

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



Acknowledgements

This Report was compiled by Steve Ouma¹ and John Ambani,² and reviewed by Dan Juma of the Kenya Human Rights Commission following consultative meetings with the Coalition of Non-Governmental Organizations (NGOs) on Economic, Social and Cultural Rights and Kenya Human Rights Network (K-Hurinet).

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(1) Economic and Social Rights Centre (Hakijamii):

The Economic and Social Rights Centre was formed in 2005 specifically to strengthen the capacity of the marginalised communities to define and claim their economic and social rights. It is registered under the Non Governmental Organisations Coordination Act as an NGO. Hakijamii is a founding member of the International Network on Economic and Social Rights and has strong partnership with several international organisations including Dignity International and Centre on Housing Rights and Evictions (COHRE).

(2) African Women's Development and Communications Network (FEMNET): FEMNET was set up in 1988 to share information, experiences, ideas

and strategies among African women's NGOs through communications, networking, training and advocacy so as to advance women's development, equality and other women's human rights in Africa. FEMNET aims to strengthen the role and contribution of African NGOs focusing on women's development, equality and other human rights.

(3) Eastern Africa Coalition on Economic, Social and Cultural Rights (EACOR): EACOR is a coalition of ecumenical and other organisations in Eastern Africa in the area of Economic, Social and Cultural Rights. It is an association of likeminded organisations from Eritrea, Ethiopia, Kenya, Rwanda, Sudan, Tanzania, Uganda, Burundi, Congo and Somalia. EACOR's goal is to empower the ecumenical and other organisations to effectively pursue economic, social and cultural rights within Eastern Africa through innovative interventions so that people living in poverty can realise their social, economic and cultural rights. EACOR is also a member of the Habitat International Coalition and its Housing and Land Rights Network.

(4) Building Eastern Africa Community Network (BEACON): BEACON is a fellowship of churches, church related organisations, NGOs, individuals and other faith communities, established in 1996 to work for the holistic development of civil society in Eastern and Horn of Africa. The purpose of BEACON is to build the capacity of churches, church related organisations, NGOs and CBOs on policy advocacy, good governance, social and economic justice and peace in East and Horn of Africa.

(5) International Commission of Jurists - Kenya Section (ICJ-K): ICJ Kenya is a membership, nongovernmental, nonpartisan and not-for-profit organisation. It is an autonomous Kenyan Chapter (Section) of the International Commission of Jurists. It is the oldest human rights organisation in Kenya and was formally registered in 1974 under the Societies Act with a vision of being the leader in securing observance of the rule of law, human rights and democracy, for a just, free and equitable society.

(6) Kenya Human Rights Commission (KHRC): KHRC is a national NGO founded in 1992 with a mission to promote, protect and enhance enjoyment of all human rights for all. It has observer status with the African Commission on Human and People's Rights (ACHPR) and the Economic and Social Council (ECOSOC); and is a member of the International Federation of Human Rights (Fédération Internationale des Ligues des Droits

de l'Homme). The Commission is the 1998 winner of the MS International Award, 2003 winner of the Corporate Conscience Award (bestowed by Social Accountability International), and the 2005 winner of the Utezezi ("Defender") Award bestowed by the Kenya National Commission on Human Rights (KNCHR).

(7) The Reproductive Health and Rights Alliance (RHRA): Reproductive Health and Rights Alliance (RHRA) (formerly Reproductive Health Steering Committee) was formed in response to the great need for a coordinated national effort around sexual and reproductive health and rights, with a focus on the right of access to safe abortion and reduced intimidation of health service providers. Its goal is to facilitate, through advocacy, the creation of a legal, political and social environment that supports sexual and reproductive health and rights, and safe abortion in Kenya.

(8) Mazingira Institute: This is a non-profit organisation working towards equitable development and environmental sustainability. Mazingira Institute is involved in information, communication and education activities. Its work is based on an interdisciplinary approach to the issues of human settlements and environmental management, gender, health and environmental awareness, peace, cooperation and environment. Through its publications, distance-education programme, workshops and seminars, the institute disseminates information on sustainable development to primary schools, grassroots institutions and the population at large. Mazingira's work, which is inter-disciplinary, comprises: research, information-communication, education and networking. Mazingira Institute is a member of Anglophone Africa Focal Point of the Habitat International Coalition and its Housing and Land Rights Network.

(9) Centre for Minority Rights and Development (CEMIRIDE): CEMIRIDE is an advocacy organisation devoted to strengthening the capacities of minority and indigenous communities in Kenya and East Africa to secure the respect, promotion and protection of their rights. Its vision is to create a society that recognises and respects minorities and indigenous peoples' rights in all aspects of social, political and economic development process. It was founded in 2000. It has proven its effectiveness and efficiency and has strong NGO networks across East Africa through which it receives regular updates regarding issues on the ground. These partners also become a mechanism through which national and global issues affecting minorities are

disseminated to community levels by CEMIRIDE. CEMIRIDE has observer status with the African Commission on Human and Peoples Rights and is an active member of various national, regional and international solidarity networks.

(10) Centre on Housing Rights and Evictions (COHRE): COHRE is an independent, non-governmental, not-for-profit human rights organisation in the Netherlands with a series of global activities. COHRE is the leading international human rights organisation campaigning for the protection of housing rights and the prevention of forced evictions.

(11) Kenya Food Security Policy Advocacy Network (KeFoSPAN): KeFoSPAN was formed to advocate for the eradication of food insecurity in Kenya. Its work entails policy advocacy, capacity development and technical assistance. Through these mechanisms, the organisation hopes to achieve not only policy change, but citizen empowerment through education, trainings, campaigns and the rights based approach to development.

(12) Students Association for Legal Aid and Research (SALAR): SALAR is a non-profit students' organisation established at the University of Nairobi School of Law in 1999. Its principal objectives are: To promote and undertake legal research as a key component of legal education; to provide free legal aid to persons who cannot afford to pay for the services of a lawyer; to provide community outreach services; to cultivate a public interest lawyering spirit in law students; and to network with NGOs, lawyers, and public and private sector institutions with the aim of expanding the scope of social justice.

(13) HIV/AIDS and Human Rights Project: This is a joint project between SALAR and the Human Rights Development Initiative (HRDI), a Non-Governmental Organisation based in Pretoria in the Republic of South Africa. The joint project is specifically referred to as the Regional Human Rights Law Clinic to increase Access to Justice for Vulnerable Groups in Africa. It seeks to promote access to justice for vulnerable people, in particular, people living with HIV/AIDS (PLWHA) within sub-Saharan Africa. It also seeks to ensure access to international and regional human rights standards and mechanisms for the vulnerable people in the region.

(14) Children's Legal Action Network (CLAN): CLAN primarily protects the rights and welfare of children

through the provision of legal aid. Beyond this, the organisation also conducts research calculated at informing stakeholders on the changes in the area of child rights.

(15) Kenya Land Alliance: The Kenya Land Alliance (KLA) is a not-for-profit umbrella network of Civil Society Organisations and Individuals committed to effective advocacy for the reform of policies and laws governing land in Kenya. KLA was founded in 1999 and registered as a Trust in 2001. The initiative to create an institutional framework for land laws and policy advocacy in Kenya was necessitated by the realization that the land policy, legal and institutional framework are inadequate due to many changes in the social, political, economic and cultural fronts that have occurred in the country over the years. The KLA's vision is to create a society in which all people are assured of sustainable livelihoods through secure and equitable access and utilisation of land and natural resources.¹

(16) Federation of Women Lawyers Kenya: The Federation of Women Lawyers Kenya (FIDA Kenya) was established in 1985 after the 3rd UN Conference on Women, which was held in Nairobi, Kenya. The Organisation is a non-profit, non-partisan and nongovernmental membership organization, committed to the creation of a society that is free of all forms of discrimination against women through provision of legal aid, women's rights monitoring, advocacy and education.

(17) Institute for Law and Environmental Governance: The Institute for Law and Environmental Governance (ILEG) is a non-profit civil society organisation. It was established to conduct policy research, advocacy and training with a view to generating new knowledge and influencing the development and implementation of appropriate laws and policies that support sustainable and equitable management of the environment and natural resources in Kenya.

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List of Abbreviations

African Charter	African Charter on Human and Peoples Rights
APRM	Africa Peer Review Mechanism
BEACON	Building Eastern Africa Community Network
CEMIRIDE	Centre for Minority Rights and Development
The Committee	Committee on Economic Social and Cultural Rights
CKRC	Constitution of Kenya Review Commission
COHRE	Centre On Housing Rights And Evictions
CSO	Civil Society Organizations
EPA	Economic Partnership Agreement
ERS	Economic Recovery Strategy for Wealth and Employment Creation
ESCR	Economic, Social And Cultural Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic Social and Cultural Rights
ICJ	International Commission of Jurists
IMF	International Monetary Fund
KACC	Kenya Anti Corruption Commission
KADU	Kenya Africa Democratic Union
KANU	Kenya National African Union
KHRC	Kenya Human Rights Commission
KNCHR	Kenya National Commission on Human Rights
NARC	National Rainbow Coalition
RHRA	Reproductive Health and Rights Alliance
SCHR	Standing Committee on Human Rights
SAP	Structural Adjustment Programme
SID	Society for International Development
TBT	Truth Be Told Network

Foreword

The Kenyan Civil Society Coalition on Economic, Social and Cultural Rights welcomes the submission of Kenya's State Report for the first substantial period as required by the International Covenant on Economic Social and Cultural Rights (ICESCR). The fact that Kenya is making a submission in itself illustrates that the government now realizes the importance of State Reporting as a means of international supervision, monitoring, and accountability for the enforcement and compliance with human rights obligations.

While writing the State Report, the State demonstrated considerable level of openness, inviting Non-Governmental Organisations (NGOs) to participate in the process. Be that as it may, the NGOs found significant limitations in the approach that the State adopted in writing its report. The approach, in our view, did not enable adequate representation of the population, through deliberate efforts to ensure public participation in the process of writing the Report. Second, the Report's content does not objectively examine the achievements vis-à-vis milestones; it rather seeks to merely offer a 'good impression' and unbalanced account to the Committee on Economic Social and Cultural Rights.

The third deficit in the State's approach was the narrow interpretation of the ICESCR, with little or no attention paid to the jurisprudence and concluding observations that the Committee has made in the past, all of which provide the normative content of the rights prescribed in the Covenant. We also note that the Report is more descriptive than analytical, leaving many questions unanswered. To this extent, therefore, the Report is not a complete offering.

It is with this background that Civil Society Organisations (CSOs) submitting this report seek to offer an expanded representation of the situation on the protection, promotion and fulfilment of economic, social and cultural rights (ESCR) in Kenya. Our aim is to supplement the State Report, and ensure constructive dialogue during its examination of the State Report. Some key issues need highlighting in this regard.

First, is poverty. It can hardly be gainsaid that poverty is one of the greatest challenges facing Kenya today. Although combating poverty, hunger and disease was a political credo at independence, majority of Kenyans remain beset by poverty today than at independence. The number of people living in absolute poverty over the last

decade has increased, the major indicators being unemployment; low coverage in water supply services; a general decline in access to health services; increased pressure on the environment; and increased number of people consuming below recommended minimum levels of dietary energy. Moreover, although 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.

Poverty, Inequality and Corruption remain the greatest challenges to the realisation of economic, social and cultural rights in Kenya.

Second, inequality remains another key challenge to the realisation of economic, social and cultural rights in Kenya. According to a seminal report by Society for International Development (SID) and the Ministry of Planning and National Development, *Pulling Apart: Fact and Figures on Inequality in Kenya*, there is an increasing gulf between the poor and the rich, a gap that makes Kenya one of the most unequal societies. For us, however, the issue of inequality is not just about the statistics on the income gap between the rich and poor, but rather the effects of this on the wellbeing, freedom, autonomy and dignity of individuals and groups. Necessitous men are not free men, it has been said, and the effects of inequality on fundamental freedoms can hardly be over-emphasised. Moreover, this divide entails differences in access to basic social goods and services such as education, food, health and so on.

Inequality in Kenya is also not confined to income and wealth, but also between groups. In this respect, gender inequality remains a key challenge, with serious implications on equal wellbeing, autonomy and dignity of men and women. More specifically, gender inequality is manifest in differential treatment and outcomes that deny women the full enjoyment of the social, political, economic and cultural rights and development. This runs afoul the principle of non-discrimination which is a fundamental tenet of the International Convention on Economic, Social and Cultural Rights.

Finally, corruption remains one of the key problems and threats to the rule of law, democracy and economic, social and cultural rights in Kenya. While there has been growing rhetoric on legal, institutional, structural and

policy measures to combat the vice, there has been little or no progress in the fight against grand political corruption in Kenya. The upshot is that public funds have been diverted by corrupt cartels with impunity, which would have otherwise been used in the provision of public goods and services, or the establishment of social protection mechanisms. The concern here is the failure by the Government of Kenya to act decisively on past and present grand corruption such as the “Goldenberg Scandal,” the “Anglo Leasing Scandal,” the plunder of Kenya’s state corporations and public land and so forth, all from which Kenya has lost tremendous amounts of money. While the Government has proposed amnesty for some perpetrators of corruption, there is no clear strategy on asset recovery, restitution and the prevention of corruption. These acts of omission and commission have had far-reaching implications on the realisation of economic, social and cultural rights in Kenya. Moreover, this has also affected equality, human development, accountability, participation and empowerment, all of which are complementary to human rights.



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I. Introduction

The Republic of Kenya ratified the International Covenant on Economic Social and Cultural Rights (ICESCR) on 1 May 1972, thereby voluntarily undertaking to implement the norms, principles and obligations enshrined therein.³ This commitment enjoined Kenya to submit reports on the measures taken and progress made in realising the rights contained in the Treaty. The main object of submitting such a report is to monitor compliance and review of the State's performance in the implementation of the stipulated entitlements.

About three decades since the instrument's entry into force, Kenya has not submitted any substantive periodic report as required by articles 16 and 17 of ICESCR. It has, however, since been slated to report in November 2008. The deliberations during this session shall be held based on the List of Issues generated by the Committee on Economic, Social and Cultural Rights (hereinafter referred to as the Committee) and the State Report submitted in September 2006.

Prior to the September 2006 submission, the Kenya State had submitted an Initial Report (E/1990/5/Add.17, 02/08/93), which was considered by the Committee on 9 May 1994. The Committee found this report to be inadequate and asked the State to submit another report that complies with the Committee's Guidelines, before the Committee's following session on 30/06/95. This was never done. At the same time, Kenya also failed to submit subsequent periodic reports, which were due on 30/06/2000 and 30/06/2005.⁴

1.1 The process towards the State's Initial Report

Prior to submitting the Initial Report in September 2006, the Government, through the Ministry of Justice and Constitutional Affairs, in collaboration with the International Commission of Jurists, Kenya (ICJ-K), convened a meeting of a section of key stakeholders, including CSOs working in the area of human rights, to launch the process of developing the Country Report. The Ministry worked with the select group of CSOs in the subsequent stages of report writing. Be that as it may, the NGOs involved found significant limitations in the approach that the State adopted in writing its report.

ICESCR

1.2 Positioning the CSOs Parallel Report

Human rights, governance and democracy organisations have carved a niche as key drivers of the clamour for Kenya's democratisation process.⁵ The period 1980–1997 witnessed the most egregious violations of human rights in Kenya. Torture, political murders, political repression, detention without trial, corruption and theft of State resources with impunity were the trade mark.⁶ There is abundant evidence that the emergence of these organisations has contributed significantly to the State's democratization. In many respects, the human rights movement in Kenya bears similarities to the international human rights movement. Like the international human rights movement, Kenya's movement has been most visible with regard to civil and political rights. With the opening up of the political space in the 1990s, however, various human rights groups have attempted to foreground the ESC rights agenda. This is evident in the work of groups such as Kituo cha Sheria (Legal Advice Centre), the Kenya Human Rights Commission (KHRC), the International Commission of Jurists – Kenya (ICJ-K), Federation of Women Lawyers (FIDA- Kenya), Kenya Land Alliance, the Economic and Social Rights Centre (Hakijamii Trust), Chambers of Justice, Mazingira Institute, Pamoja Trust, among others.

The task of accommodating the economic, social and cultural rights agenda within the national policy discourse has been challenging. Although the agenda of civil and political rights has remained the staple of several human rights organisations, not much progress was gained during the regime of the Kenya African National Union (KANU). During this period, most organisations focused on violation of civil and political rights by the KANU regime against its perceived enemies. Yet other organisations such as the KHRC also focused on related areas such as workers' rights and so on. Today, attention continues to be paid to economic, social and cultural rights, with the emergence of non-governmental organisations focussing on specific themes. These are the organisations that have participated in the drafting of this Parallel Report.

In preparing the Parallel Report, the CSOs have been guided by the requirements articulated in the various General Comments and Reporting Guidelines by the Committee,⁷ read together with articles 16(1) and 17(2). Article (16) (1) states that:

State parties to the present covenant undertake to submit

in conformity with this part of the Covenant Reports on the measures which they have adopted and the progress made in achieving the observance of the rights recognized herein.

Article 17 (2) further stipulates that:

(the) Reports may indicate factors and difficulties affecting the degree of fulfilment of obligations and affecting the degree of fulfilment of obligation under the present convention.

The two articles taken together require state parties' reports to deal not only with the progress made, but also with cases where appropriate progress has not been made.

The State Report reveals that, whereas the Kenya has attempted to address these requirements, it makes blanket assertions with regard to most articles of the Covenant and often states that '*there exist legal and constitutional provisions...*' to ensure enjoyment of the rights. Yet the provisions of the Covenant remain undomesticated in municipal law, the failed referendum being the alibi. Even so, practice shows that even where there exist legal and constitutional provisions relating to these rights, the absence of effective policy and institutional frameworks to facilitate and enhance fulfilment of those provisions and/or sometimes the lack of political goodwill have hindered their full realisation. It is, moreover, very clear from existing jurisprudence that a state must not only comply with the *obligation of conduct* but it must also comply with the *obligation of result*.

3. ICESCR was adopted by the UN General Assembly on 16 December 1966. The treaty entered into force on 3 January 1976.

4. For these and other related records see <http://www.unhchr.ch>

5. M Mutua (2004) '*Keynote address – Human rights NGOs in East Africa: Defining the challenges*', at the conference on Human Rights in East Africa, organized by the Ford Foundation, 9 – 10 October 2004, Nairobi, Kenya.

6. W Mitullah, M Odhiambo & O Ambani Kenya's Democratisation: Gains or Loses (2005) 2. Claripress: Nairobi.

7. See, for instance, General Comment Number 1 on state reporting obligations as well as General Comment Number 3 on the nature of states parties' obligations.

II. Background information

2.1 Political structure

Although the State has given a general background and context for its Report, this context is incomplete particularly in relation to the political and socio-economic formation and its historiography. At any rate, there is abundant evidence that this political and economic structure implicates the enjoyment of all human rights by Kenyans.

Since its creation by the British in 1895, the Kenyan State has largely been predatory and illiberal, defined by its proclivity for the commission of gross and massive human rights violations.⁸ The colonial State was arbitrary, brutal and obsessed with calculus for power. To maintain power, it committed a catalogue of atrocities some which have been documented by the Kenya Human Rights Commission.⁹ These include claims of torture, cruel and degrading treatment of detainees during the State of Emergency (1952–60).¹⁰

At independence in 1963, Kenya inherited a social, economic and political system that had been designed to sustain and perpetuate the colonial State. For this reason, the postcolonial State rushed to mutilate the independence Constitution, which had provided for multiparty democracy, a freely elected bicameral Parliament, and judicial independence.¹¹ However, at the State inherited wholesale the laws, practices and jurisprudence that had underpinned the colonial State.

A year after independence, the only major opposition political party, the Kenya African Democratic Union (KADU), merged with the ruling party, the Kenya National African Union (KANU), paving way for the architecture of a despotic executive branch embodied in an authoritarian presidency. A report was later to allude to an epoch in Kenya's political history with:¹²

... Unresolved political assassinations, politically engineered massacres under the guise of tribal clashes and criminalisation of the freedoms of expression and assembly under a one party regime, to mention a few... In addition, police brutality was a commonplace occurrence in dealing with real or imagined opponents of those who wielded state powers.

Alongside the political process at independence was the policy of Africanisation of the economy. This process was

undertaken within the skewed economic structures inherited by the new administration as courtiers of the new ruling class used their position to usurp economic power from the departing colonialists. The final result of this exercise was the creation of an economic system skewed to the advantage of a few, described best as a "nation of ten millionaires and ten million beggars" by J.M. Kariuki, a prolific politician in the post-independence era (who was later brutally assassinated). Thus, by the time Jomo Kenyatta, the first President of the Republic died in office in 1978, Kenya had become a pale shadow of the promising nation that it was at independence. The rates of unemployment had risen and urban and rural poverty was soaring. The imprints of these developments underlie Kenya's political crisis today.

Amid popular calls for the then President, Daniel Arap Moi, to open up Kenya's political and economic space, leading to the very strong political statements made by various parties and culminating to the abortive coup of 1982, Parliament passed the 19th Amendment to the Constitution¹³, introducing the infamous section 2A into the Constitution. This amendment converted Kenya into a de jure one-party state. It outlawed all opposition political parties and gave the ruling party, KANU, the monopoly of political power in the State, further strengthening the authoritarian presidential system in Kenya. Indeed, it was the KANU Governing Council Meeting that directed the Attorney General to prepare legislation immediately making Kenya a one-party state. This illustrates how the Executive undermined the sovereignty of Parliament and the independence and integrity of the office of the Attorney General. In strict theory, however, these amendments were legal given that the power to amend the Constitution was vested in Parliament by section 47 of the supreme law.

President Moi yielded to political pressure in 1991 and accepted to repeal section 2A hence restoring multiparty politics.¹⁴ However, this change was widely perceived as incapable of fully restoring multi-party democracy hence the resurgence of the clamour for review of the entire Constitution of Kenya.

The period between 1978 and 2002 was characterised by political and economic misgovernance by KANU and the President Moi administration. There was widespread and imperious corruption, ineptitude, nepotism and other unethical practices and economic crimes.¹⁵ Consequently, the donors starved the Moi administration of foreign aid for a period of 10 years. In a bid to attract international capital, the State launched a vigorous bid to

attract foreign investment, mostly under pressure by the World Bank Structural Adjustment Programmes (SAPs) conditionality. It is this situation that informed the inaugural address of the third President of the Republic, Hon Mwai Kibaki.¹⁶ President Kibaki stated:¹⁷

You have asked me to lead this Nation out of the present wilderness and malaise onto a promised land...Fellow Kenyans, I am inheriting a country which has been ravaged by years of misrule and ineptitude. There has been wide discontent between the people and the Government, between people's aspirations and the Governments' attitude towards them.

As part of his reform menu, President Kibaki's first administration promised to fight corruption and - even more so - political corruption, introduce free primary education, increase access to public health, create jobs through economic growth, and lead Kenyans in delivering a new democratic Constitution in 100 days in office.¹⁸

2.2 General legal framework for human rights protection

Despite ratifying the ICESCR, the State has not taken any deliberate legislative steps to wholly domesticate its obligations under the Treaty.¹⁹ Socio-economic rights are neither contained in the Constitution nor in the Bill of Rights. Efforts to write a new constitution for Kenya have equally been frustrated by a number of factors, the Government itself being an obstacle.²⁰

Moreover, judicial tribunals have not played a critical role in the enforcement of ESCR. Instead, courts of law have ruled on various occasions that international obligations not incorporated into municipal law have no legal force, implying that almost the entire corpus of ICESCR has no relevance in the State's jurisprudence. In the case of *Okunda v Republic*,²¹ a superior court of record held that international law is not a source of law in Kenya. This position is still being upheld by courts of law, as demonstrated in a fairly recent jurisprudence, *Pattni & Another v Republic*,²² where the High Court again established that international norms, much as they could be of persuasive value, are not binding in Kenya save for where they are incorporated into the Constitution or other written laws.

Consequently, the provisions of the ICESCR and most other international human rights instruments may not be invoked directly before courts of law as they have yet to be transformed into internal laws or administrative regulations

to have a binding effect. At best, what the courts do is to make reference to these international instruments and standards. In *Amanywa Wafula, Ndungi Githuku & Others v Republic*,²³ one of the few cases where the courts of law have made reference to the African Charter on Human and Peoples' Rights (African Charter) and the International Covenant on Civil and Political Rights (ICCPR), the judicial tribunal still gave credence to the claw back clause in section 80 of the Constitution which requires domestication of international human rights instruments and standards before their municipal application.

While Chapter V of the Constitution contains provisions relating to the protection of fundamental human rights and freedoms and circumstances for derogation, these entitlements are limited to civil and political rights and do not expressly encompass socio economic rights, women's rights, children's rights, rights of persons with disabilities or even nascent concerns such as discrimination of persons living with HIV/AIDS as well as sexual orientation. A writer has lamented this situation thus:²⁴

The current Constitution is not exactly 'human rights friendly'. Since 1963, Kenya has ratified or acceded to a number of international and regional human rights instruments which have increased the range of human rights standards designed to benefit the people. For example, there are now specific protections of women's rights as well as those of children in international conventions and declarations, which are not captured in the post colonial constitution of Kenya. In theory, at least, Kenya has a bill of rights just like any other country with a written constitution. However, in practice, the bill, far from reflecting the interests of the ordinary Kenyans, represents the parochial interests of the ruling class.

Kenya's constitutional dispensation also falls far below the 'equal protection' threshold in at least three cardinal respects. First, although Kenya's Constitution prohibits discrimination on a number of grounds, differentiation (especially on the basis of gender) is permitted in matters of personal law such as adoption, marriage, divorce, burial and devolution of property on death.²⁵ Second, the Constitution does not list exhaustively the grounds upon which one may not be discriminated upon. Glaringly omitted from the Constitution are exclusions on the grounds of disability, health status, sexual orientation, *et cetera*. It is instructive that a number of 'sectoral' legislations have already been enacted to cater for the other categories of people who are not sufficiently protected constitutionally. Such categories include

persons living with disability, whose needs are addressed by the *Persons with Disabilities Act, 2003*, persons living with HIV/AIDS, through the *HIV/AIDS Prevention and Coordination Act, 2006*, women, through the *National Commission on Gender and Development Act and children*, through the *Childrens Act, 2001*. These sectoral approaches to equality and human rights have hardly borne the desired fruit and hence the need for a comprehensive equality and non discrimination law. Third, affirmative action, as a principle, does not find constitutional expression in Kenya.

Despite the establishment of the Kenya National Commission on Human Rights (KNCHR),²⁶ human rights remain illusory to many citizens.²⁷ A majority of Kenyans can hardly litigate their rights under the Constitution because of ignorance of the said rights and procedures for their enforcement. Poverty also contributes to this difficulty. The cost of pursuing a constitutional matter (including filing costs, lawyers' fees et cetera, to the conclusion) is prohibitive to many because most Kenyans, about 56%, live on less than a dollar a day.²⁸ The adversarial system of litigation in Kenya requires that, for an issue to be adjudicated upon by the courts, it has to be raised by the parties. Courts will, therefore, be reluctant to grant orders on a human rights issue in a given case, unless the parties thereto have specifically canvassed it in their pleadings or arguments.

Even though, in recent cases, courts of law have been quite progressive and liberal in their approach to constitutional interpretation where human rights are implicated, the High Court has in numerous instances adopted a narrow and restrictive approach where technicalities outweigh the substantive arguments and prayers. In one instance, the High Court dismissed the applicants' pleadings on the ground simply that he did not identify which constitutional provision had been contravened.²⁹ In *Koigi Wa Wamwere v Attorney General*,³⁰ the Court held that section 72 of the Constitution protects the fundamental right to liberty, but does not specify the manner in which arrests can be made, or where such arrests can be effected. The Court declined to concern itself with extradition or the manner in which police officers carry out their duties.

Recently however, progressive decisions have been made by courts of law although it is still difficult to establish a trend. For instance, in *Roy Richard Elirema and Another v Republic*,³¹ a superior court of record held, inter alia, that the right to fair trial entails that one must be prosecuted by a competent person. In *George Ngothe Juma and two others v Attorney General*,³² the High Court held that an

accused person has the right to access prosecution's information relating to the charge in advance, especially witness statements, to be able to adequately prepare his/her defence.

Kenya's justice system has also had the problem of delays in dispensing justice due to backlog of cases especially at the High Court. According to a study carried out by the ICJ-K, the average time a constitutional suit takes from the time of filing to the date of judgment is one (1) year.³³

The independence of the judicial organ of State, which is a key component in the promotion of human rights, has also consistently been brought into question. The refusal by the opposition party, following the disputed presidential elections in Kenya in December 2007, to resort to the judicial system to resolve the post-election controversy was probably the most poignant indicator of the low level of confidence that the judicial system enjoys among the population.

2.3 National institutional framework for the protection and promotion of human rights

As stated in the State Report, an independent national human rights institution, the Kenya National Commission on Human Rights (KNCHR), was established to further the protection and promotion of human rights. The institution replaced the Standing Committee on Human Rights (SCHR) which was a non-statutory body operating under the Office of the Attorney General. The SCHR was established in 1996 to investigate complaints of alleged human rights violations and to educate the public on human rights. SCHR was required to 'submit to the President at the end of every three months, a written report of its findings in respect of any complaints.' As such, SCHR's reports for the first four years were never made public. Even though the human rights body registered incidental success, the most memorable being the investigation of the deaths in King'ong'o Prison in Nyeri, the SCHR can hardly be said to have been independent of the (then) KANU administration.

The KNCHR faces operational handicaps such as limited budgetary allocations and human resource capacity. Indeed, a report has documented that the KNCHR,³⁴ has faced a number of challenges, including inadequate human and financial resources, limited support from Government departments and the concern that human rights are not a major priority for the Government as a whole (including the President).

Besides, compared to other institutions with similar

mandate, such as the Kenya Anti Corruption Commission (KACC),³⁵ KNCHR received relatively lower resource allocations. In the financial year 2004 – 2005, for instance, KACC received a budgetary allocation of Ksh.390 million, almost five times what KNCHR received in the same year.³⁶ These hurdles hinder the KNCHR's ability to discharge its statutory mandate effectively.

Currently, the KNCHR does not enjoy constitutional protection, although this status is envisaged in the various draft versions³⁷ of proposed constitutions for

Kenya. Lack of constitutional entrenchment has meant that the KNCHR occupies a lesser position in the legal order, given the supremacy of the Constitution in Kenya's legal system.³⁸ Moreover, the fact that the KNCHR is not entrenched in the Constitution makes its independence and effectiveness tenuous. Similarly, although the Act creating the KNCHR allows it to apply international instruments to which Kenya is a party, the fact that these instruments are not constitutionally recognised as sources of municipal law creates a serious doubt as to the efficacy of such provisions.

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8. See, Republic of Kenya, *Report of the Task Force on the Establishment of a Truth Justice and Reconciliation Commission*, 26th August, 2003.
 9. See Minutes of the meeting between Mau Mau Veterans Association and the Deputy Executive Director of KHRC held on 16 September 2005.
 10. The [Mau Mau] claimants seek damages for the personal injuries that they sustained. The proposed claims are based on the tort of negligence. It is alleged that the United Kingdom Government is liable not only because of the faults of the colonial administration in Kenya but directly for its own failure to take adequate steps to prevent the widespread use of torture that it plainly knew was being perpetrated in its name. (Letter of claim addressed to the Secretary of State, Foreign and Commonwealth Office, dated 11 October 2006).
 11. See, Chapter IV, VII and X of the 1963 Kenya Constitution (Independence Constitution).
 12. Republic of Kenya, *Report of the Task Force on the Establishment of a Truth Justice and Reconciliation Commission*.
 13. Constitution of Kenya Amendment Act No. 7 of 1982.
 14. Multi-party politics was reintroduced in 1991 through the repeal of section 2A and introduction of section 1A which provides that: 'The Republic of Kenya shall be a multiparty democratic state.'
 15. See generally, K Kibwana, S Wanjala & O Owiti (eds) *Anatomy of corruption in Kenya: Legal, political and socio-economic perspectives* (1996). Nairobi: Claripress. See also, K Kibwana, SK Akivaga, LM Mute & M Odhiambo (eds) *Initiatives against corruption in Kenya: Legal and policy interventions (1995 - 2001)*. Nairobi: Claripress.
 16. See the East African Standard (31 December 2002).
 17. See the East African Standard (31 December 2002).
 18. See National Rainbow Coalition Manifesto 2002.
 19. Concluding observations of the Committee on Economic, Social and Cultural Rights: Kenya. 03/06/93. E/C.12/1993/6 Para 10.
 20. Difficulties experienced in the referendum seem to suggest that the Government was keen and interested in maintaining the authoritarian presidential model contained in the current Constitution.
 21. [1970] EA 512.
 22. [2001] Kenya Law Reports (KLR) 262.
 23. High Court Misc. Application No. 343 of 2000.
 24. M Hansungule 'Kenya's unsteady march towards the lane of constitutionalism', University of Nairobi Law Journal, Vol. 1, 2003, 43.
 25. Section 82(4)(b) of the Constitution.
 26. The KNCHR is established by the Kenya National Commission on Human Rights Act, 2002.
 27. A number of recent reports still decry the state of human rights in Kenya. See, for instance, the Bi-Annual Human Rights Report, July - December 2006, Vol 8, No 2, a report by the KHRC. Also 'Preliminary Report on Alleged Executions and Disappearance of Persons Between June and October 2007', by the Kenya National Commission on Human Rights (KNCHR).
 28. Human rights workers ought to see the notion of poverty as being about exclusion, physical and economic insecurity, fear of the future, and a constant sense of vulnerability. It is the lack of qualities that facilitate a good life, defined in terms of access to the conditions that support a reasonable physical existence and enable individuals and communities to realize their spiritual and cultural potential - opportunities for reflection, artistic creativity, development of and discourse on morality, and contribution to and participation in the political, social and economic life of the community.
 29. *Kenneth Njindo Matiba v The Attorney General*, HCCC Misc. Application No. 666 of 1990.
 30. Misc. Application N.C. No. 574/90.
 31. Nairobi Criminal Appeal No. 67 of 2002.
 32. Nairobi High Court Misc. Application No 34 of 2001.
 33. ICJ - Kenya, Constitutional law case digest: Fundamental rights and freedoms (2004), p. xxv.
 34. *Human Rights in Kenya: The Post Moi Era (2003 - 2007)*, p 82. Human Rights House Network. (2007).
 35. KACC is established by the Anti Corruption and Economic Crimes Act. Act No 3 of 2003.
 36. KNCHR, 2004, Annual Report and Accounts, pp.9; KNCHR, 2006, Annual Report and Accounts 2005/6, PP, 2; Kenya Anti Corruption Commission, 2004, Annual Report 2003/4, Nairobi; KACC.
 37. There exists about four major draft versions of the constitution namely: The Bomas Draft (developed from the National Constitutional Conference that was held at the Bomas of Kenya); The Kilifi Draft (which was drafted by the Attorney General in Kilifi after parliamentary deliberations - (it is this version that was defeated at the Referendum in November 2005); The Ufungamano Draft, developed by Inter Religious and CSOs Consultative Forum which used Ufungamano House as the venue of their meetings, and the Yash Pal Ghai Draft, a version developed by the former Chair of the Constitution of Kenya Review Commission (CKRC) and launched on 9 December 2006.
 38. The Constitution, through section 3, declares itself sovereign. In the same breadth, section 3 of the Judicature Act, Chapter 8, Laws of Kenya, gives the hierarchy of the sources of laws in Kenya with the Constitution at the top. Acts of Parliament are subordinate to the Constitution.

III. General provisions of the Covenant

3.1 Article 1(1) and 1(2): The right to self-determination [paras. 1 – 5 of the State Report]

All peoples have a right to be given an opportunity to determine their political destiny, as well as manage their own resources and wealth. This is a specific obligation of states not only to their own nationals, but also other peoples who have not yet realized their right to self-determination.³⁹

The State Report details adequately a number of efforts undertaken, in this regard, by the Kenya Government through the Intergovernmental Authority on Development (IGAD). These efforts are aimed at enabling the enjoyment of the right to self-determination for peoples of neighbouring states such as Ethiopia, Eritrea, Somalia, Sudan and other countries in the Great Lakes Region. The State Report also correctly demonstrates Kenya's fulfillment of commitments to self-governing peoples in Western Sahara.

However, the State Report fails to address the continued suppression of this right with respect to Kenya's own people. The 'whole nation feels alienated from the government and the structures of authority.'⁴⁰ Politically, for example, the provincial administration, which was inherited from the colonial Government and which replaced the traditional political institutions, has been one institution that has been used to reduce the people's space to determine their political status. Contrary to the noble intention of bringing governance close to the people, the provincial administrators (Chiefs, District Officers [DOs] and District Commissioners [DCs]), who are not elected by the people, have always sought to implement the wishes, not of the people, but of their employer - the government of the day. Indeed, the Constitution of Kenya Review Commission (CKRC) reported, after collecting and collating views from Kenyans, that:⁴¹

Many people complained about the Provincial Administration, its high handed and arbitrary ways, and lack of responsiveness to people's needs or wishes. They called for it to be abolished – or partially abolished...

Segments of Kenya's population, notably, communities that occupy the former Northern Frontier Districts,⁴² have

been denied the right to citizenship and related human rights by being denied national identity cards and voters' cards.⁴³ They are subjected to rigorous and discriminatory vetting procedures that often leave most of them without voters' cards. The result has been denial of their right to determine their political leaders. In the last six years, the Truth Be Told Network (TBT) has received, witnessed and documented difficulties encountered by communities in Northern Kenya in acquiring citizenship documents such as identification cards, passports and birth certificates. Other salient observations related to these are that:

- Due to its 'integrationist' approach; the Government has interfered with the rights of minorities to enjoy their religions, languages and cultures;
- There is no legal, policy or institutional mechanisms to protect the rights of minorities in Kenya; and
- Due to their numerical limitations, minorities lack representation in political processes and have not, therefore, enjoyed the right to participate in governance and public affairs in Kenya.

Furthermore, most communities in Kenya do not effectively share in the proceeds of the natural resources that are found within the territories that they occupy. This is in breach of article 1(2) of the ICESCR, which provides that in no case may a people be deprived of its own means of subsistence. The local community in Kwale, for example, faces imminent eviction from the land it occupies to pave way for mining of Tiomin, yet there are no elaborate schemes for its resettlement and benefit sharing. Similarly, in Ortum, in West Pokot, the Government has contracted a Ugandan company to mine limestone against the local community's wishes that the mining be subject to certain conditions, one of which is an agreement on benefit-sharing. Related to these usurpations is the relegation of the Endorois community from Lake Bogoria to pave way for tourism and 'development' activities.⁴⁴ This has, as a result, disrupted their cultural lifestyle and restricted their access to the religious sites near the lake.

According to the former Chairperson of the CKRC, Yash Pal Ghai, most Kenyans have felt marginalised, neglected and deprived of their resources; and victimised for their political or ethnic affiliations. They considered that their problems arose from Government policies over which they had no control. Decisions were made at places far away from them. These decisions did not reflect the reality under which they lived, and constraints and privations under which they suffered.⁴⁵

Lately, the State has sought to decentralise the governance of development programmes to district and constituency levels. Such initiatives include the Local Authorities Transfer Fund (LATF);⁴⁶ the Constituency Development Fund (CDF);⁴⁷ the Roads Maintenance Levy Fund (RMLF), the Constituency HIV/AIDS Fund among others. The intended purpose of this decentralised developmental approach is to empower local communities to decide on key areas of priorities and ensure their effective implementation.⁴⁸

However, these initiatives are fairly weak and do not fully represent the desired decentralisation set up.⁴⁹ It is a generally accepted theory that a formidable devolution structure must empower the devolved units to the extent of ceding both autonomy and income generation powers to such outfits.⁵⁰ The Constituency Development Fund, for instance, fails to meet this threshold and cannot be correctly referred to as an effective decentralisation scheme. Moreover, these models have been abused and have suffered a crisis of legitimacy. The fact that political leaders, MPs and Councillors, are central to these programmes also acts to limit the legitimate intentions of local communities, as they are rendered spectators in the entire scenario. Politicians have often used these funds to reward their political supporters as well as manipulate them to achieve political gain.

Further, the extent of involvement of the common citizenry in decision making regarding each of these funds has been greatly constrained. The 2003 UNDAF Report for Kenya, among other analyses, associated poverty with lack of security and power to make decisions. This implies that the poor in Kenya are exposed to ill-treatment or powerlessness in terms of influencing key governance decisions.⁵¹ It is for this reason that the current design of the decentralised funds is inadequate, mainly because resources are being sent to the local areas, while the communities have no power to decide on how they are allocated or utilized.

3.2 Article 2(1) and 2(2): Prohibition of discrimination in exercising the rights recognised by ICESCR [paras. 6 – 21 of the State Report]

Kenya's population consists of approximately 40 ethnic groups.⁵² Whereas the Constitution prohibits discrimination on the basis of race, colour, sex, tribe and other arbitrary criterion,⁵³ discriminatory practices abound. There have been allegations of discrimination and politically instigated ethnic violence by the ruling elite.⁵⁴ In addition, wielders of political office have often afforded different and preferential treatment in making appointments to public positions, in

allocating public land and other resources amongst other practices.⁵⁵ During the period between 2003 and 2007, the NARC administration was variously accused of making appointments to public offices on the basis of ethnicity.⁵⁶ Indeed, the major test in management of diversity has been the ethnic factor.

Ethnic violence, for instance, led to the killing and displacement of thousands of people in 1992 and 1997. In fact, most of those displaced are yet to be resettled.⁵⁷ Between 2003 and 2007, there were other episodes of violence in the Northern, Rift Valley and Coastal regions. The most recent threat to the nation was the post 2007 general elections conflict which resulted in the death of close to 1000 people in less than two months and displaced about 400,000 others.⁵⁸ The International Crisis Group thus described the post 2007 general elections conflict thus:⁵⁹

In the slums of Nairobi, Kisumu, Eldoret and Mombasa, protests and confrontations with the police rapidly turned into revenge killings targeting representatives of the political opponent's ethnic base. Kikuyu, Embu and Meru were violently evicted from Luo and Luhya dominated areas, while Luo, Luhya and Kalenjin were chased from Kikuyu-dominated settlements or sought refuge at police stations. Simultaneously, Kikuyu settlements, the largest migrant communities in the Rift Valley, were the primary targets of Kalenjin vigilante attacks that were reminiscent of the state-supported ethnic clashes of the mid-1990s.

In almost all the conflicts that have occurred in recent times, the core substance of contest and/or competition has been access to natural resources, especially land.

These ethnic conflicts and violence have often resulted into vicious denial of economic, social and cultural rights. In the Rift Valley, North Eastern and Mt. Elgon regions, for instance, the consequently closed schools and health centres effectively deny the rights to education and health care. Further, the case of Mt. Elgon and Marsabit areas confirms that poverty and inequality in Kenya are exacerbated by the presence of significant ethnic conflicts and tension.

3.2.1 Examples of discriminatory laws, policies and practices

Kenya's Constitution prohibits discrimination on the grounds of race, tribe and origin, political connection, colour, creed or sex.⁶⁰ This constitutional standard is below the prevailing international threshold in at least three important respects. Firstly, discrimination, even

though generally prohibited in Kenya's legal system, is permissible in certain instances, for example, in matters of personal law like adoption, marriage, divorce, burial and devolution of property on death.⁶¹ This mostly affects women. These exceptions are unjustified and continue to expose significant sections of the population to discrimination.

Secondly, the grounds listed in the Constitution upon which discrimination is discouraged are not exhaustive. These grounds clearly exclude distinctions on the basis of disability, HIV/AIDS status, property et cetera. It is important to note, however, that legislations such as the *Children's Act*⁶², the *Persons with Disabilities Act*⁶³, and the *National Commission on Gender and Development Act*⁶⁴ have broadened the scope of definition of discrimination, thus, enhancing the course of human rights. Even then, it is still crucial that the Bill of Rights itself contains a broad definition of discrimination. Thirdly, the Constitution does not uphold the principle of affirmative action, which, elsewhere, has variously been employed to redeem those traditionally, discriminated against. Indeed, according to one writer:⁶⁵

Substantive equality seeks to address the shortcomings of formal equal equality and seeks to ensure that equality is achieved. The quest for substantive equality will lead to some form of discrimination or differential treatment. This is justified on the account of levelling the playing field, it being recognised that equal rights will not deal with past injustices occasioned by formal equality that does not take into account structural distinctions.

A clear case of discrimination against women in Kenya's legal system is to be found in section 91 of the Constitution which allows husbands to confer citizenship unto their alien wives and not the converse. Discrimination in Kenya is equally continually perpetrated against aliens. For instance, persons not having Kenya's citizenship are limited in the enjoyment of entitlements such as the right to work.⁶⁶ What is more retrogressive is the fact that all proposed legislation seeking to introduce the concept of equality have not been the Government's priority and have, consequently, not been enacted. The *Equality Bill*, 2002, has failed to see the light of the day. Recently, Parliament failed to pass an Affirmative Bill that was intended to secure a number of parliamentary seats for women.

The introduction of the Law of Succession Act,⁶⁷ was supposedly a Government's measure to undo unfair and

discriminatory traditional inheritance rites. The legislation, however, allows customary law to apply in certain regions, like Garissa, Samburu, Wajir, Turkana, West Pokot, Mandera, Tana River, Lamu, Kajiado and Narok. Further, the law of succession does not apply to land and cattle in these areas, consequently perpetuating a traditional regime of discrimination. In this context, the application of customary law simply robs women the little that the already unfavourable personal law may have spared.

Although the Vagrancy Act was amended in 1997, discrimination still abounds for poor people and vulnerable groups such as women, children, refugees and minorities. For instance, authorities frequently conduct security swoops in densely populated slums. Spot checks in police cells and courts rooms show that over 80 percent of suspects are impoverished citizens. These security swoops are rarely, if at all, conducted in affluent neighbourhoods.

While section 84 of the Constitution provides for a right of recourse to the High Court in cases of violations of human rights, courts often award declaratory orders and rarely monetary compensation except only in the minority of cases.⁶⁸ Even in those cases where damages have been awarded, the State has been reluctant to enforce the court orders by refusing and or failing to pay compensation. An example is the case of Wallace Githere, a journalist who was awarded damages by the High Court, but who was not compensated until he resorted to hunger strike.

Further, these constitutional remedies for human rights violations have not been enjoyed by ordinary citizens because of poverty, ignorance and inability to engage the court process. The cost of litigation is beyond the majority of the population while the colonial technical rules of procedure have ensured that many people do not have meaningful access to the judicial system.

3.3 Article 3: Equal treatment irrespective of gender [paras. 32 – 46 of the State Report]

Parts 32–35 of the State Report present a plethora of international and regional legislative regimes safeguarding discrimination against women to which Kenya subscribes. The Report however, fails to state the fact that poverty and inequality are taking a female face in Kenya. Despite the existence of legal and constitutional provisions to the contrary, statistics show that women in

Kenya are continuously discriminated against and excluded from opportunities and decision-making processes on the basis of their sex. According to a research conducted by the Society for International Development (SID), 2004, the average monthly earnings for women in paid employment in 1999 was Kshs. 5,752/- compared to Kshs. 8,440/- enjoyed by their male counterparts.

In addition to poverty, domestic and other forms of violence against women are on the increase.⁶⁹ This violence is predominantly in the form of physical abuse, coupled with psychological, physiological, verbal and emotional abuse. According to the Chairperson of the Kenya Women Parliamentarians Association in the 9th

Parliament, at least 16,482 women are raped every year, translating to one every half hour.⁷⁰ Statistics from hospitals and community based organisations indicate that 102 male sexual violence victims were treated at the Nairobi Women's Hospital over a period of three years compared to 2,329 female sexual violence victims over the same period.⁷¹ Further, in 2005 alone, the Coalition of Violence Against Women (COVAW) received over 750 cases of violence against women.⁷² There are indications that violence against women has been escalating each year. For example, the year 2003 registered about 300 more cases than 2002, while by mid 2004, reported cases of rape were almost as many as those reported in the entire year, in 2000. The table below represents reported cases of rape between 2000 and July, 2004.

Reported Rape Cases for 2000 to July, 2004

Province	2000	2001	2002	2003	July, 2004
Total	1675	1987	2013	2308	1653

See, Daily Nation, August 19, 2004

There are many and disturbing instances where girl children, elderly women⁷³ and disabled people have been violated. In January 2006, a Member of Parliament stated that:⁷⁴

Sexual violence has hit an all-time high in the history of Kenya. The youngest rape survivor in Kenya is five months and the oldest 82 years old.

These records have since been broken as much younger and other people have been violated in the course of succeeding years.

3.3.1 Affirmative action

There is no official State policy on affirmative action to ensure the participation and involvement of women in politics, top management positions and even in organs of

decision-making. The closest that Kenya got to such a policy was during parliamentary debates on the Bill that sought to amend section 33 and 42 of the Constitution. Part of this amendment had a proposed clause that would have required that 50 seats be reserved for women candidates as specially elected members of the National Assembly.⁷⁵ This proposal was voted out by the male dominated Parliament. Statistics reveal that women remain unequal in all spheres of public sector compared to their male counterparts. In some of the latest judicial appointments, for example, out of 11 appointments of High Court Judges, only 2 were women, and out of the Appeal Judges appointed, none was a woman. Similarly, in the 2005 Cabinet reshuffle and appointment of Assistant Ministers and Permanent Secretaries, no woman was appointed. Nothing illustrates unwillingness to entrench gender equality more, than these incidents.

39. Human Rights Committee, 'General Comment No 12: The right to self-determination of peoples,' para 6.

40. Report of the Constitution of Kenya Review Commission (2002). Short Version. P 12.

41. *Ibid.*

42. Northern Kenya region, formerly Northern Frontier Districts comprise of Wajir, Garissa, Mandera, Ijara, Isiolo, Moyale and Marsabit. Most of the inhabitants of this region are ethnic Somalis, occupying almost the whole of the Eastern part of the region (Garissa, Wajir, Mandera, Ijara, Oroma, Boran, Galla, Pokomo and Rendille), which run Southwards from East of Moyale to the Tana River, an area of about 102,000 square miles of Kenya's 224,960 square-mile territory. This region of Kenya has a unique history, resulting from colonial partitioning of Africa and subsequent status disputes between Kenya and Somalia in the independence period.

43. It was not until 1997 that the Northern Frontier Districts were relieved of the yoke of administration under emergency laws. Since the

colonial days, certain oppressive legislations had operated in the region since the attempt by the Northern Province Peoples Party to secede. Such legislations include: The Outlying Districts Act; the Preservations of Public Security Act and the Contiguous Districts Regulations; Special Districts (Administrations) Act; and the Stock Theft and Produce Act. For a detailed analysis, see the Country Review Report of the Republic of Kenya, May 2006, African Peer Review Mechanism.

44. The Endorois community has lodged a communication before the African Commission [*The Centre for Minority Rights Development [CEMIRIDE] on behalf of the Endorois Community v the Republic of Kenya Comm. 112/2003*] seeking recognition of their rights over ancestral land around lakes Baringo and Bogoria.

45. See Y Ghai, Paper on Devolution and Constitution Making in Kenya. Presented during a lecture hosted by the African Research and Resource Forum.

46. The LATH programme is established by the Local Authorities Transfer Fund Act, No 8 of 1998.

47. CDF resources are operated under the legal framework of the Constituencies Development Fund Act, Act No 10 of 2003.

48. According to section 3 of the CDF Act, for instance, the provisions of the legislation shall ensure that a specific portion of the national annual budget is devoted to the constituencies for purposes of development and in particular in the fight against poverty at the constituency level.

49. *Human Rights in Kenya: The Post Moi Era* (2003 2007). Human Rights House Network. (2007).

50. See, generally, W Oyugi 'Search for an appropriate decentralization design in Kenya: Historical and comparative perspectives' in K Kindiki & O Ambani (eds) *The anatomy of Bomas: Selected analyses of the 2004 Draft Constitution of Kenya*. Claripress: Nairobi 2005.

51. United Nations Development Assistance Framework (UNDAF) Kenya, 2004-2008.

52. There could be more ethnic groups.

53. See, section 82 of the Constitution.

54. See, M Apollos 'Ethnicity, violence and democracy' (2001) XXII, 1 & 2 African Development 6; See also, 'Class v kinship in Kenya's eruption to violence' (2008) 23, 1 & 2 Wajibu.

55. This debate has been rife, at least in Kenya's leading dailies between the Months of September and November 2007. Also see the presidential Commission on Illegally allocated public land, March 2004.

56. See, for example, report titled 'The skewed government appointments in Kenya', Presented by Hon. Ochillo Ayako to 9th Parliament in June 2007. See, for example, M Apollos 'Ethnicity, violence and democracy' (2001) XXII, 1 & 2 African Development 6. See, also, B Kirui 'Worrying trend in major public sector appointments' Daily Nation 14 March 2007, where it is stated: 'The general feeling is that President Kibaki seems to have skewed appointments to plum public sector positions in favour of his native Central Kenya region.'

57. Kenya Human Rights Commission and FIDH, *Massive internal displacements due to politically instigated ethnic clashes, 2007*. According to the Report, from 1991 to 1996, over 15,000 people died and almost 300,000 displaced in Kenya. In the run-up to the 1997 general elections, fresh violence erupted at the Coast, killing over 100 people and displacing over 10,000, mostly pro-opposition, up-country people, the report adds. Other incidences of clashes were experienced between 1999 - 2005 in the same provinces.

58. International Crisis Group, Africa Report No. 137. 21 February 2008.

59. *Ibid.*

60. Section 82(1) and (3).

61. Section 82(4) (b).

62. Section 5.

63. Section 11.

64. Section 6(2)(d).

65. P Kameri-Mbote 'Gender considerations in constitution making: Engendering women's rights in the legal process,' (2003) University of Nairobi Law Journal, 156.

66. See, *Immigration Act* (Chapter 172); and the *Aliens Restriction Act* (Chapter 173).

67. Chapter 160, Laws of Kenya.

68. In *Roshanali Karmali Khimji Pradhan v Attorney General*, the court, on the basis that the Attorney General had used his powers unconstitutionally, went ahead to award damages for infringement of fundamental human rights and condemned him to pay costs.

69. This section borrows heavily from the position taken by Kenya's CSOs in *Human rights in Kenya: The post Moi era 2003 – 2007*, 33. Human Rights House Network.

70. 'Rape committed every half hour, forum told' 27 January 2006 East African Standard.

71. *Ibid.*

72. Kenya Human Rights Commission, *Bi-Annual Human Rights Report*, Vol 7, No 3 – 4. July – December 2005.. p 10.

73. See, 'Woman, 70, dies after a rape ordeal' 1 September 2006 East African Standard.

74. 'Rape committed every half hour, forum told' 27 January 2006 East African Standard.

75. National Assembly, *Official Report - Hansard*, Wednesday, 15 August 2007.

IV. National implementation of specific rights

4.1 Article 6: Right to work [paras. 47 – 55 of the State Report]



Source: Kenya Human Rights Commission, Working Conditions in Export Processing Zones in Ruaraka, Nairobi, 2008.

The NARC party promised that it would, upon election, create 500,000 jobs each year. Yet, between 2001 and 2005, the number of wage employees increased only marginally from 1,677,100 to 1,807,700.⁷⁶ Instead, during the same season, the number of self-employed and unpaid family workers increased from 65,400 to 66,800. Even worse, the informal sector grew tremendously from 4,668,700 individuals to 6,407,200. This implies that employment could have grown more in the informal sector, which is rarely regulated and therefore invariably falls short of the ideal labour standards. The same five year period witnessed the private employment sector grow only marginally by 4.3% while the public sector

shrunk by 0.6%.⁷⁷ In a population of over 14 million adults, unemployment and dependency rates should be considered very high where wage employees amount only to 1.8 million people.

Among the reforms initiatives by the NARC administration was the Economic Recovery Strategy for Wealth and Employment Creation, 2003–2007 (ERS), drawn in June 2003 as a blueprint for development. The Ministry of Planning had the task of coordinating and ensuring the implementation of the ERS. The ERS was envisioned to be the designated road map or policy document for Kenya's economic future.⁷⁸ It was built around four

pillars, namely; restoration of economic growth within the context of a sustainable macroeconomic framework, strengthening the institutions of governance, restoration and expansion of infrastructure, and investing in the human capital of the poor.

To implement the ERS, an investment programme was formulated taking into account the views of development partners, the private sector and other stakeholders. This entailed an aggressive export-oriented economy (in departure from the initial import substitution) that has been characterised by liberalisation of various sectors. Coupled with several supply-side constraints, trade liberalisation; reform in the interest-rate regime; and reduction in deficit financing, among others, have in the past led to massive importation of some products and the closure of the domestic firms that used to produce these products. The textile and leather industries in particular were seriously hit by the importation of cheap new and used clothes. Factories such as Kicomi in Kisumu and Rivertext in Eldoret were virtually closed down. The proposed revision of the Cotonou Agreement (2000) between Kenya and the European Union, creating a preferential trading regime between them, is expected to

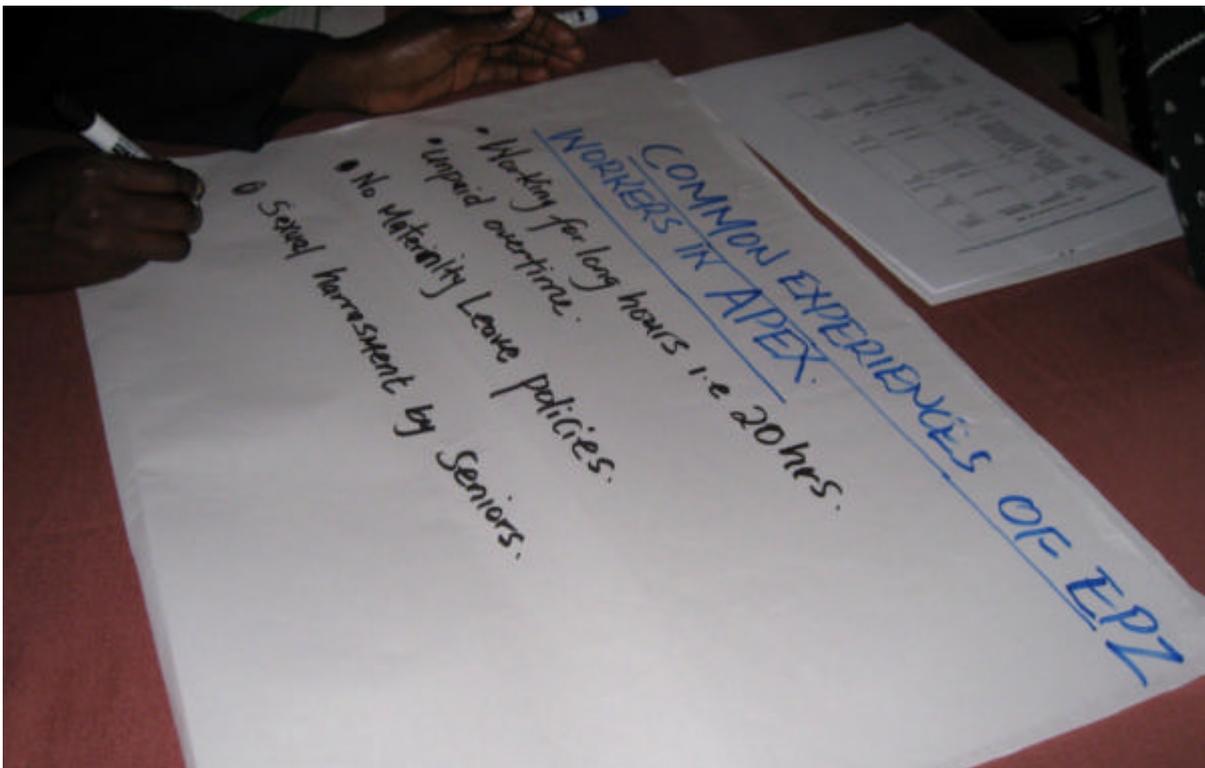
yield no better results. It has been argued by, among others, the State's think tank, the Kenya Institute for Public Policy Research and Analysis (KIPPRA),⁷⁹ that, if signed, the Economic Partnership Agreement (EPA) may have major deleterious effects on enjoyment of economic and social rights in Kenya.

But even if Kenya got a fair-trade deal, it is apparent that it would not be able to take full advantage of it in the current circumstances. This was confirmed by the mid-term review of the ERS conducted in 2005. Economists who undertook this task, established that the implementation of the strategy was being hampered by two major changes, namely:

- How to provide relief to the suffering; a vast majority of Kenyans had endured a degree of suffering in the last two regimes; and
- How to tackle structural problems of an underdeveloped economy in the era of globalization in order to lay foundation for sustained economic and social progress.⁸⁰

Most important though, this review revealed that the economy was creating wealth for a few without creating jobs for the masses.⁸¹

4.2 Article 7: The right to enjoyment of just and favourable conditions of work [paras. 56 - 63]



Kenya has recently enacted new labour legislation. The laws are a product of deliberations that lasted over five years. The new laws are; the *Labour Institutions Act, 2007*; the *Employment Act, 2007*; the *Labour Relations Act, 2007*; the *Work Injury Benefits Act, 2007*; and the *Occupational Safety and Health Act, 2007*. These legislations are fairly progressive and could go a long way to liberating the working community in Kenya.

However, the labour law reforms would have been more congruent and better pillared had they been situated in a constitutional dispensation founded on human rights principles. As already noted, currently, Kenya has a weak and sometimes rather shallow constitutional framework for the protection and promotion of human rights.

In October 2007, Parliament passed the new labour laws, thus paving way for the amendment of old oppressive statutory order. These laws, which seem to be based on social policy, stand out as an important departure from the past and can well serve as a pathway towards reconstruction of labour relations. However, there are several foundational limitations to the new order. The limitations include:

*Criminalisation of labour relations:*⁸² It seems that the new laws have simply continued with the trend established during the colonial era. Then, labour relations were criminalised as a way of forcing the 'natives' to provide their labour to the settlers. In any case, there are already many crimes provided for in a number of penal statutes that cover some of the conduct that is criminalised in the labour legislation;

Right to organise: One of the major limitations of the current workers' rights regime in Kenya is the disconnect between workers and the leadership of their trade unions. This has often led to weak trade unions. The Labour Institutions Act ought to have had provisions that strengthen democracy and accountability in trade unions. Key to this is a model constitution for the trade unions. Criminalisation of the right to strike is another fundamental limitation. Forced labour⁸³ and the denial of the right to strike are closely related. Criminalisation of strikes is clearly a breach of freedom from forced labour;

Decent work: One of the major challenges with liberalisation in Kenya has been casualisation of labour. This has led to workers finding themselves in conditions that are below the generally acceptable working conditions. The basic minimum terms and conditions of

employment provided by the new Employment Act⁸⁴ are very progressive. Efforts must however be made to also regularise working conditions in the informal sector which does not seem to adhere to basic labour standards;

Wages: Minimum wage has been determined under the provisions of the Regulation of Wages and Conditions of Employment Act (CAP 229). Notwithstanding, the wage councils seem to have fallen dormant so that minimum wages are announced by the Minister for Labour or the President on Labour Day, May 1st. This has led to politicisation of the minimum wage policy. However, the new laws have excluded workers who do not belong to any union. Furthermore, the provisions of these laws could end up encouraging firms to narrow employment of unionisable workforce by increased use of casual and contract workers.⁸⁵ The new laws do not make any revisions of existing overtime rates of payment, potentially leaving workers at the mercy of their employers.

Tripartite plus: In the era of globalization, the effects of private corporations⁸⁶ on enjoyment of human rights cannot be monitored by the tripartite⁸⁷ alone. On the industrial shop floor, it may be advisable to retain the niche focus of the social dialogue partners, on the larger societal scale however, the Industrial Relations Charter should be amended to recognise the supportive role of other partners.⁸⁸

On the issues of precarious employment in the Export Processing Zones (EPZs) and cut-flower industry as referred to in paragraphs 7, 62 and 63, there is no evidence that the weakening of implementing labour laws and regulation policies is being remedied. The Finance Act amendment of 1994, for instance, paved way for arbitrary dismissal of workers by the employers in the pretext of redundancy. Besides, the State has conceded and accommodated the irregular and unfair application of the principle of targets in the two sectors. This principle enables companies to fix unrealistic targets⁸⁹ and compel workers to fulfil such targets as part of accomplishment and attainment of daily wages. The result has been that workers have to work for longer hours to earn the meagre income.

The other factor which must be considered is that of labour administration. The Ministry of Labour and Human Resources remains largely under-funded. The Ministry is understaffed and is ill-equipped to perform its tasks.⁹⁰

4.3 Article 8: The right of everyone to form and join trade unions [paras. 64 - 69]

Kenya has been a member of the International Labour Organization (ILO) since 1964. It is thus bound by ILO's Constitution and the various conventions and recommendations that it has ratified to-date. Among the most fundamental of the obligations of ILO members is adherence to the 1998 Philadelphia Declaration on Fundamental Principles at the Work Place. These principles stipulate standards and conventions that all members of ILO should adhere to irrespective of whether they have ratified them or not. The Kenya State in the past disregarded this and deregistered and undermined strong trade unions like the Kenya Civil Servants Union and the University Academic Staff Union [UASU].

The administration of trade unions faces enormous challenges. For instance, officials at the Ministry of Labour and the Registrar of Trade Unions continue to hamper the operation of trade unions. It follows that the position stated by the State that it respects the right to organise is therefore inaccurate.⁹¹ There is evidence that the State has declined to register an additional umbrella trade union, whereas there are numerous complaints by Kenya workers regarding the inadequacy of the Central Organization of Trade Unions (COTU). Besides, trade unions that have applied to be registered to represent special sectors, like the proposed Tea Workers Unions and the Kenya Horticultural Workers Union, have had their registrations pending before the Register for as long as eight years.

The most common phenomenon is the interference by the office of the Registrar of Trade Unions in the management and operations of trade unions. This is evidenced through unprocedural removal of legitimate leaders from office, which is either orchestrated or sanctioned by the Registrar. A case at hand is that of the Kenya Union of Post Primary School Teachers (KUPPET), where the union officials were irregularly removed from office with the underhand of the registrar. There is also abundant evidence of interference, corruption and connivance by the Registrar and Ministry of Labour officials during the state-managed trade union elections.⁹² Moreover, the trend of casualisation of labour also continues to make workers vulnerable and unable to join trade unions.

4.4 Article 9: Social security [paras. 70 – 73 of the State Report]

International human rights law obligates the State to ensure social security to all.⁹³ Social security entails such schemes as: Medical care; cash based sickness benefits;

maternity benefits; old-age benefits; invalidity benefits; survivors' benefits; employment injury benefits; unemployment benefits; and family benefits.

The State has initiated a number of schemes meant to advance social security. These include the *National Social Security Fund* (NSSF); the *National Hospital Insurance Fund* (NHIF); Workmen Compensation Act; the Provident Fund; and a number of pension schemes.⁹⁴

The NSSF is established by the *National Social Security Fund Act*.⁹⁵ This legislation requires compulsory deductions usually from employed persons' salaries to the Fund. The employers are mandated to deduct and remit these monies to that kitty. The Fund is set up to pay pension benefits to employees after retirement. The Fund has benefits such as: Age benefit yielding to persons beyond the age of 55 years; survivor's benefit accruing to the survivor's next of kin, invalidity benefit meant for those who eventually become subject to mental or physical disability, withdrawal benefit for a person who attains the age of 50 and is outside employment, and the immigration grant for those who immigrate from Kenya.

NHIF is established by the *National Hospital Insurance Fund Act*.⁹⁶ NHIF mostly applies to persons in the formal sector although it permits contributions by people not in formal employment. NHIF is a limited social security in that its benefits are limited to a small percentage of medical bills (bed only) in case of hospitalisation or maternal admission. The other benefits may be in the form of a daily allowance in respect of hospital treatment.

The *Workmen Compensation Act*⁹⁷ (repealed and replaced by the Work Injury Benefits Act, 2007) provides for the compensation of workmen for injuries suffered in the course of their employment. Although this Act has been repealed as mentioned above, the replacement legislation's application (which is very progressive and incorporates the fundamental ILO recommendations mentioned below) is yet to be interpreted and implemented by a court of law. This is due to a major lawsuit filed against this Act by the Law Society of Kenya to declare some of its provisions to be unconstitutional. Therefore, the most applicable law to be discussed here is the Workmen Compensation Act. An ILO Committee has previously criticised this scheme for failing to ensure full application of the following principles:⁹⁸ The principle of compensation payable to the injured workmen or his dependents in the form of periodic payments; entitlements to medical aid free of charge and to such surgical and pharmaceutical aid as is recognised to be

necessary in consequence of accidents; supply and normal renewal by the employer or insurer of such artificial limbs and surgical appliances as are recognised to be necessary; and guarantees in the event of the insolvency of the employer or insurer.

This scheme is applicable to only those injured in either Government or private service. It, therefore, has no application to unemployed persons as it is only afforded those injured in the course of employment. Compensation in this regard happens in the case of fatal cases; permanent total incapacity; permanent partial incapacity; and temporary incapacity.⁹⁹

Aside from these contributory social benefits schemes, other schemes in place include:

- Public Officers' Pensions (Kenya and United Kingdom) Agreement Act;¹⁰⁰
- Pensions Act;¹⁰¹
- Pensions Increase Act;¹⁰²
- Provident Funds Act;¹⁰³
- Widows' and Orphans Pensions Act;¹⁰⁴
- Asian Widow' and Orphans' Pensions Act;¹⁰⁵
- Asian Officers' Family Pensions Act;¹⁰⁶
- Widows and Children's Pensions Act;¹⁰⁷
- Parliamentary Pensions Act;¹⁰⁸ and
- Presidential Retirements Benefits Act.¹⁰⁹

The *Pensions Act* provides the grant for regulating pensions, gratuities and other allowances in respect of public service officers. The *Pensions Increase Act* is concerned with increase of certain pension's payable in respect of public service. The *Provident Fund Act* establishes a provident Fund for certain enumerated public employees. The *Presidential Retirements Benefits Act* grants pension and other benefits to persons who cease from holding the office of the President.

4.4.1 Inadequacies of available social security schemes

The inadequacy of available schemes is that they apply mostly to employed persons and often exclude those employed on casual basis. NSSF and NHIF, for instance, are dependent on an individual's contribution. Further, there have been numerous instances when employers have failed to remit these statutory deductions to the various schemes. Many local authorities, hitherto, owe their employees and former employees billions of shillings in the form of un-remitted deductions yet there has been little action by the State. What is odd is that this anomaly has persisted even in the lifetime of the *Retirement Benefits Authority*.¹¹⁰

Clearly, social security is virtually absent in Kenya save for those in formal employment. NSSF, NHIF and the Provident Fund are contributed to by employees and the Government only plays a facilitative role. The pensions schemes appear to be rewards for those who have served the Government and these cannot strictly be said to benefit a majority of citizens. The same applies to the Workmen Compensation legislation. It follows that there is very little direct investment by the Government in social security, a very disappointing scenario.

4.4.2 Recent measures: Persons with Disabilities Act

In 2003, a new permanent scheme, the *National Development Fund for Persons with Disabilities*, was established under the *Persons with Disabilities Act*.¹¹¹ This Fund aims at benefiting persons with disabilities falling in certain categories. The Fund may receive monies from finances appropriated by Parliament; income generated by investments made by the trustees; and other donations.¹¹² Money from this Fund may be used to:¹¹³ Contribute to the expenses of organisations of persons with disabilities; contribute to the expenses of institutions that train persons in the care of persons with disabilities; contribute to the capital expenses of projects undertaken by the Government for the benefits of persons with disabilities; contribute to the cost of assistive devices and services; and pay allowances to persons with disabilities who have no other sources of income. This last category may benefit persons with severe disabilities and who, therefore, are not trainable in any skills; aged persons with disabilities; single parents with children with disabilities and who cannot therefore seek employment; et cetera. The implementation of this law has, however, been slow.¹¹⁴

4.4.3 Recent measures: National Social Health Insurance Bill, 2004

The Ministry of Health also introduced in Parliament the *National Social Health Insurance Bill, 2004*, to repeal and replace the NHIF Act No. 9 of 1998, to provide for a phased programme of a compulsory health insurance scheme for all. This was in line with the government's 'Economic Recovery Strategy for Wealth and Employment Creation, 2003-2007' outlining intervention measures that would improve affordability and access to quality health services particularly for the poor.¹¹⁵ These measures included the transformation of the NHIF into a National Social Health Insurance Fund (NSHIF) through which Kenyans would make affordable contributions, and others, no contribution at all.

In spite of the proposed scheme's progressive provisions, it subsequently collapsed when the Bill failed to achieve presidential assent. A study undertaken by the Institute of Policy Analysis and Research¹¹⁶ revealed that in terms of governance, the general public was sceptical about the NSHIF mainly due to the Government's poor track record of mismanagement and dismal delivery of services to the people. Furthermore, Kenya lacks adequate infrastructure, economic or otherwise, to finance and maintain the scheme. It is unlikely that the high poverty levels, poor economic situation and health service constraints would have supported the resultant high premiums and subsidies that would have been expected.

Therefore, it suffices to state that the majority of Kenyans have no access to social security. Minorities, the elderly, and other vulnerable groups have no access to social security except, perhaps, for privileged women and children who may by chance access the social security benefits of their formerly employed husbands.

4.5 Article 10: Right to family [paras. 74 – 84 of the State Report]

The family is the pillar of society and as such, its protection is paramount. Although a legal framework is in place to protect the family, certain types of marriages have little or no protection in law. Persons belonging to families that are a result of presumptive marriages, for example, have very little protection within the law. Similarly, customary marriages are not registered and proof of their existence is at times difficult. Although women married under customary laws are considered part of their husband's clan in matters of property, they are not regarded as full members of neither their natal nor their marital clans.

The Domestic Violence (Family Protection) Bill, introduced in Parliament in 2000, sought to provide for the intervention of the State, through courts of law and other established institutions, in matters of domestic violence and provide remedies for survivors and perpetrators alike through arbitration, counselling, mediation and reconciliation. It also sought to reduce and prevent domestic violence through protective orders; inexpensive, speedy, and simple access to justice. The Bill sought to provide survivors of domestic violence with appropriate programmes as well as rehabilitative programmes for perpetrators, amongst others. It is, therefore, important that this Bill - with all its noble intentions of protecting the family - which is still lying in the shelves of Parliament- be enacted into law.

Matrimonial property in Kenya is governed by the outdated Married Women's Property Act (1882) of England. One of the draft constitutions for Kenya,¹¹⁷ revamps the Bill of Rights and includes provisions that would enormously improve women's property rights by recognising customary law, giving greater recognition to the interests of dependants in the case of death, including the rights of women who have been cultivating land.¹¹⁸ It protects equal rights of men and women in marriage, during marriage and at its dissolution, and gives spouses enjoyment of common ownership of spousal land, as long as such land is the family's principal source of income or sustenance and prohibits discriminatory access to land by reason of gender, marital status, age or other distinction. The State should, thus, facilitate the speedy enactment of a new constitution and remove all the hurdles that stand in the way of its promulgation.

Marriage laws and procedures urgently need to be reviewed and reformed. The necessity was present even in 1968, when the Marriage Commission was established. The recommendations of the Commission in form of the Marriage Bill of 1976 were shelved. Doubtlessly, the need is greater now than ever before.

4.6 Article 11: Right to an adequate standard of living [paras. 85 – 121 of the State Report]

(Source: Kenya Human Rights Commission, Informal Settlements in Kibera, May 2008)

The Kenya State Report has reckoned that 'the proportion of Kenyans living below the poverty line is on the increase.' Indeed, the number of people living in absolute poverty is now 56%, (about 15 million people),¹¹⁹ with a likelihood that it will rise to 66% by 2015.¹²⁰

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. As noted, local government authorities and police disproportionately harass the poor and youths with security raids in the name of maintaining law and order.

Notably though, in the last four years, Kenya has pursued more social policies as illustrated through the adoption and implementation of the following legislation and policies:

Water Act 2002, which provides mechanisms for

financing water resource protection and management and, thus, enables the Government to implement the National Water Policy;

Sessional Paper, Kenya Housing Policy, produced by the Ministry of Housing;

Parliament is considering a draft Housing Bill.

The enactment of a Gender Development Policy, law and programmes in 2005;

The National Policy on Human Rights which is currently under discussion;

The National Youth Empowerment Policy also under deliberation;

The enactment of ERS (2003-2007) in 2003;

The implementation of the Anti - HIV/AIDS Policy in 2005;

The implementation of Free Universal Primary Education in 2003;

The enactment of a Draft National Policy on Land in 2007; and

The enactment of the Refugee Protection Act in 2004.

As a matter of fact, most of these legal instruments and policies are very well intentioned. However, those that have been enacted into law or those being operationalised have failed to give any meaningful results, because the State has retained the very power and production relations' patterns that were established to support and protect both colonialism and authoritarianism. The glaring evidence to this is the disparaging manner with which the State continues to treat the informal sector, though it is a source of income to about 78% of the population through street trading, kiosk vendors, commercial sex workers, and casual labourers.

The State has failed to establish clear policies to govern the rights of workers in these sectors. These workers and their major consumers have been pushed to the margins of the society making them vulnerable to arbitrary arrests and ill-treatment from the police and local government security forces who extort bribes, assault them, destroy their property, steal their goods, or hold them in confinement until they can 'buy' their freedom.

4.6.1 Right to housing (paras. 130 – 133 of the State Report)

Although the State applauds its own effort to address the housing crisis in Kenya, the core problem is security of land tenure, lack of adequate housing for the low-income, skewed land distribution and politicisation of land. The majority of urban Kenyans live in informal settlements in slum-like conditions. Reportedly, in 1983, 35% of all urban households lived under slum conditions in informal settlements.¹²¹ In 1993, the figure rose to 55% of a proportionally larger population.¹²² The high numbers of people living in the informal settlements not only denies them their economic, social and cultural rights, due to lack of security of tenure and other essential services but also puts them in precarious legal, social and economic position thus making them vulnerable to violations of civil and political rights. Besides, a number of informal settlements also exist in forest and rural areas which are both isolated and starved from essential services.

4.6.1.1 Forced evictions

The Committee has in the past noted, with great concern, that the practice of forced evictions without consultation, compensation or adequate resettlement has been widespread in Kenya.¹²³ Reportedly, helpless citizens have been evicted from the land they occupy without prior arrangements for their resettlement or alternative residence.¹²⁴ Although the State Report mentions evictions in [para.135], the poor and vulnerable groups continue to suffer from eviction in violation of a 1996 Moratorium on Evictions¹²⁵ and despite the covenanted obligations defined in the Committee's General Comment No. 7. The forced evictions that have taken place in Nairobi, Rift Valley and Central Kenya also reflect the unjust socio-economic history and circumstances of systemic housing rights violations and unequal land access that most communities in Kenya experience.

Forest dwellers in Kenya have endured cruel evictions and politically instigated ethnic clashes. The case of evicting the Ogiek demonstrates not only how these practices have diminished minority groups co-existence within their respective ecosystems, but have also wasted the numerous social investments (e.g., in schools) previously made to support communities living in the forest.

In the case of Francis Kemai and Others v Attorney General of the Republic of Kenya,¹²⁶ the Ogiek community challenged their eviction from their traditional

habitat, Tinet Forest, and even sought compensation. The community argued that the eviction of its members from their habitat amounted to a deprivation of livelihood given that their lives are hinged on the forest environment.

Although the Government had evicted the community ostensibly to secure a water catchment area, the community alleged that logging companies and members of other aggressing and major communities had since been allotted their traditional lands. In a most controversial decision delivered on 23 March 2000, the High Court of Kenya dismissed the application citing, amongst others, the environmental imperative of

protecting a water catchment area and lack of sufficient evidence in the applicant's case. This decision has done little to redeem the human rights of the Ogiek.¹²⁷

Authorities and their co-conspirators have used other forest dwellers (e.g. Tinet and Kuresoi) to instigate attacks on the Ogiek. The purpose appears to be to raise tensions and disenfranchise thousands of voters by displacing them from constituencies where they are registered to vote prior to the general elections. The Provincial Administration has been unresponsive to these threats and actual violence.¹²⁸ As regards the urban poor, the following case study illustrates their plight.

Case Study

Mukuru kwa Reuben Evictions

The case, documented by Pamoja Trust, illustrates the vicious manner in which the State and private individuals systematically collude in carrying out evictions in Kenya today. The village of Mukuru kwa Reuben is situated in Imara Daima Sub-location, Embakasi Division, Nairobi. The population of the village is estimated at about 4,000 households. The residents were squatters on two parcels of land, L.R. No. 209/9833 and L.R. No. 209/9832. They also occupied a portion of what is believed to be public land. They have been residing in the village for periods ranging between twelve (12) and thirty six (36) years.

L.R. No. 209/9833 is registered in the name of Affiliated Business Contacts Limited pursuant to a grant dated 21 December 1983. L.R. No. 209/9832 is registered in the name of Zucchini Holdings Limited pursuant to a transfer registered on 4 March 1997. The property had been granted to Minto Travels Limited on 23 December 1996.

On 27 July 2007, and on diverse dates thereafter July 28-29 2007 and August 4-17 2007, Affiliated Business Contacts Limited, with the assistance of Police Officers based at the Industrial Area and Embakasi Police Stations, specifically the Officer Commanding Police Station (OCS) Industrial Area, the Officer Commanding Police Division (OCPD) Embakasi and at least two hundred (200) armed officers in their command, entered into the village and demolished the villagers' residences., rendering the 4,000 households, approximately 12,000 people, including men, women, children and the elderly, homeless.

No notice of the intended demolition had been given to any of the residents prior to the demolition. The only warning they received was when they were informed by the Officer Commanding Industrial Area Police Station, at 9.00 a.m. on 27 July 2007, that their houses were going to be demolished and that they had two hours to remove their belongings. Residents who tried to protest were manhandled by the officers who were armed with guns, batons and teargas and who actively participated in the demolition and deliberate destruction of the residents' property.

The demolition of the residents' residential houses and the wanton destruction of their property were unlawful as there were no court orders authorising the acts. The only documents they were given before the demolition were copies of some pleadings and an order issued in the Chief Magistrate's Court at Milimani in CMCC No. 9095 of 2002 between Affiliated Business Contacts Limited and some nine Defendants whom the residents say did not live in the village.

The order issued by the Magistrate's Court in CMCC No. 9095 of 2002 on 13 January 2003 was an ex parte injunction to restrain further development of L.R 209/9833 pending the hearing of the main suit. The suit was never fixed for hearing but was withdrawn on 14 August 2007.

On 3 July 2007, Affiliated Business Contacts Limited again went to the lower court and obtained an *ex parte* order for the assistance of the police in enforcing the first order, i.e. to restrain further development. It should be noted that the orders granted by the Magistrate's Court only granted an injunction restraining further development and an order permitting Affiliated Business Contacts Limited to use police officers in the enforcement of the order restraining further development. No orders had been granted to it for the eviction of any party from the land in question.

It is also noteworthy that the Magistrate's Court which issued the orders had no jurisdiction to issue orders pertaining to title to land. An attempt to get similar orders from the High Court in HCCC No 1628 of 2002, filed in Court on 28 October 2002, had failed.

To compound matters, while CMCC No. 9095 of 2002 in which the orders executed by Affiliated Business Contacts Limited with the assistance of the police were issued was filed against some nine defendants allegedly occupying L.R. No. 209/9833, premises on L. R. No. 209/9832 and on public land were also demolished.

Further, the actions of the police and Affiliated Business Contacts Limited were an offence under section 90 of the Penal Code Cap 63 of the Laws of Kenya which provides that: 'Any person who, in order to take possession thereof, enters on any lands or tenements in a violent manner, whether such violence consists in actual force applied to any other person or in threats or in breaking open any house or in collecting an unusual number of people, and whether he is entitled to enter on the land or not, is guilty of the misdemeanour termed forcible entry.

In addition, as public officers granted statutory power under the Police Act to protect all citizens, the police officers cannot be used by a private party to deprive the residents of their right to shelter, guaranteed under article 11 of the International Covenant on Economic, Social and Cultural Rights. The fact that they have done so, and have continued intermittently to assist in harassing the residents to prevent them from rebuilding their shelters, is an abuse of their power. Further, the actions of the police lead not only to a deprivation of shelter, but also to a deprivation of the residents' right to a livelihood, which they earn in the neighbouring Industrial Area, and is thus a deprivation of their right to life which is guaranteed by the Constitution.

The police have continued to assist in the demolition and harassment of the residents. They have even stopped or interfered with CSOs which have been trying to assist the subsequently homeless residents. Despite an order recorded before Justice Ang'awa on 21 September 2007, confining Affiliated Business Contacts Limited to its own land, L.R. No. 209/9833, the police and the property owner continued to harass the residents on L.R. No. 209/9832 on 22-24 September 2007. The residents say that some of their neighbours were arrested.

On 26 September, 2007, the Mukuru Kwa Reuben residents were summoned to a meeting with the Nairobi District Commissioner (DC) to discuss the matter. Present were the Nairobi DC, the OCPD Embakasi and the OCS, Industrial Area. Zeph Mbugua, a director of Affiliated Business Contacts Limited, was also present. The residents were accompanied by the Deputy Mayor of Nairobi. The residents report that, at the meeting, they were not allowed to speak or to ask questions. The DC allegedly told them that both parcels of land, L.R. No. 209/9833 and 209/9832 belong to Affiliated Business Contacts Limited, and that they should not dare enter any of the land parcels. The DC also allegedly maintained that the orders issued by the Magistrate's Court, which had been used to justify the evictions, were valid and that their eviction and the demolition of their property was right and proper.

The residents further report that the OCPD told them that he did not care about court orders, and if any of them dared to step on land parcel number 209/9832, he would be shot dead and the police would say that he was '*Mungiki*'.¹²⁹

In light of the matters set out above, coming from the provincial administration and the police, who should be safeguarding the rights and interests of poor Kenyans, the residents find themselves in a totally hopeless situation in which their own Government seems to have turned against them.

Today, there are two cases pending before the High Court on the matter. One is HCCC No. 987 of 2007 seeking a prohibitory order to stop police involvement in the demolitions and harassment of the residents. The other is ELC No. 841/07 in which the residents have made a claim for adverse possession of L.R. No. 209/9833 and for an interim injunction to put them back in possession as they were removed from the land unlawfully. Regrettably, the pace at which the judiciary is moving is too slow to resolve the matter and avert conflict. The chances of conflict would, however, be removed if the police stopped siding with the land owner and in assisting it to harass the residents.

Source: Centre on Housing Rights and Evictions & Hakijamii Trust Report, August 2007

4.6.1.2 *Slum upgrading*

The history of slum upgrading in Kenya dates back to 1970's when the World Bank began to advocate for the improvement of living conditions of informal settlement residents. Kenya, like other developing countries, received funds for site-and-service projects. These projects provided small parcels of urban land for the development of individual dwellings. The parcels were provided with access roads, water, sewerage, electricity and garbage collection, as well as access to health clinics and fire protection.¹³⁰ These projects were in most cases too expensive to benefit the poor, however, and the plots were, in turn, bought up by more affluent groups, thereby displacing the poor while simultaneously reducing the amount of land available for resettlement.

It is against this backdrop that the proposed upgrading through Kenya Slum Upgrading Program, launched in January 2003 in the Soweto village in Kibera, should be reviewed.¹³¹ Besides experiencing a slow start, the Soweto residents have accused the Government of excluding them from discussions of the upgrade process, ranging from the distribution of plans for the proposed housing to planning for relocation during the resettlement process.¹³² While the Programme initially had planned to relocate Soweto residents to Athi River or Kitengela, 50 kilometres away from Kibera, during the upgrade, more recently, the Government told residents that temporary housing would be made available at a 5 acre decanting site near that Lang'ata Women's Prison, Southeast of Kibera.¹³³ These units would be rented out for 2,000 shillings. It has been reported that many residents couldn't afford the rent.¹³⁴

The State's compliance with its obligation to fulfil the right to adequate housing is wholly insufficient as budgetary allocation for the provision of affordable housing to the low-income remains woefully low. This is further compounded by the fact that there is no land policy framework that would ensure the setting aside of land for

the development of such housing. The continued absence of a specific national slum upgrading policy and legislation has further meant that all the previous upgrading projects have been unable to address the critical issues of affordability, security of tenure and accessibility, among others. The net result is that those who end up benefiting from the projects are the middle class, and not the low-income groups.¹³⁵

4.6.2 **Right to water and sanitation**

Access to safe water for all remains a daring challenge in Kenya. A majority of the population can hardly access safe water, while large sections of the population have no access to portable water especially during drought.

(Source: Kenya Human Rights Commission, *Uncollected Garbage in Informal Settlements in Kibera, Nairobi*, August 2008)

Recently, however, the water sector has realised a number of policy, legislative, and even budgetary reforms aimed at enhancing service provision. These initiatives have had mixed implications on the realization of the right to water.

On a fairly positive note, the Ministry of Water and Irrigation has realised an increase in budgetary allocations from Ksh 6.41 billion in the financial year 2004/2005 to Ksh 9.96 billion in the financial year 2005/2006. Further, a number of projects have been initiated in the water sector. For example, during the financial year 2003/2004, 45 hydrological and quality water monitoring stations were rehabilitated. As well, over 6,000 water samples were analysed and sanitation schemes in 32 urban water supply systems were augmented.¹³⁶

Despite these initiatives, Kenya still faces an acute water shortage. The national water storage capacity currently stands at 124 cubic meters, far below the required

threshold of 3.4 billion cubic meters of storage, implying that the nation's storage capacity requires to be expanded almost 30 times.¹³⁷ This calls for proper programmes and efforts.

Sessional Paper No. 1 of 1999, the National Water Policy, proposes the decentralisation of water services from the Central Government to other actors, both public and private. This policy has been lent legal sanction by the Water Act of 2002 which commercialises urban water programmes and provides for community participation in rural water supply. This legislative framework separates water resource management and development from water services delivery. Thus, Government's role has been redirected away from direct service provision to regulatory functions. In this regard water service provision is left to municipalities, the private sector and communities.¹³⁸

The trouble with the commercialisation of water services has been the commoditisation of water, which is the most essential commodity after air. As a result of this commoditisation, water is bound to be above the reach of most Kenyan's a majority of whom live below the poverty line (57%).

Available statistics indicate that the Government has performed dismally in the delivery of water. Only about 32

% of households in Kenya, mainly in urban areas, are connected to piped water.¹³⁹ The rural areas experience an even more critical situation, with about 54% of households lacking portable water.¹⁴⁰ Less than 45% of the rural households had access to piped water systems, boreholes and wells in 1999 compared to 80% who have access to these in urban areas.¹⁴¹ Most people rely on springs, rivers, streams, ponds, and lakes or dams to meet their water needs: yet these sources are temporary and they are prone to drying up during draught.

Access to and affordability of safe and acceptable water is often affected by social and economic inequalities. For instance, over 93% of the richest 20 % of the population have access to portable water but only 28% of the poorest 20% have access to drinking water.¹⁴² The disparities are even more pronounced on provincial basis.¹⁴³ While 33% of the households in Nairobi Province have piped water, only 0.6% of households in North Eastern and Nyanza Provinces can access piped water.¹⁴⁴ Access to safe water varies from a high of 92.6% in Nairobi to as low as 13.5% in Bondo District of Western Kenya. The arid and semi arid lands of Kenya have a relatively lower coverage of safe water, with below 22% of the people in North Eastern Kenya able to access a safe water source within 15 minutes. Further water access indicators by province, as at 2002, are provided in the table below:

Water indicators by Province¹⁴⁵

Indicator	Nairobi	Central	Rift Valley	Coast	Nyanza	North Eastern	Western	Eastern	Kenya
Population as at 1999 (000)	2143	3724	6987	2487	4392	962 49.0	3359	4632	28687
Access to safe water	66.0%	46.8%	46.1%	59.1%	43.3%	-	66.5%	35.7%	53.6%

(Source: UNDP Kenya Human Development Report, 2002)

According to the Second Periodic Report of the Republic of Kenya submitted to the Committee on the Rights of the Child¹⁴⁶, almost 25% of Kenyans draw their drinking water from rivers or streams. About 21% have piped water connected to their dwellings, compound or plot while 11% use a public tap. Almost one in 5 households use wells as a source of drinking water the majority of which are covered or protected. Less than 5% of households use other types of water supply sources. Only a slight majority of

households (53%) are within 15 minutes of their water sources.¹⁴⁷

As at 2002, when NARC took power, more non-poor households (23%) depended on piped water during the wet season than the poor (12.7%). More of the poor (54.8%) depended on unprotected wells, rain water, lakes and ponds than the non-poor (46.9%). The poverty related inequalities in accessing safe water are tabulated below:

Economic inequalities and access to safe water

Indicator	Poor	Non-Poor
Piped water	12,7%	23,0%
Unprotected water sources	54,8%	46,9%

(Source: UNDP, 2002)

The poor, especially within the informal settlements, remain largely underserved with minimal changes in water and sanitation coverage. This has been primarily due to the underlying market structures that result in poor people paying far more for their water. Additionally, the historical and contemporary failure to involve residents of informal settlements in the development of the water sector reform process, and to allow residents access to information about the reforms and opportunities, actually have heightened the problem.

4.7 Article 12: Right to enjoyment of the highest attainable standard of physical and mental health [paras. 134 – 144 of the State Report]¹⁴⁸

International human rights standards obligate states to ensure the best attainable state of mental and physical health to their citizenry.¹⁴⁹ Health, both under the human rights and World Health Organisation (WHO) regimes, is defined as a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity. According to the Committee on Economic, Social and Cultural Rights, the right to health embraces a wide range of socio-economic factors that promote conditions in which people can lead a healthy life, and extends to the underlying determinants of health, such as food and nutrition, housing, access to safe and potable water and adequate sanitation, safe and healthy working conditions, and a healthy environment.¹⁵⁰ For purposes of measuring progress in the implementation of the right to health in Kenya, the following indicators have been identified:¹⁵¹

- Availability of a national health policy committed to the WHO primary health care approach;
- Allocation of sufficient resources for the provision of health;
- The measures taken to reduce infant mortality rate;
- Levels attained in the immunization of infants against diseases such as diphtheria, pertussis, tetanus, measles, poliomyelitis and tuberculosis;
- Measures taken to enhance life expectancy levels;
- The proportion of the population having access to trained personnel for the treatment of common diseases/The measures to assure to all medical service and medical attention in the event of sickness;
- The proportion of pregnant women having access to trained personnel during pregnancy and proportion attended by such personnel during delivery;
- The measures taken to improve the situation of the vulnerable and disadvantaged groups or worse-off areas;
- The measures taken to prevent, treat and control epidemic, endemic, occupational and other diseases;
- Ensure health rights for the most vulnerable; and
- Water and sanitation.

4.7.1 Government health policy and law

The State has enacted a number of legislations and policies to effect measures aimed at promoting mental and physical health. One of the most significant initiatives in the health sector is the recent enactment of the *HIV and AIDS Prevention and Control Act*.¹⁵² This revolutionary piece of legislation aims to:¹⁵³ promote public awareness about the causes, modes of transmission, consequences, means of prevention and control of HIV and AIDS; extend to every person suspected or known to be infected with HIV full protection of his/her human rights and civil liberties (by prohibiting compulsory HIV testing save in certain stipulated instances; guaranteeing the right to privacy of the individual; outlawing discrimination in all its forms and subtleties against persons with or persons perceived or suspected of having HIV and AIDS; and ensuring the provision of basic health care and social services for persons infected with HIV and AIDS); promote utmost safety and universal precautions in practices and procedures that carry the risk of HIV transmission; and positively address and seek to eradicate conditions that aggravate the spread of HIV infection. This legislation is considered so fundamental that it clearly stipulates that in case of another law conflicting with it, it shall prevail.¹⁵⁴ However, heretofore, the government is yet to bring it into force.

A number of policies have recently been operational in the provision of medical and health care services. These include:

- The National Health Sector Strategic Plan (1999-2004);
- The National Reproductive Health Strategy (1997-2010);
- The National Reproductive Health Implementation Plan (1998-2003);
- The National Implementation Plan for the Integrated Management of Childhood Illness (IMCI) Strategy (2000-2004);
- The National Malaria Strategy (2001-2010);
- The National Plan of Action of the elimination of FGM in Kenya (1999-2019);
- The National Condom Policy and Strategy (2001-2005);
- The National HIV/AIDS Strategic Plan (2000-2005);

- The Sessional Paper No. 4 on AIDS in Kenya;

- The National Programs Guidelines on Orphans and Other Children Made Vulnerable by HIV/AIDS; and

- The National Plan of Action on OVC and Kenya Demographic and Health Survey (KDHS) 2003.

These policies provide for concrete frameworks designed to enhance both mental and physical health.

Until last year, the broad Government policy framework for health (for the period 2003 – 2007) was contained in the ERS. This national policy envisaged the following measures:

- The enactment of legislation converting the National Hospital Insurance Fund (NHIF) into a National Social Health Insurance Fund (NSHIF) to cover both in-patient and out-patient medical needs, sharing of costs between the Exchequer, the employers and employees, informal sector and other productive segments of society;¹⁵⁵

- Setting up of a special healthcare endowment fund to target vulnerable groups;

- Rehabilitation of existing health facilities; and

- Overhauling of the system of procurement and distribution of drugs for public health facilities in order to reduce the cost of drugs and make them affordable and also to rationalize the distribution system to ensure that drugs are supplied to areas where most needed.

4.7.2 Resource allocation for health services

Allocation of resources for health services has had mixed fortunes during the period under review. The budgetary allocations to the sector increased from Kenya Shillings 18.3 billion in 2002/03 financial year to Kenya Shillings 33.3 Billion in 2006/07, an 82% increase.¹⁵⁶ The 2007/2008 budgetary allocation amounted to 34.9 Billion i.e. 7.5% of the total budget. Although seemingly hefty, these amounts are still insufficient for the efficient running of the sector as they do not reflect effects of inflation. Most of these funds are absorbed by the Ministry of Health (MoH) recurrent expenditure like administration costs, leaving little for actual preventive or promotive services.

MoH Recurrent Expenditure (Gross) by Sub Vote (Ksh mn)

Sub-vote	2001/2002		2002/2003		2003/2004		2004/2005	
	Actual	As a % of MoH total	Actual	As a % of MoH total	Actual	As a % of MoH total	Actual	As a % of MoH total
General administration	587	5	715	5	760	5	1,223	7
Curative Health	6,759	53	7,678	53.3	7,768	50	8,640	50
Preventive and Promotive	665	5	632	4	864	6	76	5
Rural Health Facilities	1,378	11	1,436	10.0	1,688	11	2,042	12
Health Training and Research	1,060	8.3	1,162	8.1	1,460	10	1,468	8.4
Medical Supplies Unit	48	0.4	34	0.2	32	0.2	133	0.8
KNH	1,865	15	2,327	16	2,409	16	2,659	15
Moi Teaching and Referral	352	2.8	422	3	458	3	458	3
Total MoH	12,715	100	14,405	100	15,439	100	17,417	100

Source: Ministry of Health (MoH) PER, 2005 and 2006

It can be seen that the recurrent health budget is skewed in favour of the tertiary and secondary facilities while the primary facilities receive limited funding. Yet the rural health facilities provide the bulk of healthcare facilities, 70%.¹⁵⁷

4.7.3 Infant mortality rate

Infant mortality rate (IMR), between 2002 and 2007, appeared to average at 77 per 1000 live births. This figure

reflects, perhaps, the highest rate of deaths of infants since 1979 when it was estimated at 104 per 1000 live births. Indeed, up to the year 2005, infant mortality rate was still at the high of 77 deaths per 1000 live births implying either neglect or inaction on the part of Government. Even the under-five mortality rate was at its worst in over 25 years in the year 2005. This information is tabulated below:

Infant mortality rates in Kenya ¹⁵⁸

	1960	1979	1991	1992	1993	1998	2003	2004	2005 (Provisional)
Infant mortality rate per	119	104	52	51	62	71	78	77	77
1000 live births Under-five mortality rate	202	157	75	74	93	105	114	115	115

(Source: Committee on the Elimination of Discrimination against Women Session, July-August 2007)

4.7.4 Life expectancy levels

As recent as 2003, life expectancy at birth was estimated at 50 years for males and 49 years for females, while the child mortality rate was estimated at 126 and 120 per

1000 for males and females respectively. This means that an average Kenyan will hardly live beyond 50 years while about 123 out of 1000 children have to die before maturity, a very disturbing scenario.

Table on life expectancy

Indicators:	1969	1979	1989	1999	2002
Life expectancy at birth (years)	50.0	54.0	60.0 F – 49.9	F – 53.0 M – 48.7	M – 51.1

(Source: Government of Kenya, Kenya Demographic and Health Survey, 2003)

4.7.5 Immunization of infants against diseases

Recent statistics indicate that well over 40% of infants are not immunized. Only 57% of children between 12-23 months are fully immunized with minimal difference between rural (56%) and urban (59%) coverage.¹⁵⁹ Regional coverage varies from between 9% to 79%.¹⁶⁰

Although the Government has set aside funds for the immunization of infants, these have been limited and only manage to finance 5% of the budget for routine vaccines and 10% of the total immunization budget. However, the Global Alliance for Vaccines and Immunizations (GAVI) has been instrumental in the provision of immunization services in Kenya. For instance, GAVI committed \$67.4 million for a 5-year supply of pentavalent vaccine, yellow fever and DPT-HepB-Hib since 2001; a 5-year Immunisation Services Support (ISS) of \$10m and a 3-year injection safety supplies support, which ended in 2005. It is important that the Kenya Government confirmed the continuation of injection safety support after the end of the GAVI support.

4.7.6 Access to trained personnel for the treatment of common diseases

Access to trained medical personnel depends on the number of available medical personnel especially in public health facilities. According to the Government, efforts have been made to ensure that a significant population has access to trained medical officers. In the year 2002, the number of registered medical personnel increased by 3.2% from 57,208 in 2001 to 59,049 in 2002.¹⁶¹ The Government also made efforts to improve the remuneration of doctors in order to fight brain drain. The remuneration of doctors was increased by 200% in 2002 and that resulted in the re-entry of about 1,100

doctors who had initially emigrated owing to poor terms of service.

The number of health institutions also increased from 4,421 in 2001 to 4,499 in 2002. The total number of hospital beds and cots also rose from 58,080 in 2001 to 60,657 in 2002, representing a marginal increase of 4.4 per cent. The ratio of beds and cots per 100,000 populations improved marginally in all provinces.¹⁶²

Rural areas experience a problem of insufficient health personnel, with more than 80% of the doctors based in urban areas where they care for 20% of the population. There is an acute shortage of Public Health Officers, Public Health Technicians, Nutrition Technicians and Medical Social Workers who are supposed to spearhead the crusade of preventive as opposed to curative medical care.

4.7.7 Access to trained personnel during pregnancy and delivery

It is estimated that about 90% of women are seen by a professional health provider at least once during pregnancy. Much fewer women are attended to by skilled personnel during delivery (in 1990, 45%, 1998, 51%, 41% in 2000 and 42% in 2003). Only about 42% of births took place in a health facility in 1998 while 58% were realised at home in the hands of unskilled attendants. The 2003 CBS-KDHS showed no improvement with only 40.1% delivering in a health facility. The health situation is least helped by the fact of geographical inequalities in that only 7.7% of pregnant women delivered in health facilities in North Eastern Province, while 77.9% and 66.9% of pregnant women in Nairobi and Central provinces had their children in health facilities. This data is tabulated below:

Percentage of pregnant women attended to by skilled medical personnel

YEAR	1990	1998	2000	2003
PERCENTAGE	45%	51%	41%	42%

(Source: Government of Kenya, Kenya Demographic and Health Survey, 2003)

4.7.8 Situation of the vulnerable and disadvantaged groups or worse-off areas

There are great disparities in both wealth and socio-economic development in Kenya. Some regions such as North Eastern, Coast and Nyanza provinces have mostly been neglected by the Central Government with the result that these areas have no access to health facilities. As a result, only about 7.7% of pregnant women delivered in health facilities in North Eastern Province compared to 77.9% and 66.9% in Nairobi and Central provinces. Similarly, North Eastern Province has only 4 Government maternal health facilities compared to Rift Valley's 21. Again, North Eastern Province has only 63 Government dispensaries compared to Central Province with 222 such facilities.¹⁶³

Other vulnerable groups with regard to health in Kenya include people living with HIV/AIDS, pregnant women, children and other minorities.

4.7.9 Measures to prevent, treat and control epidemic, endemic, occupational and other diseases

4.7.9.1 HIV/AIDS in the context of economic, social and cultural rights

HIV/AIDS was first discovered in Kenya in 1984. By 1999, the prevalence of HIV/AIDS was at its highest point of 13 %. This disease has since become a major constraint to Kenya's social and economic development. It is estimated that there were 1.02 million births in 2002. In a population of over 30 million this generally reflects the large number of women in the sexually reproductive age bracket.¹⁶⁴ With an HIV transmission rate of 10% during pregnancy, estimates suggest 13,300 children were born with HIV in Kenya in 2002 alone.¹⁶⁵

About 10% of reported AIDS cases occur in children under the age of five years. Most of these cases are due to mother-to-child transmission of HIV.¹⁶⁶ An estimated 50,000 to 60,000 children under five years of age are infected with HIV per annum. Around 100,000 infants and children under the age of five are living with HIV in Kenya, and many more have died of AIDS. There are close to 1 million HIV/AIDS orphans in the country and numerous child headed households. The total number of orphans in the 0 to 14 age group was estimated at 1.7 million in 2004. The number is projected to have risen to 1.8 million in 2005. Out of this population 54 - 60% has been orphaned by HIV/AIDS.

In collaboration with NGOs, the Government has intensified efforts to fight the spread of HIV/AIDS through a host of Programmes including setting up of 401 Voluntary Counselling and Testing Centres and 450 PMTCT sites across the country. ARV therapy is being promoted in Kenya with treatment centres in two national teaching and referral hospitals and 8 provincial general hospitals, 16 district hospitals and 6 mission hospitals. All these facilities also have CD4 machines. About 24,000 people are on ARV therapy with a Government target of 95,000 through the "3" by "5" initiative. About 1100 health care workers have been trained on ARVs. Treatment of tuberculosis, TB is free in public hospitals.

4.7.9.2 Discrimination of people living with HIV/AIDS

Despite the high level of HIV and AIDS awareness in Kenya¹⁶⁷ people living with HIV/AIDS (PLWHA) frequently face stigma and discrimination and are subjected to other forms of human rights abuses in all sections of society. They encounter difficulties accessing healthcare, shelter, education and food.¹⁶⁸ Women's and orphans' inheritance rights are frequently violated.

There have been significant developments in the realm of the HIV/AIDS campaign. For instance, in November 1999, HIV and AIDS was declared a national disaster. In 2006, the HIV and AIDS Prevention and Control Act¹⁶⁹ was enacted to, among other things, outlaw discrimination against PLWHA. More than one and a half years since the Act was passed, the State has not yet given it a commencement date making it unenforceable. Its implementation was not factored in the latest budget, making it doubtful whether the Act will be enforceable within the next one year.¹⁷⁰ This is despite the fact that there are several matters before court regarding discrimination and human rights violations against PLWHA which are dragging on and cannot be adequately addressed by the existing legal framework.¹⁷¹

In the *UNGASS 2008 Country Report for Kenya*, the State reported that the delay in implementation of the aforementioned legislation is due to the fact that the set of regulations needed to operate it are still being drafted. It also added that the law requires some amendments to include marginalised groups and other emerging issues. These processes are taking inordinately long and it is not clear how far the State initiatives are at.

In May 2008, *Presidential Circular No. 1/2008* assigned the Ministry of State for Special Programmes the responsibility of coordinating campaign against HIV/AIDS

and placed the National AIDS Control Council (NACC) under it. This has cleared the confusion within Government and civil society over which ministry should implement the Act since more than two ministries had overlapping responsibilities on matters of HIV/AIDS. The Ministry of Special Programmes has been lethargic in undertaking its mandate relating to the Act. It should therefore provide an explanation as to what measures are being undertaken to bring the Act into force and when they are likely to be concluded.

4.7.9.3 Right to equality in the context of HIV/AIDS

Cultural practices like wife inheritance, prevalent in some communities in Western Kenya, have fuelled the spread of HIV and AIDS. They have also been used to deny women access to matrimonial property upon the death of their male spouses. The HIV and AIDS pandemic has disproportionately affected women in these regions.¹⁷² Little or no Government intervention has been visible.

4.7.9.4 Right to work and the right to just and favourable conditions of work: The context of HIV/AIDS

The Central Organisation of Trade Unions of Kenya (COTU) cites HIV and AIDS as one of the major bases of discrimination in the work place.¹⁷³ Discrimination of PLWHA continues in the work places both in the formal and informal sectors. Discrimination takes place at the point of seeking employment, promotion, providing employee insurance cover and even termination of employment.

Admittedly, in the public sector, the State has launched a Public Sector Workplace Policy on HIV/AIDS which aims at preventing discrimination of employees in the civil service.¹⁷⁴ However, as regards workers of local authorities, there seems to be a disparity in their treatment in comparison to other civil servants. Indeed, no policy exists as regards HIV/AIDS in local authorities similar to that in the public service.¹⁷⁵ It has also been claimed that funds meant for local authority workers have been channelled to sensitising civil servants instead.¹⁷⁶

Early in 2007, the State amended the labour laws to include HIV as a prohibited ground of discrimination. The HIV and AIDS legislation also outlaws discriminatory practices and policies in employment.¹⁷⁷ As noted above, the State has failed to implement the HIV and AIDS law. The generally weak enforcement mechanisms of labour laws make it doubtful that these legislations alone will bring about any meaningful results. The State should

provide an explanation as to why it has not yet implemented the Act and what steps it intends to take to prevent continued discrimination of workers in formal and informal employment.

4.7.9.5 Right to social security, including social insurance

Social security is generally inaccessible and unaffordable to most Kenyans. The existing national social security schemes are generally tailored for people in formal employment. There are no national schemes to increase access to social security to PLWHA. The private sector insurance schemes largely discriminate against PLWHA. A few insurance companies have started providing insurance cover to PLWHA albeit at a higher premium and subject to strict conditionalities. The unimplemented HIV/AIDS legislation also seeks to outlaw discriminatory practices and policies in the insurance sector.¹⁷⁸ However, without a commencement date, the legislation is largely docile and of little use to PLWHA.

4.7.9.6 HIV/AIDS and its impact on the education sector

According to a report by the National AIDS Control Council (2006),¹⁷⁹ HIV/AIDS affects the education sector in at least three critical ways. First, the HIV/AIDS scourge has reduced the supply of experienced teachers due to HIV/AIDS related illnesses and death. Second, in some cases, children are kept out of school because they are needed at home to take care of sick family members. Lastly, children drop out of school if their family cannot afford school fees due to reduced household income as a result of an HIV/AIDS related death. In addition, the report projects that children from affected households were more likely to drop out of school (36%) due to education related costs than children from unaffected households (25%).¹⁸⁰ In 2005, a five year survey of 20,000 children in rural Western Kenya, a high HIV prevalence area, found that the death of a parent led to a reduction in school participation rates by average of 5 %.¹⁸¹ This clearly indicates that the pandemic impacts adversely on the education sector as a whole and it affects quality, access, equity and performance of affected learners.

Legal provisions

Chapter 5 the Constitution provides protection of the fundamental rights and freedoms of all Kenyans. Section 82 prohibits discrimination. Although, the Constitution does not include HIV/AIDS as one the prohibited grounds of discrimination, "any other status" can be interpreted to include HIV/AIDS. The Children Act, Chapter 586,

provides extensive protection for children. Under section 7, children are entitled to a basic education which is free and compulsory. The Education Act, Chapter 211, provides for the running of the education system and is currently under review to be in line with the free primary education policy. The Act also addresses the need to target hard-to-reach and marginalized children. HIV infected and affected children can be said to fall in this category. The HIV/AIDS Prevention and Control Act prohibits educational institutions from denying access or expelling a person only on grounds of actual or perceived HIV status.

The Education Sector Policy on HIV and AIDS provides for equal access to education for all learners regardless of their actual or perceived HIV status. It further states that mechanisms will be set up to address the psycho-social, physical, emotional, educational and spiritual needs of affected and infected individuals, especially orphans and vulnerable children (OVC) and learners with special needs. In addition, the policy makes it mandatory for bursary schemes to incorporate provision to adequately cover the educational needs of deserving affected, infected and other vulnerable learners and those with special needs

The National Policy on Orphans and Vulnerable Children, 2005, recognises education as a fundamental right and outlines strategies to improve access to education for OVC, strengthening support programmes for them, including school feeding, health, bursaries and sponsorship, providing school uniforms and other essential needs as a way of removing barriers to access to schooling for OVC.

In a landmark case, Nyumbani Children Home¹⁸² sued the State for discrimination, accusing public schools in the Karen Suburb of locking children out of the educational facilities due to their HIV status, age or lack of identification documents. The court asked education authorities and representatives from the home to work out an amicable solution in the best interest of the children.¹⁸³ The children were admitted in the schools and the case was settled out of court.

Although the right to education is a right of 'progressive realisation', the Committee on Economic, Social and Cultural Rights, has stated that the prohibition against discrimination enshrined in article 2(2) of the Covenant is subject to neither progressive realization nor the availability of resources. Therefore, by failing to monitor all relevant policies, institutions, programmes and other

practices that hamper equal access to education by children affected by HIV/AIDS, the State is perpetuating discrimination.

Violations

According to a Human Rights Watch Report¹⁸⁴, even though Kenya has an official policy of free primary education, some of the educational barriers associated with HIV/AIDS, include prohibitive costs such as mandatory uniforms, textbooks, and examination fees. These costs also afflict children affected by diseases other than HIV/AIDS, as well as children living in extreme poverty or otherwise prone to discrimination or social exclusion. Consequently, by not confronting the special vulnerabilities of children affected by HIV/AIDS and extending basic protections to them and their families, the State creates the conditions for de facto discrimination in access to education and undermines progress towards the goal of education for all.

In Kenya, many HIV/AIDS-affected children live in the slums where they are unable to access public schools. This has led to the phenomenon of 'informal schools' where children who cannot afford proper State sponsored schools are enrolled. The disadvantage is that these schools often function with a single teacher, virtually no scholastic materials, and a complete lack of State support or supervision.

Although the State has put into place a number of policies to deal with the plight of affected children, it has failed to establish and enforce effective mechanisms to ensure HIV/AIDS affected children and other vulnerable children access education on equal basis with their peers. The situation is even bleaker because there is no foster care or comparable system to ensure that children have access to alternate parental care where needed. Instead, the State relies on the already overstretched extended families and community and faith-based organisations to perform this role.

The State has failed in its responsibility to ensure vulnerable children are protected not only by effective implementation of policy and legislations but also by mobilising resources for the Community Based Organisations.

It is commendable, however, that through CDF and other resources provided by the Ministry of Education, bursaries are available for needy primary and secondary school children. Nonetheless, these programmes are

prone to corruption and the money is not enough to cater for all the needy students. In June 2005, the government announced a system of cash grants for families caring for orphans, however, two and a half years down the line, the policy is yet to be implemented.¹⁸⁵

4.7.10 Malaria¹⁸⁶

Malaria remains the most common cause of mortality in children aged five years or less in Kenya. Twenty million Kenyans are affected annually and 26,000 children under five years of age (72 per day) die every year. In addition, pregnant women suffer severe anaemia and are likely to deliver infants of low birth weight as a result of contracting malaria. It is estimated that 170 million workdays are lost every year due to malarial illness thus adversely affecting the country's economic development.

About 15% of children sleep under a mosquito net while 5% sleep under insecticide treated nets (ITN). The proportion of pregnant women sleeping under a net is 13% while 4% sleep under ITN. About 24 % pregnant women take appropriate anti-malarial (SP) for intermittent treatment twice in pregnancy. Only 6% of children under five take appropriate anti-malarial within 48 hours.

4.8 Article 13 & 14: Right to education [paras. 145 - 169]

The right to education is yet to find constitutional guarantee in Kenya. However, the entitlement has attained legal sanction by virtue of the Children's Act of 2001. Kenya's progress in provision of education can be measured using the following indicators: School enrolment rate at primary level; achievement of free and compulsory primary education; high retention levels and proper transitions from primary to secondary school; accessible childhood education; proper administration of bursaries to cater for at least 10% of the most vulnerable in secondary education; the ideal teacher to student ratio of 1: 40; Improved school governance; increased number of opportunities for higher education; expanded opportunities for higher education; provision of special education and facilities; and adult literacy levels.

The NARC administration (2002 - 2007) made a bold and progressive step in cancelling certain school levies in January 2003, which has resulted in the enrolment of an additional 1.3 million children. The same programme has introduced a special education component for the disabled, whereby each disabled child is allocated Kshs.2, 000 above the normal allocation for other pupils

without disabilities. The NARC administration also raised the teachers' salaries, which has been pending for a long time.¹⁸⁷

Equally noteworthy is the implementation of the new curriculum incorporating human rights in the syllabus, thus enabling students to understand the discourse of human rights at a tender age. In addition, the NARC Administration readmitted the university students who had been expelled or suspended by the former regime, which branded them as dissidents. There have also been measures taken to rehabilitate and train families living in the streets in various vocational and formal courses and instilling reforms in management and leadership of schools.

Prior to 2002, access to primary education in Kenya had been hampered by high tuition fees, high cost learning resources, uniforms and other disguised levies such as the Building Fund and 'harambees' (special fund-raising levies/collections) for various school projects. Even then, lack of adequate trained teachers, a huge teacher-to-pupil ratio, inadequate consideration of the disadvantaged (e.g., persons with disability), strikes and gender disparities in enrolment and retention have stymied the provision of quality education. The wastage rate is increasingly high at all levels of education, since more than half the number completing primary and secondary school do not get places in high school and university respectively.¹⁸⁸ This is compounded by poverty-induced inability of most parents to access private education services.

There is however, concern that that there are no comprehensive and targeted policies and strategies that are aimed at ensuring that adequate resources are set aside to ensure that there are enough equipment and teachers for the primary schools. Without this requirement, quality will not be met. Furthermore, during the financial year 2005/2006, the State reduced expenditure at the pre-primary, primary and secondary levels. No allocation was, for example, made for pre-primary level education in the period 2005/2006.

Expenditure on Education (Development) in millions of Kshs

Education level	FY 2003/04	FY 2004/05	FY 2005/06	Total
Pre-primary	362.55	6.60	No allocation	369.15
Primary	2 214.10	3 196.90	1 311.60	6 722.6
Secondary	151.90	205.50	170.00	527.4
Total	2 728.55	3 409	1 481.6	7 619.15

Source: Economic Survey, 2006

4.8.1 Access to Education in Urban Informal Settlements

Until lately, the concept of education in informal settlements was not explicitly addressed in government policy documents even though more than 60 percent of Nairobi residents actually live in slum communities.¹⁸⁹ A survey conducted by DARAJA Civic Initiatives Forum in 2006 in Kibera and Korogocho slums indicates that up 48% of school age children are out of school in the slums. The city education department puts the percentage of out of school children in Nairobi at 45%. This reflects that there are unique factors associated with slum residence, other than urban poverty, that hinder children from enrolling and remaining in school under the free primary education program. This problem has been compounded by the fact that almost no new building of schools has taken place in slum areas for the last 15 years although large populations of the city live in slum areas.

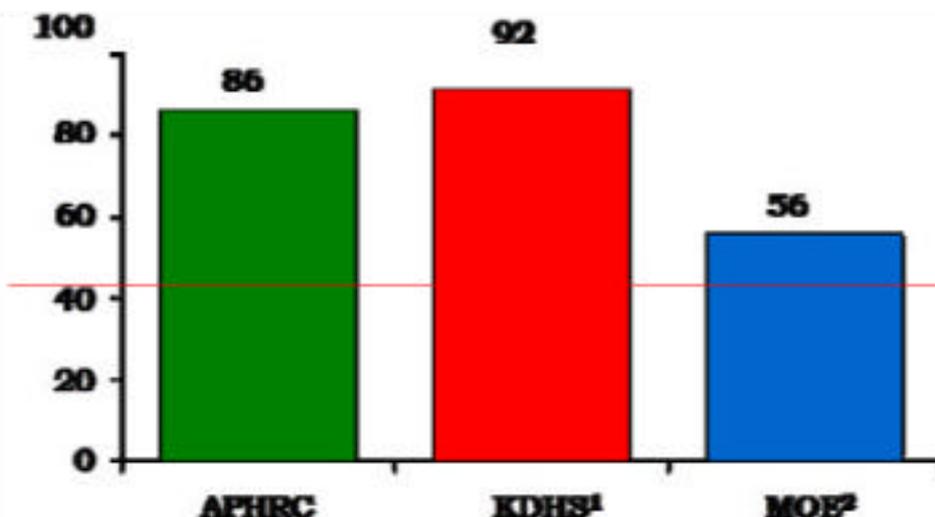
The challenges slum dwellers face in respect of education

will be addressed with a focus on the following: school enrollment, survival of primary school children, school quality, and information management systems.

4.8.1.2 School enrollment

As stated above, school enrollment among slum children is lower than other parts of the country, including rural and non-slum urban communities. In fact, an initial assessment of free primary education implementation documented that Nairobi had one of the lowest enrollment rates (62%), only better than North Eastern (25%), but much lower than Nyanza (120%).¹⁹⁰ However this enrollment only reflects enrollment in public schools and excludes children in non-public schools. The table below shows net enrollment computed using three sources of data for Nairobi; the Kenya Demographic and Health Survey (KDHS)¹⁹¹ data, the Demographic Surveillance System (DSS)¹⁹² data and the Ministry of Education's Education Management and Information System (EMIS).¹⁹³

Primary school net enrolment for Nairobi using different sources, 2003



(Source: DARAJA Civic Initiatives Forum Survey, 2006)

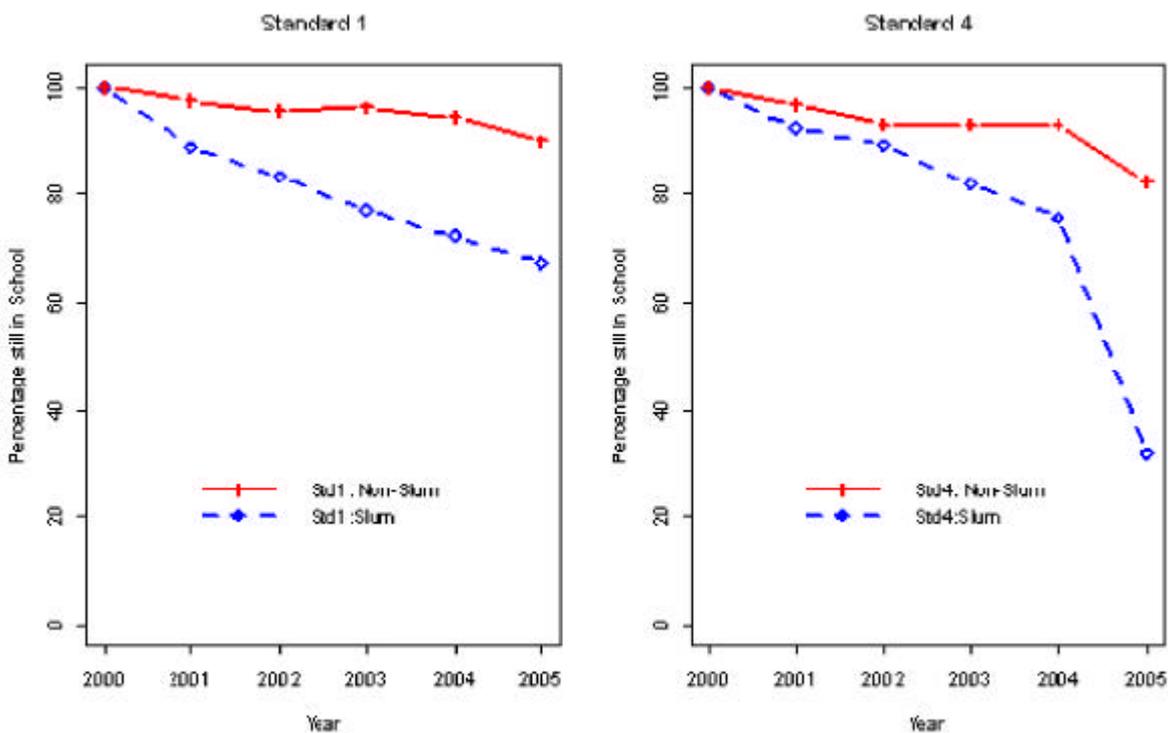
4.8.1.3 Survival through Primary School

Primary school progression among children from slum and non-slum communities of Nairobi does not seem to be a major problem at least compared to transition to secondary school. The figures below show that out of every 100 children in primary one in the year 2000, 90 of them reached primary 6 five years later for non-slum communities. In slum communities, out of every 100 children in primary one in the year 2000, 67 of them

reached primary 6 five years later – about three-quarters of the non-slum children.

Consider also those who were in standard four. Out of every 100 children in primary four in the year 2000, 82 of them were in form one five years later for non-slum communities. In slum communities, out of every 100 children in primary four in the year 2000, 32 of them were in form one five years later – about a third of those in non-slum communities.

Survival for primary school children in standard 1 and standard 4



(Source: DARAJA Civic Initiatives Forum Survey, 2006)

The State's efforts should focus more on improving progression and transition to secondary education. Its efforts should focus on interventions that have been shown to work in improving progression and transition to secondary education. Notable among them is the secondary bursary scheme that has worked in Kenya but needs to improve to respond to the needs of the urban poor.

4.8.1.4 Quality of Education in the Slums

Children in slum communities attend schools of lower quality compared to their non-slum counterparts. In the table below, a number of quality attributes are presented. These provide a comparison between formal and non-formal schools. Children in slum communities as discussed earlier, attend predominantly non-formal schools while those in non-slum communities attend formal schools. The Ministry of Education defines non-formal education as the flexible complementary delivery

channels of quality basic education to children in especially difficult circumstances, in particular those in need of special care and protection, or children who live or work in circumstances which make it impossible for them to access education through existing conventional formal school arrangements in terms of time, space, and entry requirements.

From the figure, only 12 percent of non-formal schools compared to 75 percent of formal schools are registered by the Ministry of Education. The majority of non-formal schools are registered with the Ministry of Culture. The implication of this registration is that while formal schools are supposed to provide the Ministry of Education formal curriculum, non-formal schools are not. However from the figure, close to 94 percent of non-formal schools and 97 percent of formal schools provide the national curriculum. In essence, almost all schools do provide the Ministry of Education curriculum irrespective of whether they are formal or non-formal.

Regulatory aspects of school quality, slum and non-slum in Nairobi

School quality attributes	Formal	Non-formal
School	61	33
Registration status		
Min. Education	75.4	12.1
Min. Culture	8.2	60.6
NGO Bureau	1.6	3.0
Not registered	14.8	24.2
MOE Curriculum	96.7	93.9
KCPE Examination Center	72.1	18.2
Inspections in 2005		
0 Inspection	16.4	54.5

One of the reasons why non-formal schools are not licensed to offer the formal curriculum is because they are ill prepared to do so. The evidence that almost all provide the education curriculum for which they are considered to be ill prepared to deliver should be more of a concern for the government and civil society.

Finally, the issue of inspection for support supervision or/and monitoring for conformity with rules and regulations emerges. While no inspections were done in 16 percent of the formal schools over a one year period, none were done in 55 percent of the non-formal schools. This raises a concern on whether government departments to which these schools are registered have the capacity or willingness to carry out support supervision to ensure good quality and adherence to rules and regulations.

The government is in the process of developing a non-formal curriculum which non-formal schools are expected to use. The government however recognizes that not all non-formal schools implement the non-formal curriculum and therefore is proposing to have non-formal schools continue to provide formal curriculum. This is a welcome proposal. However, there must be similar efforts to support these schools to enable them to deliver the

curriculum in an acceptable manner and with acceptable standards of quality.

Poverty eradication mechanisms would go a long way to fix problems facing the education sector. Children born into poverty are less likely to stay on in school and will have fewer qualifications. When they become adults they will be unemployed, lowly paid and are likely to die younger.

4.9 Article 15: Right to cultural life and scientific progress [paras. 170 - 174]

CSOs recognise the State's efforts to ensure that Kenya retains its distinct and rich cultural heritage, by ensuring that African customary norms have the force of law. CSOs also commend State's efforts to refurbish and renovate the National Museums of Kenya. However, the State discriminates against entire groups on the basis of race, such as the Nubians,¹⁹⁴ in the issuance of National Identity Cards and other travel documents. A case is currently pending in the High Court¹⁹⁵ in which Nubians, as a result of official and unofficial discrimination, are seeking various orders, inter alia, a declaration that they are Kenyan citizens and, thus, entitled to registration as such citizens.

76. Total recorded employment, June 2001 - 2005, Ministry of Labour. Available at: www.cbs.go.ke. Accessed on 12 September 2007.

77. *Ibid.*

78. Government of Kenya, *Africa Peer Review Mechanism Implementation Strategy for Kenya*, 14 February 2004.

79. KIPPRA and Ministry of Trade and Industry, *Assessment of the Potential Impact of Economic Partnership Agreements EPAs) on the Kenyan Economy* (2005).

80. Ryan T., Mule H. and Ndi D. Kenya: *Accelerating and Sustaining Inclusive Growth*, July 2008.

81. See PA Nyong'o 'A leap into the future: A vision for Kenya's socio-political and economic transformation (African Research and Resource Forum, English Press, 2007). It is instructive that the tenure of the ERS came to an end in December 2007.

82. This refers to master servant labour relation where the worker has no control over his/her labour and any action to tighten bargain or withdraw labour is treated as an act of subrogate or as a 'criminal act'.

83. Forced labour may be said to be labour required under the threat of punishment, whatever it may be for, and for which the individual has not offered himself voluntarily.

84. The new Employment Act, which came to force on 24 December 2007, introduced significant changes concerning casual employment. Employers who offer work that should last for at least one month should, if they cannot employ a worker on a permanent basis, engage him on a term contract. Pursuant to this Act, a casual employee who is engaged for more than a month in a job which otherwise would not reasonably be completed in a period less than three months, shall now be treated as an employee on a fortnightly contract, and on termination should be paid a fortnight salary in lieu of notice. Furthermore, where casual employees are employed for more than one month, they should, be entitled to one paid rest day in a period of seven days.

85. Proportion of temporary employees within the formal sector increased from 16.1% in 1995 to 19.5% in 2003. J. Omolo and J. Omiti (2004). *Is Minimum Wage Policy Effective in Kenya?* Available from: <www.ipar.or.ke> [accessed: 3 March 2008].

86. Corporations and other business enterprises have the capacity to foster economic well-being, development, technological improvement, and wealth as well as have the capacity to cause deleterious human rights impacts on the lives of individuals through their core business practices and operations, including employment practices, environmental policies, relationships with suppliers and consumers, interactions with governments, and other activities.

87. These include the Government, the central organisation of employers, the Federation of Kenya Employers (FKE), and the Central Organisation of Trade Unions (COTU).

88. In the recent past, it's been acknowledged by CSOs and International Labour Organization (ILO) that while the burgeoning CSOs cannot be involved in issue of industrial relations, they have been effective in using their traditions tools and methods of doing Human rights work to hold corporation accountable on amongst others issues of ;environment, gender relations, workers welfare, right to organize and so on. The

non-Governmental organizations have in particular turned to use the tools which were initially being used to put surveillance on the state towards monitoring the practice and conduct of investors. These tools are essentially the International Human Rights Conventions and several other declarations and recommendations. The trend has been made inevitable by the globalization phenomenon in which the regulatory role that the state used to play has been left to the market.

89. See Kenya Human Rights Commission, *The manufacture of poverty; A case of export processing zones in Kenya* (2003), Nairobi, Kenya.

90. See the Annual Report by the Ministry of Labor for the year 2005.

91. "KNUT also sees the government's registration of a parallel union - the Kenya Union of Post Primary Education Teachers (KUPPET) as an attempt to scuttle the teachers' pay demands." Zachary Ochieng' Teachers in Endless Wrangles with Government, News from Africa, September 2002. Available at: http://www.newsfromafrica.org/newsfromafrica/articles/art_838.html

92. See report by the KHRC on Trade Union Elections, 2006.

93. Article 9 of ICESCR

94. The succeeding arguments, under this section, are similar to those advanced earlier by CSOs in Kenya. See, Human rights in Kenya: The post Moi era 2003 – 2007, 33. Human Rights House Network.

95. Cap 258, Laws of Kenya.

96. Act No 9 of 1998.

97. Cap 236, Workmen's Compensation Act, Laws of Kenya. It is instructive that there have been significant review of labour laws in Kenya as indicated in the preceding sections.

98. See, CEACR: Individual Observation concerning Workmen's Compensation (Accidents) Convention, 1925 (No. 17) Kenya (ratification: 1964). 2007.

99. See sections 6 – 9.

100. Cap 18 of 1977.

101. Cap 189.

102. Cap 190.

103. Cap 191.

104. Cap 192.

105. Cap 193.

106. Cap 194.

107. Cap 195.

108. Cap 196.

109. Act 11 of 2003.

110. Retirements Benefits Authority was established by the Retirements Benefits Act, Act 3 of 1997.

111. See, section 32 of Persons with Disabilities Act, Act 14 of 2003.

112. Section 33(1)

113. Section 33(2).

114. 'Disability Act yet to be put in force, says MP', Daily Nation. 12 September 2007.

115. Government of Kenya (2003) Nairobi: Government Printer at p.41

116. Njeru, Enos, Arasa, Robert and Nguli, Mary *Social Health Insurance Scheme for all Kenyans: Opportunities and Sustainability Potential* (IPAR Discussion Paper No. 060/2004) ISBN 9966-948-18-x

117. Kenya Gazette, Supplement No 63. Drafted and published by the Attorney-General pursuant to section 27 of the Constitution of Kenya Review Act (Cap. 3A of the Laws of Kenya).

118. Section 38 of the Draft Constitution is, for instance, dedicated to gender.

119. United Nations Developing Nations Assistance Framework (UNDAF) Kenya, 2004-2008).

120. Republic of Kenya, Millennium Development Goals Kenya Progress Report 2005, (Nairobi, 2005). The major indicators of poverty in Kenya are unemployment; low coverage in water supply services; a general decline in access to health services; increased pressure on the environment; and increased numbers of people receiving below minimum level of dietary energy consumption.

121. For a detailed analysis of the housing situation in Kenya, see the report, Listening to the poor? Housing rights in Nairobi, Kenya. COHRE fact finding mission to Nairobi, Kenya, July 2006.

122. *Ibid.*

123. Concluding observations of the Committee on Economic, Social and Cultural Rights: Kenya. 03/06/93. E/C.12/1993/6 Para 10.

124. See, for instance, 'Mau evictions continue' 2 January 2006 East African Standard; 'Mau forest eviction squad now in Narok' 2 January 2007 East African Standard; 'State kicks out 500 squatter families from Eburu forest' 27 January 2006 Daily Nation.

125. This was an administrative directive passed by the multi-stakeholder Nairobi, Informal settlements Coordination committee.

126. Civil case No. 238 of 1999.

127. The decision has been lamented; see, for instance, G Mukundi, *Vindicating Indigenous Peoples' Land Rights in Kenya*. Unpublished LLD Thesis, University of Pretoria.

128. See KHRC, The status of human rights protection in the electoral process: October – November 2007.

129. Mungiki is a politico-religious group and a banned criminal organisation in Kenya. The network mainly operates in informal settlements in Nairobi and parts of Central Kenya. It is a criminal network that contributes to, and feeds off of, an environment plagued by a state of perpetual security crisis.

130. J Malombe, 'Conflicts in urban settlements in Kenya: Access to land and services in unplanned settlements' (August 1997) 12.

131. See generally, Centre on Housing Rights and Evictions, "Listening to the Poor? Housing Rights in Nairobi, Kenya" (July 2004).

132. *Ibid.*

133. See Centre on Housing Rights and Evictions, "*Listening to the Poor? Housing Rights in Nairobi, Kenya*"

134. *Ibid.* Other organisations have noted, however, that the Kenya Government does not have finances for the construction of housing at the Langata decanting site, and it is likely that future donors would likely be able to influence tenure arrangements and the rent charged. Interview with Jack Makau and Jane Weru, Pamoja Trust, October, 2007.

135. See, Special Briefing on Right to Housing, Hakijamii.
136. See, Initial Report of the Republic of Kenya, submitted to the Committee on Economic, Social and Cultural Rights. Para 104. E/C.12/KEN/1. 7 September 2007.
137. See, Initial Report of the Republic of Kenya, submitted to the Committee on Economic, Social and Cultural Rights. Para 107. 7 September 2007.
138. Country Review Report of the Republic of Kenya, African Peer Review Mechanism (APRM), P 231.
139. *Ibid.*
140. Country *Ibid.*
141. Kenya National Commission on Human Rights, State of human rights report (2004) 121.
142. *Ibid.*
143. *Ibid.*
144. *Ibid.*
145. *Ibid.*, 101.
146. Report on of the Kenya State on the implementation of the Convention on the Rights of the Child. CRC/KEN/2. The report is dated 20 September 2005.
147. Government of Kenya, Kenya Demographic Health Survey 2003.
148. The analysis under this section is adopted from CSO's position in Human rights in Kenya: The post Moi era 2003 – 2007, 33. Human Rights House Network.
149. See, for instance, article 12 of the ICESCR.
150. Substantive issues arising in the implementation on the International Covenant on Economic, Social and Cultural Rights.
151. See, Revised general guidelines regarding the form and contents of reports to be submitted by states parties under articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights (17/06/91). E/C.12/1991/1.
152. Act No. 14 of 2006.
153. Section 3.
154. Section 46.
155. It is instructive that the initiative aborted.
156. Excerpt from 'Role of CSOs in budgeting' by Kamau, Peter KANCO, 5-6 June 2008.
157. Thomas Maina, *Financing and Delivery of Health Care in Kenya: Do the Poor Really Benefit from Public Health Spending?* (IPAR Discussion Paper No. 084/2006) ISBN 9966-948-45-7
158. Derived from the 'Responses to the list of issues and questions with regard to the consideration of the combined fifth and sixth periodic report, Kenya'. 23 July – 10 August 2007.
159. Kenya Demographic and Health Survey (KDHR), 2003.
160. *Ibid.*
161. See Report submitted by the Kenya State to the Committee on the Rights of the Child, 2006.
162. *Ibid.*
163. See, Health Facilities Accessibility. Available at: www.health.go.ke/docs.htm.
164. According to a Commissioner at the Kenya National Commission on Human Rights, Winfred Lichuma, KNCHR. She said that cases drag on for lack of legislation to refer to. The legislation according to her would protect PLWHA if implemented. (see: <http://www.eastandard.net/archives/?mnu=details&id=1143989146&catid=159>)
165. *Ibid*
166. *Ibid.*
167. According to the Kenya Democratic Health Survey (2003), awareness level was at 98%
168. National AIDS Control Council, Office of the President, Kenya. 2008. *UNGASS 2008 Country Report for Kenya*. NACC, Nairobi, pages 24 and 28.
169. Act No. 14 of 2006.
170. Govt put in a spot over Aids, <http://www.eastandard.net/archives/?mnu=details&id=1143989146&catid=159>
171. See: <http://www.eastandard.net/archives/?mnu=details&id=1143989146&catid=159>
172. Human Rights Watch, 'Double Standards: Women's Property Rights Violations in Kenya' (March, 2003). Available at: <http://www.hrw.org/reports/2003/kenya0303/kenya0303.pdf>
173. According to a speech given by, Francis Atwoli, Secretary General of COTU at an international labour conference in Geneva, Switzerland in 2007. (see: www.eastandard.net accessed on June 14, 2007).
174. Public Sector Workplace Policy on HIV/AIDS (2005).
175. 'HIV Aids depleting staff say delegates' The standard online Thursday September 2006.
176. *Ibid.*
177. Section 31, HIV and AIDS Act, and Section 5 (3) (a) and (b) Employment Act 2007.
178. Sections 13(2) (e), 19 and 35 HIV and AIDS Prevention and Control Act 2006.
179. National AIDS Control Council, 'Report on Assessment of the Social-Economic Impact of HIV/AIDS on the key sectors in Kenya', 2006, Available at: www.nacc.or.ke
180. *Ibid.*
181. Evans & Miguel, 'Orphans and Schooling in Africa' (2005) 2-3.
182. Founded in 1992, Nyumbani Children's Home cares for abandoned and orphaned HIV infected children in Kenya.
183. Kenya Saturday Nation, 10 January 2004, News (nationmedia.com).
184. Human Rights Watch Report, Letting them fail: Governments neglect and the right to education for children affected by AIDS, 2005 Vol 17, No. 13 (A).
185. 'State sets up schemes for orphans' upkeep' Daily Nation, 17 June 2005.

186. Most of the data under this section is derived from the Report submitted by the Kenya State to the Committee on the Rights of the Child; 2006.
187. Allocation of 1,020 shillings per child to all public primary schools throughout the country, and another 2,000 shillings per child for children with special needs.- Speech by President Mwai Kibaki during the official opening of the Kenya Secondary School Heads Association Conference at Bomas of Kenya, Nairobi on 26 June 2007.
188. See CSO/PRSP Working Group, 'The People and the Poverty Reduction Strategy Paper: The Concepts, Facts and Figures.'
189. Ministry of Education, Science and Technology Report, 2003.
190. DARAJA Civic Initiatives Forum Survey, 2006.
191. KDHS is a national representative survey which is conducted every 5 years.
192. The DSS is conducted in two slum communities of Korogocho and Viwandani – with an extension of a similar approach of data collection in two non-slum communities, Harambee and Jericho.
193. EMIS data is based on routine returns from schools on school enrollment and is therefore facility based.
194. <http://www.nationaudio.com/News/EastAfrican/22072002/Features/Magazine2.html> In this article, Mbaria correctly points out that '...discrimination against the community, especially by the Government, is real...In the course of many interviews, it became apparent that they still encounter a host of hurdles in the path when it came to obtaining such civil registration documents as the national identity cards, passports and death and burial certificates...Nubians are yet to be given official recognition as a distinct Kenyan community with a unique culture, language, history and religion.'
195. HCCC Misc. Case No. 467 of 2003, Yunis Ali and 100,000 Others v Principal Registrar of Persons, Principal Immigration Officer and the Attorney General.

References

Books

ICJ - Kenya, Constitutional law case digest: Fundamental rights and freedoms (2004), p. xxv.

J Malombe, 'Conflicts in urban settlements in Kenya: Access to land and services in unplanned settlements' (August 1997)

K Kibwana, S Wanjala & O Owiti (eds) Anatomy of corruption in Kenya: Legal, political and socio-economic perspectives (1996). Nairobi: Claripress

K Kibwana, SK Akivaga, LM Mute & M Odhiambo (eds) Initiatives against corruption in Kenya: Legal and policy interventions (1995 - 2001). Nairobi: Claripress

O Odinga Not yet uhuru (1967) Farar, Straus & Giroux

W Oyugi 'Search for an appropriate decentralization design in Kenya: Historical and comparative perspectives' in K Kindiki & O Ambani (eds) The anatomy of Bomas: Selected analyses of the 2004 Draft Constitution of Kenya. Claripress: Nairobi 2005

Journal articles

M Apollos 'Ethnicity, violence and democracy' (2001) XXII, 1 & 2 African Development 6

M Hansugule 'Kenya's unsteady march towards the lane of constitutionalism', University of Nairobi Law Journal, Vol. 1, 2003, 43

P Kameri-Mbote 'Gender considerations in constitution making: Engendering women's rights in the legal process,' (2003) University of Nairobi Law Journal

International instruments

International Covenant on Economic, Social and Cultural Rights, adopted by the UN General Assembly on 16 December 1966. The treaty entered into force on 3 January 1976.

Vienna Declaration and Programme of Action. Adopted by the World Conference on Human Rights, Vienna, 25 June 1993 (A/CONF.157/24(part I) Chap. III).

General Comment 1 on state reporting obligations

General Comment 3 on the nature of states parties' obligations

Reports

Annual Report by the Ministry of Labor for the year 2005

Bi-Annual Human Rights Report, July - December 2006, Vol 8, No 2, a report by the KHRC

Bi-Annual Human Rights Report, Vol 7, No 3 – 4. July – December 2005. Kenya Human Rights Commission

'Breaking Kenya's impasse: Chaos or courts?' Africa Policy Brief, Africa Policy Institute.

Class v kinship in Kenya's eruption to violence' (2008) 23, 1 & 2 Wajibu

Country Review Report of the Republic of Kenya, May 2006, African Peer Review Mechanism

CSO/PRSP Working Group, 'The People and the Poverty Reduction Strategy Paper: The Concepts, Facts and Figures

Government of Kenya, Africa Peer Review Mechanism Implementation Strategy for Kenya, 14 February 2004

Human Rights in Kenya: The Post Moi Era (2003 - 2007). Human Rights House Network (2007)

Initial Report of the Republic of Kenya, submitted to the Committee on Economic, Social and Cultural Rights. E/C.12/KEN/1. 7 September 2007.

International Crisis Group, Africa Report No. 137. 21 February 2008.

Kenya Democratic and Health Survey (KDHR), 2003.

Manufacture of poverty: A case of export processing zones in Kenya (2003) KHRC, Nairobi, Kenya

Massive Internal Displacements in Kenya Due to Politically Instigated Clashes, Absence of Political and Humanitarian Responses, FIDH-KHRC, April 2007

National AIDS Control Council, Office of the President, Kenya. 2008. UNGASS 2008 Country Report for Kenya. NACC, Nairobi

National AIDS Control Council, 'Report on Assessment of the Social-Economic Impact of HIV/AIDS on the key sectors in Kenya', 2006. Available at: www.nacc.or.ke

PA Nyo'ngo' A leap into the future; A vision for Kenya's socio-political and economic transformation (African Research and Resource Forum, English Press, 2007)

'Preliminary Report on Alleged Executions and Disappearance of Persons Between June and October 2007', by the Kenya National Commission on Human Rights (KNCHR).

Republic of Kenya, Report of the Task Force on the Establishment of a Truth Justice and Reconciliation Commission, 26th August, 2003

Republic of Kenya, Millennium Development Goals Kenya Progress Report (2005) Nairobi

Report on of the Kenya State on the implementation of the Convention on the Rights of the Child. CRC/KEN/2. The report is dated 20 September 2005

W Mitullah, M Odhiambo & O Ambani Kenya's Democratisation: Gains or Loses (2005) 2. Claripress: Nairobi.

Domestic Legislation

Anti Corruption and Economic Crimes Act No 3 of 2003

Aliens Restriction Act (Chapter 173)

1963 Kenya Constitution (Independence Constitution)

Centre for Minority Rights Development [CEMIRIDE] on behalf of the Endorois Community v the Republic of Kenya Comm. 112/2003]

Constitution of the Republic of Kenya

Constitution of Kenya Amendment Act No. 7 of 1982

Contiguous Districts Regulations; Special Districts (Administrations) Act

Constituencies Development Fund Act, Act No 10 of 2003

Employment Act, 2007

General Comment No 12: The right to self-determination of peoples

HIV and AIDS Prevention and Control Act 2006

Immigration Act (Chapter 172)

Kenya National Commission on Human Rights Act, 2002

Judicature Act, Chapter 8, Laws of Kenya

Local Authorities Transfer Fund Act, No 8 of 1998

Outlying Districts Act

Preservations of Public Security Act

Report of the Constitution of Kenya Review Commission (2002). Short Version

Republic of Kenya, Millennium Development Goals Kenya Progress Report (2005) Nairobi

Stock Theft and Produce Act

Workmen's Compensation Act, Chapter 236

Judicial decisions

Okunda v Republic [1970] EA 512

Pattni and Another v Republic [2001] Kenya Law Reports (KLR) 262

Amanya Wafula, Ndungi Githuku & Others v Republic, High Court Misc. Application No. 343 of 2000

Kenneth Njindo Matiba v The Attorney General, HCCC Misc. Application No. 666 of 1990

Koigi Wa Wamwere v Attorney General, Misc. Application N.C. No. 574/90

Roy Richard Elirema and Another v Republic, Nairobi Criminal Appeal No. 67 of 2002

George Ngothe Juma and two others v Attorney General, Nairobi High Court Misc. Application No 34 of 2001

Yunis Ali and 100,000 Others v Principal Registrar of Persons, Principal Immigration Officer and the Attorney General, HCCC Misc. Case No. 467 of 2003

Francis Kemai and Others v Attorney General of the Republic of Kenya, Civil Case No. 238 of 1999

- (1) Economic and Social Rights Centre (Hakijamii)**
- (2) African Women’s Development and Communications Network (FEMNET)**
- (3) Eastern Africa Coalition on Economic, Social and Cultural Rights (EACOR)**
- (4) Building Eastern Africa Community Network (BEACON)**
- (5) International Commission of Jurists - Kenya Section (ICJ-K)**
- (6) Kenya Human Rights Commission (KHRC)**
- (7) The Reproductive Health and Rights Alliance (RHRA)**
- (8) Mazingira Institute**
- (9) Centre for Minority Rights and Development (CEMIRIDE)**
- (10) Centre on Housing Rights and Evictions (COHRE)**
- (11) Kenya Food Security Policy Advocacy Network (KeFoSPAN)**
- (12) Students Association for Legal Aid and Research (SALAR)**
- (13) HIV/AIDS and Human Rights Project**
- (14) Children’s Legal Action Network (CLAN)**
- (15) Kenya Land Alliance**
- (16) Federation of Women Lawyers Kenya**
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