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## The Equal Rights Trust

Parallel report submitted to the 105th session of the Human Rights Committee in  
relation to the third periodic report submitted by:

## The Republic of Kenya

*June 2012*

### Statement of Interest

1. The Equal Rights Trust (ERT) submits this parallel report to the United Nations Human Rights Committee (the Committee) commenting on the third periodic report by the Republic of Kenya (Kenya) under Article 40 of the International Covenant on Civil and Political Rights (the Covenant).
2. ERT is an independent international organisation whose purpose is to combat discrimination and promote equality as a fundamental human right and a basic principle of social justice. Established as an advocacy organisation, resource centre and think tank, it focuses on the complex relationship between different types of discrimination and inequality, developing strategies for translating the principles of equality into practice.
3. ERT has been actively involved in the promotion of improved protection from discrimination in Kenya since 2009. In the last four years, ERT has undertaken four projects in partnership with Kenyan Non-Government Organisations (principally, the Federation of Women Lawyers Kenya, the Kenya Human Rights Commission and the Gay and Lesbian Coalition of Kenya) which are focussed on developing protection from discrimination on all grounds. In the course of these projects, ERT has undertaken research on patterns of discrimination which prevail in Kenya and on the legal and policy framework designed to provide protection from discrimination.

4. In February 2012, ERT published *In the Spirit of Harambee: Addressing Discrimination and Inequality in Kenya* (the report) in partnership with one of its partners in Kenya, the Kenya Human Rights Commission. The report, which is the result of ERT's ongoing engagement in Kenya, is the first ever comprehensive account of discrimination and inequalities on all grounds and in all areas of life in Kenya. Drawing on extensive field research and legal analysis, the report makes a set of recommendations on reforms to law, policy and practice which are necessary if the rights to equality and non-discrimination are to be realised in Kenya. This submission summarises the findings and recommendations of that report, and urges the Committee to endorse and adopt these recommendations.

## Introduction

5. This submission focuses on the extent to which Kenya has met its obligations to respect, protect and fulfil the right to non-discrimination. Thus, the submission is concerned with Kenya's performance under two articles of the Covenant: Article 2(1), which requires that states parties respect and ensure the enjoyment of the rights provided in the Convention without distinction, and Article 26, which, as the Committee has stated, provides an "autonomous right"<sup>1</sup> to non-discrimination. In addition, the submission addresses some aspects of Kenya's performance with respect to Article 3 and a number of other articles, where discrimination disbars certain groups of persons from enjoying their civil and political rights under the Covenant. However, the main focus of the recommendations made in this submission is on measures required to bring Kenya's law, policy and practice in line with its obligations, arising under Article 26, to respect, protect and fulfil the right to non-discrimination as an autonomous right "not limited to those rights which are provided for in the Covenant".<sup>2</sup>
6. In assessing Kenya's adherence to its obligations under Articles 2(1) and 26, the submission relies on the interpretation of these provisions which has been provided by the Committee in its General Comment 18. In particular, we hope that this submission, and the information provided in the attached report, will respond to the Committee's wish to be informed of the existence of discrimination in fact and about "legal provisions and administrative measures directed at diminishing or eliminating such discrimination".<sup>3</sup> The submission also relies upon the Declaration of Principles on Equality (the Declaration), a document of international best practice on equality. The Declaration was drafted and adopted in 2008 by 128 prominent human rights and equality advocates and experts, and has been described as "the current international understanding of Principles on Equality".<sup>4</sup> It has also been endorsed by the Parliamentary Assembly of the Council of Europe.<sup>5</sup>
7. This submission is accompanied by copies of the aforementioned report, *In the Spirit of Harambee: Addressing Discrimination and Inequality in Kenya*. As the report provides extensive evidence and in-depth analysis of both the principal patterns of discrimination in Kenya, and the main problems with the legal and policy framework, this submission only seeks to highlight the key findings for the benefit of the Committee in each of these areas, and to present the recommendations. The recommendations are attached as an annex to the submission.
8. The submission is structured in three parts. The first part examines positive developments in Kenya since the state's last report to the Committee, and reflects on the measures which the

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<sup>1</sup> Human Rights Committee, *General Comment 18: Non-discrimination*, 1989, Para 12.

<sup>2</sup> Human Rights Committee, *General Comment 18: Non-discrimination*, 1989, Para 12.

<sup>3</sup> Human Rights Committee, *General Comment 18: Non-discrimination*, 1989, Para 10.

<sup>4</sup> *Naz Foundation v. Government of NCT of Delhi and Others* WP(C) No.7455/2001, Para. 93.

<sup>5</sup> Parliamentary Assembly of the Council of Europe, *Resolution and Recommendation: The Declaration of Principles on Equality and activities of the Council of Europe*, REC 1986 (2011), 25 November 2011, available at: [http://assembly.coe.int/ASP/Doc/ATListingDetails\\_E.asp?ATID=11380](http://assembly.coe.int/ASP/Doc/ATListingDetails_E.asp?ATID=11380).

government reported to the Committee in its third periodic report. The second part contains a summary of the findings of ERT's report. These findings are dealt with in two sub-sections. The first is focussed on the principal patterns of discrimination identified through ERT's research in Kenya, and supported with first-hand evidence of the lived experience of discrimination. The second examines the legal and policy framework in Kenya, assessing its adequacy and effectiveness. The final part presents the recommendations of the report and calls on the Committee to recommend that Kenya takes the steps outlined in the report.

## Recent Developments

9. ERT warmly welcomes the adoption of the *Constitution of Kenya*, in August 2010, after more than 20 years of attempted constitutional reform. The Constitution reflects a strong commitment to the principles of equality and non-discrimination throughout. Article 27 substantially expands the list of protected grounds and the scope of the right to non-discrimination compared to the previous Constitution. Notably, it does not reproduce broad exceptions which limited the scope of protection provided under its predecessor Constitution.<sup>6</sup> Article 27 creates a duty of non-discrimination both on the state and private actors<sup>7</sup> and is bolstered by the provisions in Articles 22 and 23 which enable individuals, groups of individuals and associations to bring proceedings in cases of discrimination and to receive relief including compensation. It is supplemented in part three of the Bill of Rights by a number of articles providing for the application of rights to particular groups.<sup>8</sup> In addition, the Constitution introduces both a general permission for positive action and a number of specific requirements for positive action on particular grounds.<sup>9</sup> Finally, through a series of measures designed to devolve power and re-distribute wealth between Kenya's regions, the Constitution provides a possible means to address the long-standing patterns of ethno-regional discrimination which flared into conflict in 2008.
10. ERT also welcomes the progress made by the Kenyan authorities in improving the legal protections from discrimination on specific grounds and in important areas of life. As the government's report notes, since its last report, it has enacted important pieces of legislation which extend protection from discrimination. The *HIV and AIDS Prevention and Control Act 2006* prohibits discrimination on the basis of actual, perceived or suspected HIV status in areas including employment, education, health, transport and insurance services. The *National Cohesion and Integration Act* defines and prohibits discrimination on ethnic grounds in a number of areas of life, criminalises hate speech and establishes a National Cohesion and Integration Commission. Finally, the *Employment Act 2007* provides significant protection from discrimination in all aspects of employment.
11. However, while ERT welcomes both the improved protection which these legal reforms provide, and the commitment to equality and non-discrimination which they illustrate, our research has identified a number of problems with the effectiveness of laws, policies and practices adopted by the government to address discrimination. In the sections below, we present a summary of our findings. These findings indicate first, that there remains a substantial problem with discrimination on a number of grounds in a variety of areas of life, including the continued existence of discriminatory laws, discrimination by state actors, failure to provide protection from discriminatory violence and discrimination and inequality in respect of employment,

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<sup>6</sup> Constitution of Kenya 1963 (repealed), Article 82(4): "Subsection (1) shall not apply to any law so far as that law makes provision – (a) with respect to persons who are not citizens of Kenya; (b) with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law; (c) for the application in the case of members of a particular race or tribe of customary law with respect to any matter to the exclusion of any law with respect to that matter which is applicable in the case of other persons..."

<sup>7</sup> Constitution of Kenya 2010, Article 27(4) and (5).

<sup>8</sup> Constitution of Kenya 2010, Articles 53, 54, 55, 56 and 57.

<sup>9</sup> Constitution of Kenya 2010, Article 27(6).

education and healthcare. Second, the findings indicate that these patterns of discrimination persist because of problems with the legal and policy framework, both in the sense of gaps and inconsistencies in the protection provided, and failures of enforcement and implementation.

## Summary of Key Findings

### *Patterns of Discrimination*

12. ERT's research presents substantial evidence of discrimination and inequality affecting members of a number of identified groups or categories of persons. The report focusses on discrimination and inequality which arises on the grounds of race and ethnicity, sex, sexual orientation, gender identity and disability and which affects two specific groups: those with albinism, and those with HIV and AIDS. A summary of the key findings in respect of each group is provided below.
13. ERT's research found that regional inequalities and direct and indirect discrimination by state actors on grounds of **ethnicity** have far-reaching consequences on the ability of particular ethnic groups to participate in society on an equal basis with others. Thus, the report identifies significant regional – which in the Kenyan context means also ethnic – disparities across a range of economic and infrastructure indicators, which have a direct impact on access to employment. Similarly, the report investigates the presence of a “Red Strip” covering North Eastern Province and the arid districts of Rift Valley and Eastern Provinces, where educational participation and outcomes, and access to healthcare and health outcomes are substantially below the national average. Most importantly, the research presents strong evidence that these regional inequalities are not solely a consequence of the climatic and ecological disadvantages of these regions, but are also a result of discrimination. Testimony collected from the residents of Burat and Wajir corroborates the perception that those with political power directly discriminate against ethnic groups who oppose them, or whose support they do not need to cultivate. Further, there is clear evidence that policies and decisions which appear neutral on their face – in particular those which channel development and infrastructure spending towards areas of the country that are already most developed – have a disproportionate impact on those ethnic groups residing in the least developed areas, and thus constitute indirect discrimination on grounds of ethnicity.
14. In addition to the overarching patterns of discrimination and inequality arising from ethnicity identified in Section 2.2, the report identifies a number of racial or ethnic groups with particular vulnerabilities. First, the report reviews the situation of Kenya's **indigenous communities**, taking a view that the concept of indigeneity should be associated with both the “negative experience of discrimination and marginalisation from governance” and the “positive aspects of being holders of unique knowledge which has emerged through the long-term management of arid areas and tropical forest ecosystems”.<sup>10</sup> The report concludes that many indigenous communities have been alienated from their traditional lands, in the past as a result of annexation and relocation, and more recently, as a result of government decisions on conservation and preservation of the environment. The report also finds that, in most cases, indigenous communities are not active in the formal economy, lack access to basic services such as education and healthcare, and have often been blocked from living on or accessing their traditional lands, which impacts significantly upon their capacity to enjoy their religious, cultural and social rights.
15. Second, the report examines the status of Kenya's **Somali population**, a group including both Kenyan citizens and refugees. It finds that this group suffers a range of discriminatory

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<sup>10</sup> Sena, K., *Africa Indigenous Peoples: Development with Culture and Identity: Article 2 and 32 of the United Nations Declaration on the Rights of Indigenous Peoples*, Paper submitted for the International Expert Group Meeting on Indigenous Peoples: Development with Culture and Identity Articles 3 and 32 of the United Nations Declaration on the Rights of Indigenous Peoples (New York, 12 - 14 January 2010), UN Doc. PFII/2010/EGM, 2010, p. 4.

treatments and inequalities, largely arising from actions of the state. The section identifies substantial evidence that Kenyans of Somali origin suffer direct discrimination in respect of citizenship and access to identity documents. Furthermore, the report includes testimony from persons stating that government officials pursued an unofficial policy of denying identity cards to Kenyan Somalis in order that they could not be counted in the census. Interviewees suggested that there was a deliberate attempt to under-count the Somali population, thus reducing the development funds allocated to areas where they were in the majority, and limiting their influence in elections. The research also reveals evidence that those of Somali origin are vulnerable to harassment and abuse by state authorities ostensibly seeking to combat terrorism. In addition, the report finds that, in common with other vulnerable ethnic groups, the large Somali population dwelling in the arid North Eastern Province, close to the border with Somalia and Ethiopia, suffers because of the significant poverty and marginalisation of the region in which they live: the province has the poorest quality land, highest unemployment, poorest educational outcomes and lowest level of access to healthcare in the country.

16. The final ethnic minority which is the subject of particular focus is the Nubian community. The report finds that Nubians are not officially recognised and remain *de facto* stateless as a result of discrimination in access to citizenship, including arbitrary denial of, and repeated delays in the provision of passports. ERT gathered evidence that, in part as a result of their statelessness, Nubians find it difficult to acquire land and property, or access employment and government services. Those interviewed also stated that they were being subjected to curfews, police harassment, arbitrary detention and extortion. The majority of Nubians are forced to live in temporary settlements and are more likely to suffer extremes of poverty, including the disproportionate effect of slum clearances and forced evictions.
17. This study found that relations between men and women in Kenya remain deeply unequal and that **women** remain subject to serious disadvantage and discrimination in many spheres of life, despite the efforts of government, civil society and others to address gender inequalities. The research identified discriminatory laws, and laws which are applied in a discriminatory manner, in respect of tax, succession, marriage and sexual offences. In addition, it reviewed and corroborated existing evidence of women's exposure to gender-based violence and harmful cultural practices, legitimated by a cultural environment based on patriarchal attitudes. The report shows that women are affected by poorer access to employment, lower rates of pay and higher unemployment, and that they experience significant inequality of opportunity and outcome in education and healthcare. The section concludes that despite government efforts to address gender inequality, women are more exposed to poverty and landlessness, as a combined result of these other factors.
18. Section 2.4 of the report demonstrates that discrimination against **lesbian, gay, bisexual, transgender and intersex (LGBTI) persons** is a serious problem in Kenya. While there are substantial differences between the situations, vulnerabilities and disadvantages faced by different groups and individuals within the "LGBTI community", the research indicates that there are also a number of common problems facing all LGBTI persons. Thus, LGBTI persons do not enjoy explicit protection from discrimination under Kenyan law, as Article 27(4) of the Constitution providing the right to equality does not include either sexual orientation or gender identity. In addition, the research confirmed that many LGBTI individuals are subject to high levels of stigma, which contributes to a climate where LGBTI persons are disproportionately vulnerable to physical violence, verbal abuse, destruction of property, and in some cases murder. Furthermore, the stigma combined with criminalisation of male homosexual conduct means that LGBTI persons are vulnerable to police harassment and extortion. The report also shows that LGBTI persons suffer discrimination in public services and employment.
19. The research undertaken for the report provides significant evidence of common problems affecting **persons with physical and sensory disabilities**, despite the differences between the situations of those with different forms of disability. The report welcomes the enhanced rights of all disabled persons following the enactment of the Persons with Disabilities Act in 2003. Yet it

establishes that despite the progress in terms of legal protections, persons with disabilities continue to face discrimination and disadvantage arising from their disability. The research found that access to assistive devices is poor, creating substantial problems for those with disability, particularly in remote, rural or marginalized areas. It also revealed that persons with disability meet barriers to education. It concludes that access to employment for persons with disabilities is limited not only by the lower educational status, but also by prejudice among employers regarding the capacities of persons with disabilities and the lack of reasonable accommodations in the workplace. Further, the report finds that many persons with disabilities live in poverty, in large part as a result of their lack of access to employment and the absence of welfare support.

20. The report goes on to examine the situation of those living with **mental and intellectual disabilities**, a difficult task in light of the limited published information available on the subject. The report finds that despite the fact that persons with mental and intellectual disabilities are protected by the equality and anti-discrimination provisions of the Persons with Disabilities Act and the Constitution, there remain several laws which discriminate against them. The report identifies three further problems affecting this group: a societal approach to mental and intellectual disabilities which is not based on human rights and equality; the denial of legal capacity; and the failure to facilitate Augmentative and Alternative Communication.
21. The researchers found little published information on the situation of **persons with albinism** in Kenya. There are no accurate estimates of the number of people living with the condition and little systematic research has been undertaken to identify the full range of obstacles and disadvantage which they face. However, from interviews conducted for the report, it became clear that people with albinism face severe problems in Kenya, arising in part as a result of prejudice and superstition and in part as a result of failure to make reasonable accommodation for their particular health and social needs. Section 2.6 of the report indicates that albinism is the subject of significant superstition in Kenya, which in some cases has led to violence against those with the condition. The report also identifies serious problems in access to education for children with albinism as a result of schools' failure to take steps to accommodate their visual impairments, and that the categorisation of persons with albinism as blind has the effect of denying them access to appropriate healthcare, which addresses their particular problems, such as photo-sensitivity.
22. Finally, the report addresses discrimination and inequality experienced by **persons living with HIV** in Kenya. The report notes that the government is attempting, through legislative, policy and healthcare initiatives, to ameliorate the situation of persons living with HIV and AIDS, alongside efforts to raise awareness and reduce transmission rates. The research reveals that stigma surrounding HIV/AIDS and prejudice against people living with HIV remains a significant problem, particularly in rural or marginalised areas of the country. The report provides substantial evidence of inequality in the workplace, arising in many cases because of discrimination or a combination of discrimination and poor health. It also presents evidence of discrimination and prejudice impacting on access to education and healthcare, the latter a problem with particularly serious consequences in terms of health outcomes.
23. Thus, the report provides evidence of significant discrimination and inequality on a range of grounds, occurring in all areas of civil, political, economic, social and cultural life. While there are clear differences between the problems experienced by those suffering discrimination and inequality on each of the grounds covered in this part – and unique problems affecting some groups – the research identified a number of common points and inter-relationships between the disadvantages experienced on different grounds.
24. First, there is a clear pattern of **lack of realisation of the rights to equality and non-discrimination**. Part 3 of the report finds that legal protections from discrimination in Kenya are inconsistent, with levels of protection varying between grounds and across areas of life, gaps in protection and direct contradiction between legal provisions in some areas of life. Thus, there

is a clear need to extend legal protections to ensure that all persons in Kenya have adequate protection from discrimination on all eligible grounds and in all areas of life regulated by law. The report also finds that, even where rights are available, enforcement is weak, knowledge of legal rights is poor among both right-holders and duty-bearers and access to justice is problematic. Thus, the communities which the report authors met in marginalised areas such as Isiolo, Wajir and Lodwar, for example, had little understanding of their legal rights under the legislation such as the National Cohesion and Integration Act or the new Constitution and no resources to mount a legal challenge against the discrimination which they suffered.

25. Second, the research identified the role of the **state as a discriminator and creator of inequality**. While this link is at its most obvious in respect of ethnicity, where the research identified patterns of both direct and indirect discrimination against particular ethnic groups, there is evidence in other areas as well. Women, for example, are subject to a range of discriminatory laws and laws which are open to discriminatory application, a situation which has only recently begun to change with the introduction of the new Constitution. Laws interpreted as criminalising same sex intimacy between men discriminate directly against gay and bisexual men, and give rise to extortion and other problems at the hands of state actors. Thus, the government appears to be failing to meet its most basic obligation to respect the right to non-discrimination under the international treaties to which Kenya is a party.
26. Third, research confirmed that two key themes, **poverty and ethnicity**, are central to an understanding of discrimination and inequality in Kenya, both because of the scale of their impact as distinct causes of discrimination, and because of their cross-cutting nature, which results in multiple discrimination for many of those suffering disadvantage because of another aspect of their identity. In the course of the research, ERT found few people who testified to having experienced discrimination or inequality where either poverty or ethnicity – themselves closely linked – were not a factor in causing, perpetuating or increasing disadvantage.

#### *Legal and Policy Framework*

27. In part 3 of the report, the authors discuss the legal and policy framework as it relates to combating discrimination and promoting equality. This includes an analysis of Kenya's international and regional legal obligations, the treatment of equality and non-discrimination in the Constitution, specific anti-discrimination laws, non-discrimination provisions in laws governing particular areas of life and government policies.
28. The first section of part 3, which examines Kenya's **international legal obligations**, indicates that the country has a moderate record of ratifying major international and regional human rights instruments. The authors identify a number of instruments which Kenya should ratify, if the country is to ensure that its participation in international instruments reflects the strongest possible commitment to equality and non-discrimination.
29. Section 3.2 of the report examines Kenya's domestic legal system, beginning with the new 2010 **Constitution**. As discussed above, at paragraph 9, the new Constitution contains a strong commitment to the principles of equality and non-discrimination which is evident throughout the Bill of Rights and elsewhere. The report welcomes many of the provisions of the new Constitution, including: the use of an expansive, and open-ended list of grounds; explicit inclusion of both direct and indirect discrimination; strong procedural and other provisions on access to justice for victims of discrimination; and detailed provisions relating to equality and non-discrimination for particular groups exposed to discrimination.
30. However, the report highlights a number of areas in which the Constitution could be improved. First, it notes that the list of protected grounds under the Constitution does not include either sexual orientation or gender identity, issues which are highly sensitive in a country where homosexual conduct remains allegedly illegal. It further notes that Article 27(4) does not provide an explicit protection against discrimination on grounds of albinism, something which

has caused concern among advocates. The report goes on to note however that the list of grounds provided in Article is indicative rather than exhaustive, creating a possibility of legal challenge by those suffering discrimination on grounds which are not explicitly listed in Article 27(4). Elsewhere, the report urges the Kenyan judiciary to interpret the words “any other ground” in Article 27(4) in line with international law and best practice which states that grounds such as sexual orientation and gender identity are covered by such provisions.

31. Second, the report notes with concern that Article 24 permits the right to non-discrimination to be qualified “to the extent necessary for the application of Muslim law before the Kadhis’ courts, to persons who profess the Muslim religion, in matters relating to personal status, marriage, divorce and inheritance”. The report notes that some commentators have raised concerns over coercion of women to submit to these courts and research suggests that *Khadhi* judgments have discriminated against women in determining questions of family law.<sup>11</sup>
32. Third, the report notes a number of discriminatory provisions which remain in the Constitution, despite the otherwise robust approach to non-discrimination and equality. These include Article 26(2), which provides a definition of the right to life which includes the phrase “life (...) begins at conception”.<sup>12</sup> This is expanded in section (4) which prohibits abortion “unless, in the opinion of a trained health professional, there is need for emergency treatment, or the life or health of the mother is in danger, or if permitted by any other written law”. Also of concern is Article 45, which states that “every adult has the right to marry a person of the opposite sex”, defines marriage in a way which discriminates against male and female same-sex couples.
33. The remainder of section 3.2 examines legislation on equality and non-discrimination, looking both at **specific anti-discrimination laws** (section 3.2.2) which address discrimination on particular grounds and **legislative protections in other areas of law** (section 3.2.3). The report notes that, in addition to its obligation to respect the right to non-discrimination by refraining from discrimination in laws or actions, Kenya is obliged to provide protection from discrimination by state and non-state actors, through the adoption of suitable legislation. Indeed, the Committee itself has stated that all states parties have an obligation to ensure that the “law shall guarantee to all persons equal and effective protection against discrimination on any of the enumerated grounds”,<sup>13</sup> while the CESCR has stated that “[s]tates parties are therefore encouraged to adopt specific legislation that prohibits discrimination in the field of economic, social and cultural rights”.<sup>14</sup> Thus, Kenya has a clear obligation to ensure that legislation providing protection from discrimination is in place on all grounds.
34. The report notes that Kenya lacks a single comprehensive anti-discrimination law or single equality enforcement body. However, the authors review two specific anti-discrimination laws – the *Persons with Disabilities Act* and the *National Cohesion and Integration Act* – which address discrimination on particular grounds. The report finds that, while they represent good progress in addressing the pre-existing lack of legal protection from discrimination on the grounds of disability and race respectively, each has a number of problems. In respect of the *Persons with Disabilities Act*, the report finds that it does not provide comprehensive protection by prohibiting all forms of discrimination in all relevant areas of life. Rather, it prohibits only direct

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<sup>11</sup> Ghai, Y. and Cottrell Ghai, J., *The Choice in the Referendum: A Comparative Analysis of the Proposed Constitution of Kenya and the Current Constitution*, July 2010, p. 9: “issues likely to arise are things like favouring the father in custody (...) limited provision for maintenance of wives after divorce, and the difference in inheritance by women and men under Muslim law”.

<sup>12</sup> Constitution of Kenya 2010, Article 26(2).

<sup>13</sup> Human Rights Committee, *General Comment 18: Non-discrimination*, 1989, Para 12.

<sup>14</sup> UN Committee on Economic, Social and Cultural Rights, *General Comment 20: Non-discrimination in economic, social and cultural rights (art. 2, Para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, UN Doc. E/C.12/GC/20, 2009, Para 37.

discrimination in employment, admission to learning institutions, and access to premises, services and amenities and sets out a range of measures intended to promote equal participation in specific areas, but without allowing for individual enforcement of those measures. While this gap in protection has been remedied in part by the general prohibition of discrimination on grounds of disability provided by Article 27 of the Constitution, gaps remain, most notably in respect of enforceable rights to reasonable accommodation. Similarly, the report finds that while the *National Cohesion and Integration Act* attempts to provide protection from racial and ethnic discrimination in a range of areas of life, it contains gaps, exceptions and inconsistencies which limit its scope and effectiveness. Further, the report identifies significant concern about the effectiveness of this Act, given evidence of ethnic discrimination by state actors uncovered elsewhere in the report.

35. Moreover, the report finds that the existence of these two laws highlights the absence of comprehensive legislative protection in respect of other grounds, including notably gender – where Kenya has particular obligations under Convention on the Elimination of All Forms of Discrimination Against Women – but also all other grounds covered by the Convention. The report notes that the general prohibition on discrimination by state and non-state actors provided by Articles 27(4) and 27(5) of the Constitution does offer a certain level of protection, and that this is bolstered by the provisions in Articles 22 and 23 which enable individuals, groups of individuals and associations to bring proceedings in cases of discrimination and to receive relief including compensation. However, the report expresses concern that these provisions alone are insufficient to meet Kenya’s obligations in respect of providing effective protection from discrimination in law.
36. The authors also note that protection from discrimination on grounds which are not the subject of specific anti-discrimination laws can be found in legislation governing other areas of this life. However, the report finds the coverage of non-discrimination in these areas to be patchy and inconsistent. While some Acts, such as the *Employment Act* and the *Universities Act*, contain provisions which prohibit discrimination based on a range of grounds, legislation in other fields, such as health and education, does not contain non-discrimination protections. In addition, there are significant inconsistencies within that legislation which does exist, on issues such as the definition of key concepts, the description of forms of prohibited conduct and the coverage of protected grounds of discrimination. Finally, where discrimination in a particular area of life is regulated by more than one statute, there are direct discrepancies between provisions in different pieces of legislation, as for example in respect of the protection provided in employment in private sector enterprises on grounds of race and ethnicity under the *Employment Act* and the *National Cohesion and Integration Act*.
37. In section 3.4, the report focuses on the **enforcement and implementation of legal provisions on equality and non-discrimination**. It looks at legal provisions governing the procedural aspects of bringing a claim of discrimination, measures to ensure access to justice, and remedies. In addition, this section reviews the impact of the pilot National Legal Aid Programme, finding it to be excessively limited in both thematic and geographical scope to ensure effective access to justice for those seeking to bring a claim of discrimination. Further, it looks at the powers and functions of specialised bodies with a mandate to address discrimination and inequality – including in particular the recently established National Gender and Equality Commission, but also the Kenya National Commission on Human Rights, the National Council for Persons with Disabilities and the National Cohesion and Integration Commission – assessing whether such bodies are sufficiently independent, empowered and well-financed to ensure effective enforcement and implementation of equality rights. Finally, this section examines the key jurisprudence on equality and non-discrimination, in an effort to evaluate the level of enforcement through the courts. In this respect, it finds little jurisprudence on the rights to equality and non-discrimination and raises concerns about the quality of the judgements in those cases which have been decided.

38. Thus, the report presents a complex picture in respect of the legal protection of the rights to equality and non-discrimination in Kenya. Taken together, the evidence reviewed in the two different parts of the report suggest that while there have been a number of important reforms which expand the scope of legal rights, significant problems remain. First, a number of **discriminatory laws and laws which are open to discriminatory interpretation** remain in force, including notably provisions in the Penal Code which has been interpreted as criminalising same-sex intimacy between men, but also laws which discriminate against women in respect of tax and marital property. While the introduction of the new Constitution 2010 may render a number of these laws unconstitutional, at present they remain in force pending legal challenge. There appear to be no plans in place for the government to undertake an audit of laws to identify and amend those laws which discriminate, despite the clear supremacy of the Constitutional prohibition on discrimination.
39. Second, there are serious **gaps in legal protection**, both with regards to the absence of legislation prohibiting all forms of discrimination on particular grounds – such as sex and age – and the absence of provisions prohibiting discrimination on a range of grounds in particular areas of life – such as education or health services. The new Constitution presents a potential remedy in this area, as it extends protection from discrimination to a wide range of grounds, prohibits discrimination by both public and private actors and provides for individuals to bring claims of discrimination against both the state and non-state actors. However, the report concludes that the lack of legislation giving clear definitions of important concepts in the law and providing clarity about the scope and operation of protection is a cause for concern.
40. Third, there are a number of **inconsistencies between provisions in different laws**, notably in the field of employment. For example, the scope of the protection from discrimination on grounds of race or ethnicity in employment appears to be different under the National Cohesion and Integration Act and the Employment Act, giving rise to uncertainty affecting both employers and employees.
41. Finally, there is a significant problem with the **poor implementation and enforcement** of existing laws, as indicated by, for example, the evidence of persistent discrimination on grounds of ethnicity, despite the protections offered under the National Cohesion and Integration Act and of the disadvantage faced by persons with disabilities, despite the existence of the Persons with Disabilities Act. A host of factors – including low awareness of rights and obligations among both rights-holders and duty-bearers, financial and other barriers preventing access to justice for victims of discrimination, and the apparent lack of progress by government in key areas such as tackling discrimination on grounds of ethnicity in the allocation of public resources – mean that even in cases where legal protections exist, these do not translate into changes on the ground.

## Recommendations

42. The report notes that Kenya has made important steps on the road to greater equality since the beginning of the century, most recently and most significantly adopting a Constitution which bears witness to the country's commitment to tackling discrimination and inequality. However, it concludes that there is a clear need for Kenya to harmonise and strengthen its legal system in respect to equality. As such, the report contains a number of recommendations which would enable Kenya to meet its obligations to respect, protect and fulfil the rights to non-discrimination and equality and in so doing meet the aspirations expressed in its 2010 Constitution.
43. The first set of recommendations is that Kenya further improves its record of ratifying key **international instruments related to equality**. It is notable that while Kenya has ratified almost all of the key instruments related to the rights to non-discrimination and equality, it has yet to join those instruments recognising the jurisdiction to hear individual complaints by the treaty bodies which supervise compliance with the treaties. Kenya should remedy this situation, and ratify the remaining instruments relevant to equality and non-discrimination.

44. The second and third sets of recommendations relate to Kenya's **obligation to respect** the rights to non-discrimination and equality. While noting the strict prohibition on discrimination by the state which is provided in the 2010 Constitution of Kenya, the research clearly indicates that Kenya does not fully meet its obligations in this regard. As such, it is recommended that the government conducts an audit to identify discriminatory laws and create a list of discriminatory provisions which should be repealed or amended. In addition, the report recommends that Kenya takes all appropriate measures to ensure that state actors do not discriminate in the exercise of their functions. This recommendation was felt to be particularly important given the range of alleged directly and indirectly discriminatory practices identified in the report.
45. With regards to Kenya's **obligation to protect** people against discrimination and inequality, the report sees the Constitution of Kenya 2010 as a significant progressive step in addressing discrimination and inequality. The fourth set of recommendations therefore concentrate on the interpretation of key concepts within the Constitution, urging the judiciary to interpret the Constitution in line with international law and comparative best practice. This includes interpreting the "open-ended" list of protected grounds provided in section 27 to include sexual orientation, gender identity and genetic inheritance, and ensuring that exceptions to the right to non-discrimination are interpreted narrowly.
46. The main recommendation related to Kenya's obligation to protect equality rights, and indeed the main recommendation in the report is that Kenya adopts **comprehensive equality legislation**. As the Committee will be aware, harmonisation of equality law can be achieved either through the adoption of a single equality Act or through the development of a system of individual laws providing protection on different grounds or in different areas of life which, together, provide comprehensive protection. In the course of three years (2009-2011), ERT and its Kenyan partners have engaged all key stakeholders in consultations and debates aimed at exploring best approaches to strengthening equality in Kenya. As a result of this process, a broad consensus has emerged that the first approach – a single equality Act – is preferable. The reason for this is that under the second approach, Kenya would be required to adopt new laws providing protection from discrimination on a number of grounds, including gender, sexual orientation, gender identity, age and genetic inheritance. In addition, it would be required to amend the various pieces of existing legislation to resolve inconsistencies within each Act and between different Acts, and to ensure that the standard and scope of legal protection meet its international obligations. This would be a significant legislative challenge. Moreover, any system of separate laws providing protection from discrimination on different grounds or in different areas of life would meet with challenges in properly reflecting the inter-connected nature of discrimination on different grounds and in different contexts. Compared with the approach of a single equality Act, it may be ill-suited to adequately address multiple discrimination, provide for the admission of new protected grounds, and ensure a consistent level of protection across different grounds. Furthermore, the patchwork approach would be likely to perpetuate a complex system of different procedures, standards and remedies, an outcome which a number of treaty bodies have called into question.
47. It is therefore preferable, in adopting comprehensive equality legislation, to take the path of a single, comprehensive equality Act, which should reflect concepts and approaches in the "Statement of Principles for Equality Law" and "Legislative Map for Equality Law" developed and endorsed by civil society actors in 2010-2011. Such an Act should prohibit discrimination on a conditionally open list of protected grounds which should incorporate at least all of the grounds set out in Article 27 of the Constitution, together with the additional grounds of sexual orientation, gender identity and genetic inheritance. It should provide a test or other mechanism for the admission of new grounds. It should prohibit all forms of discrimination and should cover all areas of life regulated by law in the private and public sectors. The law should provide for the development and implementation of positive action measures, should allow the transfer of the burden of proof in civil cases to the alleged discriminator and should provide remedies

and sanctions which are proportionate and dissuasive. Exceptions should be limited, reasonable and justifiable, in the sense that they can be shown to be necessary for the achievement of a legitimate purpose and that there is no alternative which is less restrictive. The provisions of such a law when enacted should, in the event of any conflict or inconsistency, supersede the provisions of any other legislation relating or incidental to the prohibition of discrimination and the promotion of equality.

48. The fifth set of the recommendations relates to Kenya's **obligation to fulfil** the rights to non-discrimination and equality, focusing on **measures to address discrimination and substantive inequality**. The government should finalise and adopt policies relevant to equality and non-discrimination and consider introducing a comprehensive National Equality Policy. The report urges Kenya to take positive action in order to overcome past disadvantage and accelerate progress towards equality for particular groups. Finally, the government should ensure that those parts of the Constitution which provide for the devolution of power to county governments and the redistribution of public resources are implemented in a comprehensive and timely manner, paying due regard to the principles of equality and non-discrimination embodied in the Constitution.

## **Conclusion**

49. ERT makes this submission, and provides copies of its recent report, in the hope that it can inform the Committee on the extent to which Kenya is complying with its obligations to respect, protect and fulfil the right to non-discrimination arising under Article 26 of the Covenant. We hope that the information provided is of use in this regard.
50. We urge the Committee to consider endorsing the recommendations in the report, which are attached as an annex to this submission, and to call on Kenya to take the steps set out therein.

**The Equal Rights Trust: Parallel report to the third periodic report submitted by: The Republic of Kenya**

**ANNEX: Recommendations**

**1. Strengthening of international commitments**

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

- a) UN Instruments:
  - i. Optional Protocol I to the International Covenant on Civil and Political Rights (1966);
  - ii. Optional Protocol I to the International Covenant on Economic, Social and Cultural Rights (ICESCR) (2008);
  - iii. Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (1999);
  - iv. Optional Protocol to the Convention on the Rights of Persons with Disabilities (2006);
  - v. Optional Protocol II to the Convention on the Rights of the Child (2000);
  - vi. Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990);
  - vii. Convention against Enforced Disappearance (2006);
  - viii. United Nations Educational, Scientific and Cultural Organisation Convention against Discrimination in Education (1960);
  - ix. UN Convention on the Status of Stateless Persons (1951).
- b) International Labour Organisation Conventions:
  - i. ILO Convention No. 169 on Indigenous and Tribal Peoples.

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

1.3 Kenya is urged to withdraw its reservation against Article 10(2) ICESCR, which requires that states make provision for paid maternity leave.<sup>15</sup>

**2. Repeal or amendment of national legislation**

2.1 Kenya is urged to undertake a review of all legislation and policy in order to (i) assess compatibility with the rights to equality and non-discrimination, as defined under the international instruments to which Kenya is party and the Constitution of Kenya 2010; and (ii) amend, and where necessary, abolish, existing laws, regulations and policies that conflict or are incompatible with the right to equality.<sup>16</sup> This process should include review of:

*Constitutional Provisions:*

- a) Article 26(2) and (4), Constitution of Kenya 2010, which prohibit abortion in all cases except those defined as medical emergencies;

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<sup>15</sup> International Covenant on Economic, Social and Cultural Rights, Article 10(2): “[The States Parties to the present Covenant recognize that:] Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such a period working mothers should be accorded paid leave or leave with adequate social security benefits.”

<sup>16</sup> Kenya has been advised to undertake such a review by treaty bodies including the Committee on the Elimination of Discrimination Against Women, *Concluding Observations on Kenya*, CEDAW/C/KEN/CO/6, 10 August 2007, Para 18.

- b) Article 45 (2), Constitution of Kenya 2010, which discriminate against same-sex couples in marriage;
- c) Article 24(4) of the Constitution of Kenya 2010, which provides that the rights to equality and non-discrimination shall be qualified to the extent necessary for the application of Muslim law before the Kadhis' courts in the areas of personal status, marriage, divorce and inheritance;
- d) Articles 83, 99(2)(e) and 193(2)(d), Constitution of Kenya 2010, which deny political rights to persons of "unsound mind".

*Legislative Provisions:*

- e) Sections 162, 163 and 165 of The Kenyan Penal Code;
- f) Section 45 of the Income Tax Act;
- g) Sections 32, 33, 35, 36 and 39 of The Law of Succession Act;<sup>17</sup>
- h) Sections 38 and 43(5) of the Sexual Offences Act;
- i) Section 3 of the Citizenship Act;
- j) Section 86 of The Civil Procedure Act;
- k) Section 138 of the Penal Code;
- l) Section 7 of the Transfer of Property Act;
- m) Section 8 of the Matrimonial Causes Act;
- n) Section 3 of the Immigration Act.

*Family Law*

2.2 The family law system in Kenya is complex and provides numerous opportunities for discrimination, particularly against women. While some laws in this area contain discriminatory provisions, others provide for the application of legal norms which discriminate, including in customary legal settings; the multiplicity of laws in the field means that discrimination is more likely to occur unchecked. In line with the recommendations of the Committee on the Elimination of Discrimination Against Women (CEDAW), Kenya should "[...] harmonize civil, religious and customary law with article 16 of the Convention and to complete its law reform in the area of marriage and family relations in order to bring its legislative framework into compliance with articles 15 and 16 of the Convention [...]"<sup>18</sup> This would include a review of inter alia:

- a) The Kadhis' Court Act
- b) The Mohammedan Marriage, Divorce and Succession Act
- c) The Hindu Marriage and Divorce Act
- d) The Matrimonial Causes Act

### **3. Measures to ensure state actors respect the rights to equality and non-discrimination**

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

- a) Reviewing guidelines, policies and practices to ensure that they do not contravene the rights to non-discrimination and equality;
- b) Developing guidelines to ensure that policies and practices do not contravene the rights to

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<sup>17</sup> Kenya has already agreed to review this legislation at the review of Kenya's most recent periodic report to CEDAW: Committee on the Elimination of Discrimination Against Women, *Concluding Observations on Kenya*, CEDAW/C/KEN/CO/7, 5 April 2011, Para 45.

<sup>18</sup> Committee on the Elimination of Discrimination Against Women, *Concluding Observations on Kenya*, CEDAW/C/KEN/CO/6, 10 August 2007, Para 44.

- non-discrimination and equality;
- c) Taking steps to educate public officials and other agents of the state as to their obligations with respect to the rights to non-discrimination and equality;
- d) Making effective and accessible mechanisms for individuals to bring complaints about discrimination by state actors available;
- e) Requesting the Kenya National Human Rights and Equality Commission to undertake proactive investigations and to invite the submission of complaints by those claiming to have suffered violations of the rights to non-discrimination and equality;
- f) Enforcing effective, proportionate and dissuasive sanctions against public bodies and agents found to have engaged in discrimination;
- g) Taking steps to raise public awareness, through a programme of civic education, of the rights and obligations of state actors in respect of the rights to non-discrimination and equality.

#### 4. Laws to give effect to the rights to equality and non-discrimination

##### *Constitution of Kenya 2010*

- 4.1 A strong commitment to the principles of equality and non-discrimination is evident throughout the Constitution of Kenya 2010; the Bill of Rights provides a strong set of protections from discrimination in both the public and private spheres, together with excellent enforcement mechanisms and remedies; and key provisions elsewhere in the Constitution provide the basis to tackle some of the critical problems which perpetuate systemic de facto inequalities. As such, its adoption is a very important step in giving effect to Kenya's international legal obligations to respect, protect and fulfil the rights to equality and non-discrimination.
- 4.2 In order to fully discharge Kenya's obligations under international law, it is necessary that the provisions of the Constitution which deal with the rights to equality in non-discrimination are interpreted in line with the spirit of the Constitution and with international law, including the interpretations of relevant treaty bodies. The Kenyan judiciary is called upon to interpret the Constitution in such a way as to reflect Kenya's international obligations to respect, protect and fulfil the rights to equality and non-discrimination, and the commitment to equality evidenced throughout the Constitution itself, including in particular by considering that:
- a) The words "any ground, including" in Article 27(4) are interpreted as creating a class of "other status", which itself is interpreted in line with the recommendation of the Committee on Economic, Social and Cultural Rights (CESCR) in its General Comment 20, including in particular that "other status" covers "sexual orientation" and "gender identity".<sup>19</sup>
  - b) The words "any ground, including" in Article 27(4) are interpreted as creating a prohibition on multiple discrimination, in line with the recommendation of CESCR in its General Comment 20.<sup>20</sup>
  - c) Article 27(6), which creates a duty of affirmative action, and Article 56, which requires the state to take a range of measures to ensure the participation of all groups "disadvantaged by discrimination on one or more grounds provided in Article 27(4)" in governance, education and employment, are interpreted and implemented in line with the recommendations of *inter alia* the UN Human Rights Committee (HRC), CESCR, the Committee on the Elimination of Racial Discrimination (CERD) and the Committee of the Elimination of Discrimination against Women (CEDAW) about positive action measures.
  - d) Article 24, which sets out permissible limitations of rights provided in the Bill of Rights,

<sup>19</sup> Committee on Economic, Social and Cultural Rights, *General Comment 20: Non-discrimination in economic, social and cultural rights*, UN Doc. E/C.12/GC/20, 2009, Para 27.

<sup>20</sup> Committee on Economic, Social and Cultural Rights, *General Comment 20: Non-discrimination in economic, social and cultural rights*, UN Doc. E/C.12/GC/20, 2009, Para 17.

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

- e) Article 24(4), which limits the application of the rights to equality and non-discrimination to exclude the application of Muslim law before the Kadhis' courts to persons who profess the Muslim religion, in matters relating to personal status, marriage, divorce and inheritance, is interpreted in line with Kenya's international obligations to provide effective protection from discrimination, in line with the precedent set by the courts in *Rono v Rono and Another*.

#### *Specific anti-discrimination and equality law*

- 4.3 Kenya is urged to reform its system of laws prohibiting discrimination in order to ensure that the law provides protection from discrimination on all grounds and in all areas of life. Such laws should aim at eliminating direct and indirect discrimination in all areas of life regulated by law and attribute obligations to public and private actors, including in relation to the promotion of *de facto* equality.
- 4.4 In order to give effect to recommendation 4.3 – and in recognition of the gaps in legal protection and problems of inconsistency which arise from the multiplicity of laws on discrimination in Kenya, including failure to provide effective protection from multiple discrimination, as well as to make a transition from anti-discrimination to equality law – Kenya is urged to consider the enactment of a single comprehensive Equality Act, offering consistent protection across all grounds of discrimination and in all such areas of life. In this regard, Kenya is urged to consider adopting legislation in line with the “Statement of Principles for Equality Law” and “Legislative Map for Equality Law” developed and endorsed by civil society actors in 2010-2011, which are based on the Declaration of Principles on Equality, an international best practice document adopted in 2008.

### **5. Measures to address discrimination and substantive inequality**

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

#### *Government Policy*

- 5.2 In this regard, Kenya should consider:
  - a) Finalising and introducing the Draft National Policy on Human Rights
  - b) Finalising and introducing the Draft National Land Policy
  - c) Finalising and introducing the Draft National Policy on Ageing
  - d) Reviewing and updating the National Policy on Gender and Development
  - e) Reviewing and updating the Kenya National Youth Policy
  - f) Reviewing and updating the Public Sector Workplace Policy on HIV and Aids
- 5.3 Kenya is urged to consider introducing a National Equality Policy in order that equality and non-discrimination are effectively mainstreamed into government policy-making and the delivery of public functions and services.

#### *Positive Action*

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

#### *Measures to address systemic discrimination and inequality*

- 5.5 In order to meet its obligations to take an active approach to eliminating systemic discrimination, Kenya should ensure that those parts of the Constitution which provide for the devolution of power to county governments and the redistribution of public resources are implemented in a comprehensive and timely manner, paying due regard to the principles of equality and non-discrimination embodied in the Constitution. In addition, Kenya should respect and implement Articles 202 and 203, setting out the need to share revenue on an "equitable" basis between the national government and the Counties.
- 5.6. Kenya should implement expeditiously Article 204 of the Constitution establishing an Equalisation Fund, with due regard to the principles of non-discrimination and inequality as defined in the Declaration of Principles on Equality.

### **6. Awareness-raising**

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

### **7. Data collection**

During the research for this report, it has become apparent that there is a significant lack of statistics in relation to key indicators of equality in Kenya; this absence is particularly marked in respect of statistics on access to, and outcomes in, education, employment and health. The Kenyan government should therefore collect and publicise information, including relevant statistical data, in order to identify inequalities, discriminatory practices and patterns of disadvantage, and to analyse the effectiveness of measures to promote equality.

### **8. Participation**

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

### **9. Enforcement and Implementation**

#### *Proceedings, Access to Justice, and Remedies*

- 9.1 The Chief Justice of Kenya, in discharging obligations arising under Article 22(3) of the Constitution to develop rules governing proceedings brought under the Bill of Rights, should have regards to the need for such rules to "ensure that individuals [...] have accessible and effective remedies to vindicate" the rights to equality and non-discrimination.<sup>21</sup> In particular, where the facts and events at issue lie wholly, or in part, within the exclusive knowledge of the authorities or other respondent, the burden of proof should be regarded as resting on the authorities, or the other respondent, respectively.<sup>22</sup>

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<sup>21</sup> Constitution of Kenya 2010, Article 22(3).

<sup>22</sup> Committee on Economic, Social and Cultural Rights, *General Comment 20: Non-discrimination in economic,*

- 9.2 Kenya should introduce legislation in order to harmonise the range of regimes which presently exist to provide access to justice for those subjected to discrimination on different grounds and in different areas of life, so that all individuals are able to access justice and remedies where they have been subjected to discrimination. In particular, the Kenyan government should ensure that such legislation:
- a) Expands the protection of individuals from any adverse treatment or consequence as a reaction to a complaint or to proceedings aimed at enforcing compliance with equality provisions (victimisation) to complaints in respect of all grounds, rather than solely race and ethnicity, as currently provided in the National Cohesion and Integration Act.
  - b) Adapts legal rules related to evidence and proof in order to ensure that victims of discrimination are not unduly inhibited from obtaining redress. In particular, rules on proof in civil proceedings should be adapted to ensure that when persons who allege that they have been subjected to discrimination establish, before a court of other competent authority, facts from which it may be presumed that there has been discrimination, it shall be for the respondent to prove that there has been no breach of the right of equality. Such provisions are currently found in the Employment Act; this protection should be expanded into other areas of life.
- 9.3 Sanctions for breach of the right to equality have to be effective, proportionate and dissuasive. Appropriate remedies must include reparations for material and non-material damages. Sanctions may also require the elimination of discriminatory practices and the implementation of structural, institutional, organisational or policy change that is necessary for the realisation of the right to equality.

#### *Legal Aid and Assistance*

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

#### *Enforcement and Implementation Bodies*

- 9.5 Kenya should establish a Kenyan National Human Rights and Equality Commission (or a number of separate Commissions) as provided for in Article 59 of the Constitution of Kenya 2010. Any such Commission(s) concerned with the protection, promotion and implementation of human rights should have a mandate which includes a strong focus on combating discrimination and promoting equality across all grounds and in all areas of life. Any such Commission(s) should have independent status and competences, in line with the UN Paris Principles, as well as adequate funding and transparent procedures for the appointment and removal of their members.
- 9.6 Kenya should establish a focal point within government to coordinate policy and actions in relation to equality on all grounds, as the National Commission on Gender and Development has done with regards to gender equality, but with a sufficiently broad mandate to enable it to address discrimination and inequality on all grounds and in all areas of life.

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*social and cultural rights*, UN Doc. E/C.12/GC/20, 2009, Para 40; Committee on the Elimination of Racial Discrimination, *General Recommendation No.30: Discrimination Against Non Citizens*, 2004, Para 24; see also: *Declaration of Principles on Equality*, Principle 21.