EXECUTIVE SUMMARY

On 13 December 1963, Kenya’s first Prime Minister and President, Jomo Kenyatta, spoke at the opening of parliament of the newly independent state. He called on the people to adopt the spirit of Harambee, meaning “all pull together” in Swahili. Kenyatta used Harambee as a call to action, urging the people to unite to help build the newly independent nation. Nearly half a century later, on 27 August 2010, Kenya’s third President, Mwai Kibaki, speaking at the promulgation of the country’s new Constitution, once more evoked the spirit of Harambee, calling for Kenyans to “embrace a new national spirit; a spirit of national inclusiveness, tolerance, harmony and unity (...) to build a nation that will be socially and economically inclusive and cohesive where all have equal access and opportunities to realize their full potential”1.

Yet much of Kenya’s history in the intervening period was in fact marked by growing inequality and division. Women and sexual and gender minorities were oppressed by traditional social and religious attitudes to gender which, translated into discriminatory laws and discrimination by both the state and private actors, denied them equal participation in civil, political, economic, social and cultural life. For many years, persons with disabilities, persons with albinism and persons living with HIV and AIDS lacked both legal protection from discrimination and the kinds of reasonable accommodation required to allow them to participate fully in life on an equal basis with others.

Most damagingly, income and wealth inequalities became entrenched. These inequalities were reflected in wide disparities in the level of development of different regions and – hence – between the country’s different ethnic groups. Public life came to be dominated by ethnicity, as perceptions of a link between the ethnicity of a party’s supporters and the allocation of public resources fuelled a tendency for Kenyans to identify themselves by reference to their ethnic identity. In 2008, following a tightly contested election, the resulting tensions erupted into ethnic violence, leaving over 1000 dead and many thousands more displaced.

In response to this crisis, the Kenya National Dialogue and Reconciliation (KNDR) process, led by a panel of prominent African leaders, was estab-

lished, setting out a programme for reconciliation, at the centre of which was constitutional and legal reform. On 4 August 2010, this process came to an end as the people of Kenya voted overwhelmingly to adopt the Constitution of Kenya 2010.

A commitment to equality is at the heart of this new Constitution: the preamble recognises “the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law” and measures to respect, protect and fulfil the rights to equality and non-discrimination have a prominent position both in the Bill of Rights and elsewhere in the Constitution. The Constitution represents the commitment of the Kenyan people to creating a more equal society and provides a concrete foundation for achieving this goal. Acknowledging this accomplishment, this report assesses the extent to which people in Kenya enjoy the rights to non-discrimination and equality by examining both evidence of the lived experience of discrimination and the effectiveness of the current legal, policy and enforcement framework.

The report has four parts. Part 1 provides an introduction to the conceptual framework which has guided the work, an overview of the demographic, economic, social, political and historical context of discrimination and inequality in Kenya, and an introduction to the themes which have been identified as running throughout the report. Part 2 discusses the principal patterns of discrimination and inequality affecting different groups in Kenya. Part 3 analyses the legal and policy framework as it relates to discrimination and inequality. Part 4 contains conclusions and recommendations, drawn from an analysis of both the patterns of discrimination and inequality examined in Part 2 and the gaps, weaknesses and inconsistencies in the legal and policy framework identified in Part 3.

One of the principal conclusions arising from Part 2 of this report is that poverty and ethnicity are factors of critical importance in establishing the context in which discrimination and inequality arise in Kenya. However, each is also a ground of discrimination and inequality in its own right. The poor do not enjoy equality in access to public services, cannot access basic amenities and have lower levels of participation in public life. Enrolment, attendance and completion rates in education vary substantially according to income. Similarly, access to healthcare is highly unequal, leading to inequalities in health
outcomes. In addition, as stated by a coalition of Kenyan NGOs in a parallel report to the Committee on Economic, Social and Cultural Rights (CESCR):

*Many Kenyans continue to face ill-treatment just because they are poor and unemployed. Discrimination abounds for poor people (...) local government authorities and police disproportionately harass the poor.*

Section 2.2 of the report reveals that regional inequalities and direct and indirect discrimination by state actors on grounds of *ethnicity* have far-reaching consequences on the ability of particular ethnic groups to participate in society on an equal basis with others. It identifies significant regional – which in the Kenyan context means also ethnic – disparities across a range of economic and infrastructure indicators, which have a direct impact on access to employment. Similarly, the section investigates the presence of a “Red Strip” covering North Eastern Province and the arid districts of Rift Valley and Eastern Provinces, where educational participation and outcomes, and access to healthcare and health outcomes are substantially below the national average.

In addition to the overarching patterns of discrimination and inequality arising from ethnicity identified in section 2.2, the report identifies a number of racial or ethnic groups with particular vulnerabilities. Section 2.2.1 examines the situation of Kenya’s *indigenous communities* – a contentious definition, as “in Kenya all Africans are indigenous to the country, as many Kenyans are inclined to point out”. The report takes a view that the concept of indigenerity should be associated with both the “negative experience of discrimination and marginalisation from governance” and the “positive aspects of being holders of unique knowledge which has emerged through the long-term man-

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agement of arid areas and tropical forest ecosystems". Thus, while the issues affecting indigenous groups vary between communities, this section of the report asserts that some general patterns of discrimination and inequality are worth highlighting. The report concludes that many indigenous communities have been alienated from their traditional lands, in the past as a result of annexation and relocation, and more recently, as a result of government decisions on conservation and preservation of the environment. The report also finds that, in most cases, indigenous communities are not active in the formal economy, lack access to basic services such as education and healthcare, and have often been blocked from living on or accessing their traditional lands, which impacts significantly upon their capacity to enjoy their religious, cultural and social rights. In addition, it finds that while in most cases indigenous communities are keen to preserve aspects of their traditional lifestyles, in others, the principal concerns are about unequal access to employment, education and healthcare.

Section 2.2.2 reports that the Somali population – a group including both Kenyan citizens and refugees – suffer a range of discriminatory treatments and inequalities, largely arising from actions of the state. The section claims that there is substantial evidence that Kenyans of Somali origin suffer direct discrimination in respect of citizenship and access to identity documents. Furthermore, some of those interviewed for this study stated that government officials pursued an unofficial policy of denying identity cards to Kenyan Somalis in order that they could not be counted in the census. Interviewees suggested that there was a deliberate attempt to under-count the Somali population, thus reducing the development funds allocated to areas where they were in the majority, and limiting their influence in elections. The research also discovered evidence that those of Somali origin are vulnerable to harassment and abuse by state authorities ostensibly seeking to combat terrorism. Furthermore, in common with other vulnerable ethnic groups, the large Somali population dwelling in the arid North Eastern Province, close to the border with Somalia and Ethiopia, suffers because of the significant poverty and marginalisation of the region in which they live: the province has the

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poorest quality land, highest unemployment, poorest educational outcomes and lowest level of access to healthcare in the country.

Like the ethnic Somali who became Kenyan citizens upon independence in 1963, the Nubian population in Kenya is a legacy of the country’s colonial past. As a result of successive waves of conscription into the army, large numbers of Nubians from the Nuba Mountains in Sudan and what is now the Central African Republic lived and retired in Nairobi and the north of the country where they continue to live on the margins of society. The Nubians are not officially recognised and remain de facto stateless as a result of discrimination in access to citizenship, including arbitrary denial of, and repeated delays in the provision of passports. The Equal Rights Trust (ERT) and the Kenya Human Rights Commission (KHRC) gathered evidence that, in part as a result of their statelessness, Nubians find it difficult to acquire land and property, or access employment and government services. Those interviewed also stated that they were being subjected to curfews, police harassment, arbitrary detention and extortion. The majority of Nubians are forced to live in temporary settlements and are more likely to suffer extremes of poverty, including the disproportionate effect of slum clearances and forced evictions.

This study found that relations between men and women in Kenya remain to date deeply unequal and that women remain subject to serious disadvantage and discrimination in many spheres of life. The research identified discriminatory laws, and laws which are applied in a discriminatory manner, in respect of tax, succession, marriage and sexual offences. In addition, it contributed to the existing evidence of women’s exposure to gender-based violence and harmful cultural practices, legitimated by a cultural environment based on patriarchal attitudes. Section 2.3 of the report shows that women are affected by poorer access to employment, lower rates of pay and higher unemployment, and that they experience significant inequality of opportunity and outcome in education and healthcare. The section concludes that despite government efforts to address gender inequality, women are more exposed to poverty and landlessness, as a combined result of these other factors.

Section 2.4 of the report demonstrates that discrimination against lesbian, gay, bisexual, transgender and intersex (LGBTI) persons is a serious problem in Kenya. While there are substantial differences between the situations, vulnerabilities and disadvantages faced by different groups and individuals within the “LGBTI community”, the research indicates that there
are also a number of common problems facing all LGBTI persons. LGBTI persons do not enjoy explicit protection from discrimination under Kenyan law, as Article 27(4) of the Constitution providing the right to equality does not include either sexual orientation or gender identity. In addition, the research confirmed that many LGBTI individuals are subject to high levels of stigma, which contributes to a climate where LGBTI persons are disproportionately vulnerable to physical violence, verbal abuse, destruction of property, and in some cases murder. Furthermore, the stigma combined with criminalisation of male homosexual conduct means that LGBTI persons are vulnerable to police harassment and extortion. The section also shows that LGBTI persons suffer discrimination in – and inequality of access to – public services and employment.

As with LGBTI persons, it should be recognized that discussing discrimination and inequality affecting all persons with physical and sensory disabilities – as section 2.5.1 seeks to do – limits the extent to which the report is able to address the specific problems which affect those with different forms of disability. Again, however, the research undertaken for the report provided significant evidence of common problems. The report welcomes the enhanced rights of all disabled persons following the enactment of the Persons with Disabilities Act in 2003. Yet it establishes that despite recent progress in terms of legal protections, persons with disabilities continue to face discrimination and disadvantage arising from their disability. The research found that access to assistive devices is poor, creating substantial problems for those with disability, particularly in remote, rural or marginalized areas. It also revealed that persons with disability meet barriers to education. It leads to the conclusion that access to employment for persons with disabilities is limited not only by the lower educational status, but also by prejudice among employers regarding the capacities of persons with disabilities and the lack of reasonable accommodations in the workplace. Further, the report finds that many persons with disabilities live in poverty, in large part as a result of their lack of access to employment and the absence of welfare support.

In section 2.5.2, the report examines the situation of those living with mental and intellectual disabilities, a difficult task in light of the limited published information available on the subject. The report finds that despite the fact that persons with mental and intellectual disabilities are protected by

the equality and anti-discrimination provisions of the Persons with Disabilities Act and the Constitution, there remain several laws which discriminate against them. The report goes on to identify three further problems affecting this group: a societal approach to mental and intellectual disabilities which is not based on human rights and equality; the denial of legal capacity; and the failure to facilitate Augmentative and Alternative Communication.

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

Section 2.6 of the report indicates that albinism is the subject of significant superstition in Kenya, which in some cases has led to violence against those with the condition. The report also identifies serious problems in access to education for children with albinism as a result of schools’ failure to take steps to accommodate their visual impairments, and that the categorisation of persons with albinism as blind has the effect of denying them access to appropriate healthcare, which addresses their particular problems, such as photo-sensitivity.

Section 2.7 addresses discrimination and inequality experienced by Kenya’s 1.3 - 1.6 million persons living with HIV. The government is attempting, through legislative, policy and healthcare initiatives, to ameliorate the situation of persons living with HIV and AIDS, alongside efforts to raise awareness and reduce transmission rates. The HIV and AIDS Prevention and Control Act adopted in 2006 prohibits discrimination on the grounds of “actual, perceived or suspected HIV status” in employment, education, transport or habitation and healthcare services. However, the research revealed that stigma surrounding HIV/AIDS and prejudice against people living with HIV remains a significant problem, particularly in rural or marginalised areas of the country. This section of the report provides substantial evidence of inequality in the

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7 *HIV and AIDS Prevention and Control Act 2006*, sections 31, 32, 33(1) and 36, respectively.
workplace, arising in many cases because of discrimination or a combination of discrimination and poor health. It also presents evidence of discrimination and prejudice impacting on access to education and healthcare, the latter a problem with particularly serious consequences in terms of health outcomes.

Thus, the report provides evidence of significant discrimination and inequality on a large number of grounds, occurring in all areas of civil, political, economic, social and cultural life. It highlights two factors – poverty and ethnicity – as most critical in determining a person’s exposure to disadvantage, and their vulnerability to other forms of discrimination. It also highlights the connections between different forms of discrimination and disadvantage, and provides examples of multiple discrimination and the complex interaction between social inequality and status-based inequalities. Moreover, it presents consistent evidence of the role of the state in perpetuating discrimination, both through maintaining discriminatory laws and through failure to effectively prohibit discrimination by state agents. Finally, it leads to the conclusion that despite great progress in the adoption of legislation prohibiting discrimination in the last decade, important gaps in the law remain, and enforcement is poor.

**Part 3** discusses the legal and policy framework as it relates to combating discrimination and promoting equality. This includes an analysis of Kenya’s international and regional legal obligations, the treatment of equality and non-discrimination in the Constitution, specific anti-discrimination laws, non-discrimination provisions in laws governing particular areas of life and government policies. In addition to discussing the content of these laws and policies, Part 3 also reviews evidence of their enforcement both through specialised institutions and through the courts.

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8 The term “legal and policy framework” is used to indicate that this section of the report examines the whole system of laws, policies and enforcement related to addressing discrimination and inequality. In this respect, it denotes an assessment which covers: (a) all laws related to discrimination and inequality, including international instruments to which the state is party, the Constitution, specific anti-discrimination legislation and legislative protections from discrimination and measures to promote equality found in other areas of law; (b) non-legislative policies which have an impact in addressing discrimination or inequality, either directly or indirectly; and (c) the enforcement and implementation of laws and policies, including through the courts and specialised bodies, and through the work of these bodies with respect to obligations to monitor, educate and raise awareness about discrimination and inequality.
Section 3.1 of the report – which examines Kenya's **international legal obligations** – indicates that the country has a moderate record of ratifying major international and regional human rights instruments. It is a party to the main 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, Kenya has not ratified those optional protocols which allow individuals to bring claims under these treaties. Kenya has also adopted a number of other instruments which impact on equality, such as the ILO Conventions concerning discrimination in employment, including the Equal Remuneration Convention 1951 (C100) and the Discrimination (Employment and Occupation) Convention 1958 (C111). At the regional level, Kenya has adopted many of the conventions established by the African Union. Further, this section notes that under Article 2(6) of the Constitution, 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 now have direct effect in the Kenyan legal system.

Section 3.2 of the report examines Kenya's domestic legal system, beginning with the new 2010 **Constitution**, which represents a welcome improvement on the previous Constitution of 1963. A strong commitment to the principles of equality and non-discrimination is evident throughout the new Constitution. Article 27 which enshrines the rights 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 of persons. In addition, the Constitution introduces both a general permission for 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 good basis to address the long-standing patterns of ethno-regional discrimination which were among the root causes of the post-election violence in 2008.

Section 3.2.2 examines the two **specific anti-discrimination laws** which address discrimination on particular grounds – the Persons with Disabilities Act and the National Cohesion and Integration Act. While the Persons with Disabilities Act is a welcome attempt to prohibit discrimination against and pro-
mote equality for persons with disabilities, it is not without problems, includ-
ing, notably, a limitation on reasonable accommodation measures which can
be imposed on public service providers. Similarly, while the National Cohe-
sion and Integration Act, enacted in the wake of the post-election violence in
2008, attempts to provide protection from racial and ethnic discrimination in
a range of areas of life, it contains gaps, exceptions and inconsistencies which
limit its scope and effectiveness. This section of the report also reviews the
provisions of two laws – the Children Act and the HIV Prevention and Control
Act – which contain provisions relating to the prohibition of discrimination.

In reviewing **legislative protections from discrimination and measures
to promote equality in other areas of law** in section 3.2.3, the report char-
acterises coverage as patchy and inconsistent. While some Acts, such as the
Employment Act, the Universities Act and the Children Act, contain provi-
sions which prohibit discrimination based on a range of grounds, legislation
in other fields does not contain non-discrimination protections. In addition,
there are significant inconsistencies within that legislation which does exist,
on issues such as the definition of key concepts, the description of forms of
prohibited conduct and the coverage of protected grounds of discrimination.
Finally, where discrimination in a particular area of life is regulated by more
than one statute, there are direct discrepancies between provisions in differ-
ent pieces of legislation, e.g. in respect to the protection provided in employ-
ment in private sector enterprises on grounds of race and ethnicity under the
Employment Act and the National Cohesion and Integration Act.

Section 3.3 reviews 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 entitled
*Vision 2030*, and policies designed to combat discrimination against and ac-
celerate progress of particular “vulnerable groups”, such as the *National Poli-
cy on Gender and Development*.

In section 3.4, the report focuses on the **enforcement and implementation
of legal provisions on equality and non-discrimination**. It looks at legal
provisions governing the procedural aspects of bringing a claim of discrimi-
nation, measures to ensure access to justice, and remedies. In addition, this
section reviews the impact of the pilot National Legal Aid Programme, finding
it to be excessively limited in both thematic and geographical scope to ensure
effective access to justice for those seeking to bring a claim of discrimina-
Further, it looks at the powers and functions of specialised bodies with a mandate to address discrimination and inequality – including in particular the recently established National Gender and Equality Commission, but also the Kenya National Commission on Human Rights, the National Council for Persons with Disabilities and the National Cohesion and Integration Commission – assessing whether such bodies are sufficiently independent, empowered and well-financed to ensure effective enforcement and implementation of equality rights.

Finally, this section examines the key jurisprudence on equality and non-discrimination, in an effort to evaluate the level of enforcement through the courts. In this respect, it finds little jurisprudence on the rights to equality and non-discrimination and raises concerns about the quality of the judgments in those cases which have been decided.

Thus, Part 3 presents a complex picture in respect of the legal protection of the rights to equality and non-discrimination in Kenya. Taken together, the evidence reviewed in Part 2 and the analysis in Part 3 of the report suggest that while there have been a number of important reforms which expand the scope of legal rights, significant problems remain. First, as highlighted in Part 2, a number of discriminatory laws and laws which are open to discriminatory interpretation remain in force, including notably provisions in the Penal Code which has been interpreted as criminalising same-sex intimacy between men, but also laws which discriminate against women in respect of tax and marital property. While the introduction of the new Constitution 2010 may render a number of these laws unconstitutional, at present they remain in force pending legal challenge. There appear to be no plans in place for the government to undertake an audit of laws to identify and amend those laws which discriminate, despite the clear supremacy of the Constitutional prohibition on discrimination.

Second, there are serious 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 a range of grounds in particular areas of life – such as education or health services. The new Constitution presents a potential remedy in this area, as it extends protection from discrimination to a wide range of grounds, prohibits discrimination by both public and private actors and provides for individuals to bring claims of discrimination against both the state
In the Spirit of Harambee

and non-state actors. However, the report concludes that the lack of legislation giving clear definitions of important concepts in the law and providing clarity about the scope and operation of protection is a cause for concern.

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 affecting both employers and employees.

Finally, there is a significant problem with the poor implementation and enforcement of existing laws, as indicated by, for example, the evidence of persistent discrimination on grounds of ethnicity, despite the protections offered under the National Cohesion and Integration Act and of the disadvantage faced by persons with disabilities, despite the existence of the Persons with Disabilities Act. 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 by government in key areas such as tackling discrimination on grounds of ethnicity in the allocation of public resources – mean that even in cases where legal protections exist, these do not translate into changes on the ground.

Part 4 contains conclusions and recommendations, drawn from an analysis of both the patterns of discrimination and inequality examined in Part 2 and the gaps, weaknesses and inconsistencies in the legal and policy framework identified in Part 3. The report notes that Kenya has made important steps on the road to greater equality since the beginning of the century, most recently and most significantly adopting a Constitution which bears witness to the country’s commitment to tackling discrimination and inequality. However, it concludes that there is a clear need for Kenya to harmonise and strengthen its legal system in respect to equality. As such, the report contains a number of recommendations which would enable Kenya to meet its obligations to respect, protect and fulfil the rights to non-discrimination and equality and in so doing meet the aspirations expressed in its 2010 Constitution.

The first set of recommendations is that Kenya further improves its record of ratifying key international instruments related to equality. It is notable
that while Kenya has ratified almost all of the key instruments related to the rights to non-discrimination and equality, it has yet to join those instruments recognising the jurisdiction to hear individual complaints by the treaty bodies which supervise compliance with the treaties. Kenya should remedy this situation, and ratify the remaining instruments relevant to equality and non-discrimination.

The second and third sets of recommendations relate to Kenya’s obligation to respect the rights to non-discrimination and equality. While noting the strict prohibition on discrimination by the state which is provided in the 2010 Constitution of Kenya, the research clearly indicates that Kenya does not fully meet its obligations in this regard. As such, it is recommended that the government conducts an audit to identify discriminatory laws and create a list of discriminatory provisions which should be repealed or amended. In addition, the report recommends that Kenya takes all appropriate measures to ensure that state actors do not discriminate in the exercise of their functions. This recommendation was felt to be particularly important given the range of alleged directly and indirectly discriminatory practices identified in the report.

With regards to Kenya’s obligation to protect people against discrimination and inequality, the report sees the Constitution of Kenya 2010 as a significant progressive step in addressing discrimination and inequality. The fourth set of recommendations therefore concentrates on the interpretation of key concepts within the Constitution, urging the judiciary to interpret the Constitution in line with international law and comparative best practice. This includes interpreting the “open-ended” list of protected grounds provided in section 27 to include sexual orientation, gender identity and genetic inheritance, and ensuring that exceptions to the right to non-discrimination are interpreted narrowly.

The main recommendation related to Kenya’s obligation to protect equality rights, and indeed the main recommendation in the report is that Kenya adopts comprehensive equality legislation. Harmonisation of equality law can be achieved either through the adoption of a single equality Act or through the development of a system of individual laws providing protection on different grounds or in different areas of life which, together, provide comprehensive protection. In the course of three years (2009-2011), ERT and its Kenyan partners have engaged all key stakeholders in consultations and debates aimed at exploring best approaches to strengthening equality
in Kenya. As a result of this process, a broad consensus has emerged that the first approach – a single equality Act – is preferable. The reason for this is that under the second approach, Kenya would be required to adopt new laws providing protection from discrimination on a number of grounds, including gender, sexual orientation, gender identity, age and genetic inheritance. In addition, it would be required to amend the various pieces of existing legislation to resolve inconsistencies within each Act and between different Acts, and to ensure that the standard and scope of legal protection meet its international obligations. This would be a significant legislative challenge. Moreover, any system of separate laws providing protection from discrimination on different grounds or in different areas of life would meet with challenges in properly reflecting the inter-connected nature of discrimination on different grounds and in different contexts. Compared with the approach of a single equality Act, it may be ill-suited to adequately address multiple discrimination, provide for the admission of new protected grounds, and ensure a consistent level of protection across different grounds. Furthermore, the patchwork approach would be likely to perpetuate a complex system of different procedures, standards and remedies, an outcome which a number of treaty bodies have called into question.

It is therefore preferable, in adopting comprehensive equality legislation, to take the path of a single, comprehensive equality Act, which should reflect concepts and approaches in the “Statement of Principles for Equality Law” and “Legislative Map for Equality Law” developed and endorsed by civil society actors in 2010-2011. Such an Act should prohibit discrimination on a conditionally open list of protected grounds which should incorporate at least all of the grounds set out in Article 27 of the Constitution, together with the additional grounds of sexual orientation, gender identity and genetic inheritance. It should provide a test or other mechanism for the admission of new grounds. It should prohibit all forms of discrimination and should cover all areas of life regulated by law in the private and public sectors. The law should provide for the development and implementation of positive action measures, should allow the transfer of the burden of proof in civil cases to the alleged discriminator and should provide remedies and sanctions which are proportionate and dissuasive. Exceptions should be limited, reasonable and justifiable, in the sense that they can be shown to be necessary for the achievement of a legitimate purpose and that there is no alternative which is less restrictive. The provisions of such a law when enacted should, in the event of any conflict or inconsistency, supersede the provisions of any other legislation relating or incidental to the prohibition of discrimination and the promotion of equality.
The fifth set of the recommendations relates to Kenya’s **obligation to fulfil** the rights to non-discrimination and equality, focusing on **measures to address discrimination and substantive inequality**. The government should finalise and adopt policies relevant to equality and non-discrimination and consider introducing a comprehensive National Equality Policy. The report urges Kenya to take positive action in order to overcome past disadvantage and accelerate progress towards equality for particular groups. Finally, the government should ensure that those parts of the Constitution which provide for the devolution of power to county governments and the redistribution of public resources are implemented in a comprehensive and timely manner; paying due regard to the principles of equality and non-discrimination embodied in the Constitution.

A detailed list of the report’s **recommendations** is presented below. All recommendations are based on international human rights law related to equality, as well as the Declaration of Principles on Equality, a document of international best practice adopted in 2008.

**1. Strengthening of International Commitments**

1.1 Kenya is urged to ratify the following international human rights instruments which are relevant to the rights to equality and non-discrimination:

   a) **UN instruments:**

      i. Optional Protocol I to the International Covenant on Civil and Political Rights (1966);
      ii. Optional Protocol I to the International Covenant on Economic, Social and Cultural Rights (ICESCR) (2008);
      iii. Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (1999);
      iv. Optional Protocol to the Convention on the Rights of Persons with Disabilities (2006);
      v. Optional Protocol II to the Convention on the Rights of the Child (2000);
      vi. Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990);
      vii. Convention on the Protection of All Persons from Enforced Disappearance (2006);
viii. United Nations Educational, Scientific and Cultural Organisation Convention against Discrimination in Education (1960);

b) International Labour Organisation Conventions:
i. ILO Convention No. 169 on Indigenous and Tribal Peoples.

1.2 Kenya is urged to make a declaration under Article 14 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) allowing individual complaints.

1.3 Kenya is urged to withdraw its reservation against Article 10(2) ICESCR, which requires that states make provision for paid maternity leave.9

2. Repeal or Amendment of National Legislation

2.1 Kenya is urged to undertake a review of all legislation and policy in order to (i) assess compatibility with the rights to equality and non-discrimination, as defined under the international instruments to which Kenya is party and the Constitution of Kenya 2010; and (ii) amend, and where necessary, abolish, existing laws, regulations and policies that conflict or are incompatible with the right to equality.10 This process should include review of:

Constitutional Provisions:

a) Article 26(2) and (4), Constitution of Kenya 2010, which prohibit abortion in all cases except those defined as medical emergencies;
b) Article 45 (2), Constitution of Kenya 2010, which discriminates against same-sex couples in marriage;

9 International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), 1966, Article 10(2): “[The States Parties to the present Covenant recognize that:] Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such a period working mothers should be accorded paid leave or leave with adequate social security benefits.”

10 Kenya has been advised to undertake such a review by treaty bodies. See, for example, Committee on the Elimination of Discrimination Against Women, Concluding Observations on Kenya, CEDAW/C/KEN/CO/6, 10 August 2007, Para 18.
Executive Summary

c) Article 24(4), Constitution of Kenya 2010, which provides that the rights to equality and non-discrimination shall be qualified to the extent necessary for the application of Muslim law before the Kadhis’ courts in the areas of personal status, marriage, divorce and inheritance;

d) Articles 83, 99(2)(e) and 193(2)(d), Constitution of Kenya 2010, which deny political rights to persons of “unsound mind”.

Legislative Provisions:

e) Sections 138, 162, 163 and 165 of the Kenyan Penal Code;
f) Section 45 of the Income Tax Act;
g) Sections 32, 33, 35, 36 and 39 of the Law of Succession Act;\textsuperscript{11}
h) Section 38 and subsection 43(5) of the Sexual Offences Act;
i) Section 3 of the Citizenship Act;
j) Section 86 of the Civil Procedure Act;
k) Section 7 of the Transfer of Property Act;
l) Section 8 of the Matrimonial Causes Act;
m) Section 3 of the Immigration Act.

Family Law

2.2 The family law system in Kenya is complex and provides numerous opportunities for discrimination, particularly against women. While some laws in this area contain discriminatory provisions, others provide for the application of legal norms which discriminate, including in customary legal settings; the multiplicity of laws in the field means that discrimination is more likely to occur unchecked. In line with the recommendations of the Committee on the Elimination of Discrimination Against Women, Kenya is urged to “harmonize civil, religious and customary law with article 16 of the Convention and to complete its law reform in the area of marriage and family relations in order to bring its

\textsuperscript{11} Kenya has already agreed to review this legislation at the review of Kenya’s most recent periodic report to CEDAW: Committee on the Elimination of Discrimination against Women, Concluding Observations on Kenya, CEDAW/C/KEN/CO/7, 5 April 2011, Para 45.
In the Spirit of Harambee

legislative framework into compliance with articles 15 and 16 of the Convention”.12 This would include a review of:

a) The Kadhis’ Court Act;
b) The Mohammedan Marriage, Divorce and Succession Act;
c) The Hindu Marriage and Divorce Act;

3. Measures to Ensure State Actors Respect the Rights to Equality and Non-discrimination

Kenya is urged to take all appropriate measures to ensure that all public authorities and institutions respect the rights to non-discrimination and equality. Such measures would include, but are not limited to:

a) Reviewing guidelines, policies and practices to ensure that they do not contravene the rights to non-discrimination and equality;
b) Developing guidelines to ensure that policies and practices do not contravene the rights to non-discrimination and equality;
c) Taking steps to educate public officials and other agents of the state as to their obligations with respect to the rights to non-discrimination and equality;
d) Making effective and accessible mechanisms for individuals to bring complaints about discrimination by state actors available;
e) Requesting the National Gender and Equality Commission to undertake proactive investigations and to invite the submission of complaints by those claiming to have suffered violations of the rights to non-discrimination and equality;
f) Enforcing effective, proportionate and dissuasive sanctions against public bodies and agents found to have engaged in discrimination;
g) Taking steps to raise public awareness, through a programme of civic education, of the rights and obligations of state actors in respect of the rights to non-discrimination and equality.

12 See above, note 10, Para 44.
4. Laws to Give Effect to the Rights to Equality and Non-discrimination

Constitution of Kenya 2010

4.1 A strong commitment to the principles of equality and non-discrimination is evident throughout the Constitution of Kenya 2010; the Bill of Rights provides a strong set of protections from discrimination in both the public and private spheres, together with excellent enforcement mechanisms and remedies; and key provisions elsewhere in the Constitution provide the basis to tackle some of the critical problems which perpetuate systemic *de facto* inequalities. As such, its adoption is a very important step in giving effect to Kenya’s international legal obligations to respect, protect and fulfil the rights to equality and non-discrimination.

4.2 In order to fully discharge Kenya’s obligations under international law, it is necessary that the provisions of the Constitution which deal with the rights to equality in non-discrimination are interpreted in line with the spirit of the Constitution and with international law, including the interpretations of relevant treaty bodies. The Kenyan judiciary is called upon to interpret the Constitution in such a way as to reflect Kenya’s international obligations to respect, protect and fulfil the rights to equality and non-discrimination, and the commitment to equality evidenced throughout the Constitution itself, including in particular by considering that:

a) The words “any ground, including” in Article 27(4) are interpreted as creating a class of “other status”, which itself is interpreted in line with the recommendation of the Committee on Economic, Social and Cultural Rights (CESCR) in its General Comment 20, including in particular that “other status” covers “sexual orientation” and “gender identity”.13

b) The words “any ground, including” in Article 27(4) are interpreted as creating a prohibition on multiple discrimination, in line with the recommendation of CESCR in its General Comment 20.14

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c) Article 27(6), which creates a duty of affirmative action, and Article 56, which requires the state to take a range of measures to ensure the participation of all groups “disadvantaged by discrimination on one or more grounds provided in Article 27(4)” in governance, education and employment, are interpreted and implemented in line with the recommendations of *inter alia* the UN Human Rights Committee (HRC), CESCR, the Committee on the Elimination of Racial Discrimination (CERD) and the Committee of the Elimination of Discrimination against Women about positive action measures.

d) Article 24, which sets out permissible limitations of rights provided in the Bill of Rights, including the rights provided in Articles 27, 53, 54, 55, 56 and 57, is interpreted strictly in light of Kenya’s international obligations to respect, protect and fulfil the rights to equality and non-discrimination, and in line with constraints provided for such limitations in Article 24(1) itself.

e) Article 24(4), which limits the application of the rights to equality and non-discrimination to exclude 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, is interpreted in line with Kenya’s international obligations to provide effective protection from discrimination, in line with the precedent set by the courts in *Rono v Rono and Another*.

**Specific Anti-discrimination and Equality Law**

4.3 Kenya is urged to reform its system of laws prohibiting discrimination in order to ensure that the law provides protection from discrimination on all grounds and in all areas of life. Such laws should aim at eliminating direct and indirect discrimination in all areas of life regulated by law and attribute obligations to public and private actors, including in relation to the promotion of *de facto* equality.

4.4 In order to give effect to recommendation 4.3 – and in recognition of the gaps in legal protection and problems of inconsistency which arise from the multiplicity of laws on discrimination in Kenya, including failure to provide effective protection from multiple discrimination, as well as to make a transition from anti-discrimination to
equality law – Kenya is urged to consider the enactment of a single comprehensive Equality Act, offering consistent protection across all grounds of discrimination and in all such areas of life. In this regard, Kenya is urged to consider adopting legislation in line with the “Statement of Principles for Equality Law” and “Legislative Map for Equality Law” developed and endorsed by civil society actors in 2010-2011, which are based on the Declaration of Principles on Equality, an international best practice document adopted in 2008.

5. Measures to Address Discrimination and Substantive Inequality

5.1 In addition to the obligations to respect and protect the right to non-discrimination, Kenya has an obligation to fulfil the rights to non-discrimination. This includes, inter alia, obligations to introduce and implement strategies, policies and plans of action to promote equality and non-discrimination; obligations to adopt positive action measures to overcome past disadvantage and accelerate progress towards equality; and other measures to eliminate systemic discrimination, including in particular in those areas highlighted below.

Government Policy

5.2 In this regard, Kenya should consider:

a) Finalising and introducing the Draft National Policy on Human Rights;
b) Finalising and introducing the Draft National Land Policy;
c) Finalising and introducing the Draft National Policy on Ageing;
d) Reviewing and updating the National Policy on Gender and Development;
e) Reviewing and updating the Kenya National Youth Policy;
f) Reviewing and updating the Public Sector Workplace Policy on HIV and AIDS.

5.3 Kenya is urged to consider introducing a National Equality Policy in order that equality and non-discrimination are effectively mainstreamed into government policy-making and the delivery of public functions and services.
Positive Action

5.4 Kenya should take positive action, which includes a range of legislative, administrative and policy measures, in order to overcome past disadvantage, as required by Article 27(6) of the Constitution and Kenya’s legal obligations under a range of international instruments.

Measures to Address Systemic Discrimination and Inequality

5.5 In order to meet its obligations to take an active approach to eliminating systemic discrimination, Kenya should ensure that those parts of the Constitution which provide for the devolution of power to county governments and the redistribution of public resources are implemented in a comprehensive and timely manner, paying due regard to the principles of equality and non-discrimination embodied in the Constitution. In addition, Kenya should respect and implement Articles 202 and 203, setting out the need to share revenue on an “equitable” basis between the national government and the counties.

5.6 Kenya should implement expeditiously Article 204 of the Constitution establishing an Equalisation Fund, with due regard to the principles of non-discrimination and inequality as defined in the Declaration of Principles on Equality.

6. Awareness-raising

The Kenyan government should take action to raise public awareness about equality, and to introduce suitable education on equality as a fundamental right in all educational establishments. Such action is particularly necessary in order to modify social and cultural patterns of conduct and to eliminate prejudices and customary practices which are based on the idea of the inferiority or superiority of one group within society over another.

7. Data Collection

The Kenyan government should collect and publicise information, including relevant statistical data, in order to identify and measure inequalities, discriminatory practices and patterns of disadvantage, and to analyse the effectiveness of measures to promote equality.
8. Participation

Kenya should ensure that those who have experienced or who are vulnerable to discrimination are consulted and involved in the development and implementation of laws and policies implementing the rights to non-discrimination and equality.

9. Enforcement and Implementation

Proceedings, Access to Justice, and Remedies

9.1 The Chief Justice of Kenya, in discharging obligations arising under Article 22(3) of the Constitution to develop rules governing proceedings brought under the Bill of Rights, should have regard to the need for such rules to “ensure that individuals (...) have accessible and effective remedies to vindicate” the rights to equality and non-discrimination.\(^{15}\) In particular, where the facts and events at issue lie wholly, or in part, within the exclusive knowledge of the authorities or other respondent, the burden of proof should be regarded as resting on the authorities, or the other respondent, respectively.\(^{16}\)

9.2 Kenya should introduce legislation in order to harmonise the range of regimes which presently exist to provide access to justice for those subjected to discrimination on different grounds and in different areas of life, so that all individuals are able to access justice and remedies where they have been subjected to discrimination. In particular, the Kenyan government should ensure that such legislation:

a) Expands the protection of individuals from any adverse treatment or consequence as a reaction to a complaint or to proceedings aimed at enforcing compliance with equality provisions (victimisation) to complaints in respect of all grounds, rather than solely race and ethnicity, as currently provided in the National Cohesion and Integration Act.

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\(^{15}\) Constitution of Kenya 2010, Article 22(3).

b) Adapts legal rules related to evidence and proof in order to ensure that victims of discrimination are not unduly inhibited from obtaining redress. In particular, rules on proof in civil proceedings should be adapted to ensure that when persons who allege that they have been subjected to discrimination establish, before a court or other competent authority, facts from which it may be presumed that there has been discrimination, it shall be for the respondent to prove that there has been no breach of the right to equality. Such provisions are currently found in the Employment Act; they should be expanded into other areas of life.

9.3 Sanctions for breach of the right to equality have to be effective, proportionate and dissuasive. Appropriate remedies must include reparations for material and non-material damages. Sanctions may also require the elimination of discriminatory practices and the implementation of structural, institutional, organisational or policy change that is necessary for the realisation of the right to equality.

*Legal Aid and Assistance*

9.4 The government should introduce mechanisms for victims of discrimination to have effective access to judicial and/or administrative procedures, including through the provision of legal aid for this purpose. In this regard, the government should consider the expansion of the National Legal Aid (and Awareness) Pilot Programme to include discrimination cases and to operate throughout the country.

*Enforcement and Implementation Bodies*

9.5 Kenya should ensure that the National Gender and Equality Commission be able to operate independently and with adequate resources, in line with the relevant provisions of the National Gender and Equality Commission Act 2011, and the UN Principles relating to the Status of National Institutions (the Paris Principles).