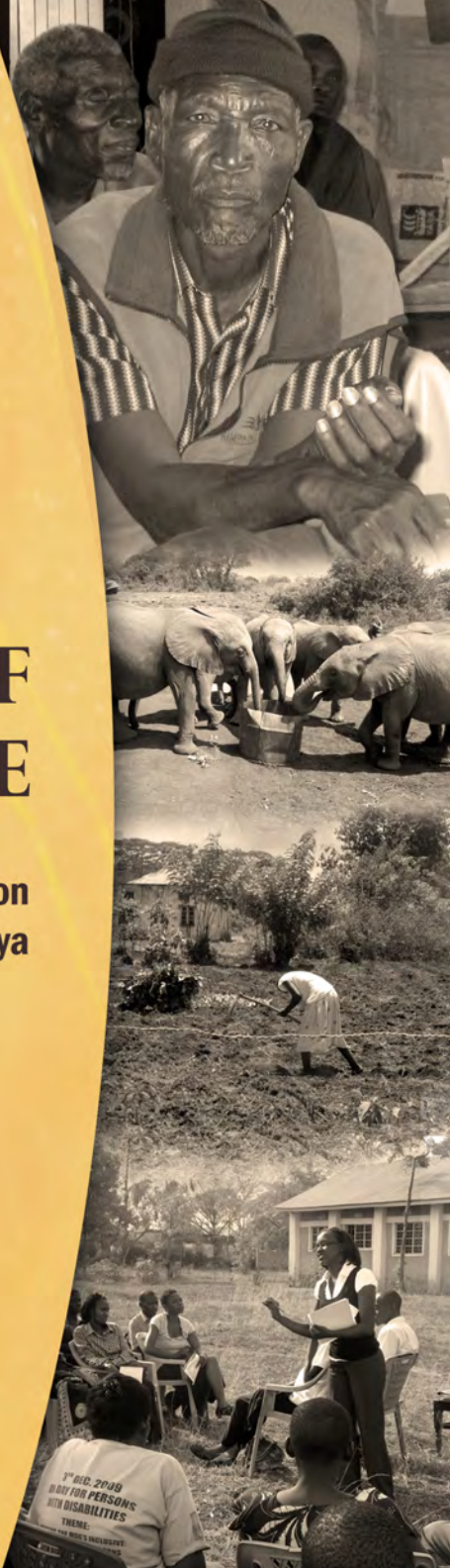
IN THE SPIRIT OF HARAMBEE

Addressing Discrimination and Inequality in Kenya



The Equal Rights Trust
in partnership with the Kenya Human Rights Commission

THE EQUAL RIGHTS TRUST
IN PARTNERSHIP WITH THE KENYA HUMAN RIGHTS COMMISSION

In the Spirit of Harambee

Addressing Discrimination and Inequality in Kenya

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The Equal Rights Trust (ERT) is an independent international organisation whose purpose is to combat discrimination and promote equality as a fundamental human right and a basic principle of social justice. Established as an advocacy organisation, resource centre and think tank, ERT focuses on the complex relationship between different types of discrimination, developing strategies for translating the principles of equality into practice.

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"Our motto 'harambee' was conceived in the realisation of the challenge of national building that now lies ahead of us. It was conceived in the knowledge that to meet this challenge, the government and the people of Kenya must pull together. We know only out of our efforts and toil can we build a new and better Kenya."*

Jomo Kenyatta, 13 December, 1963,
Statement at the Opening of Parliament

"We, the people of Kenya....
PROUD of our ethnic, cultural and religious diversity, and determined to live in peace and unity as one indivisible sovereign nation...
RECOGNISING 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...
ADOPT, ENACT and GIVE this Constitution to ourselves and to our future generations…"

Preamble to the Constitution of Kenya 2010

**Harambee (Swahili) - "all pull together", the official motto of Kenya which appears on its coat of arms.*

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The principal drafter of the report is Jim Fitzgerald (ERT). He was assisted by other ERT staff, particularly Jessica Duggan-Larkin, who provided research, drafting and editing advice and support. Paola Uccellari provided guidance, advice and direction throughout the drafting of this report. Dimitrina Petrova, Executive Director of ERT, oversaw the research and drafting of the report, copy-edited and authorised the report for publication. ERT staff including Natalie Brinham, Libby Clarke, Amal De Chickera, Ingrid Dessauvages, Anne Muthee and Nicola Simpson provided assistance.

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ACRONYMS

AAC	Augmentative and Alternative Communication
ACHPR	African Charter on Human and Peoples' Rights
AFEA	Albinism Foundation of East Africa
ASAL	Arid and Semi-Arid Lands
ASK	Albinism Society of Kenya
AU	African Union
AUB	African Union of the Blind
CDF	Community Development Fund
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CERD	Committee on the Elimination of Racial Discrimination
CESCR	Committee on Economic Social and Cultural Rights
CPED	International Convention for the Protection of All Persons from Enforced Disappearance
CRC	Convention on the Rights of the Child
CREAD	Center for Disability Rights, Education and Advocacy
CRPD	Convention on the Rights of Persons with Disabilities
DfID	UK Department for International Development
EFA	Education for All
ERT	The Equal Rights Trust
FGM	Female Genital Mutilation
FIDA-K	Federation of Women Lawyers- Kenya
FORD	Forum for the Restoration of Democracy
GALCK	Gay and Lesbian Coalition of Kenya
GDP	Gross Domestic Product
HDI	Human Development Index
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic Social and Cultural Rights
IDP	Internally Displaced Person
IGO	Inter-Governmental Organisation
ILO	International Labour Organisation
KADU	Kenya African Democratic Union

KANU	Kenyan African National Union
KAU	Kenya African Union
KHRC	Kenya Human Rights Commission
KNCHR	Kenya National Commission on Human Rights
KNDR	Kenya National Dialogue and Reconciliation
KPU	Kenya People's Union
KSMH	Kenya Society for the Mentally Handicapped
KUB	Kenya Union of the Blind
LGBTI	Lesbian, gay, bisexual, transgender and intersex
MARPS	Most at risk populations
MSM	Men who have sex with men
NALEAP	National Legal Aid (and Awareness) Pilot Programme
NCIC	National Cohesion and Integration Commission
NCPD	National Council for Persons with Disabilities
NGO	Non-Governmental Organisation
NHRI	National Human Rights Institution
NYP	National Youth Policy
ODM	Orange Democratic Movement
PNU	Party of National Unity
PSC	Parliamentary Select Committee
SID	Society for International Development
TEA	Transgender Education and Advocacy
TYC	Turkana Youth Council
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNDP	United Nations Development Programme
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UN-HABITAT	United Nations Human Settlements Programme
UNHCR	United Nations High Commissioner for Refugees
UNICEF	United Nations Children's Fund
UPE	Universal Primary Education
UPR	Universal Periodic Review
WEF	Women's Enterprise Fund
WHO	World Health Organisation

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-

1 President Mwai Kibaki, *Speech on the Occasion of the Promulgation of the New Constitution*, 27 August 2010, available at: http://www.communication.go.ke/media.asp?id=1217.

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.*[2]

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".[3] The report takes a view that the concept of indigeneity 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-

2 Coalition of Non-Governmental Organizations on Economic, Social and Cultural Rights and Kenya Human Rights Network, *Taking These Rights Seriously: Civil Society Organisations' Parallel Report to the Initial State Report of the Republic of Kenya on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, 2008, p. 26, available at: http://www2.ohchr.org/english/bodies/cescr/docs/ngos/K-HURINET_Kenya_CESCR41_report.pdf.

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

agement of arid areas and tropical forest ecosystems".[4] 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

4 Sena, K., *Africa Indigenous Peoples: Development with Culture and Identity: Article 2 and 32 of the United Nations Declaration on the Rights of Indigenous Peoples*, Paper submitted for the International Expert Group Meeting on Indigenous Peoples: Development with Culture and Identity Articles 3 and 32 of the United Nations Declaration on the Rights of Indigenous Peoples (New York, 12 - 14 January 2010), UN Doc. PFII/2010/EGM, 2010, p. 4.

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 LBGTI 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.[5] 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

5 Persons with Disabilities Act 2003.

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 or 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**.[6] 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.[7] 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

6 United Nations Children's Fund, *Kenya Statistics,* available at: http://www.unicef.org/infobycountry/kenya_statistics.html.

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.[8] 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.

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, including, notably, a limitation on reasonable accommodation measures which can be imposed on public service providers. Similarly, while the National Cohesion 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 characterises coverage as 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 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 different pieces of legislation, e.g. in respect to the protection provided in employment 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 accelerate progress of particular "vulnerable groups", such as the *National Policy 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 discrimination, 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-

tion. 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 judgements 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

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);
ix. UN Convention on the Status of Stateless Persons (1951).

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.

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;[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

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.

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;
d) The Matrimonial Causes 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]

13 Committee on Economic, Social and Cultural Rights, *General Comment 20: Non-discrimination in economic, social and cultural rights*, UN Doc. E/C.12/GC/20, 2009, Para 27.

14 *Ibid.*, Para 17.

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 meets 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).

16 **Committee on Economic, Social and Cultural Rights, note 13, Para 40; Committee on the Elimi**nation of Racial Discrimination *General Recommendation No.30: Discrimination against Non-Citizens*, 2004, Para 24; see also: *Declaration of Principles on Equality*, published by The Equal Rights Trust, London 2008, Principle 21, p. 13.

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).

1. INTRODUCTION

1.1 Purpose and Structure of This Report

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."[17]

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 remained degraded by traditional social and religious gender prejudice which, translated into discriminatory laws and discrimination by both the state and private actors, had the effect of denying 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 levels of development of different regions and – hence – in the positions of 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,

17 President Mwai Kibaki, *Speech on the occasion of the promulgation of the new Constitution*, 27 August 2010, available at: http://www.communication.go.ke/media.asp?id=1217.

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 established, 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 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. Thus, in addition to providing strong protection of the rights to non-discrimination and equality, equality and non-discrimination also function as principles to guide the response to some of the most vexed questions facing the country, such as land rights, regional inequalities and the party political structure.

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 and the effectiveness of the current legal, policy and enforcement framework related to these rights. The report aims to bring together – for the first time – evidence of the lived experience of discrimination and inequality in Kenya on a wide range of different grounds, including ethnicity, sex, disability and sexual orientation, with an analysis of the adequacy of the laws, policies and institutions established to address these issues.

The report has four parts. Part 1 provides an introduction to the conceptual framework which has guided the authors' work and an overview of the demographic, economic, social, political and historical context of discrimination and inequality in Kenya. Part 2 discusses the principal patterns of discrimination and inequality affecting different groups in Kenya. Part 3 analyses the legal and policy framework put in place to address 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.

Patterns of Discrimination and Inequality

Part 2 discusses the principal patterns of discrimination and inequality affecting different groups in Kenya. It is based both on original direct testimony collected from a wide range of individuals and groups and an analysis of existing research – from sources including international organisations, government bodies, NGOs, academic studies, news reports and statistical data. The report discusses the ways in which people experience discrimination in a range of areas of life, including as a result of discriminatory laws, discrimination by state actors carrying out public functions, exposure to discriminatory violence and discrimination and inequality in areas such as employment, education and access to goods and services

Section 2.1 of the report discusses poverty, discrimination and inequality, looking at the extent to which these factors are linked and mutually-reinforcing. Section 2.2 examines discrimination and inequality on grounds of race and ethnicity, in particular the role of ethnicity and tribal identity in political decision making and the prevalence of direct and indirect discrimination in the allocation of public resources. It goes on to examine particular vulnerable racial or ethnic groups, including indigenous minorities, Somalis and Nubians. Section 2.3 examines discrimination, inequality and violence affecting women, finding patterns of significant and sustained disadvantage across all areas of life, despite a number of commendable initiatives by the Kenyan authorities. Section 2.4 looks at discrimination against sexual and gender minorities. It finds both groups to be particularly vulnerable to discrimination and discriminatory violence, as a result of discriminatory laws and societal prejudice against lesbian, gay, bisexual, transgender and intersex persons (LGBTI). Section 2.5 examines disability, including mental and intellectual disability, finding that persons with disability continue to suffer discrimination and inequality arising from prejudice and discrimination, including lack of reasonable accommodation and lack of access to assistive technologies, despite the existence of the Persons with Disabilities Act. Section 2.6 discusses the problems experienced by persons with albinism, while section 2.7 focuses on the discrimination and disadvantages faced by persons living with HIV and AIDS. In both cases, the research identifies a number of particular reasonable

accommodation needs which are not currently met, together with persistent societal discrimination affecting both groups.

Two factors – poverty and ethnicity – are of overarching importance in the Kenyan experience of discrimination and inequality. **Poverty** is the unavoidable backdrop to any discussion of discrimination and inequality in Kenya. Kenya is a poor country, both on average and aggregate measures. Moreover, large inequalities in wealth and income, coupled with disparities in access to infrastructure and public services in certain parts of the country create a specific ethno-regional profile of relative poverty. This report confirms that discrimination and inequality are closely linked to poverty, finding that poverty is both a cause and a consequence of discrimination. **Ethnic identity** is another key determinant of an individual's ability to participate in life on an equal basis with others, largely because certain ethnic groups live in areas with under-developed economies, poor infrastructure, and a lack of public services. These two aspects of an individual's identity – their economic status and their tribal belonging – frame most people's experience of discrimination and inequality, with people experiencing disadvantage either on these grounds alone, or in combination with other grounds.

This report has identified a number of both **directly and indirectly discriminatory laws** in Kenya. Arguably the most severe and far-reaching of these are the provisions of the Penal Code which have been consistently interpreted as prohibiting consensual sex between men, effectively criminalising men who have sex with men and contributing to prejudice and stigma against all LGBTI persons. Women are also particularly vulnerable to discriminatory laws – including in particular in respect of tax, succession and in questions of marriage, divorce and matrimonial property. The research also found substantial evidence of **discrimination by the state and its agents in carrying out public functions**. The report includes examples of both direct and indirect discrimination on grounds of ethnicity in the allocation of public resources through infrastructure and development funding by public officials, acts which accelerate the disadvantage of those living in marginalised, arid areas. There is also significant evidence to suggest that two particular ethnic groups – Kenyans of Somali origin and Nubian Kenyans – suffer direct discrimination when applying for citizenship and identity documents and are subjected to police harassment. The report also finds that the *de facto* criminalisation of same sex intimacy between men leaves gay men vulnerable to extortion and harassment by law enforcement officials.

This report identifies a serious problem with **discriminatory violence** against particular groups because of their actual or perceived characteristics. Thus, the testimony of B.M. – a gay man from Mombasa who was threatened with violence by a large mob at his home – indicates the risk of homophobic violence to which openly gay men are exposed. Women are also particularly vulnerable to discriminatory violence, as revealed by statistics on rape and domestic violence. The report also reviews evidence of discriminatory violence – often motivated by ignorance, superstition and prejudice – against persons with disabilities and persons with albinism.

The report presents evidence of **discrimination and inequality in employment** across a range of grounds, including notably gender, sexual orientation, gender identity and disability. Data collected by government, intergovernmental agencies and non-governmental organisations (NGOs) indicates that women suffer discrimination in recruitment, pay and conditions of work, and that they are exposed to a higher risk of unemployment. Access to employment presents a substantial problem for persons with disabilities, due to their relative lack of education, prejudice among employers about the capacities of persons with disabilities and lack of reasonable accommodation in the workplace, again despite the protection provided by the Employment Act. LGBTI activists interviewed for the report indicated that discrimination on grounds of sexual orientation and gender identity – grounds which are not protected under the Employment Act – affects openly gay men and transgender persons.

Evidence shows widespread **discrimination and inequalities in access to health and education.** Thus, the report investigates the presence of a "Red Strip" across the north of the country, where educational participation and outcomes, and access to healthcare and health outcomes are substantially below the national average. These regional disparities are closely aligned with ethnicity. Similarly, the research imposes the conclusion that those vulnerable to discrimination on the basis of other aspects of their identity – gender, disability, sexual orientation, gender identity or HIV status, for example – tend to have poorer access to education, health and other services.

Finally, the research provides compelling evidence of the particular disadvantages suffered by **persons with disabilities**. Those interviewed for this report highlighted under-provision of assistive devices, including white canes, wheelchairs and crutches, limited use of sign language and Braille, and lack of reasonable accommodations, as critical factors preventing participation in

employment and education by persons with disabilities. A lack of clear statistical data prevents a quantitative analysis of these problems, but the evidence collected in the course of field research for this report is sufficient to conclude that persons with disabilities are denied equal participation in all areas of life. The Persons with Disabilities Act 2003 contains some strong elements, for example the prohibition on direct disability discrimination and the creation of a National Council for Persons with Disabilities. However, the lack of protection from indirect discrimination, the absence of a right to reasonable accommodation and the poor implementation mean that the Act does not appear adequate, alone, to address this problem.

In sum, the report finds evidence of significant discrimination and inequality on a large number of grounds, occurring in all areas of civil, political, economic, social and cultural life.

Law and Policy Addressing Discrimination and Inequality

Part 3 of the report discusses the legal and policy framework addressing discrimination and inequality.[18] This includes an analysis of Kenya's international and regional legal obligations, the treatment of equality and non-discrimination in the Constitution of Kenya, 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.

Part 3 reveals a complex setting in respect of the legal protection of the rights to equality and non-discrimination. While a number of recent legal reforms are to be welcomed as expanding the scope of legal rights, significant prob-

18 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 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 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.

lems remain. In this respect, four principal conclusions arise from Part 3 of the report. First, from evidence analysed in part 2 of the report, it is clear that a number of **discriminatory laws and laws which permit discriminatory interpretation** remain in force, including notably provisions in the Penal Code which have 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 promulgation of the new Constitution in 2010 may have rendered a number of these laws 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.

Second, there are serious **gaps in legal protection**, both with regard to the absence of legislation prohibiting all forms of discrimination on particular grounds – such as sex and age – and the absence of any provisions prohibiting discrimination in particular areas of life – such as education or health services. Again, the Constitution presents a potential remedy in this area, 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 legislation that provides protection from discrimination on particular grounds means that many Kenyans are not adequately protected. Additionally, the lack of legislation giving clear definitions of important concepts in the law, or providing clarity about the scope 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. 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 by public officials – mean that even in cases where legal protections exist, these are not effectively enforced.

Recommendations

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. While the report's recommendations are principally directed at the Kenyan authorities, recommendations are also made for those working to combat discrimination and promote equality in Kenya, including NGOs, political and religious leaders and local community-based organisations.

The first set of recommendations urges Kenya to improve its record of ratifying key international instruments related to equality. The second set of recommendations urges repeal or amendment of national legislation while the third features measures to ensure state actors respect the rights to equality and non-discrimination. The fourth set – which is of central importance to this report – details recommendations concerning laws to give effect to the rights to equality and non-discrimination. The rest of the recommendations concern the obligation to introduce specific measures to address discrimination and substantive inequality, as well as measures related to awareness-raising, data collection, participation of members of disadvantaged groups, and enforcement.

1.2 Conceptual Framework and Research Methodology

This report takes as its conceptual framework the unified human rights perspective on equality which emphasises the integral role of equality in the enjoyment of all human rights, and seeks to overcome fragmentation in the field of equality law and policies. The unified human rights framework on equality is a holistic approach which, while keeping in view the specificities of the different strands of equality and the different types of disadvantage, seeks more effective implementation of the right to equality by stressing the overarching aspects of these different strands and types. The framework brings together inequalities based on different grounds, such as age, gender, race, religion, nationality, disability, sexual orientation and gender identity; and inequalities in different areas of life, such as the administration of justice, policing, employment, education, and provision of goods and services. Finally, the different approaches to equality which have evolved over many decades in two formerly isolated frameworks – those of international human rights and equality law – meet and converge in the unified human rights framework on equality.

The Unified Human Rights Perspective on Equality

The unified human rights perspective on equality is expressed in the Declaration of Principles on Equality, developed and launched by the Equal Rights Trust (ERT) in 2008, following consultations with 128 human rights and equality experts from over 47 countries in different regions of the world. Principle 1 of the Declaration defines the right to equality:

> *The right to equality is the right of all human beings to be equal in dignity, to be treated with respect and consideration and to participate on an equal basis with others in any area of economic, social, political, cultural or civil life. All human beings are equal before the law and have the right to equal protection and benefit of the law.*[19]

Thus defined, the right to equality has a broader scope, when compared with the traditional approach in most national legal systems, and its content is richer than that of a right to non-discrimination. Most importantly, it encompasses a right to equal participation in all areas of life in which human rights apply, and it is a right which is autonomous. As Dimitrina Petrova states in a commentary on the Declaration:

> *Defining the right to equality as requiring participation on an equal basis with others in any area of economic, social, political, cultural or civil life is consistent with international human rights law in delineating the areas in which human rights apply. But the Declaration defines the areas of application of the right to equality without drawing the distinctions between civil and political rights, on the one hand, and economic, social and cultural rights, on the other hand, which have for so long bedevilled international human rights law. At the same time, the Declaration goes beyond the understanding of discrimination and equality as necessarily related to an existing legal right (...) In the drafters' view, the right to equality (and non-*

19 *Declaration of Principles on Equality*, published by The Equal Rights Trust, London 2008, Principle 1, p. 5.

> *discrimination) can be claimed in any of the listed five areas of social life, even in the absence of certain legal rights within them. (…) The definition in Principle 1 does not require the right to equality to be based on or related to the enjoyment of any other human right.*[20]

Thus the right to equality implies not only the equal enjoyment of other human rights. Nor is it limited to the equal benefit of rights set out in law. The Declaration proclaims that this right extends to guarantee equality in all areas of human life normally regulated by law, and should be addressed holistically. This approach recognises the interconnectedness of inequalities arising in different contexts, which makes it necessary to take a comprehensive approach to combating manifestations of discrimination arising in all areas of life. Therefore, this report examines the extent to which equality is enjoyed across all areas of economic, social, political, cultural or civil life.

This report takes the right to equality, as expressed in the Declaration, as the baseline against which it assesses the presence or degree of **inequality**. It goes beyond poorer notions of equality found in many legal systems, by comprising not only a right to be free from all forms of discrimination, but also a right to substantive equality in practice. As discussed below, this motivates an analysis of **disadvantage** affecting different **groups** beyond that which arises as a result of discernable acts of discrimination. From this perspective, many societal inequalities are seen as a consequence of historic disadvantage, but with a realisation that the broad right to equality defined in the Declaration requires states to address such inequalities, however "innocuous" their cause. Thus the unified framework makes *de facto* inequalities, whether or not they result from discrimination, a relevant subject for this report.

Regarding the relationship between the rights to equality and non-discrimination, the Declaration regards the right to be free from discrimination as subsumed in the right to equality.[21] Thus, when examining the situation of a particular group of persons, the report looks both at examples of discrimination

20 Petrova, D., "The Declaration of Principles on Equality: A Contribution to International Human Rights", in *Declaration of Principles on Equality*, above note, pp. 30-31.

21 See above, note 19, Principle 4, p. 6.

and at inequality in participation in areas such as employment or public life, differential access to goods and services and socio-economic disadvantage.

The unified human rights perspective on equality makes it desirable and possible to provide a general legal definition of discrimination covering all types of discrimination. Principle 5 of the Declaration offers such a definition:

> *Discrimination must be prohibited where it is on grounds of race, colour, ethnicity, descent, sex, pregnancy, maternity, civil, family or carer status, language, religion or belief, political or other opinion, birth, national or social origin, nationality, economic status, association with a national minority, sexual orientation, gender identity, age, disability, health status, genetic or other predisposition toward illness or a combination of any of these grounds, or on the basis of characteristics associated with any of these grounds.*
>
> *Discrimination based on any other ground must be prohibited where such discrimination (i) causes or perpetuates systemic disadvantage; (ii) undermines human dignity; or (iii) adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on the prohibited grounds stated above*.
>
> *Discrimination must also be prohibited when it is on the ground of the association of a person with other persons to whom a prohibited ground applies or the perception, whether accurate or otherwise, of a person as having a characteristic associated with a prohibited ground.*
>
> *Discrimination may be direct or indirect.*
>
> *Direct discrimination occurs when for a reason related to one or more prohibited grounds a person or group of persons is treated less favourably than another person or another group of persons is, has been, or would be treated in a comparable situation; or when for a reason related to one or more prohibited grounds a person or group of persons is subjected to a detriment. Direct discrimination may be*

> *permitted only very exceptionally, when it can be justified against strictly defined criteria.*
>
> *Indirect discrimination occurs when a provision, criterion or practice would put persons having a status or a characteristic associated with one or more prohibited grounds at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary.*
>
> *Harassment constitutes discrimination when unwanted conduct related to any prohibited ground takes place with the purpose or effect of violating the dignity of a person or of creating an intimidating, hostile, degrading, humiliating or offensive environment*.
>
> *An act of discrimination may be committed intentionally or unintentionally.*[22]

This definition of discrimination takes a broad view regarding the list of **protected grounds**. It contains both an extensive list of explicitly protected grounds and a "test" for the inclusion of further grounds, according to which "candidate grounds" have to meet at least one of three conditions.[23] Thus, the definition provides a foundation for tackling the full complexity of the problem to be addressed – a person's lived experience of discrimination. It recognises that a single person may experience discrimination on a "combination" of subtly interacting grounds, or on grounds not previously recognised as "protected", and that the cumulative impact of discrimination on different

22 See above, note 19, Principle 5, p. 6-7.

23 See above, note 20, p. 34, where Petrova writes: "The definition of discrimination in Principle 5 includes an extended list of 'prohibited grounds' of discrimination, omitting the expression 'or other status' which follows the list of characteristics in Article 2 of the Universal Declaration of Human Rights. While intending to avoid abuse of anti-discrimination law by claiming discrimination on any number of irrelevant or spurious grounds, the definition nonetheless contains the possibility of extending the list of 'prohibited grounds' and includes three criteria, each of which would be sufficient to recognise a further characteristic as a 'prohibited ground'. This approach is inspired by the solution to the open versus closed list of 'prohibited grounds' dilemma provided by the South African Promotion of Equality and Prevention of Unfair Discrimination Act (2000)."

grounds can be bigger than the sum of its parts. The unified perspective on equality acknowledges that the phenomenon of discrimination must be addressed holistically, if it is to be effectively challenged.

Principle 5 provides the basis for consideration of the range of identity-based groups included in the report. Thus, at various points, the report examines discrimination on grounds of race, ethnicity and descent;[24] sex, pregnancy, maternity and civil, family or carer status;[25] birth, national or social origin and nationality;[26] economic status;[27] sexual orientation and gender identity;[28] disability;[29] and health status.[30] Furthermore, the report examines one pattern of discrimination and inequality – that affecting persons with albinism[31] – which does not fall within any of these specified grounds, but which it is felt meets all three requirements of the test established in the second paragraph of the definition.

The Declaration defines three forms of **prohibited conduct** which constitute discrimination: direct discrimination, indirect discrimination, and harassment. All three concepts reflect current expert opinion on the definitions of the different forms of discrimination in international[32] and regional[33] human rights and equality law. They are used throughout Part 2 to assess the patterns of discrimination identified by the research against the state's obliga-

24 See below, section 2.2.

25 See below, section 2.3.

26 See below, section 2.2.

27 See below, section 2.1.

28 See below, section 2.4.

29 See below, section 2.5.

30 See below, section 2.7.

31 See below, section 2.6.

32 See, for example, Committee on Economic, Social and Cultural Rights, *General Comment 20: Non-discrimination in economic, social and cultural rights (art. 2, Para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, UN Doc. E/C.12/GC/20, 2009, Para 10.

33 See, for example, European Union Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Articles 2(a), 2(b) and 3; and European Union Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, Articles 2(a), 2(b) and 3.

tion to respect the right to non-discrimination, and in Part 3 as a basis against which to assess the adequacy of legal provisions intended to protect people from discrimination.

This report relies on a number of other important concepts and definitions contained in the Declaration of Principles on Equality. Thus, the report employs the definition of **reasonable accommodation** provided in Principle 13 of the Declaration:

> *To achieve full and effective equality it may be necessary to require public and private sector organisations to provide reasonable accommodation for different capabilities of individuals related to one or more prohibited grounds.*
>
> *Accommodation means the necessary and appropriate modifications and adjustments, including anticipatory measures, to facilitate the ability of every individual to participate in any area of economic, social, political, cultural or civil life on an equal basis with others. It should not be an obligation to accommodate difference where this would impose a disproportionate or undue burden on the provider.*[34]

In line with international law in this area, the approach taken in the report is that a denial of reasonable accommodation constitutes discrimination.[35] Reflecting an emerging international consensus on this issue, the concept of reasonable accommodation "is extrapolated to cover other forms of disadvantage beyond disability, as well as, more generally, differences which hamper the ability of individuals to participate in any area of economic, social, political, cultural or civil life".[36] Thus, in the context of this report, it is accepted that the duty of reasonable accommodation can arise in respect of any ground.

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34 See above, note 19, Principle 13, p. 10-11.

35 See, for example, Convention on the Rights of Persons with Disabilities, G.A. Res. A/RES/61/106, (2006), Article 2; and Committee on Economic, Social and Cultural Rights, *General Comment 5: Persons with Disabilities*, UN Doc. E/1995/22, 1995, Para 15: "disability-based discrimination" includes the denial of "reasonable accommodation based on disability which has the effect of nullifying or impairing the recognition, enjoyment or exercise of economic, social or cultural rights".

36 See above, note 20, p. 39.

Similarly, the report employs the understanding of **positive action** provided in Principle 3 of the Declaration. As with other concepts in the Declaration, this definition draws upon emerging approaches in international and regional human rights law, in this case with regards to the concepts of special measures in the various instruments,[37] whereby "it should be noted that the Declaration captures the growing tendency of interpreting "special measures" as part of, rather than an exception to, equal treatment."[38] Principle 3 states:

> *To be effective, the right to equality requires positive action.*
>
> *Positive action, which includes a range of legislative, administrative and policy measures to overcome past disadvantage and to accelerate progress towards equality of particular groups, is a necessary element within the right to equality.*[39]

The notion of positive action plays an important role in the unified perspective on equality, and, therefore, in the approach of this report. As previously discussed, the right to equality extends beyond a right to be free from discrimination and contains an element of participation on an equal basis with others in all areas of life regulated by law. Positive action is key to addressing those inequalities which are not attributable solely to discrimination. Having identified patterns of substantive inequality in Part 2, Part 3 of this report analyses the adequacy of positive action measures to address these.

The review of laws and policies in Part 3 of this report is based on an assessment against those parts of the Declaration which set out the **obligations of the state** with regards to the rights to equality and non-discrimination, including in particular Principle 11. In this regard, the Declaration applies the understanding of state obligations in the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), as explained, *inter alia*, in General Comment 3

37 See, for example, International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106 (XX), 1965, Article 1(4); Convention on the Elimination of All Forms of Discrimination against Women, G.A. Res. 34/180, 1979, Article 4(1); and Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, Article 2(1)(d).

38 See above, note 20, p. 32.

39 See above, note 19, Principle 3, p. 5.

of the Committee on Economic, Social and Cultural Rights (CESCR) and General Comment 31 of the Human Rights Committee (HRC). As stated in the commentary on the Declaration*:*

> *By analogy with the interpretation of States' obligations set out in General Comment 3 of the UN Committee on Economic, Social and Cultural Rights, States are required to take all necessary steps, including legislation, to give effect to the right to equality in the domestic order and in their international cooperation programmes. The right to full and effective equality may be difficult to fulfil; however, the State does not have an excuse for failing to take concrete steps in this direction. The requirement to take such steps is unqualified and of immediate effect. A failure to comply with this obligation cannot be justified by reference to cultural, economic, political, security, social or other factors.*[40]

Part 3 of this report assesses the adequacy of the legal and policy framework in the light of the Declaration's principles relating to access to justice for discrimination victims, evidence and proof in discrimination proceedings, and other elements of enforcement of equality rights.[41] While the necessity of effective enforcement of the rights to non-discrimination and equality is illustrated by the findings in Part 2 of this report, these issues are discussed in more detail in Part 3 and Part 4, in the context of recommendations about legal and policy reform, implementation and enforcement.

Application of the Unified Human Rights Perspective on Equality

Applying the unified human rights perspective on equality has a number of consequences for the content, structure and methodology of this report. The first consequence is reflected in the subject and scope of the report – the presentation of **discrimination and inequality on a number of different grounds in the same study**, covering the grounds of socio-economic status, race or ethnicity, gender, sexual orientation, gender identity, disability and health status, side by side. While it is clearly beyond the scope of the report to provide a detailed analysis of discrimination and inequality arising on every

40 See above, note 20, p. 38.

41 See above, note 19, Principles 18-25, pp. 12-14.

possible ground, the aim has been to present what appears to be the most significant patterns of discrimination and inequality found in the Kenyan context. Thus, certain issues which might legitimately be the subject of study – notably discrimination on grounds of age and religion – have not been made the focus of the research. Similarly, in respect of certain grounds, it has not been possible to include every group which is vulnerable to discrimination and inequality: the examination of issues affecting indigenous communities, for example, looks at a selection of these communities in detail to illustrate the issues which affect indigenous communities in general.

Presenting patterns of discrimination and inequality alongside each other also requires a specific weighing of the sources of evidence. To some extent, Part 2 of the report relies on pre-existing research into inequalities affecting particular groups, which was substantial and readily available in some areas, but limited in others. In those areas where pre-existing research was unavailable, ERT has relied more heavily on direct testimony from individual victims, focus groups, or interviews with professionals working on behalf of particular groups. The evidence obtained through field research and desk research has been weighed and contextualised, with a view to presenting a map of discrimination and disadvantage in Kenya as true to reality as possible. In so doing, it is hoped that the report also illuminates the links between inequalities on different grounds, through identifying overarching issues, instances of multiple discrimination and common experiences.

The second consequence of following the unified human rights perspective relates to the scope of application of the right to equality, which encompasses **all areas of activity regulated by law.** In respect of each ground of discrimination and inequality, the report seeks to assess people's experience of discrimination across the full range of areas of activity, such as employment, education, or healthcare. But in this respect, too, the evidence is uneven: there is little evidence of discrimination or inequality in particular areas of life for certain disadvantaged groups, either because persons within these groups do not experience disadvantage in a particular area, or because evidence of such disadvantage was not forthcoming in the course of the research. Thus, the approach taken was to seek evidence of discrimination and inequality in all areas of life regulated by law, but to focus on those areas where problems appeared to be more significant, and to pass over areas where evidence was not forthcoming.

The third consequence of applying the unified perspective is to require an **analysis of both violations of the right to non-discrimination and the right to equality**. The report takes the right to equality, as defined in the Declaration of Principles on Equality, as the baseline against which it assesses the degree of inequality. Thus, the report investigates patterns of substantive inequality, by looking at the element of "participation on an equal basis with others in economic, social, political, cultural or civil life", thereby extending beyond experiences of discrimination. In discussing the pattern of ethno-regional inequality, for example, the report finds extensive evidence of substantive inequality in access to basic amenities, employment, education and healthcare. While in some cases these can be easily put down to current or past discrimination, whether direct or indirect, in other cases this would not be relevant. In any case, the state should take steps to address these substantive inequalities, thus going beyond its obligations understood as observance of formal equality.

The final consequence of this approach is to **present evidence of patterns of discrimination and inequality alongside an analysis of the legal and policy framework on promoting equality**. The existence and enforcement of laws and policies prohibiting discrimination and promoting equality is a critical factor – though by no means the only one – in ensuring enjoyment of the rights to non-discrimination and equality. Protecting people from discrimination by enacting such laws is a key state obligation in respect of these rights. Thus, this report seeks to match an assessment of the lived experience of discrimination and inequality with a review of Kenya's legal and policy framework, in order to establish where the law discriminates, where gaps and inconsistencies in legal protection exist, and where laws are inadequately enforced. The analysis of patterns of discrimination in Part 2 of the report gives rise to a number of concerns about the adequacy and enforcement of the laws and policies designed to address discrimination and inequality in Kenya. Thus, it is hoped that the information contained in Part 2 provides a strong evidence base for analysing the effectiveness of the laws and policies discussed in Part 3, and therefore to ensure that the conclusions and recommendations in Part 4 are relevant and robust.

Research Methodology

ERT and the Kenya Human Rights Commission (KHRC) have been working in partnership since 2009, on three joint projects related to equality.

Throughout the course of this work, the partners have undertaken research by conducting field missions for gathering direct testimony and documenting discrimination and other violations of the right to equality, roundtable discussions, focus groups and interviews, as well as reviewing research conducted by others. They have also analysed the legal and policy framework related to equality in Kenya. All of this work has contributed to the development of this report.

Research for Part 2 of the report included both desk based research and field work, with the latter featuring focus group discussions and semi-structured interviews. During desk research, the widest possible range of existing sources were reviewed, and during field research an attempt was made to collect testimony from groups and individuals in as many different parts of Kenya as possible. This approach has limitations but is believed to be adequate for the purpose of this report: to highlight the prevalence and severity of discrimination and inequality in Kenya through presenting the most important country-specific patterns; to emphasise the links between inequalities on different grounds and in different areas of activity; and to illustrate the need for the introduction of new legislative and policy measures to provide comprehensive protection from discrimination and to promote equality.

The research process for Part 2 of the report began with six months of desk research followed by two roundtable discussions held in Nairobi in January and July 2010. The aim of these events was to involve a broad range of actors, both in terms of representation of different groups vulnerable to discrimination and inequality, and in terms of engaging stakeholders working at both the grass-roots and national levels. The two events brought together representatives from a range of human rights organisations, including those from particular groups vulnerable to discrimination and inequality including *inter alia* women, ethnic minorities, LGBTI persons, persons with disabilities and persons with albinism, together with a number of representatives of statutory bodies including the Kenya Law Reform Commission. These events provided a range of insights into the range of experiences of discrimination and inequality in Kenya, and acted as the starting point for identifying the specific patterns which are featured in Part 2 of the report.

The desk research which continued throughout 2010 reviewed relevant literature on discrimination and inequality in Kenya, including reports to UN

treaty bodies by the government and NGOs, research published by international and national NGOs, academic research and media reports on particular incidents. The literature review covered relevant aspects of human rights and equality, as well as a number of related issues in the fields of development studies, economics, labour studies, education sociology, etc.

The research effort was distributed in a way to maximise the use of pre-existing studies and to fill gaps in documentation. Thus, while in respect of some issues such as violence against women there had been good body of pre-existing governmental, non-governmental and academic research, on other issues, such as discrimination against persons with albinism, prior research was very limited. In addition, given the need to look beyond discrimination and assess equality of participation, traditional methods of human rights documentation were complemented by sociological research, in particular related to employment, education and healthcare. Wherever possible, statistical data was relied on to improve understanding of inequalities. The basic data has come from the Kenya National Bureau of Statistics,[42] complemented by and compared to data from the World Bank, the World Health Organisation (WHO), the United Nations Development Programme (UNDP), the United Nations Educational, Scientific and Cultural Organisation (UNESCO) and other sources. However, the scarcity of relevant statistical data – in particular data disaggregated by protected characteristics such as gender, ethnicity, age or religion – presented a challenge to effective quantitative research on discrimination and inequality. Indeed, this in itself is a cause for concern, as the government should ensure collecting of disaggregated data allowing it to assess and address inequalities.[43]

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42 Kenya National Bureau of Statistics, all information accessible at: http://www.knbs.or.ke/.

43 States have an obligation to collect data on the participation of different groups under the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of Discrimination against Women and the Convention on the Rights of Persons with Disabilities, an obligation which is frequently invoked by treaty bodies when reviewing state compliance. See, for example, the Committee on the Elimination of Racial Discrimination*, General Recommendation 24*: *Reporting of persons belonging to different races, national/ethnic groups, or indigenous peoples (Art. 1),* UN Doc. A/54/18, annex V, 1999, Para 1, in which the Committee states: "[I]t is essential that States parties provide as far as possible the Committee with information on the presence within their territory of [races, national or ethnic groups or indigenous peoples]." Under the Declaration of Principles of Equality, the obligation to collect disaggregated data covers all characteristics relevant to disadvantage. Principle 24 states: "To give full effect to the right to equality States must collect and publicise information, including relevant statistical data, in order to identify inequalities, discriminatory practices and patterns of disadvantage, and to analyse the effectiveness of measures to promote equality." (See above, note 19, p. 14.)

Field research was conducted in a number of locations in Kenya in November - December 2010, March 2011 and August 2011. The teams visited locations in different parts of the country, selected to reflect Kenya's geographical diversity, a particularly important consideration given the ethno-regional divides within the country, and the great disparities of income, infrastructure and access to public services between different regions. In an effort to gain an understanding of the different patterns of discrimination and inequality across the country, the teams met with a range of persons from different groups vulnerable to discrimination in each different location. The field research corroborated and contextualised evidence found in pre-existing research, at the same time identifying potential gaps in the existing literature and documenting the concerns of people confronted by issues of discrimination in their everyday lives. Research methods with regard to focus groups and individual respondents were designed to incorporate both individual narratives and group opinions.

Research on law and policy for Parts 2 and 3 was undertaken by ERT with assistance from KHRC throughout 2010 and 2011. Research on Kenya's international legal obligations benefited from the United Nations Treaty Collection database[44] and the website of the Office of the High Commissioner for Human Rights.[45] Research on Kenyan laws, including the Constitution, legislation and case law, consisted of reviewing primary sources, accessed via the Kenya Law Reports maintained by the National Council for Law Reporting, a semi-autonomous state agency established under The National Council for Law Reporting Act 1994.[46]

Research on Kenyan government policies was undertaken through review of government websites, policy documents and independent commentary on policies. Research on the role, functions and operations of the specialised bodies responsible for human rights and equality issues was undertaken by review of the relevant legislation, policy documents, publications and annual reports produced by the bodies themselves and interviews conducted both with Commissioners and staff at these bodies and with civil society actors.

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44 United Nations, *United Nations Treaty Series Online Collection*, available at: http://treaties.un.org/pages/UNTSOnline.aspx?id=1.

45 Office of the High Commissioner for Human Rights, available at: http://www.ohchr.org/EN/Pages/WelcomePage.aspx.

46 National Council for Law Reporting, *Kenya Law Reports*, available at: http://www.kenyalaw.org/klr/index.php?id=29.

Scope and Limitations of the Report

It is not possible for any report to provide an exhaustive account of discrimination and inequality in a given country, and this report is no exception. While aiming to provide a comprehensive account of the Kenyan legal and policy framework as it relates to equality, the review of the Kenyan people's experience of discrimination and inequalities is limited to only the most widespread and serious patterns which, taken together, present "the big picture". Manifestations of discrimination and inequality are as varied as the population of Kenya itself. Each individual will have their own perceptions of discrimination and inequality arising in different areas of life, in different circumstances, in interaction with different persons, institutions or organisations and as a result of any aspect of their identity, or any combination of these aspects.

For these reasons, Part 2 of this report does not aim to be exhaustive either in the inclusion of different grounds of discrimination and inequality, or in the treatment of these grounds. Rather, the aim is to discuss the major patterns of discrimination and inequality which arise in relation to those grounds felt to be most significant in the Kenyan context. The result is that some issues are deliberately left out. In particular, three types of limitations of the report should be highlighted: (1) the lack of focus on particular grounds of discrimination, including religion and age; (2) the lack of full coverage of particular groups within the treatment of certain grounds, including in particular in relation to the ground of race and ethnicity; and (3) the lack of discussion of inequalities in certain areas of activity, with respect to certain grounds.

Part 2 does not focus specifically on discrimination on the basis of **religion** as no significant evidence of this problem could be gathered through first-hand research for this report. It appears that part of the reason for this dearth of evidence is that a number of Kenya's religious minorities are also ethnic minorities, and the discrimination and inequality which they experience tends to be understood by them in relation to their ethnicity, rather than their religion. According to figures collected in the 2009 Census, one in ten Kenyans[47]

47 See Ministry for Planning, National Development and Vision 2030, *2009 Population & Housing Census Results,* 2010, no longer available online. Following disputes about the annulment of results in eight northern districts and questions over the veracity of the statistics for certain ethnic groups in the 2009 Census (see, for example, Muchangi, J., "Kenya: Anger As Census Results Cancelled" *AllAfrica,* 1 September 2010, available at: http://allafrica.com/stories/201009020398.html), the government of Kenya announced it would re-run the census in parts of the country. As a result, a full set of statistics from the 2009 Census originally published on the Kenya National Bureau of Statistics website has recently been withdrawn.

identify themselves as Muslim. The majority of this population reside in Coast and North Eastern Provinces which are home to Kenyan Somalis. Reports of Kenyan Muslims experiencing difficulties in obtaining passports are generally attributed to ethnicity, since many of these individuals are also ethnic Somali. The same problem exists when attempting to assess the existence of discrimination or inequality affecting Hindus: as the Hindu population is largely Asian, the problems of marginalisation – particularly in political participation – faced by this group appear to arise because of their ethnicity, rather than their religion. None of this suggests that discrimination on grounds of religion or belief is not a problem in Kenya, or that the problems affecting Kenyan Somalis and Kenyan Asians are not examples of multiple discrimination on grounds of race and religion. Rather, it indicates that the authors' research did not reveal significant incidences of discrimination and inequality arising mainly because of religion, and that the testimony collected from groups practicing minority religions indicated that their concerns were about racial or ethnic discrimination.

Similarly, the lack of evidence of discrimination and inequality **affecting persons on the basis of their age**, both in respect of previous research published by academics, governmental or non-governmental organisations, and original documentation for this report, made it impossible to focus on this issue in Part 2 of the report. In particular, the absence of statistics disaggregating data on poverty, access to employment and access to services by age made any assessment of age inequalities difficult. In addition, elderly and young persons interviewed during field research in a number of different communities across Kenya stated that they experienced their disadvantage due to factors other than age, including in particular poverty, ethnicity and disability. Again however, the report does not claim that age inequalities are non-existent in Kenya. Moreover, several respondents, asked to list the five or six most disadvantaged categories of persons in Kenya, included the category "young people" and explained that all young people faced difficulties in employment.

A further limitation of this report is that the section dealing with discrimination and disadvantage based on ethnicity does not cover the experience of each particular group. Kenya is a country of significant ethnic diversity, and is home to more than 70 different **ethnic groups or tribes**,[48] including both

48 University of Pennsylvania Africa Studies Centre, *Kenya - Ethnic Groups*, undated, available at: http://www.africa.upenn.edu/NEH/kethnic.htm.

large groups such as the Kikuyu (22%), Luhya (14%), Luo (13%) and Kalenjin (12%) and a significant number of small **indigenous communities** practicing traditional lifestyles, such as the Ogiek and Il Chamus. As a result, section 2.2 and section 2.2.1 take a thematic, rather than group-specific approach, seeking to illustrate the overarching theme of ethnically-based discrimination and inequality.

Finally, while the report is an attempt to examine the experience of different groups in **all areas of economic, social, political, cultural or civil life**, it does not seek to be exhaustive in terms of covering all areas when analysing inequalities according to protected personal characteristics. Thus, in respect of some characteristics, no information on inequalities in some areas of life is included, while in respect of others, there is a focus on problems in specific areas of life. This reflects the nature of the evidence which arose in the course of the research for this report: while discrimination and disadvantage in some areas of life may have a particularly severe impact on a certain category of persons, in other areas equality issues have been less prominent or absent in respect to that category.

1.3 Country Context

Kenya, a large country in coastal East Africa bordering Ethiopia, Somalia, Sudan, Tanzania and Uganda, is home to just under 40 million people.[49] It does not have an ethnic majority,[50] and is home to more than 70 different ethnic groups or tribes, the largest of which are the Kikuyu, Luhya, Kalenjin and Luo.[51] In addition to the larger ethnic groups, there are a significant number of indigenous communities such as the Turkana, Ogiek and Endorois, which practice traditional, pastoralist or nomadic lifestyles that are under threat as a result of government policies, environmental degradation and land acquisition. Kenya is also home to a number of migrant communities from neighbouring countries, the largest of which are the Kenyan Somalis, numbering 2.3 million.[52] An estimated 100,000 Kenyan Nubians, a *de facto*

49 See above, note 47.

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

51 See above, note 48.

52 See above, note 47.

stateless group descended from Sudanese ex-servicemen in the British Army, live in the North East of the country, as well as in the Kibera slum area of Nairobi.[53] According to the UNHCR's 2009 Global Trends Report, Kenya is host to the fifth largest population of refugees in the world,[54] with significant populations fleeing violence and conflict in neighbouring Somalia, Ethiopia, and southern Sudan.[55] Kenya's colonial past has resulted in the presence of a number of non-African minority populations. Prior to independence in 1963, Kenya had an estimated 60,000 white British settlers, but a large number of these departed the country shortly after independence under a subsidised "willing buyer willing seller" scheme. Approximately 30,000 were resident in the country in 2006.[56] Kenya also has a small Asian population, mainly descendants of those who arrived during the colonial period as both indentured and free migrant workers; the 2009 census results showed 35,000 Asians in the country, though this number is disputed.[57]

Kenya is linguistically diverse, though only English and Swahili are recognised as official languages.[58] *Ethnologue* indicates that 69 languages are spoken in Kenya,[59] and it is common for Kenyans to be tri-lingual, speaking both official languages and the language of their ethnic group. The population is predominantly Christian, with 45% of Kenyans identifying themselves as Protestant and 33% as Roman Catholic.[60] An estimated 7% of Kenyans identify themselves as Muslim,[61] and the proportion is significantly higher in Coast

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

54 United Nations High Commission for Refugees, *2009 Global Trends: Refugees, Asylum-seekers, Returnees, Internally Displaced and Stateless Persons,* 2010, p. 7.

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

56 McGreal, C., "A Lost World", *The Guardian*, 26 October 2006.

57 Warah, R., "Census Data on Kenyan Asians Raises More Questions than Answers", *The Daily Nation*, 5 September 2010.

58 Constitution of Kenya 2010, Article 7(2).

59 Lewis, M. (ed.), *Ethnologue: Languages of the World*, Sixteenth edition, SIL International, 2009, available at: http://www.ethnologue.com/show_country.asp?name=KE.

60 See above, note 47.

61 Pew Research Center, *Mapping the Global Muslim Population: A Report on the Size and Distribution of the World's Muslim Population*, 2009, p. 30, available at: http://pewforum.org/uploadedfiles/Orphan_Migrated_Content/Muslimpopulation.pdf.

and North Eastern Provinces.[62] According to the 2009 census, approximately 635,000 people practice traditional religions, 550,000 belong to "other religions" and 920,000 stated no religious affiliation.[63]

Kenya is a poor country, ranking 143rd out of 187 countries on the 2011 United Nations Development Programme's Human Development Index.[64] The World Bank records that in 2005, the most recent year for which figures are available, 19.7% of the population lived on $1.25 a day or less,[65] and that 45.9% of the population were living below the national poverty line.[66] Income and wealth distribution in the country is highly unequal, with 38% of income accruing to the top 10%, compared with just 2% accruing to the poorest 10% according to 2005 data.[67]

There is a distinct lack of current statistics on the state of the labour market, either from the government itself or international institutions, such as the International Labour Organization (ILO) or the United Nations Development Programme (UNDP). As such, it is difficult to get a clear picture of the nature and level of employment, and there is substantial variation between the figures presented in different studies. However, World Bank data for 2009 indicates that the rate of labour force participation (the percentage of the total population over the age of 15 in employment) was 82%, while the employment to population ratio was 74%.[68] The same source estimated that

62 See above, note 50, p. 18.

63 See above, note 47.

64 United Nations Development Programme, *International Human Development Indicators: Kenya,* 2011, available at: http://hdrstats.undp.org/en/indicators/103106.html.

65 The World Bank, *Poverty headcount ratio at $1.25 a day (PPP) (% of population) for 2005*, available at: http://data.worldbank.org/indicator/SI.POV.DDAY/countries.

66 The World Bank, *Poverty headcount ratio at national poverty line (% of population) for 2005*, available at: http://data.worldbank.org/indicator/SI.POV.NAHC/countries.

67 The World Bank, *Income share held by lowest 10% for 2005*, available at: http://data.worldbank.org/indicator/SI.DST.FRST.10/countries?page=1; and The World Bank, *Income share held by highest 10% for 2005*, http://data.worldbank.org/indicator/SI.DST.10TH.10/countries.

68 The World Bank, *Labor participation rate, total (% of total population ages 15+) for 2009,* available at: http://data.worldbank.org/indicator/SL.TLF.CACT.ZS/countries; and The World Bank, *Employment to population ratio, 15+, total (%) for 2009*, available at: http://data.worldbank.org/indicator/SL.EMP.TOTL.SP.ZS/countries.

61.1% of employment was in the agricultural sector in 2005,[69] though this appears to contradict data published in 2009 by the Kenya Institute for Policy Research and Analysis which estimated that only approximately 6 million persons (17%) of people were employed in small-scale agricultural work.[70]

Access to education and health services in Kenya is far from comprehensive, though in both areas, the country has made substantial gains in recent years. The Kenyan government has made significant efforts to increase access to education, in particular through the provision of free primary education. Data for 2009 produced by UNESCO estimates that the net enrolment ratio at primary level was 83%.[71] UNESCO data also indicates that only 48% of girls in the relevant age group are in secondary school, compared with 52% of boys.[72] A 2010 report by the organisation Uwezo Kenya suggests that the quality of education is also a cause for concern, finding levels of literacy and numeracy significantly below expected levels.[73] Life expectancy in 2009 was significantly below the global average, at 58 for men and 62 for women, though both are slightly above the regional average.[74] Infant mortality and maternal mortality rates are high and there is a high rate of communicable diseases, including malaria, which is the leading cause of morbidity, and tuberculosis.[75] According to a report produced by the National AIDS Control Council HIV prevalence has been declining in the last two decades, with the result that "estimates for 2009 gave a HIV prevalence of 6.2%".[76]

69 The World Bank, *Employment in agriculture (% of total employment) for 2005*, available at: http://data.worldbank.org/indicator/SL.AGR.EMPL.ZS/countries?page=1.

70 The Kenya Institute for Public Research and Analysis, *Unemployment in Kenya: the Situational Analysis*, May 2009, p. 61.

71 United Nations Educational, Scientific and Cultural Organisation Institute for Statistics, *Statistics In Brief: Education (all levels) profile – Kenya*, available at: http://stats.uis.unesco.org/unesco/TableViewer/document.aspx?ReportId=121&IF_Language=eng&BR_Country=4040&BR_Region=40540.

72 *Ibid*.

73 Uwezo Kenya, *Are Our Children Learning: Annual Learning Assessment Kenya 2010,* 2010, p. 15.

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

75 World Health Organisation, *Country Cooperation Strategy,* 2009.

76 National AIDS Control Council, *UNGASS 2010: United Nations General Assembly Special Session on HIV and AIDS, Country Report - Kenya*, 2010, p. 6.

The Constitution establishes the country as a presidential democracy,[77] with what is referred to as a "strong presidency" model.[78] Until elections are held pursuant to the new Constitution, the country retains a coalition government of national unity formed by the Party of National Unity (PNU) and the Orange Democratic Movement (ODM) in the wake of post-election violence in 2007.[79] Under this arrangement, PNU leader and former President Mwai Kibaki retains the presidency while his former opponent, Raila Odinga, is the country's Prime Minister. Kenya is a democratic state and political freedoms are generally respected, though corruption and impunity for past abuses continue to pose questions about the government's legitimacy. Freedom House's Freedom in the World report 2010 scores Kenya as "partly free" citing "vote rigging and other administrative manipulations" in the 2007 elections, lack of progress on electoral reform and widespread corruption as significant concerns.[80] It states that freedom of speech and freedom of the press are "generally respected in practice", as are religious freedom, academic freedom and freedom of assembly.[81] Corruption is a major problem: Transparency International's Corruption Perceptions Index ranked Kenya 154th out of 178 countries surveyed, where the 1st is the country with least perceived corruption.[82] The 2009 East African Bribery Index identified the Kenyan police as the most corrupt institution in East Africa.[83]

1.4 Recent History and Politics

Kenya gained independence from Great Britain in 1963, bringing to an end over four hundred years of European involvement in Kenyan affairs, first

77 See above, note 58, Article 130.

78 Mathenge, O. and Barasa, L., "High Stakes Round of Talks Awaits MPs", *The Daily Nation*, 24 January 2010.

79 See above, note 58, Sixth Schedule, section 12 (1) which states: "The persons occupying the offices of President and Prime Minister immediately before the effective date shall continue to serve as President and Prime Minister respectively, in accordance with the former Constitution and the National Accord and Reconciliation Act, 2008 until the first general elections held under this Constitution, unless they vacate office in terms of the former Constitution and the Accord."

80 Freedom House, *Freedom in the World, Country Report: Kenya,* 2011.

81 *Ibid*.

82 Transparency International, *Corruptions Perceptions Index 2010 Results*, 2010.

83 Transparency International, *East African Bribery Index 2009: The Kenya Police Is the Most Corrupt Institution in East Africa,* 2 July 2009.

under the Portuguese and later under the British. Motivated by trading interests, the desire to abolish the slave trade and competition with other European powers in the region, the British established the East Africa Protectorate in 1895, claiming land from the coast to Lake Naivasha; in 1902 the border was extended to Uganda and in 1920, the protectorate became a crown colony. Under British rule, two important waves of migration took place: European immigrants were encouraged to settle in the fertile Rift valley and Highland areas in an effort to stimulate economic growth; and 32,000 Indian workers were imported to work on a railway line connecting Uganda to the coast at Mombasa.

With the introduction of new taxes and a new wave of settlers in the aftermath of World War I, political activity among the African population increased and the Young Kikuyu Association, the country's first African political movement, was formed. However, political power remained largely vested in the British governor, with a Legislative Council providing representation for European, Indian and Arab residents, but no African representation. During World War 2, Kenya served as an important military base for British campaigns in Somaliland and Ethiopia. As in other parts of the British Empire, the war helped to catalyse African political protest, and, in 1944, the multi-tribal political organisation Kenya African Union (KAU) was established.

Following British refusal of KAU demands for discriminatory legislation to be repealed and greater political representation to be given to Africans, the "Mau Mau Uprising" – an armed movement directed against the colonial government and European settlers – began in 1952. A state of emergency was declared and as conflict escalated, the British undertook large scale offensive operations, rounding up Kikuyu into concentration camps and later into designated "villages". KHRC has estimated that 90,000 Kenyans were executed, tortured or maimed during the conflict. After the suppression of the conflict, the British provided for direct election of six African members to the Legislative Council, but the pressure for universal suffrage increased.

At a conference in London in 1960, an agreement was reached between African members of the Council and representatives of the English settlers, to lift a ban on political parties and in that same year a new political party, the Kenyan African National Union (KANU), was formed. KANU later split and at elections in 1961, KANU took 19 of the 33 seats allocated for Africans and

the breakaway Kenya African Democratic Movement (KADU) took 11 seats. In August 1961 Jomo Kenyatta, imprisoned during the uprising, was released and assumed the presidency of KANU. Following further pressure for full independence, and in the spirit of the decolonisation movement taking hold across the British Empire at the time, a Kenyan Constitution was negotiated between representatives of KANU and KADU and the British government and agreed in 1962, and Kenya became independent on 12 December 1963, with Jomo Kenyatta as President.

In 1966 a Luo-dominated faction of KANU broke away and established itself as the Kenya People's Union (KPU). However, in 1969, following the outbreak of ethnic violence in the aftermath of the assassination of a prominent Luo politician, the KPU was banned and Kenya became a *de facto* one-party state. While Kenyatta claimed that with one-party rule he had brought stability to the country, the seeds of ethnic tensions were sown, as land formerly owned by white settlers was broken up and given to farmers from the Kikuyu, Embu and Meru tribes. By Kenyatta's death in 1978, most of the country's wealth and power was in the hands of these groups.

Daniel arap Moi became interim – and then official – President on Kenyatta's death in 1978. In 1982 he secured an amendment to the Constitution establishing Kenya as a *de jure* one-party state. Moi ruled until 2002, concentrating power in the Presidency and governing in an authoritarian manner which allowed corruption to flourish. Within eight years of assuming power, Moi had successfully concentrated political and economic power in the hands of members of his Kalenjin tribe. In 1991, under pressure from foreign donors, Moi repealed the amendment making Kenya a one-party state, and the Forum for the Restoration of Democracy (FORD), under Oginga Odinga, emerged as the main opposition. FORD rapidly split down ethnic lines. In the 1992 Presidential elections, the split opposition allowed Moi to retain the presidency with 37% of the vote. Throughout the 1990s, as liberalisation continued to allow the establishment of new political parties, Moi continued to employ ethnic favouritism, together with state repression, to maintain control.

In 2002, a rainbow coalition led by Mwai Kibaki defeated Jomo Kenyatta's son, Uhuru, Moi's chosen successor for the presidency. Kibaki's National Rainbow Coalition (NARC) took 62% of the vote. Over the course of the next five years, Kenya enjoyed significant economic growth, but social inequalities in-

creased as the benefits of growth accrued to the wealthiest section of society. In response to the perceived dominance of the Kikuyu in public life and the ensuing economic benefits perceived to be reaped by Kikuyu, Luo and Kalenjin groups split from the NARC in the run up to the 2007 election, forming the Orange Democratic Movement (ODM) and supporting Raila Odinga (Oginga Odinga's son) for President. ODM claimed to have won a significant majority in the parliamentary election, but Kibaki was declared the winner in the presidential election. Amid accusations of vote-rigging, violence erupted as supporters of the two sides took the dispute over the election outcome to the streets. It left 1,133 people dead and a further 3,561 injured.[84]

In an effort to seek resolution to the violence and instability, the Kenya National Dialogue and Reconciliation (KNDR) process, led by a panel of prominent African leaders, was established. The KNDR framework identified four critical agendas for addressing the causes of the crisis: (1) action to stop violence and restore rights and liberties; (2) action to address the humanitarian crisis and promote reconciliation; (3) overcoming the political crisis; and (4) addressing long term issues, including constitutional and legal reform. A coalition government was formed, bringing together representatives of both parties; Kibaki assumed the presidency while Odinga became Prime Minister.

Under the auspices of Agenda 4, the Constitution of Kenya Review Act was adopted in 2008, setting out a detailed process for the development, drafting and adoption of a new constitution. A Harmonized Draft Constitution written by a Committee of Experts was released to the public for consultation on 17 November 2009. The consultation received almost 40,000 responses, making an estimated 1.7 million substantive recommendations. On 7 January 2010, the Committee of Experts passed a revised draft to a Parliamentary Select Committee (PSC) to consider the draft and build consensus on contentious issues. The PSC submitted their recommendations to the Committee of Experts on 2 February and the Committee of Experts submitted a final draft to the National Assembly on 21 February. Following debate in the National Assembly, a final Proposed Constitution of Kenya was published by the Attorney General on 6 May 2010. In a referendum on 4 August, the new Constitution was adopted by a majority of 67% of the votes.

84 Commission of Inquiry into Post-Election Violence, *Final Report*, 2008, pp. 345-346.

1.5 Ground for Hope: The New Constitution

The most significant development in respect of equality in Kenya in recent years is the adoption of a new Constitution in the summer of 2010. The constitutional review process which took place between 2008 and 2010 focused on addressing complex and contentious issues of governance, devolution and the separation of powers. The Constitution which emerged contains a substantially improved Bill of Rights and could represent a real step change in the protection of the rights to equality and non-discrimination in Kenya. While the new Constitution contains a number of serious problems in terms of achieving equality, it nonetheless represents a significant change for the better for a number of reasons.

Firstly, a **commitment to the principles of equality and non-discrimination** is woven throughout the Constitution. Thus, in the preamble, equality is listed as one of six essential values upon which governance should be based. This expression of principle is given legal force elsewhere in the Constitution where equality is listed among the national values and principles of governance that are to be used in applying and interpreting the Constitution, and among the values to be promoted in interpreting the Bill of Rights specifically. Thus, equality, together with related principles such as protection of groups vulnerable to discrimination and respect for ethnic, religious, cultural and linguistic diversity, has an important position in all aspects of constitutional interpretation.

Secondly, the Constitution contains a substantially **improved and expanded provision on the rights to equality and non-discrimination**. The relevant Article begins with a guarantee of equality before the law and equal protection and benefit of the law, a guarantee which was not present in the previous Constitution. Moreover, equality is defined as including "full and equal enjoyment" of all rights and freedoms. Article 27 prohibits direct and indirect discrimination, both by the state and by natural and legal persons on an extensive list of specified grounds and – through the use of the words "shall not discriminate directly or indirectly on any ground, including" provides for protection in respect of new grounds analogous to those explicitly listed.[85] In

85 See above, note 58, Article 27(4) in which the explicitly protected grounds of discrimination are: "race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth".

addition, it creates a duty of affirmative action, a concept which is defined as "any measure designed to overcome or ameliorate an inequity or the systemic denial or infringement of a right or fundamental freedom".[86]

Thirdly, in addition to the general protection from discrimination offered by Article 27, Part 3 of the Bill of Rights makes **specific provision for particular groups vulnerable to discrimination and inequality**, with the aim of ensuring "greater certainty as to the application of those rights and fundamental freedoms to certain groups of persons".[87] Articles 53, 55 and 57 provide specific rights for children, young people and older people respectively. Article 54 focuses on the rights of persons with disabilities, while Article 56 provides additional rights and protections for "minorities and marginalised groups", a classification which potentially encompasses all those vulnerable to discrimination under Article 27.[88] While a section on the rights of women is notably absent from this part, elsewhere in the Constitution, gender equality features prominently: equal rights for men and women are guaranteed during a marriage and at its dissolution;[89] in the acquisition of citizenship through birth and marriage;[90] and the "elimination of gender discrimination in law, customs and practices" related to land is included among the principles of land policy.[91]

Fourthly, the **potential impact of constitutional rights to address discrimination and inequality through changes to law, policy and practice** is significant. This is because of three important sets of provisions, the first setting out the deliberately narrow provisions for limitation of the rights recognised, the second setting out the supremacy of the Constitution, and the third incorporating Kenya's international legal obligations into national law. The previous Constitution of Kenya contained significant limitations in the application of the right to non-discrimination significantly in three critical areas: laws ap-

86 *Ibid.*, Article 260.

87 *Ibid.*, Article 52(1).

88 *Ibid.*, Article 260 in which the term "marginalised groups" is defined as: "a group of people who, because of laws 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)".

89 *Ibid.*, Article 45(3).

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

91 *Ibid.*, Article 60(1)(f).

plying to non-citizens; matters of personal law; and systems of customary law. The new Constitution does not replicate these exemptions, such that the only limitation on the application of the rights to equality and non-discrimination are those found in the general – and narrowly tailored – limitation clauses applicable to the Bill of Rights as a whole. Thus, the scope of application of the constitutional right to quality is significantly broader under the 2010 Constitution. In addition, constitutional supremacy is clearly established. Section 7 of the Sixth Schedule states that "all law (...) shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution" and Article 2(4) expressly states that "any law, including customary law, which is inconsistent with this Constitution, is void to the extent of its inconsistency". This expands the scope for challenges of discriminatory laws and policies substantially. Finally, Article 6(6) of the Constitution, which states that "any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution", means that international instruments which provide important protections from discrimination now have direct effect as part of Kenyan law.

Fifthly, the Constitution contains a number of provisions on **devolution and equitable resource allocation**, which present a substantial opportunity to address long-standing issues of ethno-regional discrimination and inequality. Equitable access to resources, public services and infrastructure is a highly contentious issue in Kenya, particularly given the role which regional patronage has played in national politics. Thus, provisions which set out that power will be executed at both the national and county level[92] and establish 47 counties, whose objects include to "foster national unity by recognising diversity" and to "ensure equitable sharing of national and local resources" are a significant step.[93] What is more, these provisions are complemented by the establishment of an Equalisation Fund to accelerate progress towards equality in marginalised areas, in recognition of the disparities in the provision of basic services between different 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.

92 *Ibid.*, Article 1(4).

93 *Ibid.*, Articles 174(b) and (g).

Finally, the fact of the adoption of the new Constitution is itself important, both in what it represents, and what it prefigures. The successful process through which the Constitution was developed, debated and ratified represents a major step in the development of Kenya's legal system. The fact that the values of equality and non-discrimination were embedded in this process is highly significant in terms of the will of the public and the political leaders. What is more, since its adoption, the consequences of the Constitution have become increasingly clear. Gender discrimination in the allocation of government jobs has been successfully challenged, first in the public sphere, and then in the courts. Debate has ensued about the mandate and functions of new institutional arrangements under the Bill of Rights which – in the midst of partisanship and other challenges – has indicated a genuine concern about how to address the different aspects of inequality and discrimination. Kenyan civil society actors have waged a consistent campaign that legislation establishing a Commission on equality should incorporate the necessary elements of substantive law required to meet Kenya's obligations to protect the rights to equality and non-discrimination on all eligible grounds and spheres of life.

Thus, the new Constitution contains a wealth of progressive measures in respect of the rights to equality and non-discrimination and presents an array of opportunities to entrench the enjoyment of these rights. However, it is not a panacea. As this report shows, the Kenyan legal and policy framework on equality and non-discrimination remains fragmented and inconsistent, with significant gaps in protection and poor implementation and enforcement. The recommendations of this report seek to set out the measures which the Kenyan government should take to address these problems and thus begin to tackle the patterns of discrimination and inequality which Part 2 of the report identifies.

2. PATTERNS OF DISCRIMINATION AND INEQUALITY

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

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

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

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

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

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

2.1 Poverty, Inequality and Discrimination

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

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

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

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

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

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

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

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

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

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

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

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

100 Coalition of Non-Governmental Organizations on Economic, Social and Cultural Rights and Kenya Human Rights Network, *Taking These Rights Seriously: Civil Society Organisations' Parallel Report to the Initial State Report of the Republic of Kenya on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, 2008, p. 8, available at: http://www2.ohchr.org/english/bodies/cescr/docs/ngos/K-HURINET_Kenya_CESCR41_report.pdf.

101 See below, section 2.5.

102 See below, section 2.3.

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

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

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

Statistical studies present evidence of *de facto* inequalities between income groups in access to public services, including education and health services. According to data collected in 2003, attendance ratios at primary and secondary school level vary significantly between the highest and lowest income groups: the attendance ratio at primary level is 86% for the highest income quintile, compared with 61.3% for the lowest.[105] Data collected by United Nations Children's Fund (UNICEF) indicate that drop-out rates are higher among the poorest children: while 87.4% of children from the richest quintile who enrol in standard 1 will reach standard 8, only 68.2% of children from the poorest quintile will complete standard 8.[106] Similarly, access to healthcare and health outcomes are highly unequal: the Society for International Development (SID) has established that infant mortality rates are significantly higher in the poorest 20% of the population than in the richest 20%, with 96

103 See below, section 2.2.

104 See above, note 100, p. 26.

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

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

deaths per 1000 live births compared to 62.[107] UNICEF data indicates that only 28% of the poorest households have access to safe drinking water, compared with 93.7% of those in the richest quintile.[108]

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

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

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107 See above, note 105, p. 6.

108 See above, note 106, p. 12.

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

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

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

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

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

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

112 See below, section 2.3.

113 *Ibid.*

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

115 See above, note 100, p. 17.

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

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

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

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

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

118 *Ibid.*, p. 12.

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

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

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

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

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

120 See below, section 2.2.

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

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

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

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

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

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

2.2 Tribe, Ethnicity and Region

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

131 See above, note 128.

132 See above, note 129, p. 6.

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

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

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

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

133 *Ibid*., p. 7.

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

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

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

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

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

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

137 *Ibid.,* p. 10.

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

> *[P]oliticians find that an easy way to build support is by playing on ethnicity, by stirring up ethnic loyalties on one hand, and ethnic animosities on the other (…) They promise their tribe development and other benefits if they have their vote.*[138]

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

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

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

139 See above, note 119, Para 13.

140 *Ibid.*

141 See above, note 136, p. 8.

142 *Ibid.*, p. 9.

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

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

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

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

144 See above, note 119, Para 26.

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

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

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

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

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

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146 *Ibid.*

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

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

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

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

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

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

150 See above, note 116, p. 5.

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

152 See above, note 116, p. 22.

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

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

Data from the aforementioned SID study "Pulling Apart: Facts and Figures on Inequality in Kenya" also reveals substantial regional disparities across a range of economic and infrastructure indicators, including employment. According to the study, the urban areas of North Eastern Province had the highest rate of unemployment at 35%, a rate which was almost six times higher than that in Central Province (6%).[155] Even so, these figures may understate the difference between the two provinces, as data from the rural parts of North Eastern Province – where unemployment may be higher – are not included. In addition, these figures are based on the Integrated Labour Force Survey 1998/1999. Yet this appears to be the most recent data which is available on the respective employment rates in different provinces. Given the significant disparities which the data reveals and the fact that these regional disparities are likely to translate into inequalities between ethnic groups, it is regrettable that more up to date information is not available. The World Bank has raised concerns about "the timeliness of the data from national surveys", and in particular the "the absence of recent data on labour market issues, whether on firms or workers".[156] In its 2008 Kenya Poverty and Inequality Assessment,[157] the lack of available data led World Bank staff to develop estimated projections of unemployment rates in different provinces on the basis of data from the Kenya Integrated Household Survey 2005-2006.[158] These 2008 estimates show a similar disparity between North Eastern Province, which had an unemployment rate of 40%, and Central Province, where unemployment was 10%, to the earlier Integrated Labour Force Survey.[159] Youth unemployment data from the same World Bank Assessment paints a similarly stark picture of disparity, with youth unemployment rates at 55% in North Eastern Province compared to 15% in Central.[160]

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

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

156 See above, note 154, p. 188.

157 See above, note 154.

158 *Ibid*., p. 55.

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

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

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

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

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

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

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

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

164 *Ibid*., p. 17.

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

166 *Ibid*., p. 17.

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

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

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

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

168 *Ibid.*

169 See above, note 153, p. 114.

170 *Ibid.*, p. 107.

171 See above, note 126, Para 197.

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

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

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

172 See above, note 148.

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

Box 1: Case Study

The Turkana – A Marginalised Community

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

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

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

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

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

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

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

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

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

Box 2. Case Study

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

175 Constitution of Kenya 2010, Article 260: "'marginalised group' means a group of people who, because of law or practices before, on, or after the effective date, were or are disadvantaged by discrimination on one or more of the grounds in Article 27(4)".

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

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

2.2.1 Indigenous Pastoralist and Traditionalist Groups

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

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

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

178 See above, note 176, p. 5.

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

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

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

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

179 See above, note 177, Para 10.

180 *Ibid*., p. 2.

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

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

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

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

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

182 See above, note 177, Para 25.

183 *Ibid.*, Para 30.

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

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

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

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

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

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

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

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

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

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

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

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188 *Ibid.,* p. 18.

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

190 *Ibid.*

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

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

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

Box 3. **Case Note**

Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya
(African Commission on Human and Peoples' Rights, Communication 276/2003)

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

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

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

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

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

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

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

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

195 See above, note 119, Para 17.

196 See above, note 177, Para 42.

197 Kavilu, S., "Kenya's Smallest Indigenous Tribe Faces Extinction", *Gáldu*, 31 August 2010.

198 See above, note 177, Para 45.

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

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

199 *Ibid.*, Paras 21-23.

200 *Ibid.*, Para 24.

Box 4. **Case Note**

***Lemeiguran and Others v Attorney-General and Others* (2006)**
(Misc. Civil Application 305, 2004, High Court, 18/12/2006)

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

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

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

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

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

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

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

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

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

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

202 See above, note 177, Para 69.

203 *Ibid.*, Para 75.

al rights for "minorities and marginalised groups", requiring the state to undertake measures – including affirmative action – to ensure the participation of these groups in governance, education and employment, to have access to water, health services and infrastructure, and to develop their cultural values, languages and practices.

2.2.2 Kenyan Somalis and Somali Refugees

The Somali population in Kenya is made up of two distinct groups: those who are Kenyan citizens, following accession of Somali territory at the time of Kenyan independence (Kenyan Somalis), and refugees who have fled to Kenya to escape violence, famine and insecurity which has affected Somalia at various times since the mid-1980s, but have no citizenship rights in Kenya (Somali refugees). In 1963, part of the disputed Ogaden region between Southern Somalia, Ethiopia and British Kenya was claimed as Kenyan land, and this area today contains the majority of the Kenyan Somali community. The exact number of Kenyan Somalis is currently contested. The 2009 Census recorded the total population of Kenyan Somalis as 2.3 million persons, up from the 900,000 registered in 1989.[204] However, the census was criticised for inconsistencies in the data regarding some of the northern areas of the country in which most Kenyan Somalis live.[205]

The Somali refugee population is by far the largest refugee group in Kenya, and it has continued to grow in recent years, including a continuing influx in 2011.[206] UNHCR figures indicate that there were 385,000 Somali refugees in the country in January 2011 (of a total refugee population of 970,300).[207] The number of registered Somali refugees in Kenya rose to 520,352 by November 2011 and is expected to rise to 623,100 by December 2012.[208]

Kenyan Somalis

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

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

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

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

207 *Ibid.*

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

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

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

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

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

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

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

210 *Ibid.*

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

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

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

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

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212 *Ibid.*

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

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

215 See above, note 119, Para 21.

216 *Ibid.*

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

218 *Ibid.*

Box 5. Case Note

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

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

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

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

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

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

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

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

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

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

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

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

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

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

221 See discussion at section 2.2 above.

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

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

Somali Refugees

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

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

224 See above, note 206.

225 See above, note 119, Para 25.

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

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

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

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

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

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

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

229 *Ibid.*

230 See above, note 226.

231 *Ibid.*

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

233 See above, note 228, p. 25.

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

2.2.3 Kenyan Nubians

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

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

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

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

236 *Ibid.*

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

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

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

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

239 See above, note 119, Para 21.

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

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

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

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

240 See above, note 235.

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

242 *Ibid.*

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

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

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

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

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

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

Box 6. **Case Note**

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

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

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

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

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

> *is not convinced, especially in relation to a practice that has led children to be stateless for such a long period of time, that the current discriminatory treatment of the Government of Kenya in relation to children of Nubian descent is "strictly proportional with" and equally importantly "absolutely necessary" for the legitimate state interest to be obtained. The Committee is of the view that measures should be taken to facilitate procedures for the acquisition of a nationality for children who would otherwise be stateless, and not the other way round. As a result of all the above, the African Committee finds a violation of Article 3 of the African Children's Charter.*
>
> The Committee also found that this discriminatory treatment had resulted in further "long standing and far reaching effects on the enjoyment of other Charter rights".

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

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

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

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

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

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

2.3 Women

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

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

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

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

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

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

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

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

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

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

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

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

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

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

253 See above, note 251.

254 See above, note 248, Para 45.

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

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

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

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

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

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

258 See above, note 251, Para 36.

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

260 See above, note 250, Para 44.

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

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

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

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

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

264 See above, note 109.

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

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

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

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

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

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

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

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

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

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268 See above, note 138, p. 9: "issues likely to arise are things like favouring the father in custody, (...) limited provision for maintenance of wives after divorce, and the difference in inheritance by women and men under Muslim law".

269 See above, note 248, Para 11.

Gender-based violence – in particular sexual violence – is prevalent and a cause for significant concern. Rape remains a serious a problem. The most recent crime statistics published by the Kenyan police recorded 735 cases in 2008,[270] 729 cases in 2009 and 785 cases in 2010,[271] though this is likely to be a significant underestimate of actual cases, due to low reporting rates. Indeed, the Gender Violence Recovery Centre at Nairobi Women's Hospital – which receives only a fraction of cases nationally – reported that it treated 2357 people for rape or defilement in the period April 2008 to March 2009.[272] A 2008 report on the incidence and prevalence of rape in Nairobi estimated that "only 1 out of 20 women in Kenya will report a rape and only 1 in 6 will seek medical assistance".[273] For some women, being raped is a cause of significant stigma in their local community, something which accounts for under-reporting. ERT interviewed P.A., a woman living with HIV who was raped in the 2008 post-election violence. Her testimony indicates the severity of social stigma surrounding rape:

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

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

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

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

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

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

The Sexual Offences Act 2006 introduced stronger penalties for rape and attempted rape,[275] in an effort to reduce the level of sexual crime in the country. However, the law is not without significant problems. Section 43(5) states that all acts described in the Act as unlawful and intentional "shall not apply in respect of persons who are lawfully married to each other".[276] The resulting lack of protection for victims of marital rape is something which has caused concern among civil society actors working on women's issues[277] and UN treaty bodies.[278] The Committee on the Elimination of Discrimination against Women has stated that "family violence is one of the most insidious forms of violence against women" and that state parties should introduce "criminal penalties where necessary" to prohibit family violence.[279] Another serious problem is that section 38 of the Act provides that any person making false allegations of any of the offences under the Act will be liable to punishment equal to that provided for commission of the alleged offence itself. As FIDA-K has commented, "this provision itself can make a survivor of sexual assault not to (sic) report to the Police for fear of being punished if the case fails".[280] CESCR has urged that the provision should be immediately relaxed as it discourages women who have been raped from taking their cases to court,[281] while the Committee on the Elimination of Discrimination against Women has called for it to be repealed in full.[282]

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

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

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

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

278 See above, note 248, Para 21.

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

280 See above, note 277.

281 See above, note 237, Para 22.

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

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

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

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

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

284 *Ibid.,* p. 26.

285 *Ibid.,* p. 31.

286 See above, note 114, Para 206.

287 See above, note 283, p. 7.

288 See above, note 135.

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

Female genital mutilation (FGM) persists, though prevalence rates are falling. Data collected for the 2008-2009 Kenya Demographic and Health Survey indicates that 27% of women have undergone some form of FGM, a fall from 38% in 1998 and 32% in 2003.[290] The survey found that the proportion of women who had undergone FGM increased with age: while 49% of women in the age group 45-49 had undergone FGM, only 15% of women in the age group 15-19 had.[291] The report found strong correlations between FGM and education status, with women with no education 2.8 times more likely to have undergone FGM than those with a secondary education; and between FGM and poverty, with poor women much more likely to have undergone FGM.[292] It also identified significant variations across religious and ethnic groups, Muslims and the Kisii and Somali ethnic groups recording much higher prevalence rates than other groups.[293] According to Kenya's state report to the Committee on the Elimination of Discrimination against Women, the Department for Gender and Social Development's research found that FGM was taking place earlier in life than in the past, and increasingly under medication.[294]

As in other areas of gender-based violence and gender inequality, the government is making efforts to tackle the continued practice of FGM, both through legislation and through public education programmes. FGM has been prohibited since 2001 under the Children Act 2001.[295] In October 2011, the Prohibition of Female Genital Mutilation Act 2011 entered into force, establishing new offences and penalties and providing for the establishment of an Anti-Female Genital Mutilation Board. The Act creates specific offences of committing, aiding and abetting, and procuring a person to perform female genital mutilation in another country.[296] The Act provides a penalty of not less than

290 See above, note 153, p. 264.

291 *Ibid.*

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

293 *Ibid.*

294 See above, note 114, Para 48.

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

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

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

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

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

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

297 *Ibid.,* section 29.

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

299 See above, note 135.

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

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

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

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

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

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

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

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

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

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

In its 2010 state report to the Committee on the Elimination of Discrimination against Women, the Kenyan government provided data on the distribution of wage employment by sex and income which shows that while there have been net increases in the number of women in employment, the overall proportion of those in wage employment who are female only increased marginally. The data show that women's participation in employment rose to 30.1% in 2007, compared with 29.5% in 2004.[309] Looking at the data for women's representation in different income brackets, there is relatively little variation from this average 30.1% participation rate between different brackets. The data indicates that women occupy 17.3% and 30.1% of positions in the two lowest income brackets, compared to 26.5% and 32.3% in the two highest income brackets.[310] However, it is possible that this data masks significant disparities within income brackets, and ignores women's greater participation in the informal economy and non-wage employment. Other sources reveal gender disparities in access to senior positions. According to a joint NGO submission to the Committee regarding the civil service, while female staff account for just 16% of those in senior civil service positions, females account for 74% of those in the lower cadre.[311] The Committee, in its 2011 concluding observations on Kenya's state report, expressed concern about the "low rate of female engagement in paid work (30%), a wide wage gap between women and men and occupational segregation".[312] The Committee called upon the state to

306 See above, note 116, p. 21.

307 *Ibid*., p. 22.

308 See above, note 114, p. 47,

309 *Ibid.*

310 *Ibid.*

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

312 See above, note 248, Para 33.

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

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

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

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

313 *Ibid.*, Para 34.

314 See above, note 311, p. 22.

315 *Ibid.*, p. 23.

316 See above, note 114, Para 95.

317 *Ibid.*

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

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

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

Data on attendance rates also supports the contention that some parents choose not to send their children to school, despite a range of policy measures designed to increase access to education for all and positive action measures aimed at increasing female participation. Indeed, some statistics indicate a worrying regressive tendency which has emerged in recent years. In 2003, the government of Kenya introduced free primary education, supplemented in 2008 by subsidy for secondary education. The government has adopted a Gender Policy in Education and has also included a number of affirmative action measures in the national Education Policy. Yet in the period 2000-2008, despite net gains in the absolute numbers of female children enrolling and completing education at various stages, the ratio of female to male children declined at both primary and secondary levels. At primary level, the rate of enrolment was lower for girls than for boys, and despite a narrowing of the gap in the first period 2000-2005, the ratio of female to male children declined in later years. The most recent data produced by the government indicates that girls made up 48.5% of those enrolling in primary school in 2008, compared with 48.9% in 2000.[321] The percentage of those enrolling in secondary education who were female declined significantly over the same period, from 47.0% of the total population to 44.6%.[322]

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319 See above, note 109.

320 See above, note 114, Para 167.

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

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

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

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

323 See above, note 106, Table 8.

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

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

326 See above, note 163, p. 15,

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

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

329 See above, note 100, p. 36.

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

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

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

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

330 *Ibid*.

331 See above, note 311, p. 24.

332 See above, note 114, Para 176.

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

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

335 See above, note 248, Para 37.

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

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

Participation of women in political and public life is low, despite concerted efforts by successive governments to increase women's democratic participation and the representation of women in parliament. Women are less likely to vote in national elections than men, with almost 1 million fewer women registered to vote in 2007 than men.[341] In the parliament elected in 2007, approximately 10% of seats were held by women (21 of 222 seats), a modest improvement on the representation of women in the previous parliament elected in 2002.[342] FIDA-K and others, in their joint submission to

336 Penal Code 2009 (revised), sections 158, 159 and 160. These sections prohibit procurement of miscarriage by a woman herself or by any other person. Section 240 provides an exception on health grounds: "A person is not criminally responsible for performing in good faith and with reasonable care and skill a surgical operation upon any person for his benefit, or upon an unborn child for the preservation of the mother's life, if the performance of the operation is reasonable, having regard to the patient's state at the time and to all the circumstances of the case."

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

338 See above, note 114, Para 197.

339 *Ibid.*, Paras 197 - 198.

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

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

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

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

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

However, the enactment of a new Political Parties Act, and the adoption of the Constitution of Kenya 2010 represent a significant positive step towards increasing the representation of women. Article 27(8) of the 2010 Constitution requires the state to take measures to implement the principle that "not more than two-thirds of the members of elective or appointive bodies" are of the same gender and separate provisions create reserved places for women in the National Assembly, Senate and County Assemblies.[346] While women remain under-represented in decision-making positions, modest improvements were achieved following the 2007 elections: in February 2009, 16.7% of ministers and 11.5% of assistant ministers were women.[347] However, the total proportion of senior civil service positions (Permanent Secretary) occupied by women fell slightly from 16.7% in 2006 to 15.9%, in 2009, despite an increase in the total number of such positions from 30 to 44.[348] This is particularly concerning when viewed in light of the fact that women occupy almost three quarters (74%) of all positions at the lower levels of the civil service.[349]

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343 See above, note 311, p. 16.

344 *Ibid.*, p. 17.

345 See above, note 114, Para 122.

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

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

348 *Ibid.*

349 *Ibid.*, Para 123.

Box 7. **Case Note**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Section 162 bears a close similarity to section 377 of the Indian Penal Code,[352] and is an example of what Human Rights Watch has called the "descendants" of section 377 which exist in a number of countries formerly under British rule.[353] Thus, while section 162 does not make explicit reference to consenting sexual conduct between males, it has generally been interpreted as criminalising such conduct, as have these other colonial-era laws. The UN HRC has repeatedly expressed its concern that laws criminalising same-sex relations between consenting adults constitute both a violation of the right to privacy and the right to non-discrimination as provided in the ICCPR,[354] and in 2005, it specifically called upon Kenya to repeal section 162.[355]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Box 8. **Case Note**

R.M. v Attorney General & 4 Others
Petition 705 of 2007, High Court, 2/12/10

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Box 9. Testimony

B. M.

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

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

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

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

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

> we were taken there, the Head of KEMRI recognised us as his clients and he advised us not to consent to the anal swabs unless there is a court order to that effect. [The police] told us that when we refuse to be tested we will be charged (...) with other offences which are not related to sexual crimes. It was more like threatening us so that we would consent. It's what they do – trump up other charges.
>
> We refused to be tested. When we came back to the police station after the hospital we were put in a cell for about five minutes. But then came somebody who was working at KEMRI. Then a lady and two men from the Kenya Human Rights Commission came. Then we were released. After being released we went to Mombasa for hiding.
>
> [The police] said we are not arrested but kept for our safety.

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

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

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

374 See above, note 359, p. 87.

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

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

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

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

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

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

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

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

379 See above, note 359, p. 86.

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

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

As part of efforts to further combat the high incidence of HIV/AIDS, the Kenyan AIDS prevention programme has recently publicised the need to focus additional attention on Kenya's homosexual population, proposing Africa's first full census of gay and lesbian persons in June 2010.[383] However, no further announcements about the timing of the census have been released. While the state's acknowledgement of the importance of Kenya's gay and lesbian popu-

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

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

382 See above, note 357.

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

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

Despite the myriad challenges and difficulties faced by the LGBTI community in Kenya, efforts to secure rights for LGBTI persons are increasing, and Kenya has a vibrant civil society movement working on behalf of LGBTI rights. Six organisations work under the banner of GALCK[385] and other civil society organisations, including notably KHRC, are seeking to mainstream gay rights issues into their other human rights work. In May 2010, GALCK member organisations came together with KHRC to celebrate the International Day Against Homophobia. KNCHR Commissioner, Lawrence Mute, attended the event and for the first time, media were invited. LGBTI activist Kate Kamunde emphasised the novelty of the event, stating that "spaces are (...) opening up to accommodate us, which was not possible two years ago".[386]

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

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

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

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

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

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

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

2.5 Persons with Disabilities

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

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

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

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

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

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

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

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

390 *Ibid.*

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

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

393 The Persons with Disabilities Act 2003.

other impairment that affects a person's "ability to carry out ordinary day-to-day activities" – is included in the list of prohibited grounds of discrimination in article 27(4). Article 54 focuses specifically on the rights of persons with disabilities, with 54(1) setting out the right to be treated with dignity and respect. Article 54 creates specific rights of access to educational institutions and to public places, transport and information. It also contains a right to use sign language, Braille or other means of communication and to materials or devices to overcome constraints arising from disability.

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

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

394 See above, note 387, p. 8.

395 *Ibid.*, p. 11.

396 *Ibid.*, p. 44.

397 *Ibid.*, p. 49.

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

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

2.5.1 Persons with Physical and Sensory Disabilities

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

398 *Ibid.*, p. 59.

399 *Ibid.*, p. 52.

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

401 See above, note 388, p. 15.

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

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

Box 10. Testimony

Godfrey Odhiambo

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

407 See above, note 387, p. 52.

408 *Ibid.*

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

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

411 See above, note 388, p. 9.

412 *Ibid.*, p. 11.

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

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

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

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

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

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

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

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

416 See above, note 387, p. 59.

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

2.5.2 Persons with Mental and Intellectual Disabilities

In addition to facing many of the same disadvantages as persons with physical and sensory disabilities, persons with mental and intellectual disabilities are vulnerable to discrimination as a consequence of social prejudice about their condition, which manifests itself in discriminatory laws and discriminatory treatment by both state and non-state actors. Despite the fact that mental and intellectual disabilities are included within the scope of the non-discrimination and equality provisions of the Persons with Disabilities Act, the Constitution[418] and the Convention on the Rights of Persons with Disabilities (CRPD) (which has direct effect in Kenyan law by virtue of Article 2(6) of the Constitution), there remain several laws which discriminate against persons

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

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

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

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

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

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

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

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

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

There remain several laws which appear to violate the non-discrimination and equality provisions of the Constitution and the Persons with Disabilities Act, in particular with regards to persons with intellectual disabilities. For example, the Mental Health Act provides for voluntary and involuntary treatment of persons with mental and intellectual disabilities.[423] Under the Matrimonial Causes Act, a petition for divorce may be submitted on the ground that the respondent "is incurably of unsound mind and has been continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition".[424] In addition, persons who have been found to be of "unsound mind" are denied legal capacity in some important areas, including voting in elections,[425] and are disqualified from standing for election to Parliament[426] or a County Assembly.[427] These provisions are potentially in conflict with Kenya's obligations under the Convention on the Rights of Persons with Disabilities to ensure that persons with disabilities are able to enjoy political rights on an equal basis with others.[428] The broad reach of these provisions, particularly when combined with the lack of clarity as to the meaning of "unsound mind" – a term which is not defined in Kenyan law – means that they are unlikely to comply with Kenya's obligations to recognise that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.[429] Commissioner Lawrence Mute of the KNCHR has argued that "the bulk of persons with intellectual disabilities (…) are technically not unsound of mind; and indeed (…) even if they were adjudged to be of unsound mind, fundamental rights

422 See above, note 419.

423 Mental Health Act 1991.

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

425 See above, note 222, Article 83.

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

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

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

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

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

> *The question, then, is whether or not mental ill health may on occasion translate into disability. The Convention on the Rights of Persons with Disabilities (CRPD) (United Nations 2006), which Kenya signed and ratified in 2007 and 2008 respectively, recognizes that disability "... results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others" (Preamble); and that "persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others" (Article 1).*
>
> *Hence illness in and of itself may not be a disability. Nevertheless, if a person's organ (in this case the mind) is so impaired as to undermine such person's long-term effective interaction with his or her surroundings (social, economic, political, etc.), then that individual has a disability. This point may seem to be merely academic, but in fact it is not. If the law after declaring a person to be of unsound mind proceeds to disenfranchise him or her, that is discrimination on the ground of disability.*[431]

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

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

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

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

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

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

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

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

433 See above, note 419.

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

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

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

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

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

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

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

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

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

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

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

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

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

440 See above, note 419.

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

2.6 Persons with Albinism

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

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

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

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

In some cases, superstition or stigma has led to violence against those with the condition. A 2009 news report on attitudes towards albinism in Kenya cites as typical the case of two brothers, John Brown Shamallah and his brother Collins Maikuva, whose parents were told by other villagers in their area that they should be placed in boiling water "so that they would become like other normal children."[442] This said, Kenya had – until 2010 – appeared to be less affected than others by the wave of attacks, abductions and murders of persons with albinism in the region, which saw 19 people die in neighbouring Tanzania in 2007-8.[443] However, in August 2010, this situation changed when a Kenyan man, Nathan Mutei, was sentenced to 17 years in prison in Tanzania and a fine after confessing to human trafficking. Mr Mutei was arrested while trying to sell a man with albinism to undercover police officers posing as businessmen.[444] The case led the Parliamentary Equal Opportunities Committee to call for urgent government action to protect persons with albinism.[445] ASK called on the government to provide bodyguards to protect people with albinism.[446]

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

441 Masakhwe, P., "Dispelling Africa's Myths about Albinism", *Pambazuka News,* 10 September 2009.

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

443 "Witchdoctor Killings Condemned"*, Reuters*, 3 April 2008.

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

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

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

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

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

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

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

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

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

449 *Ibid.*

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

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

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

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

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

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

2.7 Persons Living with HIV and AIDS

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

In 2009 there were an estimated 1.3 – 1.6 million adults living with HIV in Kenya. Of these, between 650,000 – 860,000 were women and 110,000 were new infections.[454] Although AIDS-related deaths are falling in number, an estimated 90,000 people died from the disease in 2009.[455] Children are severely affected by HIV/AIDS, both as sufferers and as a result of the death of their parents from the disease. Kenya's National AIDS Control Council estimates that the cumulative number of children infected was 184,052 by 2009 and

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

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

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

455 *Ibid*., p. 185.

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

UNAIDS data suggests that the HIV prevalence rate has fallen from a peak of around 14% in the mid-1990s to 5% by 2006.[460] HIV prevalence rates vary significantly according to gender, age and region. Prevalence rates are significantly higher for women than men: according to the Kenya Demographic and Health Survey (KDHS) 2008-2009, prevalence among women between the ages of 15 and 49 is 8.0% compared to 4.3% for men in the same age group.[461] There are also significant regional disparities in prevalence rates. The KDHS estimates that prevalence among adults in rural areas is 6.0% against 7.2% in urban areas, and indicates that there are wide regional disparities: according to the survey, prevalence in North Eastern province is just 0.9%, compared to 13.9% in Nyanza province.[462]

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

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

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

458 See above, note 456, p. 17.

459 See above, note 454, p. 98.

460 *Ibid.*, p. 28.

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

462 *Ibid,* p. 217.

463 See above, note 456, p. 7.

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

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

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

464 *Ibid.*

465 *Ibid.*

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

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

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

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

2010 survey of 430 households in three districts of western Kenya undertaken by ActionAid International and Women Fighting AIDS in Kenya found significant evidence of prejudice. 74% of respondents felt that HIV was a punishment for morally unacceptable conduct and 70% stated that people with HIV were promiscuous.[470] However, the government's UNGASS report indicates that levels of stigma are reducing among the general population, indicating that while in 2003, 26.5% of women and 39.5% of men revealed accepting attitudes towards people with HIV and AIDS, this had increased to 32.6% and 47.5% respectively by 2010.[471]

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

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

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

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

471 See above, note 456, p. 14.

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

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

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

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

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

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

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

476 See above, note 453, p. 19.

477 *Ibid.*, p. 20.

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

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

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

478 *Ibid.*, p. 22.

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

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

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

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

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

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

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

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

482 *Ibid.*, p. 4.

483 See above, note 472, p. 29.

484 *Ibid.*, p. 28.

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

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

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

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

487 *Ibid.,* p. 7.

488 *Ibid.,* p. 8.

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

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

The government is making efforts to improve access to healthcare for persons living with HIV and AIDS through increasing awareness and education, improving availability of counselling and testing, and increasing access to treatment. The Kenya Development and Health Survey 2008-09 indicates that public education programmes are successfully raising awareness, reporting that 75% women and 81% men are aware that condom use can reduce risk of getting HIV and that over 90% of both groups know that abstinence or limiting sexual intercourse to one uninfected partner can reduce the chances of getting HIV.[492] The 2010 National AIDS Council's report to the UN suggests that testing has also significantly increased, reporting that almost 3.5 million adults were tested in 2009. The report indicates that by 2008-09, 40.4% of women and 56.5% of men had been tested at some point in their life, compared with 14.3% and 13.1% respectively in 2003.[493]

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

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

491 See above, note 457, p. 4.

492 See above, note 456, p. 14.

493 *Ibid*., p. 11.

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

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

2.8 Other Patterns of Discrimination and Disadvantage

Discrimination on Grounds of Religion or Belief

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

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

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

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

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

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

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

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

496 See above, section 2.2 and note 123.

Discrimination on Grounds of Political Opinion

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

Age Discrimination

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

497 See above, note 126, Para 9.

498 See above, note 135.

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

Discrimination and Inequality Affecting Asian and White Kenyans

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

499 See above, note 123, p. 13.

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

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

502 *Ibid*, pp. 8-9.

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

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

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

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

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

ERT found little evidence of discrimination against **white Kenyans**. Prior to independence in 1963 Kenya was home to an estimated 60,000 white British settlers, but a large number of these departed the country shortly after independence under a subsidised "willing buyer willing seller" scheme, leaving an estimated 30,000 still resident in the country in 2006.[509] There is very little current information about the status of white Kenyans, though one recent report suggests that their relative wealth, coupled with a decision to absent themselves from public life, means that the remaining population is largely shielded from any negative effects which might arise from their minority status.[510]

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

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

508 See above, note 119, Para 21.

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

510 *Ibid.*

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

Treaty	Status	Date
International Covenant on Civil and Political Rights (1966)[511]	Ratified	1972
Optional Protocol I to the International Covenant on Civil and Political Rights (1966)[512]	No	
International Covenant on Economic, Social and Cultural Rights (1966)[513]	Ratified	1972
Optional Protocol I to the International Covenant on Economic, Social and Cultural Rights (2008)[514]	No	
International Convention on the Elimination of All Forms of Racial Discrimination (1965)[515]	Ratified	2001
Declaration under Article 14 allowing individual complaints	No	
Convention on the Elimination of All Forms of Discrimination against Women (1979)[516]	Ratified	1984
Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (1999)[517]	No	
Convention on the Rights of Persons with Disabilities (2006)[518]	Ratified	2008

511 International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 1966.

512 Optional Protocol I to the International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 1966.

513 International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), 1966.

514 Optional Protocol I to the International Covenant on Economic, Social and Cultural Rights, G.A. Res. A/RES/63/117, 2008.

515 International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106 (XX), 1965.

516 Convention on the Elimination of All Forms of Discrimination against Women, G.A. Res. 34/180, 1979.

517 Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, G.A. Res. A/RES/54/4, 1999.

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

Optional Protocol to the Convention on the Rights of Persons with Disabilities (2006)[519]	No	
Convention on the Rights of the Child (1989)[520]	Ratified	1990
Optional Protocol I to the Convention on the Rights of the Child (2000)[521]	Ratified	2002
Optional Protocol II to the Convention on the Rights of the Child (2000)[522]	Signed	2000
International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990)[523]	No	
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984)	Ratified	1997
Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (2002)	No	

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-

519 Optional Protocol to the Convention on the Rights of Persons with Disabilities, G.A. Res. A/RES/61/106, 2006.

520 Convention on the Rights of the Child, G.A. Res. A/RES/44/25, 1989.

521 Optional Protocol I to the Convention on the Rights of the Child, G.A. Res. A/RES/54/263, 2000.

522 Optional Protocol II to the Convention on the Rights of the Child, G.A. Res. A/RES/54/263, 2000.

523 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, G.A. Res. A/RES/45/158, 1990.

524 See above, note 513, Article 10(2): "The States Parties to the present Covenant recognise 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."

525 International Covenant on Economic, Social and Cultural Rights, Declarations and Reservations: Reservation made by the Republic of Kenya, available at: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en#EndDec.

ployment Act which makes provision for three months paid maternity leave and guarantees the right to return to work.[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.[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".[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.[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.[530]

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526 Employment Act 2007, section 29.

527 Committee on Economic, Social and Cultural Rights, *Concluding Observations on Kenya*, UN Doc. E/C.12/KEN/CO/1, 2008, Para 39.

528 Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, Declarations and Reservations: Reservation made by the Republic of Kenya, available at: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-b&chapter=4&lang=en.

529 United Nations Treaty Collection, Status of Treaties, 2011, available at: http://treaties.un.org/Pages/ParticipationStatus.aspx.

530 *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

Treaty	Status	Date
AU African Youth Charter (2006)	Ratified	2008
Protocol on the Rights of Women in Africa (2005)	Signed	2003
Protocol on the Establishment of an African Court on Human and People's Rights (1997)	Ratified	2005

531 ILOLEX, Database of International Labour Standards, *Kenya*, 2011, available at: http://www.ilo.org/ilolex/english/newratframeE.htm.

532 *Ibid.*

533 United Nations Educational, Scientific and Cultural Organisation, Convention against Discrimination in Education, Paris, 1960, *Ratifications by State*, available at: http://portal.unesco.org/la/convention.asp?KO=12949&language=E&order=alpha.

534 Convention relating to the Status of Refugees, 189 UNTS 137, 1954.

535 United Nations High Commission for Refugees, *2009 Global Trends: Refugees, Asylum-seekers, Returnees, Internally Displaced and Stateless Persons,* 2010, p. 7.

536 Convention Relating to the Status of Stateless Persons, ECOSOC RES/526 A, 1960.

African Charter on the Rights and Welfare of the Child (1990)	Acceded	2000
African Charter on Human and Peoples' Rights (1981)	Ratified	1992
Convention on Specific Aspects of Refugee Problems in Africa (1969)	Ratified	1992
AU Cultural Charter for Africa (1976)	Ratified	1981

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.[537] 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

537 President Kibaki, The New Constitution of Kenya, Promulgation, L.N. 133/2010, 27 August 2010.

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,[538] 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.[539]

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.*

538 Constitution of Kenya 2010, Article 19(3).

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).[540] The section does not establish a test for the inclusion of new grounds as has been developed in South African anti-discrimination legislation,[541] 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'."

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

laration of Principles on Equality.[542] 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.[543] The prohibition on discrimination in Article 27(5) applies to both natural and legal persons.[544]

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").[545] 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"[546], 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".[547] 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

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

543 The National Cohesion and Integration Act 2008 (Act No.12 of 2008) prohibits segregation, harassment and victimization; The Sexual Offences Act 2006 (Act No. 3 of 2006) creates a criminal offence of sexual harassment.

544 See above, note 538, Article 260 which defines "person" as including "a company, association or other body of persons whether incorporated or unincorporated".

545 See International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), 1966, Article 2(2); Committee on Economic, Social and Cultural Rights, *General Comment 20: Non-discrimination in economic, social and cultural rights*, UN Doc. E/C.12/GC/20, 2009, Para 9; see also Committee on the Elimination of Discrimination against Women, *General Recommendation 25: Temporary special measures,* 2004, Paras 14, 18.

546 Human Rights Committee, *General Comment 18: Non-discrimination,* 1989, Para 10.

547 Committee on Economic, Social and Cultural Rights, *General Comment 20: Non-discrimination in economic, social and cultural rights*, UN Doc. E/C.12/GC/20, 2009, Para 9.

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).[548] 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.[549]

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-

548 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)".

549 See above, note 542, Principle 3, p. 5.

eral Recommendation on this matter.[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",[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".[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),[553] access to employment (youth)[554] and to receive reasonable care and assistance from their family and the state (older persons).[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.[556] Article 57 enshrines the themes running through the United Nations Principles for Older Persons: independence, participation, care, self-fulfilment and dignity.[557] The range of guarantees for each group represents a welcome addition to the protection from discrimination provided under Ar-

550 Committee on the Elimination of Racial Discrimination, *General Recommendation 15: Organized violence based on ethnic origin*, UN Doc. A/48/18, 1993, Para 4.

551 See above, note 538, Article 91(2)(a).

552 *Ibid.*, Article 52(1).

553 *Ibid.*, Article 53.

554 *Ibid.*, Article 55.

555 *Ibid.*, Article 57.

556 *Ibid.*, Article 53(2).

557 United Nations Principles for Older Persons, G.A. Res. 46/91, 1991.

ticle 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 in 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.[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;[565] equality between male and female parents and spouses is guaranteed in the acquisition of citizenship through birth and marriage;[566] and the "elimination of gender discrimination in law, customs and practices" related to land is included among the principles of land policy.[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.[568] In line with Kenya's obligations under CEDAW,[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.[570] Separate provisions create reserved places for women in the National Assembly,

564 *Ibid.*, Articles 3(c) and (f), 9, and 24.

565 See above, note 538, Article 45(3).

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

567 *Ibid*., Article 60(1)(f).

568 *Ibid.*, Article 2(4).

569 See Committee on the Elimination of Discrimination against Women, *General Recommendation No. 23: Women in Political and Public Life*, 1997, Para 15.

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. 21of 2011), section 10.

Senate and County Assemblies.[571] 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.[572] 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.[573]

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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.[574] 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.[575] Finally, it provides that interested parties with particular expertise may participate in proceedings as a friend of the court.[576] 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.[577]

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,[578] ICESCR,[579] CEDAW[580] and CERD.[581]

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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).

577 See, for example, Convention on the Rights of Persons with Disabilities, above note 518, Article 13; Committee on the Elimination of Discrimination against Women, *General Recommendation No. 28: on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, UN Doc. CEDAW/C/2010/47/GC.2, 2010, Para 34; Human Rights Committee, *General Comment 31: The nature of the general legal obligation imposed on states parties to the Covenant,* UN Doc. CCPR/C/21/Rev.1/Add. 13, 2004, Para 16.

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.

581 Committee on the Elimination of Racial Discrimination, *General Recommendation No. 26: Article 6 of the Convention,* UN Doc. A/55/18, annex V, 2000, Para 2.

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.[582] Such institutions should have appropriate powers including powers of investigation.[583] 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.[584]

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582 Human Rights Committee, above note 577, Para 15; Committee on Economic, Social and Cultural Rights, *General Comment 10: The role of national human rights institutions in the protection of economic, social and cultural rights*, UN Doc. E/C.12/1998/25, 1998, Para 1.

583 Human Rights Committee, above note 577, Para 15; Committee on Economic, Social and Cultural Rights, above note 582, Para 3.

584 International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights, *Chart of the Status of National Institutions*, August 2011.

However, given that the functions and powers defined under their constituting legislation – and the fact that the predecessor to both commissions, the KNCHR was accredited with A status – it appears likely that such accreditation will be obtained.

Article 24 strictly constrains any limitation of rights or fundamental freedoms 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 purpose 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 Constitution, 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 considerations which should be taken into account in determining whether a restriction 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 possibility 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) the limitation is strictly required by the emergency; and*
> *(ii) 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".

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585 This Article is discussed further at 3.2.2 below.

586 Ghai, Y. and Cottrell Ghai, J., *The Choice in the Referendum: A Comparative Analysis of the Proposed Constitution of Kenya and the Current Constitution*, July 2010, p. 9: "issues likely to arise are things like favouring the father in custody (…) limited provision for maintenance of wives after divorce, and the difference in inheritance by women and men under Muslim law".

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[587] and establishes 47 counties, with the objects of "fostering national unity by recognising diversity" and ensuring equitable sharing of resources.[588] Counties are given a wide range of functions,[589] 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.[590] 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.[591] 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.[592] 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.

portant 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.[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[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.

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",[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".[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

593 *Ibid.*, Article 60(1)(a).

594 National Cohesion and Integration Act 2008, sections 10, 11 and 12.

595 Human Rights Committee, above note 577, Para 12.

596 See above, note 547, Para 37.

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.[597] 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.[598] 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,

597 Committee on the Elimination of Discrimination against Women, above note 577, Paras 10 and 13; International Convention on the Elimination of All Forms of Racial Discrimination, above note 37, Article 2(1); Convention on the Rights of Persons with Disabilities, above note 518, Article 5(2).

598 Persons with Disabilities Act 2003, Cap. 14.

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.

602 The Persons with Disabilities (Access to Employment, Services and Facilities) Regulations, 2009.

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".[607] 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.[608] 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.[609] 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.[610] The Act also exempts persons with disability from income tax.[611]

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, *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, *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,[615] 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[616] and enabling persons with disabilities to attain and maintain independence through provision of habilitation and rehabilitation services.[617]

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

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,[618] 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.[619] 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.[620] 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.

618 *Ibid.*, Article 14(2).

619 See above, note 518, section 28(1).

620 See above, note 602, Regulation 9.

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.[621] 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.[622] 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.[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.[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.[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

623 See, for example, above note 602, Regulations 8, 9(4), 14(c), 15, 16 and 17.

624 See above, note 598, section 33(2)(a), (b) and (c).

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".[626] 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.[627]

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 segregation[630] 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.

efits, and dismissal).[634] 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.[635] The section also prohibits harassment by an employer, or an employer's representative, of employees and those applying for employment.[636] 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,[637] 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).[638] 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,

638 *Ibid.*, sections 9(1) and (2).

descent, or national or ethnic origin".[639] 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.[640]

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.[641] 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.[642] 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

639 Committee on the Elimination of Racial Discrimination, *General Recommendation No. 30: Discrimination against non citizens*, 2004, Para 9.

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, r 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-

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

644 See above, note 550, Para 4.

645 See above, note 594, section 25(1).

646 Committee on the Elimination of Racial Discrimination, *General Recommendation 17: Establishment of national institutions to facilitate implementation of the Convention,* UN Doc. A/48/18, 1993, Para 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.[647] 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,[648] or issue a notice of compliance setting out duties on the responsible party.[649] 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".[650] 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

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 practises 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.

652 HIV and AIDS Prevention and Control Act 2006, section 3.

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.*[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.[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[661] and through birth.[662] The Committee welcomed the Constitutional changes in its Concluding Observations on Kenya's periodic report under CEDAW.[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-

659 See above, note 547, Para 37.

660 Constitution of Kenya 1963 (repealed), Articles 90 and 91.

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

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

663 Committee on the Elimination of Discrimination against Women, *Concluding Observations of the Committee on the Elimination of Discrimination of Women: Kenya,* UN Doc. CEDAW/C/KEN/CO/7, 2011, Para 4(b).

nized state")[664] and migrants who have been living in Kenya since independence and meet various other conditions.[665] 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,[666] ICERD,[667] and CRPD,[668] 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-

664 Kenya Citizenship and Immigration Act 2011, (Cap. 12), section 15.

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",[669] 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".[670] 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

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.[671] Similarly, provisions governing decrees of nullity, decrees of presumption of death and decrees of judicial separation treat petitions from either partner equally.[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.[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 **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.[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.[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 **Marriage Bill** and the **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 **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,

671 Matrimonial Causes Act 1941, (Cap. 152), section 8.

672 *Ibid.,* sections 13, 14, 22, and 17.

673 See above, note 516, Article 16(1)(c).

674 Law of Succession Act 1981, sections 38 and 5(2).

675 See above, note 663, Para 45.

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.[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".[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 **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

676 African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49, 1990, Article 21(2).

677 Committee on the Elimination of Discrimination against Women, *General Recommendation No. 21: Equality in marriage and family relations*, 1994, Para 18.

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.

684 Committee on the Elimination of Discrimination against Women, *General Recommendation No. 19: Violence against women*, 1992, Para 24(t)(i).

685 Sexual Offences Act 2006, section 3(1).

686 *Ibid.*, section 43(1).

687 *Ibid.*, section 3(3).

medical purposes). Persons found guilty of the offence are liable to conviction to between ten years and life imprisonment.[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.[689] While these provisions go some way towards complying with Kenya's obligations to eliminate all forms of gender-based violence under CEDAW,[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.[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-

688 *Ibid.*, section 5(2).

689 *Ibid.*, sections 6, 7, 8 and 9.

690 See above, note 684, Para 24(a).

691 See above, note 685, section 23(1).

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[695] 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.[696] 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,

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.[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,[706] a provision which is in line with acknowledged best practice for civil proceedings.[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:

705 See above, note 697, section 3(2).

706 *Ibid.*, section 5(7).

707 See above, note 542, Principle 21, p. 13.

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,[710] while, as noted above, discrimination on grounds of pregnancy is prohibited by section 5, as required by CEDAW.[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.[712] Women are required to give notice, in writing,[713] no less than seven days in advance of their intention to take maternity leave,[714] and may be required to produce a medical certificate.[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".[716] Significantly, subsection 5(2) places a general obligation on employers – albeit narrower

710 See above, note 516, Article 11(2)(b) and note 513, Article 10(2).

711 See above, note 516, Article 11(2)(a).

712 See above, note 697, section 29(3).

713 *Ibid.*, section 29(5).

714 *Ibid.*, section 29(4).

715 *Ibid.*, section 29(6).

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".[721] 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.[722] 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.[723] 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.[724]

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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.[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.[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.

725 *Ibid.,* section 21(1)(d).

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.[727] 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

727 Government of the Republic of Kenya, *Vision 2030 Popular Version,* 2007.

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;*

728 Government of the Republic of Kenya, *National Policy on Gender and Development*, 2000.

729 *Ibid.*, p. 9.

- *develop indicators to monitor the participation of women in economic development;*[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.*[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".[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.*[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.[734]

730 *Ibid.*, pp. 9-10.

731 *Ibid.,* p. 16.

732 National Commission on Gender and Development, *Vision, Mission and Mandate*, undated, available at: http://www.gender.go.ke/index.php/Semi-Autonomous-Government-Agencies/national-commission-on-gender-and-development-ncgd.html.

733 *Ibid.*

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; heath; 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

735 Ministry of Home Affairs, Heritage and Sports, *Kenya National Youth Policy,* 2002.

736 Directorate of Personnel Management, Office of the President, *Public Sector Workplace Policy on HIV and AIDS,* 2005.

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.*[737]

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".[738] 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

737 *Ibid.,* p. xxiii.

738 Ministry of Lands, *National Land Policy,* 2007, p. 1.

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[739] 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[740] 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.

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739 Ministry of State for Special Programmes, *National Policy on Protecting and Assisting Internally Displaced Persons in Kenya*, 2010.

740 Ministry of Justice, National Cohesion and Constitutional Affairs and Kenya National Commission on Human Rights, *Draft National Policy on Human Rights*, 2010. For further information see: http://www.justice.go.ke/; and http://www.knchr.org/index.php?option=com_content&task=view&id=46&Itemid=89.

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.

741 Ministry of Gender, Children and Social Development, *Draft National Policy on Ageing*, undated, not available online. For further information see: http://www.un.org/ageing/documents/workshops/Vienna/kenya.pdf.

742 For current status, please see: http://www.gender.go.ke/index.php/Gender-and-Social-Development/policies-of-the-department.html.

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".[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[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,[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-

743 Government of Kenya Ministry of Education, *Mission and Vision,* 2009.

744 For further information see: http://www.gender.go.ke/index.php/Gender-and-Social-Development-Divisions/social-welfare-persons-with-disabilities-programme.html.

745 See, for example, Human Rights Committee, *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.[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:

> *[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.*[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:

> *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.*[748]

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746 Committee on the Elimination of Discrimination against Women, *General Recommendation No. 28: On the core obligations of states parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women,* UN Doc. CEDAW/C/GC/28, 2010, Para 34.

747 See above, note 578, Para 15.

748 See above, note 746, Para 32.

Sanctions imposed on discriminators must be effective, proportionate and dissuasive.[749] 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.*[750]

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.[751] 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

749 See above, note 542, Principle 22, p. 13.

750 See above, note 578, Para 15.

751 See, for example, Committee on the Elimination of Racial Discrimination, *General Comment No. 17: Establishment of national institutions to facilitate implementation of the Convention,* UN Doc. A/48/18, 1993, Para 1. See also Principles relating to the Status of National Institutions (the Paris Principles), adopted by General Assembly resolution 48/134 of 20 December 1993.

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.[752] 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.[753] It also provides a list of potential remedies in line with those required by various international treaties to which Kenya is party.[754] 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".[755]

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."[756]

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

755 See above, note 578, Para 15.

756 Committee on the Elimination of Racial Discrimination, *General Recommendation No. 26: Article 6 of the Convention,* 2000, Para 2.

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".[757] 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,[758] a provision which is in line with acknowledged best practice for civil proceedings concerning discrimination.[759] 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.[760] 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-

757 See above, note 578, Para 15.

758 See above, note 697, section 5(7).

759 See, for example, Committee on the Elimination of Racial Discrimination, *General Recommendation No. 30: Discrimination against non citizens*, 2004, Para 24. See also *Declaration of Principles on Equality*, above note 542, Principle 21, p. 13.

760 Ministry of Justice, National Cohesion and Constitutional Affairs, *The National Legal Aid (and Awareness) Programme: Pilot Projects*, undated, available at: http://www.justice.go.ke/index.php?option=com_content&task=view&id=162&Itemid=99.

velopment 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.*[761]

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.[762]

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.[763]

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.

Cases Brought under the Constitution of Kenya 1963

Among the most significant cases brought under section 82 of the previous Constitution is *Rangal Lemeiguran & Others v Attorney General and Others*[764]

763 See above, note 547, Para 7.

764 *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-

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.

766 *Rono v Rono and Another*, Civil Appeal 66 of 2002, Court of Appeal, 29 April 2005.

terpreting 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

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

768 *Teresia_Wanjiru Macharia v Kiuru Macharia and Phyllis Njeri Ngana*, Civil Case 400 of 2003, High Court, 25 October 2007.

769 *In the Matter of the Estate of Mugo Wandia(deceased)*, Succession Cause 320 of 2007, High Court, 20 May 2009.

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.

772 *In the Matter of the Estate of Lerionka Ole Ntutu*, Succession Cause 1263 of 2000, High Court, 19 November 2008.

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

773 *S.O. v L.A.M.*, Civil Appeal 175 of 2006, Court of Appeal, 30 January 2009.

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

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*,[778] 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*,[779] 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*[780] 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

778 *Hersi Hassan Gutale and Abdullahi Mohamed Ahmed v Principal Register of Persons and the Attorney-General*, Miscellaneous Civil Application 774 of 2003, High Court, 24 May 2004.

779 *R.M. v Attorney General & 4 Others*, Petition 705 of 2007, High Court, 2 December 2010.

780 *James Nyasora Nyarangi & 3 Others v The Attorney-General*, Petition 298 of 2008, High Court, 10 July 2008.

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

781 *Law Society of Kenya v Attorney-General*, Petition 185 of 2008, High Court, 4 March 2009.

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)*[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)*[784]; *In the Matter of the Estate of the Lawrence Douglas Magambo*[785]; and *In the Matter of the Estate of M'miriti MaAtune (deceased).*[786]

783 *In the Matter of the Estate of M'mukindia M'ndegwa (deceased)*, Succession Cause 29'B' of 1988, High Court, 22 October 2010.

784 *In the Matter of the Estate of Mburugu Nkaabu (deceased)*, Succession Cause 206 of 1995, High Court, 22 October 2010.

785 *In the Matter of the Estate of the Lawrence Douglas Magambo*, Succession Cause 309 of 2002, High Court, 22 October 2010.

786 *In the Matter of the Estate of M'miriti MaAtune (deceased)*, Succession Cause 119 of 2003, High Court, 22 October 2010.

4. CONCLUSIONS AND RECOMMENDATIONS

4.1 Conclusions

This report is published at a moment of profound political and social change in Kenya. The country has seized the opportunity for national renewal presented in the wake of the 2008 post-election violence, adopting a Constitution which reflects a strong commitment to the principles of non-discrimination and equality and to maintaining Kenya's unity in diversity. Coming at the end of a decade which saw the introduction of laws prohibiting discrimination on grounds of disability, race and ethnicity and HIV status, and on a range of grounds in respect of employment, the Constitution marks the latest – and largest – improvement in Kenya's legal framework on equality and non-discrimination.

Acknowledging this achievement, 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 legal, policy and enforcement framework – as currently constituted – to meet the aspirations expressed in the Constitution for a more equal society. The report makes this assessment against the standards defined in the Declaration of Principles on Equality, which derives from, and builds upon, the requirements of international instruments to which Kenya is party.

Measured against these standards, the general conclusion arising from the analysis of patterns of discrimination and inequality in Part 2 of the report is that, in spite of the recent positive developments in the legal regime, the rights to equality and non-discrimination are yet to be effectively implemented in Kenya. Similarly, the assessment of the legal and policy framework in Part 3 identifies a number of problems which exist despite the introduction of the 2010 Constitution and the adoption of laws providing protection from discrimination on grounds of race and ethnicity, disability and HIV status, together with protections for children suffering discrimination and those experiencing discrimination in employment. Despite the prohibition on discrimination by the state, discriminatory provisions in some laws remain in place and state actors – including notably the police and immigration services, but also public servants involved in delivery of services such as health and education – discriminate with relative impunity. Gaps and inconsistencies in the legal system – from the lack of protection for LGBTI persons and persons

with albinism in all areas of life to the lack of protection for women and other groups in specific areas such as education or health services – mean that different levels of protection are afforded to different groups and in different situations. Moreover, implementation and enforcement of those provisions which are in place – including the protection from discrimination in employment, for example – is weak. As the analysis of patterns of discrimination and inequality has identified, the existence of legal protections does not directly translate into improvements in practice.

Thus, the report concludes that while Kenya has made great progress, discrimination exists across a range of grounds and areas of life, and major substantive inequalities remain. Taking the adoption of the new Constitution as a starting point, the report makes recommendations about further legal and policy reforms which Kenya can undertake, and measures to improve implementation and enforcement. In so doing, this report seeks to contribute to the ongoing debate about how Kenyans can create the equal society to which they aspire.

Patterns of Discrimination and Inequality

As outlined in the introduction to this report, ERT identified two factors – poverty and ethnicity – as being of overarching importance in most Kenyan people's experience of discrimination and inequality. **Poverty** is the unavoidable backdrop to any discussion of discrimination and inequality in Kenya. Kenya is a poor country, both on average and aggregate measures. Moreover, inequalities in wealth and income, coupled with lack of infrastructure and public services in certain parts of the country mean that poverty impacts on different groups in profoundly unequal ways. This report confirms that discrimination and inequality are closely linked to poverty, finding that poverty is both a cause and a consequence of discrimination. **Ethnic identity** is another key determinant of an individual's ability to participate in life on an equal basis with others, largely because certain ethnic groups live in areas with under-developed economies, poor infrastructure, and a lack of public services. These two aspects of an individual's identity – their economic status and their tribal identity – frame most people's experience of discrimination and inequality, with people experiencing disadvantage either on these grounds alone, or in combination with other grounds. They also form part of a power relationship, where political leaders use relative poverty and ethnic identity as means to elicit support from certain groups.

This report has identified a number of both **directly and indirectly discriminatory laws**. Arguably the most severe and far-reaching of these are the provisions of the Penal Code which have been consistently interpreted as prohibiting consensual sex between men, effectively criminalising men who have sex with men and contributing to prejudice and stigma against all LGBTI persons. Women are also particularly vulnerable to discriminatory laws – including in particular in respect of tax, succession and in questions of marriage, divorce and matrimonial property. The report also identifies substantial evidence of **discrimination by the state and its agents in carrying out public functions**. There is evidence of both direct and indirect discrimination on grounds of ethnicity in the allocation of public resources through infrastructure and development funding by public officials, acts which accelerate the disadvantage of those living in marginalised, arid areas. The report finds that there is substantial evidence to suggest that two particular ethnic groups – Kenyans of Somali origin and Nubian Kenyans – routinely suffer direct discrimination when applying for citizenship and identity registration and are subjected to police harassment. The report also finds that the criminalisation of same sex intimacy between men leaves gay men vulnerable to extortion and harassment by law enforcement officials.

This report identified a serious problem with **discriminatory violence** against particular groups because of their actual or perceived characteristics, including in particular sexual orientation and sex. Women are particularly vulnerable to discriminatory violence, as revealed by statistics on rape and domestic violence. The report also reviews evidence of discriminatory violence – often motivated by ignorance, superstition and prejudice – against persons with disabilities and persons with albinism.

The report finds evidence of **discrimination and inequality in employment** across a range of grounds, including notably gender, sexual orientation, gender identity and disability. Data collected by government, intergovernmental agencies and non-government organisations indicates that women suffer discrimination in recruitment, pay and conditions of work, and that they are exposed to a higher risk of unemployment. Access to employment presents a substantial problem for persons with disabilities, due to their relative lack of education, prejudice among employers about the capacities of persons with disabilities and lack of reasonable accommodation in the workplace, despite the protection provided by the Employment Act. LGBTI activists interviewed for the report indicated that discrimination on grounds of sexual orientation

and gender identity – grounds which are not protected under the Employment Act – affects openly gay men and transgender persons.

Evidence shows **discrimination and inequality in access to health and education.** Thus, the report investigates the presence of a "Red Strip" across the north of the country, where educational participation and outcomes, and access to healthcare and health outcomes are substantially below the national average. It finds that these regional disparities are closely aligned with ethnicity. Similarly, it finds that those vulnerable to discrimination on the basis of other aspects of their identity – gender, disability, sexual orientation and gender identity and HIV status, for example – tend to have poorer access to education, health and other services.

Finally, the report found compelling evidence of the particular disadvantages suffered by **persons with disability**. Those interviewed for this report highlighted under-provision of assistive devices – including white canes, wheelchairs and crutches – limited use of sign language and Braille, and lack of reasonable accommodation, as critical factors preventing participation in employment and education by persons with disability. A lack of clear statistical data prevents a quantitative analysis of these problems, but the evidence produced by ERT field research indicates that persons with disability are denied equal participation in all areas of life as a consequence of a lack of basic accommodation. The Persons with Disabilities Act 2003 – despite containing strong provisions on direct disability discrimination and creating a National Council for Persons with Disabilities – does not appear adequate to address this problem.

Thus, it is clear that Kenya is currently some way from ensuring enjoyment of the rights to non-discrimination and inequality in practice.

Legal and Policy Framework

As highlighted above, the Constitution of Kenya 2010 represents a substantial step forward in increasing the protection of the rights to equality and non-discrimination. Article 27 substantially expands the list of protected grounds and the scope of the right to non-discrimination compared to the previous Constitution. It creates a duty of non-discrimination both on the state and private actors. This is bolstered by the provisions in Articles 22 and 23 which enable individuals, groups of individuals and associations to bring proceed-

ings in cases of discrimination and to receive relief including compensation. 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 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. This combination of measures means that the Constitution of Kenya 2010 provides a strong basis for addressing the problems of discrimination and inequality discussed in this report.

Prior to the introduction of the Constitution, the last decade has witnessed developments in respect of increasing protection from discrimination in Kenya. Most notably, the Persons with Disabilities Act 2003 and the National Cohesion and Integration Act 2008 provide protection from discrimination on grounds of disability and race, respectively. In addition, the Children Act 2001 provides a general non-discrimination protection for children on an extensive list of grounds, while the HIV and AIDS Prevention and Control Act 2006 prohibits discrimination on the basis of actual, perceived or suspected HIV status in areas including employment, education, health, transport and insurance services. In addition to these instruments which provide protection on particular grounds across a range of areas of life, the Employment Act, enacted in 2007, provides protection from discrimination in employment on an extensive list of grounds.

However, problems in the legal framework remain. The level of protection provided is inconsistent across different grounds of discrimination and areas of life. 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, sexual orientation, gender identity, age, and genetic inheritance – and the absence of any provisions prohibiting discrimination on all grounds in particular areas of life – such as provision of education or health services. In addition to the lack of protection on particular grounds, the lack of comprehensive protection means that multiple discrimination is inadequately regulated. There are also a number of **inconsistencies between provisions in different laws,** undermining efforts to ensure their implementation and enforcement. Such inconsistencies are an inevitable result of the multitude of different instruments which provide protection from dis-

crimination. Thus, the range of competing legal norms, and the gaps in protection for particular groups or in particular areas of life suggests that there is a need for harmonisation. Finally, there is a significant problem with the **poor implementation and enforcement** of existing laws. A host of factors – including inadequate enforcement mechanisms, low levels of awareness of rights and obligations among both rights-holders and duty-bearers, financial and other barriers preventing access to justice for victims of discrimination – result in a lack of effective implementation of the right to equality.

Thus, the report identifies a complex picture in respect of the legal protection of the rights to equality and non-discrimination. While the Constitution provides general protection from discrimination by state and non-state actors in all areas of life, it does not provide explicit protection from discrimination on grounds such as sexual orientation, gender identity and genetic inheritance, or multiple discrimination. Moreover, constitutional provisions alone are insufficient to ensure that victims of discrimination are able to access justice and appropriate remedies for discrimination. As UN treaty bodies have stated, governments have an obligation to adopt specific legislation in order to provide effective and comprehensive protection from discrimination in all areas of life. Such legislation is needed to make the rights to equality and non-discrimination effective, by defining prohibited conduct such as direct and indirect discrimination, harassment and failure of reasonable accommodation, setting out provisions for access to justice and establishing appropriate systems of enforcement.

4.2 Recommendations

ERT and KHRC have identified a clear need for Kenya to harmonise and strengthen its legal system in respect to equality. Based on an analysis of both the patterns of discrimination and inequality which prevail in Kenya and the legal and policy framework which is in place, ERT and KHRC make a number of recommendations which would enable Kenya to meet its obligations to respect, protect and fulfil the rights to non-discrimination and inequality and in so doing meet the aspirations expressed in the Constitution of Kenya 2010.

The first set of recommendations relate to the need that Kenya further improve its record of ratifying key **international instruments related to equality**. The second and third sets of recommendations relate to Kenya's obligation to respect the rights to non-discrimination and equality. It is rec-

ommended that the government conducts an audit of **discriminatory laws** and provide a list of discriminatory provisions which should be repealed or amended. It is also recommended 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 of state actors identified in the report.

Principal among the report's recommendations is that Kenya adopts **comprehensive equality legislation, preferably through a single equality Act**. ERT and KHRC recognise that harmonisation of equality law can be achieved either through the adoption of a single equality law or through the development of a complex system of individual laws providing protection on different grounds or in different areas of life which, together, would provide comprehensive protection. Under this second approach, Kenya would be required to adopt new legislation providing protection from discrimination on a number of grounds, including gender, sexual orientation, gender identity, age and genetic inheritance, where legislation does not currently exist. 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 met 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 ignore the inter-connected nature of discrimination on different grounds and in different contexts. As such, it would be ill-suited to adequately address multiple discrimination, to provide protection for the admission of new protected grounds, and to provide a consistent level of protection across different grounds. Furthermore, it would be likely to perpetuate a complicated system of different procedures, standards and remedies, an outcome which a number of treaty bodies have called into question. Cost-effectiveness is also a factor that weighs strongly in favour of a single equality Act.

The authors therefore recommend the adoption of single, comprehensive equality law, which should reflect the agreements 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 a law 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

of Kenya, 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 in addition to those explicitly protected. 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 to the alleged discriminator in civil proceedings and should provide effective remedies, and sanctions which are effective, proportionate and dissuasive. Exceptions to the law should be limited and be reasonable and justifiable, in the sense that it can be shown to be necessary for the achievement of a legitimate purpose and where 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.

In part five of the recommendations, ERT and KHRC identify **measures to address substantive inequality.** The authors urge Kenya to take such measures, including through the adoption and implementation of legislation, policies, practices and plans of action, to ensure that it meets its obligations to fulfil the right to equality. Recommendations include that the government finalise and adopt policies relevant to equality and non-discrimination and that it consider introducing a National Equality Policy. ERT and KHRC urge the government to introduce positive action in order to overcome past disadvantage and to accelerate progress towards equality of particular groups. Finally, the authors urge the government to 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.

All recommendations are based on international human rights law related to equality, and on 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 (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 against Enforced Disappearance (2006);

viii. United Nations Educational, Scientific and Cultural Organisation Convention against Discrimination in Education (1960);

ix. UN Convention on the Status of Stateless Persons (1951).

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 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.[787]

787 International Covenant on Economic, Social and Cultural Rights, 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."

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.[788] 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;
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;[789]
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;

788 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*, UN Doc./CEDAW/C/KEN/CO/6, 10 August 2007, Para 18.

789 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*, UN Doc./CEDAW/C/KEN/CO/7, 5 April 2011, Para 45.

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 legislative framework into compliance with articles 15 and 16 of the Convention".[790] 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;
d) The Matrimonial Causes 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

790 Committee on the Elimination of Discrimination Against Women, *Concluding Observations on Kenya*, UN Doc./CEDAW/C/KEN/CO/6, 10 August 2007, Para 44.

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.

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".[791]

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.[792]
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

791 Committee on Economic, Social and Cultural Rights, *General Comment 20: Non-discrimination in economic, social and cultural rights*, UN Doc. E/C.12/GC/20, 2009, Para 27.

792 *Ibid.*, Para 17.

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 meets 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.[793] 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.[794]

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:

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793 Constitution of Kenya 2010, Article 22(3).

794 Committee on Economic, Social and Cultural Rights, note 13, Para 40; Committee on the Elimination of Racial Discrimination *General Recommendation No. 30: Discrimination against Non-Citizens*, 2004, Para 24; see also: *Declaration of Principles on Equality*, published by The Equal Rights Trust, London 2008, Principle 21, p. 13.

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.

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).

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The Equal Rights Trust (ERT) is an independent international organisation whose purpose is to combat discrimination and promote equality as a fundamental human right and a basic principle of social justice.

The Kenyan Human Rights Commission is an independent national organisation whose mission is to work towards the respect, protection and promotion of all human rights for all individuals and groups.

For those seeking greater equality in Kenya, this is a time of hope. In 2010, the people of Kenya seized the opportunity for national renewal presented in the wake of the 2008 post-election violence, and adopted a new Constitution that enshrines a strong right to equality. Coming at the end of a decade which saw the introduction of laws prohibiting discrimination on grounds of disability, race and ethnicity and HIV status, and on a range of grounds in respect of employment, the Constitution marks a decisive improvement in Kenya's legal framework on equality and non-discrimination.

This report asks whether, following the changes of recent years, people in Kenya can live their lives as equals in dignity and rights. It documents the voices of those exposed to discrimination, from the gay victim of violence and police extortion in Mombasa to the disabled child in Siaya denied an education by her own parents and the Kenyan Somali man from Isiolo who has been repeatedly denied identity documents. It analyses the legal, policy and enforcement framework related to equality and identifies numerous gaps, inconsistencies and problems with enforcement. It recommends a set of steps that should be taken if Kenyans' aspiration for a more equal society based on the spirit of Harambee is to be realised.

This report is the outcome of a three-year long partnership between ERT and KHRC and is the first attempt to provide a comprehensive analysis of discrimination and inequality in Kenya, combining both an assessment of the lived experience of those exposed to discrimination and a review of the relevant law and policy in this area.