

## 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."<sup>17</sup>

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,

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<sup>17</sup> 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.<sup>18</sup> 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-

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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.<sup>19</sup>*

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-*

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<sup>19</sup> 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.*<sup>20</sup>

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.<sup>21</sup> Thus, when examining the situation of a particular group of persons, the report looks both at examples of discrimination

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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.<sup>22</sup>*

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.<sup>23</sup> 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

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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;<sup>24</sup> sex, pregnancy, maternity and civil, family or carer status;<sup>25</sup> birth, national or social origin and nationality;<sup>26</sup> economic status;<sup>27</sup> sexual orientation and gender identity;<sup>28</sup> disability;<sup>29</sup> and health status.<sup>30</sup> Furthermore, the report examines one pattern of discrimination and inequality – that affecting persons with albinism<sup>31</sup> – 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<sup>32</sup> and regional<sup>33</sup> 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-

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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.<sup>34</sup>*

In line with international law in this area, the approach taken in the report is that a denial of reasonable accommodation constitutes discrimination.<sup>35</sup> 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”.<sup>36</sup> 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,<sup>37</sup> 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.”<sup>38</sup> 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.*<sup>39</sup>

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

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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.<sup>40</sup>*

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.<sup>41</sup> 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

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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,<sup>42</sup> 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.<sup>43</sup>

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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<sup>44</sup> and the website of the Office of the High Commissioner for Human Rights.<sup>45</sup> 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.<sup>46</sup>

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<sup>47</sup>

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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**,<sup>48</sup> including both

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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.<sup>49</sup> It does not have an ethnic majority,<sup>50</sup> and is home to more than 70 different ethnic groups or tribes, the largest of which are the Kikuyu, Luhya, Kalenjin and Luo.<sup>51</sup> In addition to the larger ethnic groups, there are a significant number of indigenous communities such as the Turkana, Ogiek and Endoroi, 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.<sup>52</sup> An estimated 100,000 Kenyan Nubians, a *de facto*

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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.<sup>53</sup> According to the UNHCR's 2009 Global Trends Report, Kenya is host to the fifth largest population of refugees in the world,<sup>54</sup> with significant populations fleeing violence and conflict in neighbouring Somalia, Ethiopia, and southern Sudan.<sup>55</sup> 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.<sup>56</sup> 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.<sup>57</sup>

Kenya is linguistically diverse, though only English and Swahili are recognised as official languages.<sup>58</sup> *Ethnologue* indicates that 69 languages are spoken in Kenya,<sup>59</sup> 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.<sup>60</sup> An estimated 7% of Kenyans identify themselves as Muslim,<sup>61</sup> and the proportion is significantly higher in Coast

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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](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](http://pewforum.org/uploadedfiles/Orphan_Migrated_Content/Muslimpopulation.pdf).

and North Eastern Provinces.<sup>62</sup> 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.<sup>63</sup>

Kenya is a poor country, ranking 143<sup>rd</sup> out of 187 countries on the 2011 United Nations Development Programme’s Human Development Index.<sup>64</sup> 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,<sup>65</sup> and that 45.9% of the population were living below the national poverty line.<sup>66</sup> 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.<sup>67</sup>

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%.<sup>68</sup> The same source estimated that

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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,<sup>69</sup> 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.<sup>70</sup>

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%.<sup>71</sup> UNESCO data also indicates that only 48% of girls in the relevant age group are in secondary school, compared with 52% of boys.<sup>72</sup> 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.<sup>73</sup> 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.<sup>74</sup> 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.<sup>75</sup> 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%”.<sup>76</sup>

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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](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,<sup>77</sup> with what is referred to as a “strong presidency” model.<sup>78</sup> 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.<sup>79</sup> 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.<sup>80</sup> 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.<sup>81</sup> Corruption is a major problem: Transparency International’s Corruption Perceptions Index ranked Kenya 154<sup>th</sup> out of 178 countries surveyed, where the 1<sup>st</sup> is the country with least perceived corruption.<sup>82</sup> The 2009 East African Bribery Index identified the Kenyan police as the most corrupt institution in East Africa.<sup>83</sup>

## 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

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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.<sup>84</sup>

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.

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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.<sup>85</sup> In

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<sup>85</sup> 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”.<sup>86</sup>

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”.<sup>87</sup> 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.<sup>88</sup> 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;<sup>89</sup> in the acquisition of citizenship through birth and marriage;<sup>90</sup> and the “elimination of gender discrimination in law, customs and practices” related to land is included among the principles of land policy.<sup>91</sup>

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-

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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<sup>92</sup> 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.<sup>93</sup> 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.

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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.