).
754 Ibid., Article 23(3).
communal, cultural or religious custom or practice. Subsection 26(2) establishes minimum fines and sentences for offences, while under subsection 26(3), any person found guilty of an offence may also be ordered to pay the injured person compensation. In addition, subsection 25(3) provides that any person denied entry to premises, or use of services or amenities on sole grounds of disability has the right to recover damages in any court of competent jurisdiction. While provisions requiring the payment of compensation to victims of discrimination are welcome, the absence of measures providing for victims to bring complaints raises concerns over the extent to which the Act complies with Kenya’s obligations to ensure that “individuals also have accessible and effective remedies”.

Under subsections 43(1) and (2) of the National Cohesion and Integration Act, any one or more persons may complain to the National Cohesion and Integration Commission of a contravention of the Act. Subsection 43(3) states that complaints may be brought against individuals and against corporate or unincorporated bodies of persons. Subsection 43(4) states that a complaint need not relate exclusively to the complainant. The sections of the Act governing enforcement proceedings set out a procedure which in the first instance is based on conciliation, and where this is “inappropriate”, a hearing may be sought by the complainant, a request with which the Commission must comply. In cases which proceed to a hearing, where the Commission finds a complaint of discrimination proven, it may issue a compliance order; and where such an order is not complied with, the Commission may refer to a magistrates’ court for an order requiring such compliance. While this is welcome, there is a risk that the power to issue compliance orders could be interpreted narrowly to the effect of requiring a discriminator to amend or reverse their discriminatory practice in respect of the complainant alone. This would ignore the need to ensure that remedies address systemic discrimination. Further, such orders would not address the need for reparation to victims of discrimination for harm suffered in the form of “financial compensation for damage, material or moral, suffered by a victim, whenever appropriate.”

As discussed above, the provisions regarding enforcement in the Employment Act – the only other legislation with substantial non-discrimination

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755 See above, note 578, Para 15.

provisions – do not allow individual complaints or remedy. Rather, the Act provides that those found to have committed discrimination will be guilty of a criminal offence. Subsection 5(6) states that contravention of the provisions elsewhere in section 5 (discrimination in employment) constitutes an offence, while section 48 provides that any person found guilty of an offence under the Act for which no penalty is expressly provided (which includes discrimination), is liable to a fine and/or term of imprisonment not exceeding one year. As with the Persons with Disabilities Act, the lack of civil complaints mechanisms for victims of discrimination raises concerns over the extent to which the Act complies with Kenya’s obligations to ensure that “individuals also have accessible and effective remedies”. Subsection 5(7) of the Act provides that the burden of proof where contravention is alleged lies with the employer, who must prove that the discrimination did not take place as alleged, and that the act or omission is not based on any of the protected grounds, a provision which is in line with acknowledged best practice for civil proceedings concerning discrimination. While the transfer of the burden of proof is necessary to ensure that victims of discrimination are able to successfully bring civil cases, shifting the burden of proof in criminal proceedings as provided in this case, particularly where imprisonment is possible, contradicts basic principles of criminal law and is likely to conflict with fair trial rights.

**Legal Aid and Assistance**

The National Legal Aid (and Awareness) Pilot Programme (NALEAP) was launched on 18 September 2008 with the objective of improving access to justice in Kenya. A Steering Committee appointed by the president was established in late 2007 and includes representatives from a number of government departments, the Law Society of Kenya and a number of civil society organisations. The establishment of the NALEAP is a positive de-

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757 See above, note 578, Para 15.
758 See above, note 697, section 5(7).
development and represents a significant step in addressing some of the barriers preventing access to justice among the poor. However, the pilot for the programme is limited in scope, both geographically and thematically. At present, the scheme is being piloted in five urban centres, each of which is focused on one area of law (for example family law, criminal law, or capital offences). It is a cause of concern that the scheme does not specifically cover anti-discrimination law, particularly given the strong link identified in this report between discrimination and poverty. There is a significant risk, therefore, that individual victims of discrimination will remain unable to access their rights to be free from discrimination, which have been so carefully protected in the Kenyan legal system.

**Enforcement and Implementation Bodies**

In addition to the National Cohesion and Integration Commission and the National Council for Persons with Disabilities discussed in section 3.2.3 above, a new body – the National Gender and Equality Commission (NGEC) was established in August 2011 under the National Gender and Equality Commissions Act 2011, pursuant to Article 59 of the Constitution. The functions of NGEC are to:

(a) promote gender equality and freedom from discrimination in accordance with Article 27 of the Constitution;
(b) monitor, facilitate and advise on the integration of the principles of equality and freedom from discrimination in all national and county policies, laws, and administrative regulations in all public and private institutions;
(c) act as the principal organ of the State in ensuring compliance with all treaties and conventions ratified by Kenya relating to issues of equality and freedom from discrimination and relating to special interest groups including minorities and marginalized persons, women, persons with disabilities, and children;
(d) co-ordinate and facilitate mainstreaming of issues of gender, persons with disability and other marginalised groups in national development and to advise the Government on all aspects thereof;
(e) monitor, facilitate and advise on the development of affirmative action implementation policies as contemplated in the Constitution;

(f) investigate on its own initiative or on the basis of complaints, any matter in respect of any violations of the principle of equality and freedom from discrimination and make recommendations for the improvement of the functioning of the institutions concerned;

(g) work with other relevant institutions in the development of standards for the implementation of policies for the progressive realization of the economic and social rights specified in Article 43 of the Constitution and other written laws;

(h) co-ordinate and advise on public education programmes for the creation of a culture of respect for the principles of equality and freedom from discrimination;

(i) conduct and co-ordinate research activities on matters relating to equality and freedom from discrimination as contemplated under Article 27 of the Constitution;

(j) receive and evaluate annual reports on progress made by public institutions and other sectors on compliance with constitutional and statutory requirements on the implementation of the principles of equality and freedom from discrimination;

(k) work with the National Commission on Human Rights, the Commission on Administrative Justice and other related institutions to ensure efficiency, effectiveness and complementarity in their activities and to establish mechanisms for referrals and collaboration in the protection and promotion of rights related to the principle of equality and freedom from discrimination;

(l) prepare and submit annual reports to Parliament on the status of implementation of its obligations under this Act;

(m) conduct audits on the status of special interest groups including minorities, marginalised groups, persons with disability, women, youth and children;
(n) establish, consistent with data protection legislation, databases on issues relating to equality and freedom from discrimination for different affected interest groups and produce periodic reports for national, regional and international reporting on progress in the realization of equality and freedom from discrimination for these interest groups;
(o) perform such other functions as the Commission may consider necessary for the promotion of the principle of equality and freedom from discrimination; and
(p) perform such other functions as may be prescribed by the Constitution and any other written law.

Thus, the Commission has a range of powers and functions in respect of the rights to equality and non-discrimination on all grounds specified under Article 27(4) of the Constitution. Under section 26, the Commission has a range of general powers, including powers to: (a) issue summons, compel attendance and interview any person or group of persons; (b) require that statements be given under oath or affirmation; (c) requisition reports, records and documents and enter any premises in the course of investigations; (d) adjudicate on matters relating to equality and freedom from discrimination; (e) conduct audits of any institution to establish the level of compliance with the regard to integrating the principle of equality and equity in its operations; and (f) require any public or private institution report on matters relating to the institution’s implementation of the principle of equality.

A number of the functions set out in section 8 are worthy of note. Significantly, under paragraph (f), the Commission has powers to investigate either on its own initiative or on the basis of complaints “any matter in respect of violations of the principle of equality and freedom from discrimination”, a critical function in terms of effective access to justice for victims of discrimination. The Act does not grant the Commission powers to order redress or compensation for victims of discrimination. Instead, section 41 provides the Commission with five possible courses of action following the consideration of a complaint or an investigation, including referral to the Director of Pub-

761 National Gender and Equality Commissions Act 2011, (Cap. 15), section 8.
762 Ibid., section 26.
lic Prosecutions, should the investigation reveal a criminal offence, or to any other relevant institution; recommend to the complainant a course of other judicial redress; recommend other appropriate methods of settling the complaint or obtaining relief; provide a copy of the inquiry report to all interested parties, and submit summonses as it deems fit in fulfilment of its mandate.

In addition to its power to investigate and hear complaints, the Commission has a range of policy functions, including monitoring integration of the principles of equality and non-discrimination in policies, laws and regulations; monitoring and ensuring compliance with Kenya’s international obligations on equality; mainstreaming equality concerns in national development; and monitoring and facilitating the development of affirmative action policies. Significantly, the Commission is mandated to work with “other relevant institutions” in the “development of standards for the implementation of policies for the progressive realisation of the economic and social rights specified in Article 43 of the Constitution”, a power which reflects the importance placed on the right to non-discrimination by the CESCR, which has stated that “non-discrimination is an immediate and cross-cutting obligation” in respect of economic, social and cultural rights.\textsuperscript{763}

\textit{Enforcement through the Courts}

While a number of individuals and organisations have instituted cases on human rights violations before the courts, few have concerned the rights to equality and non-discrimination. Those cases which have raised equality arguments have mainly relied upon constitutional provisions in the 1963 and 2010 Constitutions. There has been little litigation based on Kenya’s two pieces of specific anti-discrimination legislation (the Persons with Disabilities Act and the National Cohesion and Integration Act) or the equality provisions of the Employment Act. The quality of the judgements in cases concerned with equality is mixed.

\textit{Cases Brought under the Constitution of Kenya 1963}

Among the most significant cases brought under section 82 of the previous Constitution is \textit{Rangal Lemeiguran & Others v Attorney General and Others}\textsuperscript{764}

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\textsuperscript{763} See above, note 547, Para 7.

\textsuperscript{764} \textit{Rangal Lemeiguran & Others v Attorney General and Others}, Miscellaneous Civil Application 305 of 2004, High Court, 18 December 2006.
commonly known as the *Il Chamus* case. The Il Chamus, an indigenous minority community in Kenya, sought a declaration from the Court to have a special nomination seat in the National Assembly. The applicants argued that their rights as enshrined in the Bill of Rights, including the right to equal treatment, would continue to be violated if they did not have representation in Parliament. In giving an affirmative decision, the Court echoed the principles in a previous ruling by Ringera J, in *Njoya & 6 Others v AG & Others* (No. 2), which stated that:

> The concept of equality before the law, citizens rights in a democratic state and of the fundamental norm of non-discrimination all call for equal weight for equal votes and dictate that minorities should not be turned into majorities in decision making bodies of the State (...) However, that cannot be the only consideration in a democratic society. The other consideration is that minorities of whatever hue and shade are entitled to protection. And in the context of Constitution-making it is to be remembered that the Constitution is being made for all, majorities and minorities alike and, accordingly, the voices of all should be heard.\(^{765}\)

Under the 1963 Constitution, the provision on anti-discrimination, Article 82(4), contained exclusions for all matters of personal law, including “adoption, marriage, divorce, burial, devolution of property on death”, as well as for all systems of customary law. Despite these exclusions and the tendency towards gender discrimination in succession cases decided under these customary systems, a trend in the jurisprudence in the years immediately before the adoption of the new Constitution 2010 began to protect the rights of female children to an equal share of inheritance.

The most significant of these was *Rono v Rono and Another*\(^{766}\) in which the Court of Appeal overturned a previous decision which granted more land to the deceased’s sons, instead providing equal shares to all children. In in-

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\(^{765}\) *Njoya & 6 Others v Attorney General & 3 Others (No 2)*, Miscellaneous Civil Application 82 of 2004, High Court, 25 March 2004, pp. 687, 688, per Ringera, J.

interpreting the relevant provisions of the Succession Act (sections 32 and 33 which allow customary law to apply to the division of agricultural land and livestock) the Court stated that it must consider its role as set out in section 3 of the Judicature Act, which allows the Court to be guided by customary law so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law. In determining whether customary law should apply to the division of property under the Succession Act in this case the Court considered the constitutional prohibition on discrimination in Article 82 and the anti-discrimination provisions of the Universal Declaration of Human Rights, ICESCR, ICCPR, CEDAW and the African Charter on Human and Peoples’ Rights. This judgement was followed in later cases including *Andrew Manunzyu Musyoka (Deceased)*\(^767\); *Teresia Wanjiru Macharia v Kiuru Macharia and Phyllis Njeri Ngana*\(^768\); *In the Matter of the Estate of Mugo Wandia (deceased)*\(^769\); and *Elieen Kurumei and Mary Joan Cheono v Philip Tiren, James Tiren and Thomas Tiren*.\(^770\) In the latter case the judge rebuked the sons who had attempted to disinherit their sisters by explaining the content of international law on discrimination:

*I have referred to those instruments with the view of putting the respondents in the right perspective as to how to regard women dependants/children of their father. It is hoped that that has persuaded them to regard their sisters as the law treats them.*\(^771\)

*Rono v Rono* was also followed *In the Matter of the Estate of Lerionka Ole Ntutu*\(^772\) in which the judge stated that Article 82(4) of the Constitution “was not and cannot have been made so as to deprive any person of their social and

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\(^767\) *Andrew Manunzyu Musyoka (Deceased)*, Succession Cause 303 of 1998, High Court, 15 December 2005.


\(^770\) *Elieen Kurumei and Mary Joan Cheono v Philip Tiren, James Tiren and Thomas Tiren*, Succession Cause 52 of 1994, High Court, 28 July 2010.

\(^771\) *Ibid.*, per Mwilu, J.

legal right only on the basis of sex. Finding otherwise would be derogatory to human dignity and equality amongst sex universally applied.”

In other areas the response of the court to discriminatory customary law has been mixed. In relation to the custody of children, the court in S.O v L.A.M\(^{773}\) stated that it was relevant for the trial magistrate to refer to Article 16 of CEDAW and Articles 3 and 14 of the African Charter on the Rights and Welfare of Children. The court stated that the custom of the Teso that children belonged to the father should not be taken into account as mothers would be discriminated against if such a custom were applied. The court noted that the principles of the African Charter on the Rights and Welfare of Children were relevant as they had been domesticated through the Children Act. In contrast, in relation to customary burial, the court in Salina Soote Rotich v Caroline Cheptoo and 2 Others\(^{774}\) found that while Keiyo burial customs discriminate against women, as a daughter has no role to play in her father’s funeral, they are removed from the operation of the non-discrimination provision in the Constitution by Article 82(4)(b) which excludes laws that make provision with respect to burial. It should be noted that this approach contrasts with that taken in the succession cases above. The judge in this case stated that the decision in Rono v Rono was irrelevant to the proceedings under consideration, as it dealt with succession and that burial and succession have no correlation in law.

In another positive judgement on the scope of the limitations under Article 82(4), George Gitau Wainaina v Rose Margaret Wangari Wainaina\(^{775}\), the court found that provisions of the African Christian Marriage and Divorce Act, which required African Christians to file divorce cases in lower courts while other ethnic groups could file for divorce in the High Court, was discriminatory on the grounds of race. This treatment was contrary to the protection against discrimination in Article 82 of the Constitution notwithstanding Article 82(4)(b) which stated that the prohibition of discrimination does not


\(^{774}\) Salina Soote Rotich v Caroline Cheptoo and 2 Others, Civil Appeal 48 of 2010, High Court, 28 July 2010.

\(^{775}\) George Gitau Wainaina v Rose Margaret Wangari Wainaina, Divorce Cause 72 of 2002, High Court, 18 November 2004.
apply to laws with respect to divorce. Discussing the effect of the exception in Article 82(4)(b), Kubo, J stated:

> At first sight the discrimination entailed in sections 3, 14 and 15 of the African Christian Marriage and Divorce Act would appear permissible under subsection 4(b) of the Constitution quoted above, but closer scrutiny persuades me otherwise. There is nowhere in the said subsection where discrimination is permitted. (...) It seems to me that the provisions contained in section 3, 14 and 15 of the African Christian Marriage and Divorce Act, as read with section 3 of the Matrimonial Causes Act, are in breach of the Constitutional provisions barring discrimination on racial grounds, are obsolete and out of step with present day Kenya and in need of urgent review.\(^{776}\)

A less positive example of judicial treatment of the concepts of equality law is *Rose Moraa and Another v Attorney General*\(^ {777}\) in which the court had to consider whether the provisions of the Children Act which state that the mother (and not the father) bears parental responsibility for a child born to unmarried parents were in conflict with the right to non-discrimination provided in Article 82 of the 1963 Constitution. First, the court found that these provisions were covered by the exemption for matters of personal law contained in Article 82(4). Second, the court stated that it would not expand the grounds of discrimination covered by Article 82 to include illegitimacy. In reaching this decision, the court stated that when the legislature expanded the protected grounds to include sex in 1997 it had deliberately chosen not to include other grounds and to do so now would amount to unacceptable judicial activism. Third, the court found that the provisions of the Children Act on the children of unmarried mothers did not deny equal protection of laws as there was a real and substantial difference between the situation of children born within and outside wedlock. Fourth, the court also stated that the difference of treatment was for a reasonable and legitimate purpose – that of ensuring there is no gap in parental responsibility if the father cannot be identified. In contrast to its approach in other cases, where it discussed international law

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\(^{776}\) *Ibid.*, p. 9, per Kubo, J.

\(^{777}\) *Rose Moraa and Another v Attorney General*, Civil Case 1351 of 2002, High Court, 1 December 2006.
norms in the interpretation of Article 82, the court in this case stated that international law was not relevant to interpretation as there was no ambiguity. This said, the court did note its view that its judgement would not be in conflict with international law in any event as this allows the state a margin of appreciation and allows differential treatment that is reasonable and for a legitimate purpose.

In another problematic case discussed above – *Hersi Hassan Gutale and Abdullahi Mohamed Ahmed v Principal Register of Persons and the Attorney-General*, the court found that requiring all persons of Somali origin to prove they were legally in Kenya and denying them “new generation” identity cards did not constitute discrimination. In finding for the state and against the claimants, the court failed to consider whether these measures were a proportionate response to the threat to national security posed by the influx of Somali refugees, instead suggesting that whatever action a government takes in relation to a legitimate security threat would be considered justified. In another disappointing case discussed above, *R.M. v Attorney General & 4 Others*, the court found no discrimination against the applicant, an intersex person. It noted that intersex was not a protected ground and instead stated that all intersex persons could be considered either male or female, depending on their particular circumstances.

Worryingly, two cases concerning discrimination in relation to the treatment of companies and employers demonstrate that in some instances claimants, lawyers and, in the second case, even the judiciary may have misinterpreted key concepts in equality law, including in particular the need for prohibited conduct to be related to a prohibited ground of discrimination. *James Nyasora Nyarangi & 3 Others v The Attorney-General* involved three bus operators and a commuter who claimed that by-laws which prevented bus companies from entering the city of Nairobi from particular streets were void for being incompatible with the prohibition on discrimination contained in the Constitution. The bus operators claimed that as other operators were allowed to

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enter the city centre the fact they were not constituted discrimination, but failed to identify a ground on which this differential treatment was based. The court found that the by-laws did not amount to discrimination as any differential treatment was justified by the need to reduce congestion in the central business district and that in any event they did not discriminate on the basis of a prohibited ground. In *Law Society of Kenya v Attorney-General* \(^{781}\), however, the court found that two provisions of the Work Injury Benefits Act 2007 discriminated against employers as they provided rights to employees that were not provided to employers. Section 21 allowed employees to have a medical practitioner of their choice present at an examination but did not afford such rights to employers. Section 52 gave employees the right to appeal to the Industrial Court against a decision but did not grant such rights to employers. It should be noted that, in finding these two sections in violation of Article 82 of the Constitution of Kenya 1963, the court did not discuss whether these employers had been discriminated against on the basis of a prohibited ground, despite the fact that Article 82(4) did not contain a ground of employment status or similar. Nor did Article 82(4) provide an open list whereby an argument could be made that the treatment of employers was based on an “other status” protected therein. Thus, it appears that the court found evidence of discrimination without finding a connection between the treatment of those affected and a protected ground of discrimination, a flawed interpretation of the Constitutional provision. The court did not consider whether the treatment was for a legitimate purpose and proportionate, despite the Attorney-General and the intervening Trade Unions’ submissions regarding the purpose of the law and its importance in providing protections needed by employees.

*Cases Brought under the Constitution of Kenya 2010*

Although the Constitution of Kenya 2010 has only been in operation since August 2010, there have already been some significant judgements concerning discrimination under Article 27(4). Of particular note is *Centre for Rights Education and Awareness (CREAW) & 7 Others v the Attorney-General* \(^{782}\) (discussed in detail above) in which the court found that a *prime facie* case had

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\(^{782}\) *Centre for Rights Education and Awareness (CREAW) & 7 Others v the Attorney-General*, Petition 16 of 2011, High Court, 3 February 2011.
been established that Presidential nomination of the Chief Justice, Attorney-General, Director of Public Prosecutions, and Controller of the Budget were unconstitutional on a number of grounds, including that they discriminated against women due to the fact that all appointees were men.

In addition to this, a number of positive judgements in relation to succession have also been handed down. These reflect the fact that the discrimination provision in the new Constitution does not contain any exemptions for personal or customary law. In the Matter of the Estate of M’mukindia M’ndegwa (deceased)\textsuperscript{783} Lady Justice Mary Kasango found in favour of the wife and redistributed lands of the deceased to ensure his wife and daughters received a fair share. The judge cited the anti-discrimination provisions in Article 27(1)-(5) of the Constitution which include the grounds of race, sex, pregnancy and marital status and Article 60(f) which specifically aims to eliminate gender discrimination in law, custom and practices related to land and property. Similar judgements can be seen In the Matter of the Estate of Mburugu Nkaabu (deceased)\textsuperscript{784}; In the Matter of the Estate of the Lawrence Douglas Magambo\textsuperscript{785}; and In the Matter of the Estate of M’miriti MaAtune (deceased).\textsuperscript{786}

\begin{itemize}
\item \textsuperscript{783} In the Matter of the Estate of M’mukindia M’ndegwa (deceased), Succession Cause 29’B' of 1988, High Court, 22 October 2010.
\item \textsuperscript{784} In the Matter of the Estate of Mburugu Nkaabu (deceased), Succession Cause 206 of 1995, High Court, 22 October 2010.
\item \textsuperscript{785} In the Matter of the Estate of the Lawrence Douglas Magambo, Succession Cause 309 of 2002, High Court, 22 October 2010.
\item \textsuperscript{786} In the Matter of the Estate of M’miriti MaAtune (deceased), Succession Cause 119 of 2003, High Court, 22 October 2010.
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