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The promulgation of the Constitution of Kenya 2010 marked a significant milestone in the quest for recognition of human rights in the country. In comparison with the independence constitution, the 2010 version was subjected to a referendum vote; therefore according the people of Kenya its authorship and ownership. It reiterates the provisions of international and regional instruments applicable to the country; thereby consolidating the otherwise several norms and standards that have long served as a reference point for human rights.

The Kenya National Commission on Human Rights (KNCHR) has since its inception in 2003 worked tirelessly to promote the realization of human rights. The 2010 Constitution also enhanced the status of the Commission through its re-establishment as a constitutional body/institution under Article 59 which provides for the Kenya National Human Rights and Equality Commission (KNHREC). This was further restructured by Parliament into three commissions, namely KNCHR, National Gender and Equality Commission (NGEC) and the Commission on Administrative Justice (Ombudsman/CAJ). Together the three work to promote human rights, advance gender and other equalities and address maladministration, respectively. Further, the CoK provided for a robust Bill of Rights in Chapter 4, which acts as the key guide in ensuring the realization of human rights for all.

The fourth State of Human Rights report is the first by KNCHR under the current constitutional dispensation. KNCHR therefore analyses the operationalization of the Constitution and its impact on the lives of mwananchi. Having been in operation for over four years now, the time is ripe for assessment of its successes and shortcomings. In remaining alive to the fact that enshrinement of rights is merely contributory to their realisation, this report interrogates the factors that have promoted and hindered the enjoyment of rights.

The Kenyan Constitution has been acclaimed and acknowledged as both progressive and exemplary by the international community. However, the country still faces challenges in its effective implementation. The aspirations of the people of Kenya at its inception have largely also remained unmet. This has been caused by a political, economic and social environment that is not conducive for the actualisation of human rights.

The period under review has seen great efforts by the political class in absconding their constitutionally enshrined obligations, particularly those relating to international law. There was an increase in actions that violated human rights in anti-terrorism activities, determination of salaries and benefits of parliamentarians and former members of the executive and lack of accountability under the Rome Statute. Business entities have also undermined human rights in their pursuit of profit generation. An important illustration of this has especially been witnessed in the mining industry. Additionally, public appreciation and support of human rights has continued to erode, particularly with regards to efforts of curbing the rising cases of insecurity in the country. This is also true of the public’s perception of human rights defenders work to ensure the respect of guaranteed rights.

Through the publication of this report, KNCHR is focused on calling on all Kenyans to reflect on the spirit of the Constitution and the ambitions of the country at the time of its adoption, and the progress achieved so far. The Commission expects that the commencement of this discussion will yield progressive strategies to steer the country back to the envisioned direction.

Kagwiria Mbogori
Chairperson
ACRONYMS AND ABBREVIATIONS

ACHPR: African Commission on Human and Peoples' Rights

AFC: Agricultural Finance Corporation

AIDS: Acquired Immuno-deficiency Syndrome

AMISOM: African Union Mission in Somalia

Art.: Article

ARV: Antiretroviral

ASAL: Arid and Semi-Arid Land

CRC: Convention on the Rights of the Child

CRPD: Convention on the Rights of Persons with Disability

CSO: Civil Society Organization

CT-OVC: Cash Transfer to Orphans and Vulnerable Children

CT-PWSD: Cash Transfer to Persons with Severe Disabilities

EACC: Ethics and Anti-Corruption Commission

FGM/C: Female Genital Mutilation/Cutting

GCN: Girl Child Network

GDP: Gross Domestic Product

HIV: Human Immuno-deficiency Virus

HRD: Human Rights Defender

HRW: Human Rights Watch

ICC: International Criminal Court

ICCPR: International Covenant on Civil and Political Rights

ICESCR: International Covenant on Economic, Social and Cultural Rights

ICLU: Independent Medico-Legal Unit

IMR: Infant Mortality Rate

IOM: International Organization for Migration

IPOA: Independent Policing Oversight Authority

JMVB: Judges and Magistrates Vetting Board

JSC: Judicial Service Commission

JTI: Judicial Training Institute

KDF: Kenya Defence Forces

KDHS: Kenya Health and Demographic Survey

KEJUDE: Kenyans for Justice and Development

Kg: Kilogram

KICA: Kenya Information and Communication (Amendment) Bill

KNBS: Kenya National Bureau of Statistics

KNCHR: Kenya National Commission on Human Rights

KNHREC: Kenya National Human Rights and Equality Commission

KODI: Kenya Open Data Initiative

KTN: Kenya Television Network

KUPPET: Kenya Union of Post Primary Education Teachers

LGBT: Lesbians, Gays, Bisexual and Transgender

LGBTI: Lesbians, Gays, Bisexual, Transgender and Intersex

MHR: Maternal Mortality Rate

MTP: Mid-Term Plan

MUHURI: Muslims for Human Rights

NAAIAP: National Accelerated Agricultural Input Access Programme

NALEAP: National Legal Aid and Awareness Programme

NCIC: National Cohesion and Integration Commission

NCPB: National Cereals and Produce Board

NGEC: National Gender and Equality Commission

NGO: Non-Governmental organization

NHIF: National Hospital Insurance Fund

NIS: National Intelligence Service

No.: Number

NPSC: National Police Service Commission

NSSF: National Social Security Fund

ODPP: Office of the Director of Public Prosecutions

OP-CT: Cash Transfer to Older Persons

PASUNE: Paralegal Support Network

PBO: Public Benefits Organization

PEP: Post Exposure Prophylaxis

PIC: Parliamentary Investment Committee

PPIPS-WS: Pro-poor Implementation for Water Supply and Sanitation

PWDs: Persons with Disability

RRI: Rapid Results Initiative

SND: Strategies for Northern Development

STI: Sexually Transmitted Infection

TI: Transparency International

TJRC: Truth, Justice and Reconciliation Commission

TNA: The National Alliance

UDHR: Universal Declaration on Human Rights

UN: United Nations


URP: United Republican Party

US: United States
EXECUTIVE SUMMARY

The Kenya National Commission on Human Rights is mandated under Section 8 of the KNCHR Act, 2011 (Revised 2012) to act as the principal state agency in the promotion and protection of human rights. In discharging this function, the Commission is required to ensure observance of human rights in all spheres of life in the Republic of Kenya. Moreover, the Commission is required to perform any other function that will assist fulfillment of its mandate. To this end, the Commission prepares occasional reports on various human rights aspects. These reports assist to assess the state of human rights in Kenya.

This report, The State of Human Rights Report in Kenya 2011-2014, reviews the human rights situation in Kenya over a four year period—January 2011 to March, 2014. The report analyses and documents implementation of human rights as envisaged under the Constitution over the stated period. Specifically, the report points out success that was achieved during the said period in the implementation and respect for human rights. In addition, the report critically evaluates the challenges that have impeded full implementation and realization of human rights.

The report utilizes the three classifications of human rights namely civil and political rights, socio-economic rights and group rights. Under civil and political rights, the principle of public participation, the rights to political participation and to access justice are analysed. The analysis of socio-economic rights focuses on the rights to education, health, water and sanitation, environment, housing and social security. Lastly, the section on group rights focus on special interest groups such as women, children, the elderly, marginalized communities and persons living with disability. The 3 classifications of rights have been addressed under the report with regard to their scope, substance, legal and policy basis. An assessment of the progress made so far in realization of the rights is provided in this report.

The report is divided into 3 chapters: the first chapter, consists of an introductory part that provides an overview of the political, social and economic context in Kenya against the backdrop of the country’s development blueprint, Vision 2030. Chapter 1 also provides the legal and policy framework obtaining in Kenya for the observance of human rights. The chapter looks at the institutions, organizations and individuals who play a critical role in protecting and promoting human rights including human rights defenders, non-governmental organizations and key players in the human rights agenda. The second chapter, titled ‘The State of Human Rights in Kenya’, is the backbone of this report. This chapter analyses and discusses each right, giving the attendant success and challenges that have been witnessed in enforcement while chapter 3 draws the findings from it into actionable recommendations.

In conclusion, it is worth noting that this report has benefited greatly from the input and comments of both internal and external peer review. The report bears witness to the developing clamour for the respect of human rights in Kenya and the steps taken towards achieving a nation respectful of human rights. It is our hope that the report will become an effective resource in the promotion and protection of human rights in Kenya.
During the review period, political developments in Kenya largely focused on the implementation of the new constitution, reforms in the judiciary, the cases at the International Criminal Court (ICC) involving President Kenyatta, his deputy and 4 others, and the general elections held on the 4th of March, 2013. In the run up to the 2013 election following the indictment of the President and his running mate, the ICC process was used to mobilize support for the two as they depicted themselves as the victims and targets by their political rivals. Having assumed office the indictment of the two was challenged on the basis that there was no evidence to support the cases.

Attempts to remit the cases to Kenya were frustrated by the provisions of the Rome Statute. Eventually the President was discharged. On numerous occasions, Parliament debated the ICC issue and passed a resolution for Kenya to withdraw from the Rome Statute. Moreover, the government engaged in the famous ‘shuttle diplomacy’ that saw the then Vice President Kalonzo Musyoka visit 4 African nations to mobilize support for the withdrawal of the cases from the ICC. The country also enlisted the assistance of the African Union to mobilise other African nations to withdraw from the Rome Statute if ICC proceedings against the President were not halted. Nonetheless, the ICC cases proceeded.

The promulgation of the Constitution ushered in a transformational legal document, this notwithstanding the Executive persisted in acting in contravention rather than in compliance. For example in 2011, former President Mwai Kibaki attempted to appoint the Chief Justice, the Attorney General and the Director of Public Prosecution without due process as had been envisaged under the Constitution. An ensuing court challenge by civil society led to the withdrawal of the cases at the ICC. The country also enlisted the assistance of the African Union to mobilise other African nations to withdraw from the Rome Statute if ICC proceedings against the President were not halted. Nonetheless, the ICC cases proceeded.

During the review period, the charges against former Police Boss Major General Mohammed Hussein Ali and former Minister Henry Kosgey, 2 of the 6 Kenyans accused for bearing the greatest responsibility for the 2007 post-election violence, were dismissed on 23rd January, 2012. The case against another accused, former Head of Public Service, Francis Muthaura, was terminated on the 18th of March, 2013 on the grounds that the prosecution lacked sufficient evidence to proceed. Additionally, there were proposals made in 2012 to establish an International Crimes Division in the High Court in order to deal with cases of International Crimes committed by Kenyans. However, over one and a half years since the International Crimes Division (ICD) in the High Court of Kenya was first proposed by the Judicial Service Commission (JSC) in its report of October 2012, there has been little concrete movement towards the actual setting up of the Division. At the point of writing this report, the charges against the President had also been dropped and only 2 accused persons remain: the Deputy President, Hon. William Samoei Ruto and Joshua Sang, a radio journalist. Kenya’s commitment to the ICC and to justice for the victims of the 2007 post-election violence has however been put to question. The ICC prosecutor has often lamented Kenya’s failure to adhere to its obligations under the Rome Statute.

The Judicial Service Commission (JSC) interviewed candidates and finally recommended for the President’s appointment, nominees for the positions of Chief Justice and Deputy Chief Justice. Dr. Willy Mutunga and Nancy Baraza were then appointed to the respective positions in the newly established Supreme Court of Kenya. Similarly, the process of recruiting the other judges of the Supreme Court was conducted by the JSC and eventually saw the appointment of Dr. Smokin Wanjala, Prof. J.B Ojwang, Njoki Ndung’u, Mohamed Ibrahim and Philip Tunoi.

Meanwhile, police reforms geared to give impetus to the new constitutional dispensation were also initiated during the same period. Parliament passed two critical statutes, the National Police Service Act and the National Police Service Commission Act, both of 2011. The Acts brought the Kenya Police and the Administration Police under a single command structure. The National Police Service Commission Act establishes an independent as its membership includes IG and his two deputies) National Police Service Commission whose mandate includes police recruitment, training and disciplinary proceedings. In November 2011, Parliament enacted the Independent Policing Oversight Authority (IPOA) Act to promote accountability and civilian oversight over police conduct.

Part of the legacy of colonization is the Ethnicisation of the Country. This is particularly so in the political realm, where political parties and coalitions are formed along ethnic groupings. Since the advent of multi-party politics, Kenyan elections have been divisive and heavily contested. It documented that the violence in 2007 was triggered by the debate over the results of the presidential election. The Constitution, therefore addresses the issue of management of elections and election disputes. Though less controversial than the 2007 elections, the 2013 post-election period momentarily witnessed some political tensions after the legality of the presidential election outcome was challenged at the Supreme Court by former Prime Minister, Hon. Raila Odinga.

The Supreme Court ruled that the elections had been conducted freely and fairly, paving way for inauguration of the President-elect and his deputy on the 9th of April, 2013. The two are at the helm of the government of the day under the umbrella of Jubilee Alliance which comprises The National Alliance (TNA) of the President and the United Republican Party (URP) of the Deputy President. Together, they are guided by the Jubilee manifesto which has three key pillars: economy (uchumi), openness (uzawa) and unity (umujia).

The Economy

Freedom is said to be the engine that drives sustainable economic growth and provides increased access to prosperity for all people everywhere. Economic freedom is essentially about ensuring human rights. Strengthening and expanding it guarantees an individual’s natural right to achieve his or her goals and then own the value of what they create. A good economy will see to it that citizens have access to basic human rights such as housing, access to medical services, experience the availability of social amenities, education and improved standards of living. In fact, Nobel laureate economist who has made considerable contributions to development economics, Amartya Sen once noted that “Development consists of the removal of various types of unfreedoms that leave people with little choice and little opportunity for exercising their reasoned legacy.”

People crave liberation from poverty, and they hunger for the dignity of free will. By reducing barriers to these fundamental human rights, forces of economic freedom create a framework in which people fulfill their dreams of success. In other words, the greater the economic freedom in a nation, the easier for its people to work, save, consume, and ultimately live their lives in dignity and peace. A nation therefore enhances the rights of its citizens. Kenya has the largest and most diverse economy in East Africa, with an average annual growth rate of over 5% for nearly a decade. The Human Development Index of 2014


5 K Wambua Waiting in the Dark: Kenyan Voices After 2013 Elections (2014) 11

6 See The Harmonized Jubilee Coalition Manifesto

Having come into office after the promulgation of the Constitution of Kenya (2010), the Jubilee administration is expected to fully implement the Constitution and operationalize devolution through political, policy, financial and legal support.
Kenya’s GDP per capita income and growth are linked to structural bottlenecks in the labour market, especially the high share of informal sector jobs and unemployment. In 2013, the GDP grew by 5.7% which was an increase from the 4.6% posted in 2012.9 Fears that the 2013 elections would slow growth in the economy did not materialize. In 2014, the country posted a slight improvement in economic growth at the rate of 5.8%. However, increased terror attacks in recent years have stifled growth in the country’s tourism sector. Socially, the country remains divided along ethnic and political lines. Sufficient national healing and reconciliation has not been realized following the 2007 post-election crisis and the 2013 elections. Efforts to address inequalities and marginalization of both communities and regions are still insufficient. Wide disparities exist in terms of access to basic services such as health, water and education across the geographical regions of Kenya.10 These concerns prompted the government to create the National Cohesion and Integration Commission (NCIC) in 2008 which is mandated to lead the country in addressing ethnic discrimination, negative ethnicity, perceptions of discrimination, and unequal distribution of resources and opportunities. Youth (18–34 year olds) who form 35% of the Kenyan population have the highest unemployment rate of 67%. Over one million young people enter into the labour market annually without any skills some having either dropped out of school or completed school and not enrolled in any college. A further 415,000 jobs are annually after completing training in TVET or at the university. A total of over 1.3 million new employment places have to be created annually to meet this demand. It is also noted that, the skills acquired by the college and university graduates often do not meet the expectations of employers. There is therefore urgent need for the Government to strengthen and scale up successful measures targeting quality skill development and employment creation for the youth.11

1.2 REFORMS UNDER THE NEW CONSTITUTION

1.2.1 National Values and Principles of Governance

The national values and principles of governance in Article 10 of the Constitution are binding on all state organs, state officers, public officers and all persons – therefore, all duty bearers and right holders. Article 10 further states that the national values and principles of governance therein must be applied in interpretation of the Constitution or any other law and in the implementation of public policy. These values and principles have a direct link to human rights because adherence to them enhances the enjoyment of rights and fundamental freedoms. This premise is supported by various international instruments, for instance, General Comment No. 12 on the Right to Food,12 which states inter alia, that good governance is essential to the realization of all human rights including the elimination of poverty and ensuring a satisfactory livelihood for all. Clearly, the weight and significance of our national values and principles of governance possess cannot be gainsaid. However, the reality is that they have not been respected and observed to the standards outlined in the Constitution. The immediate result of this has been rampant corruption in the public and private sectors, blatant impunity and inadequate public participation in important policy and decision making processes. The absence of a national framework to guide public participation13 in governance aggravates this state of affairs.

1.2.2 Devolution

The Constitution establishes a devolved system of government through the creation of two levels of government: the national and county governments, with legislative and executive

19 See Article 174 of the Constitution. It lists 9 objects of national revenue for the implementation of county governments’ development agenda. Additionally, article 174 of the Constitution lists the objects of devolution to include: Fostering of national unity by recognizing diversity. Promoting democratic and accountable exercise of power. Giving powers of self-governance to the people and enhancing the participation of the people in the exercise of the powers of the state and in making decisions affecting them. Recognize the right of communities to manage their own affairs and to further their development and Protection and promotion of rights of the marginalized and minority groups.14 To ensure a stable and elaborate process of entrenching devolution in Kenya, the Transition Authority15 was established as a statutory commission, to facilitate effective allocation of functions and utilization of resources by counties. Devolution has ensured that regions that have historically been marginalized are able to accelerate their development and prosperity. Granted, devolution is envisaged to promote equitable sharing of national resources, but its implementation has not been without challenges.

17 Articles 209 (3) and 202 (2) of the Constitution of Kenya, respectively
18 Article 203 (2) of the Constitution of Kenya
19 See Article 174 of the Constitution. It lists 9 objects of Devolution.
20 The Transition Authority was established under the Transition to Devolved Government Act (No 1 of 2012). Section 37 of the Act provides that the Authority shall be dissolved three years after the first general elections under the Constitution or upon the full transition to county governments, whichever is the earlier.

Kenya National Commission on Human Rights
As highlighted by the Controller of Budget, county governments have low absorption rates for the funds allocated from the national government and some are collecting lower revenues in comparison to their predecessor local governments. Some county governments are culpable for wastefully spending financial resources as evidenced in their frequent domestic and international travels, by particularly Members of County Assemblies and the County Executives in some instances.

County governments still face capacity challenges, especially human resource, which has had an adverse effect on efficacy in public service delivery. This is further exacerbated by the absence of a human rights-based framework for county governments to utilize as a guideline in implementation of their functions as outlined in Schedule IV of the Constitution. Consequently, there has been concern that there is need to refocus energy towards continued realization of human rights and fundamental freedoms in counties in line with devolution.


Human rights are said to be those entitlements that accrue to an individual by virtue of being human. These rights are interdependent, indivisible, universal and interrelated. These rights have been classified into different categories. These are Civil and Political rights and Economic, social and cultural rights. Civil and political rights are often referred to as first generation rights since they involve the interaction of individuals with their human and political rights. These rights encompass the participation of people in the political process and recognizes the inherent powers that people have to determine their form of governance.

Economic social and cultural rights are often taken to be the second generation rights and involve the interaction of individuals with their human and personal development. These rights are geared towards improving the social status of an individual and ensure that basic essentials associated with proper living are accorded to individuals. These rights include the right to healthcare, the right to work, the right to social security, food, water and sanitation and the right to shelter. These rights require progressive realization towards their implementation.

There is yet another generation of rights often referred to as third generation rights or group rights. These rights accrue to vulnerable groups such as children, women, youths, persons with disabilities and the elderly. For the observance of these rights, there is a corresponding duty to ensure that the set rights are respected, protected and promoted. As such, the law provides for mechanisms of ensuring compliance and promotion of these rights by creating duties to individuals. The result is that the government is obligated to respect rights of individuals and ensure that they are enjoyed without limitation. Similarly, citizens are required to take steps to ensure that they do not violate the rights of others. The duty requires parties to refrain from acting in a way that deprivens the people of the guaranteed right.

2.1 CIVIL AND POLITICAL RIGHTS

2.1.1 Access to Justice

Access to justice is a broad concept that has international recognition as laid out in several international instruments such as International Covenant on Civil and Political Rights (ICCPR) and a plethora of other instruments comprising declarations, principles, rules, recommendations and guidelines that bolster the international human rights edifice. These instruments provide for the right to legal representation as a right under the due process of law. Article 2 of the Constitution of Kenya transposes the concept of access to justice as rationalized by the international instruments to the Kenyan jurisdiction. Further, under Article 48, the Constitution provides for access to justice for all persons, thereby imposing an obligation on the judiciary for realization of this right.

In the review period, infrastructural progress has been made with the construction and establishment of new courts and recruitment of additional magistrates and judges. There is continued need to build the capacity of Kenyans to claim justice by raising awareness levels on rights as ignorance and limited understanding on rights remains a major obstacle to accessing justice among the indigent, vulnerable and uneducated people. Being a signatory to the UN Convention on the Rights of Persons with Disability, Kenya is obliged to similarly ensure effective access to justice for persons with disability (PWDs) on equal basis with others. PWDs continue to face several challenges in accessing justice, with obstacles such as inaccessible and lack of legal capacity pretending the justice system. KNCHR has noted the absence of appropriate services to help the police, the judiciary and other government institutions to communicate with persons with psychosocial disabilities and the deaf. Courts do not provide for sign language interpreters for the deaf nor braille facilities for the blind. The key barriers to effective access to justice by people with disability include: unavailability of community support, accessibility to information, social risk factors, negative attitudes and assumptions that persons with disability cannot make decisions.

2.1.1.1 Independence of the Judiciary

The judiciary is one of the three co-equal arms of government. Its chief mission is to resolve disputes in a just manner with a view to protecting the rights and liberties of all, thereby facilitating the attainment of the rule of law ideal. It performs this function by providing independent, accessible and responsive for the resolution of disputes. The judicial system is established under Chapter 10 of the Constitution. Article 159 vests the exercise of judicial powers in the courts and tribunals and sets out principles guiding the exercise of these powers. Among others, the principles include: independence of justice without undue regard to procedural technicalities and protection and promotion of the purposes and principles of the Constitution.

2.1.1.2 Independence of the Judiciary

Article 160 of the Constitution establishes the independence of the judiciary, subject only to the control and direction of the Constitution itself and the law. This gives the judiciary autonomy in conducting its affairs whilst safeguarding it from external interference. With further provisions vested in the High Court authority to hear any cases relating to interpretation of the Constitution, the judiciary has played an important role in implementation of the Constitution by rendering opinions and guidance on various provisions of the Constitution.

Independence of the judiciary has been bolstered further with increased transparency in the appointment of judges, now carried out by the President on the recommendation of the Judicial Service Commission. Approval of the National Assembly is now sought in the appointment of the Chief Justice and the Deputy Chief Justice. Judges are secure from arbitrary removal from office, as the same can only be effected on the basis of mental or physical incapacity hindering performance or breach of code of conduct; bankruptcy; incompetence or gross misconduct or misbehaviour. Even so, it is only the Judicial Service Commission (JSC) that can recommend the process of removal of a judge. These provisions allow for the judiciary to remain independent of external pressures, especially political interference in the past has compromised the bench.

In discharging the mandate bestowed upon it by the Constitution, the judiciary has played an oversight role with respect to governance and accountability which has in turn shaped the human rights discourse and practice in Kenya.

2.1.1.3 Judicial Reform

The first responses to the challenges the judiciary faced in delivering access to justice sought to confront integrity deficits, plug staffing gaps, improve physical infrastructure and eradicate case backlog. The judiciary also undertook to increase the accessibility of courts and the expeditious handling of cases to address backlog. It sought to ensure it was well-equipped and accessible to the public. A Rapid Results Initiative (RRI) was commenced by recruiting a large number of new judges and magistrates. The enactment of the Constitution of Kenya prompted the development of critical legislation and administrative measures that have significantly enhanced the integrity, efficiency and transparency of the judiciary; transforming it into an independent establishment capable of effectively administering justice.
checking impunity, upholding and enforcing the Bill of Rights. Based on the recommendations of the Taskforce on Judicial Reforms Report of July 2010, transformation of the judiciary has seen the establishment of a supreme court, re-establishment of the Judicial Service Commission, restructuring of procedures for appointment, removal and vetting of judges and magistrates in the transitional period, and revised remuneration, benefits packages and increased allocation to meet the judicial budget and handing down important decisions on electoral processes that helped successfully steer an otherwise perilous transition.

In this regard, five groups of cases are important: the election decision; the integrity decision; the electoral boundaries matter; the presidential election petition; and the 188 election petitions relating to counties and the national legislature. All which have served to rebrand the judiciary and improve public confidence in its ability to dispense justice.

Judicial reforms have resulted in initiation of administrative and judicial processes over the past year to conclude cases that have clogged the courts for years. An initial analysis of the case backlog revealed that files recorded as pending were no longer active and could be closed. Although the backlog in the Environment and Land Division was estimated at 5,000, a baseline survey established that 16,907 new cases had been filed between the years 2000 and 2011. Within 100 days, this backlog had been reduced by 3,419 cases. In the Commercial and Admiralty Division where a baseline survey surfaced 29,000 cases, 27,000 cases were removed from the backlog. There were similar initiatives in the Constitutional, Human Rights and Judicial Review, Criminal and Family Divisions. Out of the 58,800 cases captured as backlog in these courts, 31,260 were disposed of in just 100 days. In the Constitutional and Human Rights Division, a baseline survey surfaced 6,000 files and within 100 days, a total of 590 cases had been cleared. Despite these elaborate and timely efforts, the judiciary is still challenged with backlogs and a shortfall in court stations and judicial officers.

In response to the shortage of judicial staff, the Judicial Service Commission embarked on an aggressive recruitment programme in the reporting period. 109 magistrates were recruited, 278 already in just 100 days. In the Constitutional and Human Rights Division, an additional 36 judges were hired for the High Court, 12 for the Industrial Court and 15 for the Land and Environment Court. These 63 additional judges increased the accessibility and efficiency of the High Court, bringing the total number of High Court judges to 112. 7 High Court judges were elevated to the Court of Appeal after successful interviews by the JSC. As provided by Section 7 of the Judicial Service Act, 83 legal researchers were appointed to provide judicial support. However, only 63 took up their appointment. A further 85 researchers are expected to be hired.

On the 9th May, 2012, the Judicial Service Commission appointed a committee whose mandate included examining the modalities of establishing an International Crimes Division of the High Court for post-election cases and expanding jurisdiction of the Division to also deal with international and transnational crime. The jurisdiction of the Division shall include post-election violence crimes, crimes against humanity, genocide, war crimes, human trafficking and organized crime.

2.1.4 The Judicial Service Commission and its reform.

The Judicial Service Commission (JSC) is established under Article 171 of the Constitution. It is constituted by 11 members, the initial team having been appointed in December, 2010. The roles of the commission include review and recommendations for conditions of service, discipline of judicial officers and staff, programming education and training of judges and judicial officers, and advising the national government on effective administration of justice. The oversight role of the JSC is however limited by the administration of the Judiciary Fund.

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Frustration from the political class in the form of budget cuts and reduced public confidence, particularly in the aftermath of the Supreme Court decision in the presidential election petition, are some of the challenges that the judiciary has to contend with.

2.1.5 Reforms guided by the Judicial Transformation Framework

The judiciary, through the Judiciary Transformation Framework 2012-2016, put in place various strategies to enhance access to and expedite delivery of justice. Positive outcomes from implementation of the framework include an increase in the number of judicial officers to enhance timely access to justice; and the building of new courts to reduce distance to courts. The number of court stations has also continuously received a boost. In 2011, 4 High Court stations and 2 Magistrate Courts were added to the existing ones.

In rural areas, access to justice has been accelerated by introduction of mobile courts in an effort to increase the judiciary’s reach to people in remote areas. An effective system has been further established to provide information on courts’ jurisdiction, fees and calendar; a litigant’s charter has been drawn and the costs of accessing judicial services reduced. Other strategies taken to transform the judiciary include an effort to make courts less intimidating by establishing a customer care desk at every court station. The Judiciary Transformation Secretariat, in conjunction with the Judiciary Training Institute, offered specialized customer service skills training to 108 members of staff who had been designated to run customer care desks between 17th and 22nd September, 2013.

The Judiciary Transformation Framework also acknowledges the complementary role of alternative justice systems to which many Kenyans turn to. Indeed, the Constitution urges the judiciary to promote the usage of such systems so long as they are not repugnant to justice and morality. In response to this call, JTI partnered with Usalama Forum to organize a workshop to explore ‘The Role of Councils of Elders in Promoting Access to Justice in Isiolo County.’ The workshop, which was held between June 24 and 26, 2013, brought together stakeholders working on promoting alternative justice systems from different government and non-government organizations.

Massive investment in growing technological, organizational, institutional and human resource capabilities have raised efficiency in the judiciary. Other key reform measures include the establishment of the National Council on the Administration of Justice, which creates...
a unified justice sector that serves the people while upholding the values of collective responsibility, interdependence, service, constitutionalism and mutual accountability. Section 35 of the Judicial Service Act, 2011, empowers the Council to formulate policies relating to the administration of justice; implement, monitor, evaluate and review strategies for the administration of justice; facilitate the establishment of Court Users Committees (CUCs) at the county level; and mobilize resources for purposes of the efficient administration of justice.

2.1.6 Development of the Judiciary Training Institute

In line with the Judiciary Transformation Framework, the Judiciary Training Institute (JTI) was established in 2008 with the mandate of providing judicial training for judges and magistrates. This mandate is exercised by meeting the training, research and capacity development needs of judicial staff. This is done through public lectures, research papers and publications targeting the staff.

A case in point is when the JTI conducted induction programs for the new legal researchers.

Through the JTI, all judges and magistrates serving in all courts across the country undergo regular training in courses such as substantive law, advances in evidence and procedure, improvement of judicial skills, among others. In a bid to boost public confidence, the judiciary has utilized the institute to reinforce a change of culture through trainings. JTI has also started a compulsory continuing judicial education program for all judges and magistrates.

Under this program, all judicial officers will be required to attend at least one training each year to ensure they are updated on developments in law and judicial practice. The table below shows some of the trainings undertaken within the reporting period. Through the Judicial Training Institute, the judiciary is developing a sentencing and bail handbook that will be made available to all judicial officers. This handbook is expected to play a great role in promoting uniformity in exercise of judicial discretion on granting of bail, thereby enhancing access to justice.

### Table 2.3: Schedule of mobile and traffic courts during the reporting period

<table>
<thead>
<tr>
<th>Station</th>
<th>Mobile Court</th>
</tr>
</thead>
<tbody>
<tr>
<td>Garissa</td>
<td>Dadaab, Modogashe, Ijara, Bangale</td>
</tr>
<tr>
<td>Kajiado*</td>
<td>Loitoktok</td>
</tr>
<tr>
<td>Kitui*</td>
<td>Zombe</td>
</tr>
<tr>
<td>Kabarnet</td>
<td>East Pokot</td>
</tr>
<tr>
<td>Wanguru*</td>
<td>Karaba</td>
</tr>
<tr>
<td>Homa Bay*</td>
<td>Mbita</td>
</tr>
<tr>
<td>Lamu*</td>
<td>Faza Islands Mpeketoni</td>
</tr>
<tr>
<td>Maralal</td>
<td>Wamba</td>
</tr>
<tr>
<td>Marsabit</td>
<td>Laisamis/Merille</td>
</tr>
<tr>
<td>Lodwar</td>
<td>Lokichar, Lokitaung</td>
</tr>
<tr>
<td>Isiolo</td>
<td>Merti, Archers Post</td>
</tr>
<tr>
<td>Kapsabet*</td>
<td>Songhor</td>
</tr>
<tr>
<td>Garsen</td>
<td>Kipini</td>
</tr>
<tr>
<td>Kimilli*</td>
<td>Kapsokwony</td>
</tr>
</tbody>
</table>

### Table 2.4: Induction workshops for new judicial staff between July 2012 and June 2013

<table>
<thead>
<tr>
<th>Training Activity</th>
<th>Dates</th>
</tr>
</thead>
<tbody>
<tr>
<td>Induction for newly-appointed Resident Magistrates</td>
<td>July 30 - August 10, 2012</td>
</tr>
<tr>
<td>Induction for newly appointed High Court Judges</td>
<td>September 18 - 23, 2012</td>
</tr>
<tr>
<td>Induction for newly appointed Judges of Court of Appeal</td>
<td>December 3 - 7, 2012</td>
</tr>
<tr>
<td>Induction for Registrars, Law Clerks &amp; Legal Researchers of the Supreme Court of Kenya</td>
<td>April 22 - 26, 2013</td>
</tr>
<tr>
<td>Induction for Drivers</td>
<td>May 22 - 26, 2013</td>
</tr>
<tr>
<td>Induction for Kadhis</td>
<td>June 4 -9, 2013</td>
</tr>
<tr>
<td>Induction for Supply Chain Management Officers</td>
<td>June 19 -23, 2013</td>
</tr>
</tbody>
</table>

43 Republic of Kenya (n 27 above) 153.


45 Judiciary of Kenya (n 35 above) 108.

46 Judiciary of Kenya (n 27 above).
2.1.1.7 Judges and Magistrates’ Vetting

In a move to effect relevant changes recommended by the Task Force on Judicial Reforms, the judiciary commenced a vetting process to determine the suitability of sitting judges and magistrates. There had been many complaints by the public on corruption, bias and discrimination by judicial officers at all levels of the court hierarchy. The Kenya Judges and Magistrates Vetting Board (JMVB), was formed to purge the judiciary of culpable judges and magistrates in a transitional measure aimed at restoring public confidence in the institution.

The JMVB was established by the Judges and Magistrates Vetting Board Act of 2011 to vet the suitability of all the judges and magistrates in office on the effective date of the Constitution, to continue to serve in accordance with the values and principles set out in the Constitution. Judges and magistrates found unsuitable were dismissed. This has enhanced integrity in the judiciary.

The JMVB vetting process commenced on 23rd February, 2012 with the most senior judge of the Court. It has carried out its work effectively albeit with challenges. Judicial officers aggrieved by the decisions of the board filed petitions in court with challenges. Judicial officers aggrieved by the decisions of the board filed petitions in court with challenges. Judicial officers aggrieved by the decisions of the board filed petitions in court. It has carried out its work effectively albeit with challenges.

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2.1.1.8 Legal Aid in Kenya

The Population of Kenyan remand prison facilities consist mainly of people are who have been arraigned before the court, but keep having their cases postponed, for lack of legal representation. Many of these are people who would be out on bond, if only they had the means to arrange for it. In the Coast, there are tens of thousands of so-called ‘squatters’ who - in the worst case scenario - are entitled to keep their land under ‘adverse possession’ laws; but such people are regularly evicted by hirelings of land owners waving court orders legally obtained in a court action in which the ‘squatters’ had no representation.

To deal with the challenge of cost of accessing legal services, there is a proposal to set up a national legal aid scheme to be accessed by the indigent. The board itself also sought to suspend vetting of judicial officers subject to complaints arising after the promulgation date of the Constitution and there were reports in some quarters that sacked judicial officers continued to receive their pay even after their dismissal. Moreover, strict transitional time lines have affected requirements of a thorough hearing. There has also been inadequate transparency in the vetting process, with the public often kept in the dark about hearings. On the other hand, where information on vetting sessions was available, members of the public showed reluctance to offer information or raise complaints. The process is still on course and at the time of this report, the Board is vetting magistrates having finalized with the High Court, the Court of Appeal and Supreme Court judges.

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issues of public interest. Though the framework is yet to be put in place, many paralegals in Kenya have stepped in to provide an important source of legal assistance that would otherwise lack due to the absence of a sufficient cadre of lawyers. Kenya is home to several paralegal networks which have received some legal training and work for free in many communities. The paralegals in Kenya spread awareness of human rights and make referrals to appropriate services. In a few cases, paralegals serve as monitors for legal aid organizations, sending them information collected from the grassroots level and submitting monthly reports. The place of legal aid is well-anchored in the Constitution through various indirect provisions and frameworks. However, the scope of this right can be viewed through different prisms. Legal aid can be seen through the lenses of access to justice, fair hearing, fair administrative action, ensuring the rule of law is upheld as well as ensuring equal rights between people.

The Constitution of Kenya obliges the state to ensure access to justice for all persons and that if any fee is payable, the state is to ensure that the fee is reasonable and does not impede access to justice. By this provision, the Constitution offers the opportunity to realize the expansive ideal of legal aid through inclusion of other types of assistance. The Constitution goes further to address the need for legal aid by requiring accused persons to be assigned advocates by the state if substantial injustice would otherwise result, and to be informed of this right promptly.

Access to justice in Kenya is just emerging from the doldrums. From a historical perspective, Kenyans were not conversant with their basic rights, in turn affecting their ability to resort to the judicial system for dispute resolution. They alternatively looked to traditional or informal systems for recourse; which did not have a clear institutional linkage with the formal justice system, thereby occasioning instances of non-conformity with human rights principles. Legal services have also long been expensive for the larger population, compounded by court fees and procedures that historically dragged on for long periods, thereby attracting more costs to litigants. It was on this premise that efforts to establish a legal aid framework began in the 1980s. Since then, some success has been recorded such as the establishment of the Legal Aid Steering Committee, the Paralegal Support Network (PASUNE), the National Legal Aid and Awareness Program (NALEAP) and the provision of legal aid by several civil society organizations.

Efforts to improve access to justice have culminated in the Legal Aid Bill (2013). The Bill introduces various promising strides for the establishment of a national legal aid framework. There is proposed a national legal aid service that would establish and administer a national legal aid scheme and alternative dispute resolution. The scheme is to be founded on the objects of affordability, accessibility, sustainability, credibility, and accountability. The service would additionally cater for the representation of successful applicants, remuneration for the work of legal aid providers, and manage its own services and expenses from a legal aid fund. The Bill provides for the process of application for legal aid, review and appeal of unsuccessful applications and withdrawal of legal aid. The service would also play the critical role of creating awareness on rights through the publication of a legal aid guide biennially. The guide would contain simple language, relevant legislation, regulations, policies, directives and services available. The Bill further provides for accreditation of paralegals and intermediary agencies offering legal aid services, thereby providing structure to the sector that has long served to bridge the gap in access to justice.

While the Bill heralds a new dawn for increased access to justice, there are still a few concerns that need to be addressed before the Bill is enacted into law. Firstly, the creation of a centralized national legal aid service at the capital city would be sub-optimal, considering the benefits the proposed framework would yield if decentralized to each of the 47 counties. That the judiciary is not accorded any discretion to order provision of legal aid services to deserving cases and litigants is a
perhaps also a weakness in the Bill. Several clauses of the Bill require clarification. For instance, the Bill is unclear on the time frame for feedback following an application for legal aid. There is also need to clarify whether a beneficiary continues to enjoy support from the legal aid scheme during appeal process.

21110 The Criminal Justice Sector

Release on Bail / Bond Terms

Since independence, bail and bond have often been given at the discretion of the presiding judge or magistrate. There are no set guidelines for the grant of bail or bond. This discretion has not been guided and in some cases has occasioned a miscarriage of justice or has exposed the judiciary to criticism. In the past it has been interpreted that in discharging this function, courts have not been considerate to the type of offence that a suspect has been charged with. The police have come out criticizing the judiciary for what they termed as lack of support since suspects considered to be dangerous have been released. Moreover, there has been issues as to whether certain classes of offenders deserve bail or bond such as suspected terrorists, suspected murderers and also corrupt individuals. Additionally, the lack of laid down rules on the grant of bail or bond has led to enormous inconsistencies in setting the bail conditions. In similar offences, it is possible to find that courts have given accused persons different amounts of bail and this has not augured well with litigants and the accused persons.

The Constitution under Article 49 (h) provides for a qualified right to bail and/or bond for all suspects; even those accused of capital offences and other serious crimes. The Police and courts grappled with the same issue in their efforts to respond to crime in a number of ways; retributive, deterrent and rehabilitative. This has not been well articulated in Kenya’s justice system. Other issues that heightened confusion on the scope of the right to bail include interpretation of Article 25 of the Constitution which provides the right to a fair trial as one of the fundamental rights that may not be limited. In some instances, this was perceived as according an absolute entitlement to bail and bond to accused persons. It is however noteworthy that the Constitution does not mention the provisions on the entitlement to bail and bond as a component of the right to fair trial under Article 50. The right to bail and bond is provided under Article 49 as comprising part of the general rights of arrested persons. As such, this right can be subjected to limitation by statutes.

Sentencing Regime

58 TJRC (n 98 above) 71-82. Also see TJRC Kenya Report of the Truth, Justice and Reconciliation Commission 1 (2013) 55 at paragraph 57: “The Commission faithfully performed these functions. On identifying and specifying victims of violations, the Commission ensured that the report a list of victims of various violations committed during its mandate period. The list contains the names of victims who submitted their cases to the Commission and as such, it is not a complete list of all people who suffered violations during the mandate period. In relation to determining ways and means of redressing the suffering of victims, this report contains a catalogue of recommendations aimed at repairing the harm suffered by victims. The Commission’s measures intended to ensure that victims have had a platform for non-retributive truth-telling are discussed in detail in the next chapter.”

The key findings of the TJRC Report were that the previous governments, from the colonial to the Kisubi administration in 2008, were responsible for gross human rights violations including massacres, torture, assassinations, extrajudicial executions, illegal and irregular allocation of public land. It is critical to also note that close to 50% of memoranda and statements received by the TJRC were claims on land. Land was identified as the single most important driver of ethnic tension and conflict in Kenya.

The TJRC Report made broad findings of categories of human rights violations and proposed that victims of the violations receive reparations. Recommendations of particular types of reparations to specifically identifiable victims falling under Section 6 (c) and (1) of the TJRC Act were made but the TJRC failed to operationalize the Reparations Fund, instead recommending that it be established by Parliament. The Commission admits to this in the report and recommends that an implementation committee oversees the reparations mechanism.56 Lack of political goodwill, vested interests and proposed parliamentary amendments to the report which fail to address the reparations mechanism as proposed by Section 42 of the TJRC Act and the report itself, have all contributed to the successful operationalization of the TJRC recommendations. Lessons from Kenya’s transitional justice journey indicate that the concept and objectives are good, but the process of implementation is often compromised by political imperatives and the temptation to sidestep costly reparations. The need to examine and learn from these lessons to avoid deferment of the objectives of learning the truth and achieving community reconciliation is self-evident.

58 TJRC (n 98 above) 71-82. Also see TJRC Kenya Report of the Truth, Justice and Reconciliation Commission 1 (2013) 55 at paragraph 57: “The Commission faithfully performed these functions. On identifying and specifying victims of violations, the Commission ensured that the report a list of victims of various violations committed during its mandate period. The list contains the names of victims who submitted their cases to the Commission and as such, it is not a complete list of all people who suffered violations during the mandate period. In relation to determining ways and means of redressing the suffering of victims, this report contains a catalogue of recommendations aimed at repairing the harm suffered by victims. The Commission’s measures intended to ensure that victims have had a platform for non-retributive truth-telling are discussed in detail in the next chapter.”

Key element of the criminal justice system is punishment. The sentencing policies therefore seek to respond to crime in a number of ways; retributive, deterrent and rehabilitative. This has not been well articulated in Kenya’s justice system.
and therefore there is need to develop sentencing guidelines for definite and consistent mode in sentencing. Sentencing has transformed from being very retributive to take up a more humane approach.60 While judges and magistrates hold the discretion when it comes to sentencing, mitigation and other underlying issues have found a place in our courts where they are considered before a sentence is passed. Ideally, a sentence in its application should act as a punishment, a deterrent to future commission of crime, a form of treatment and as a measure of protection to the society.

Kenya has provisions for both mandatory and discretionary sentencing. However, our courts have been plagued with disparity and disproportionate sentencing patterns.

Substantial evidence indicates that gross sentencing disparities exist among similarly situated individuals convicted of the same offences.61 The lack of sentencing guidelines in the period under review continued to propel these disparities, uncertainties, and lack of uniformity in sentencing. This has led to discrimination as offences are not treated equally and the inverse is that individual offenders are also not treated equally. Additionally, there is the right to have mitigating factors taken into account. Mitigating factors are part and parcel of rights that are guaranteed under the rights to fair trial. As such by failure to the courts to take the mitigating factors into account amounts to a violation of rights of an accused person to a fair trial as encapsulated under Article 50 of the Constitution.

Towards the end of the review period, on the 23rd June 2014, the Chief Justice gazetted a task force mandated to look into past sentencing patterns with a view to improve dispensation of justice by the judiciary.62 The team was tasked to review past sentencing patterns, policies and outcomes and give recommendations on how to reduce unwarranted disparity, increase certainty and uniformity and promote proportionality in sentencing. The team was further expected to come up with a plan for suggested interventions that will include educating and engaging members of the public and other stakeholders on the sentencing system and its effectiveness.

Rights of arrested persons and detainees

The Constitution of Kenya (2010) heralded a comprehensive Bill of Rights that, for the first time, recognized the rights of arrested persons. Article 51 of the Constitution is specific on the rights of persons detained, held in custody or imprisoned. In April 2011, a task force to draft the Bill on the rights of persons detained, held in custody or imprisoned was gazetted and subsequently prepared the Persons Deprived of Liberty Bill (2012).

The Bill provides for humane treatment of persons detained, held in custody or imprisoned, and gives effect to the provisions of international human rights instruments and rules on such persons.63 Protection of Victims Bill was also prepared for the protection of rights and welfare of victims of crime. Furthermore, efforts to review the laws governing prisons and borstal institutions were stepped up, with the Kenya Prisons Service taking the lead in convening stakeholders into a working group for the review of the Prisons Act64 and the Borstal Institutions Act.65 Realization of the much sought reforms in the sector has not however been without challenges; the first being lack of political goodwill. This saw the Persons Deprived of Liberty Bill shelved for quite a while after the taskforce66 forwarded it to the AG with no progress made towards its enactment into law. The Bill was later revised in 2014 and brought before Parliament for debate and subsequent adoption into law, later the same year.

Conditions of Detention

The conditions of detention in Kenya (both in police custody and prisons) in the review period continued to be harsh and life-threatening, particularly in relation to overcrowding, lack of appropriate health services, insufficient food, degrading clothing and bedding, lack of clean water, infectious diseases, imposed homosexuality and high levels of violence, among others. The population in Kenya’s penal institutions ranges from 50,000 to as high as 60,000 inmates, yet the institutions’ holding capacity stands at 22,000. Kenya Prisons Service reported a total prison population of 53,163 as of May 2014. Of these, approximately 36.5% were in pre-trial detention. More than 90% of the prison population was male. The country’s 110 prisons had a designated capacity of 24,794 inmates. Nairobi’s Industrial Area Remand Prison, which holds prisoners yet to be sentenced, has a designated capacity of 3,000 but was well over capacity for most of the year.

A 2009 prison assessment by the KNCHR concluded that torture, degrading and inhuman treatment, unsanitary conditions, and extreme overcrowding were endemic in prisons. Prison staff routinely beat and assault prisoners, disregarding their rights as protected by the Constitution and international human rights obligations.67 In the period under review, KNCHR notes that reforms had been embraced in Kenya prisons. There was remarked improvement in sanitation, inmates’ welfare including sanitation, meals and accommodation. There was also remarkable improvement in the welfare of officers which included housing and fairly improved working conditions. However, the reforms were not uniform and the pace depended mainly on respective prison management.

The government, human rights groups, civil society and international observers all noted that acts of torture and ill-treatment were seldom investigated and prosecuted, and that the perpetrators were either rarely convicted or were sentenced to lenient penalties not commensurate to the grave nature of their crimes.68 Kenya has committed to implement the UN Standard Minimum Rules for the Treatment of Prisoners but domestic law and practice during the period under review failed to provide protective and comprehensive legislative, administrative, judicial and other protections necessary to prevent acts of torture and ill-treatment.

64 Cap 90, Laws of Kenya
65 Cap 91, Laws of Kenya
66 Task force to draft the Bill on the Rights of persons detained, held in custody or imprisoned

Access to basic amenities

The Prisons Act, Cap 90 Laws of Kenya, provides that a prisoner shall be supplied with prison clothing and bedding which shall be for warmth and health.69 However, in the review period, prison uniforms and beddings were in inadequate supply in most prisons. In some facilities, mattresses were stacked up in stores with prisoners unable to use them due to prison congestion that had led to lack of space to lay down the mattresses. This forced inmates to share the available mattresses; one being shared by up to three inmates at a time. In other prisons, uniforms and beddings were too tattered to keep out the cold, yet some people were forced to sleep on the cold floor. This compromised the health of inmates, exposing them to respiratory infections and illnesses that could spell over to officers who come into direct contact with the inmates. These included Kisi, Kericho and Kodiaga prisons mainly because of the high population of inmates. However, prisons such as Hola, Langata Women Prison, Kismu Women prison and Malindi Women prison showed commendable cleanliness in cells and wards where inmates are held.

A prisoner’s health is directly related to the overall health status of society. If the health of prisoners is neglected, prison serves as a reservoir for transmission of diseases to the general society when inmates come and leave. In spite of incarceration, prisoners retain their entitlement to a standard of medical care which is at least equivalent to that provided in the wider community.60 Part III of the Prisons Rules, as contained in Cap 90, focuses on provision of health services for inmates.

The rules require each prison to have a dispensary and the Director of Medical Services to assign a medical officer to each prison. Besides providing curative services, the medical officer is also required to advise prisoners on preventive measures and how to deal with disease outbreaks and control of vermin within prisons. In the review period, a majority of prisons had a dispensary and a clinical officer stationed in them - pointing to a slight improvement in the provision of healthcare in most prisons. Prisons that did not have a health facility

69 Cap 90 Laws of Kenya, Rules 46 and 47
were in close proximity to a dispensary of a district hospital where inmates could easily access medical care, including emergency treatment. Kenya Prisons Service had begun employing medical officers within its ranks to boost availability of health personnel at station level. Despite all these efforts, overcrowding, unhygienic conditions, and inadequate medical treatment contributed to prisoner deaths, with 187 prisoners reported to have died in 2011 alone – majority of them from infections or other generally preventable causes.77

Children accompanying mothers

The number of children accompanying mothers to prison was found to be between 600 and 800 during the reporting period. As living conditions and environment of most prisons are deplorable, the children accompanying mothers had to contend with these grim conditions in which their mothers live. The children are not accommodated separately from their mothers. Day care services in prisons are not available, limiting the amount of play and outdoor activity that these children are exposed to. There were attempts however by the government, with the support of partners, to put up a day care centre for the children at Lang’ata and Kisii Women Prisons. Unfortunately, other prisons accommodating children do not have these facilities.78 In prisons where children have to share wards with their mothers, though not documented, there is a great risk of negative influence such as the children learning bad habits like foul language, witness or experience sexual abuse and contract of communicable diseases. Equally bad are the conditions of detention for child offenders which did not show any remarkable improvements in the reporting period. Child offenders were still being cuffed while on transit to court despite regulations prohibiting the practice. Mixing of children in custody with adult offenders continued; the attendant risk of abuse of the children by the adult offenders notwithstanding. Some of the children ended up being used as drug traffickers.

Child offenders

Equally bad are the conditions of detention for child offenders which did not show any remarkable improvements in the reporting period. Child offenders were still being cuffed while on transit to court despite regulations prohibiting the practice. Mixing of children in custody with adult offenders continued; the attendant risk of abuse of the children by the adult offenders notwithstanding. Some of the children ended up being used as drug traffickers.

The country continued facing a challenge in detention of girl offenders owing to the lack of a detention facility to accommodate girls. Child offenders are held in Borstal institutions and only two such institutions are available in the entire country which only admit boys only. In many of the female prisons visited, there was a considerable number of girls below the apparent age of 18 years held together with older women. This was complicated by the fact that age assessment and determination is a slow process since the approved medical personnel are few and have a huge caseload to work on. In remand homes, children were being held for more than the required one month due to court processes taking longer. There was no form of formal education going on in child rehabilitation schools and remand homes. The practice in Remand homes has been to teach the children life skills and general knowledge subjects except for those about to sit national exams, who are taken through guided revision for two or three hours a day. This situation persisted within the reporting period, jeopardizing enjoyment of the right to quality education by children.79

Sexual assault in prison

In the period under review, it was established that sexual assault was a big challenge in prisons, though barely acknowledged by prison management. Death row inmates expressed concerns that stress in prison caused prisoners to engage in same sex relationships or to trade sexual favours, leading to high rates of HIV infection as well as other sexually transmitted infections. Prison management refused to acknowledge cropping up of the practice in prisons, thereby hampering provision of condoms to curb the spread of HIV/AIDS and other sexually transmitted infections. This plight is aggravated by inadequate food, especially for inmates requiring special nutrition like lactating mothers and persons living with HIV. Inmates were at times forced to trade sexual favours for food.

Work environment for warders

Poor terms of service and conditions of work for prison officers continued to impact negatively on the performance of prison warders. Though the government slightly improved remuneration, the officers proved it still inadequate for their daily needs in view of the rising cost of living that was witnessed in the period under review. Housing was cited as a big problem in the period, despite government efforts to upgrade living conditions for the officers. The state budgetary allocations to the Prisons Service were not adequate to support day to day operations of the institution while also adequately compensating the officers for their efforts. Prison warders could not rent houses outside the prison compound for security reasons; yet what were available for their dwelling in most towns were mabati (corrugated sheet) structures that get either too cold or too hot depending on the weather. In rural prisons, grass- thatched, mud-walled houses shared in most cases by at least two families in one house characterized accommodation facilities for prison officers and their families. Fresh prison recruits who left college for prison institutions were housed in unpartitioned halls, denying officers the right to privacy. Some of the prison houses lack electricity despite being located in the main prisons situated in our cities.80 Prison officers received a medical cover scheme which allows them and their families receive both in and outpatient medical care at no individual cost. Construction of decent houses for officers had begun, though the units under construction and those completed were inadequate to shelter all officers.

Reform process

Kenya was slow in implementing recommendations towards the reform of places of detention. Legal reforms expected to have been effected soon after the promulgation of the Constitution dragged on for years with little or no progress made. By the end of the review period, various legislative processes, among them review of the Prisons and Borstal Institutions Acts; the enactment of the Bill on the Rights of Persons Deprived of Liberty and the review of the Probations Act had not materialized.

Small-paced strides in improving the conditions of detention could however be seen in the slight increase in the supply and allocation of blankets and uniforms for both officers and inmates, including the introduction of sweaters for inmates in cold weather regions. Notwithstanding the strides, there were challenges in allocation of the blankets and clothing occasioned by inadequacy. Budgetary constraints continue to plague the prison department slowing down the much needed reforms. An open door policy has been put in practice, opening up the prison facilities to members of the public and well-wishers. Rehabilitation of young offenders (and to some extent adult offenders) adopted contemporary methods, including tapping into the entertainment industry.81

21.1.11 Witness Protection

The Witness Protection Agency was established in 2008. Regulations to facilitate efficient and effective implementation of the agency’s mandate were gazetted in 2011 vide Legal Notice No.99 of 2011.82 The object of the agency is to establish a framework and procedures for providing special protection to persons in possession of important information. The basis of protection is potential risk or intimidation attendant on cooperation with the prosecution or other law enforcement agencies. The agency, which is housed within the Office of the President, has its board consisting of senior government officials including the Attorney General, the Head of the National Police Service

77 http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm#wrapper (accessed 7 June 2013)
81 A group of young offenders from the Kamenti Youth Correctional and Training Center contested in a dance show, Sakata East Africa where they showcased their dancing skills alongside other youths from the region. This is the first time in history that inmates were allowed to enter such competition or afforded a platform where they could share equal opportunities with free society. This further enhanced the freedom of association and assembly for the youthful offenders.
and the Head of the National Intelligence Service. This top-level public servant composition of the board has led to intimidation of witnesses who fear that rather than protecting them, the agency might further jeopardize their security, particularly in instances where they have evidence against the state.76

The agency has faced numerous challenges since its inception in 2011, among them financial constraints. In 2012, it was allocated 196 million shillings against the 450 million it had requested in its budgetary proposals submitted to the National Treasury. Scarce resources meant that witnesses were often asked to protect themselves. Funding constraints had the agency ask witnesses to bear the cost and inconvenience of protective measures by either changing their names, mobile numbers or keeping a low profile.77 This led to the agency playing more of an advisory role than its majorly payment of salaries and execution of its mandate was a new concept in the country that are few. Getting qualified staff was a challenge for the agency within the reporting period, which also served as a new concept in the country that are few. Therefore, there is need to delink the WPA from the state probably under the ODPP or the Judiciary and ensure its autonomy.78

Within the reporting period, which also served as a new concept in the country that are few. The agency has faced numerous challenges since its inception in 2011, among them financial constraints. In 2012, it was allocated 196 million shillings against the 450 million it had requested in its budgetary proposals submitted to the National Treasury. Scarce resources meant that witnesses were often asked to protect themselves.

2.1.2 Right to Life

“All life has inestimable value. Even the weakest and most vulnerable, the sick, the old, the unborn and the poor, are masterpieces of God’s creation, made in his own image, destined to live forever, and deserving of the utmost reverence and respect.” (Pope Francis July 28, 2013).

The Constitution guarantees the right to life and goes further to stipulate that nobody shall be deprived of his life except through the due process of the law.

2.1.2.1 The Legal Framework

Termination of Pregnancy

The Constitution of Kenya

Article 26 of the Constitution provides protection to life of every human being in Kenya. This is a basic right that is interdependent with other rights crucial for the preservation and enhancement of human life. In view of sanctity of life, the Constitution has declared abortion illegal unless there is need for emergency treatment; the life or health of the mother is in danger; or is permitted by any other written law. Article 43(1) of the Constitution amplifies the right to life by guaranteeing the right to the highest attainable standard of health, including reproductive health care. The Constitution further provides that a person should not be denied emergency medical care and in Article 53(1) (c), that all children, including children with disabilities, have the right to basic nutrition, shelter and health care.

Penal Code, Cap 63 Laws of Kenya

The right to life is protected under the Penal Code through criminalization of manslaughter, murder, suicide, infanticide and failure by any person charged with the duty of providing for another person the necessities of life to so provide, thus occasioning the loss of life or health of that person.

2.1.2.2 Emerging Issues that Affect Realization of the Right to Life

Extra-Judicial Killings and Disappearances

Since 2011, KNCHR in partnership with civil society organizations (CSOs) has continued to receive complaints of disappearances and extrajudicial
2.1.3 Freedom of Information, Expression and Media

It is increasingly being recognised that states are under an obligation to take practical steps – including through legislation, to give effect to the right to freedom of information. This right has been provided for under Article 35 (1) of the Constitution which also binds Kenya to a series of international and regional legal instruments including the International Covenant on Civil and Political Rights and the African Charter on Human and Peoples’ Rights governing free expression. This goes to say, information is not just a necessity for people; it is an integral part of good governance and a catalyst for democracy. Informing the public of their rights and promoting a culture of openness within government is essential if the goals of the freedom of information legislation are to be realised. Information then allows people to scrutinize the actions of a government and is the basis for proper, informed debate of those actions. It is with this concern that a government is vetted on the premise of how it facilitates and promotes the openness of its operations, and the use and expression of information among its citizens.

Freedom of expression, media.

Long after the promulgation of the new constitution and efforts towards aligning the existing laws with the same, the country is at this point, the State is yet to enact a legal framework that directly and holistically addresses the right to access information. The review period is therefore not only highlighted by lack of such a framework, but also marked with the use of laws that are out of tune with the spirit and letter of the new constitution. Such laws, in a supplementary role, govern the collection, storage and disclosure of public information. They include, Books and Newspaper Act, Official Secrets Act of 1968, the Public Archives and Documentation Service Act of 1966 and the Statistics Act of 2006. Of these, the Defamation Act and the Official Secrecy Act remain the most restrictive laws in the access of information and its freedom of expression.

In this period, statues that have great bearing on the right to access of information were drafted - The Access to Information Bill, 2013 was forwarded to the Attorney General for publication to parliament and the Freedom of Information Bill, 2012 has for some considerable length of time been pending in Parliament. Others were the Kenya Information and Communication (Amendment) Bill 2013 (KICA) and the Media Council Bill 2013. KICA bill and the Media Council Bill 2013 contained provisions that curtailed press freedom. KICA sought to provide for the body that is free of external influence and that will set broadcasting standards.

In the index to the killings of Hassan Ali Guyo, a human rights defender in Northern Kenya, in August 2013, he was a Program Director at Strategies for Northern Development (SN&D) and was shot dead by an army officer as he documented the use of excessive force and other human rights violations against demonstrators in a joint operation of the Kenyan Defence Forces and the National Police Service. Senior government security officers had, in that same year, made several public announcements threatening or encouraging the use of lethal force by police officers. For example, in May 2013, Deputy President William Ruto told police officers to be ready while dealing with criminal gangs. This was in reaction to spiralling insecurity reports in the media. These kinds of pronouncements and actions threaten both the right to life and the right to a fair trial.

Further in July 2013, Internal Security Cabinet Secretary, Joseph ole Lenku, announced a campaign to ‘kill all gun’ in Samburu County following clashes with the police in 2012, during which locals stole police weapons. He publicly threatened that if residents failed to turn in all guns to the police within two weeks, the government would “use force and people would die.” On 14th April, 2013, a police officer shot and killed a well-known local community athlete at a bus stop in Nairobi’s informal settlement of Mathare. Independent Policing Oversight Authority (IPOA) took up the case in August, but the officer had not been prosecuted by the year’s end. In 2014, senior government officers issued ‘shoot to kill orders’ to the police in the wake of rising terrorist attacks and radicalization of youth in Mombasa and its neighbouring counties.

From 2011 to 2014, KNCHR received a total of 55 complaints on disappearances and extrajudicial killings. This obtaining situation requires collaborative intervention by all stakeholders in order to provide adequate policy measures to stop human rights violations. The situation is further worsened by laxity in prosecution of perpetrators of the alarming number of cases of unresolved extrajudicial killings and enforced disappearances, some of which were documented in the KNCHR report, The Cry of Blood.

Independent Medico-Legal Unit (IMLU), a non-government organization working on freedom from torture, filed a case in the East African Court of Justice and the African Commission on the issue of the state’s failure to thoroughly, effectively and impartially investigate, document and redress extrajudicial killings in the country. In a few instances though, Kenyan courts have upheld the right to life. In 2012 for example, KNCHR filed a petition in the High Court on extrajudicial killing of a father and his son in Kawangware. The case was issued judgment in 2014 and found that the two had been extra legally executed by the police and awarded compensation to the widow of the deceased.

Abolition of the death penalty

The government is yet to yield to calls by the UN Committee on ICCPR to abolish capital punishment in promotion of the right to life. Additionally, the Court of Appeal recently held that capital punishment, stipulated in Section 204 of the Penal Code, to be in contradiction of the spirit of the Constitution which provides protection from torture, inhuman and degrading punishment. In

90 Reference no. 3 of 2010
91 Communication no. 381 of 2010
93 In David Njorgoe Macharia v. Republic, the court held that section 204 of the Penal Code (PC), to the extent that it provided that the death penalty is the only sentence in respect to the crime of murder, is inconsistent with the letter and spirit of the Constitution which makes no mandatory provision. It held that section 204 of the PC which provides for a mandatory death sentence is antithetical to constitutional provisions on protection against inhuman, or degrading punishment and treatment and fair trial.
96 See the annexes section
The Media Council Bill also proposed the creation of a Media Council and Complaints Commission with powers to prohibit media content perceived to be prejudicial to public or national interest; prescribe standards for journalists; and develop and regulate ethical and disciplinary standards for journalists, media practitioners and media enterprises. Subsequently, Kenya’s journalist associations and media houses filed a petition in court to challenge constitutionality of the Bill and obtained an injunction on 31st January 2014, halting progress on the Bill for the period of time legal questions raised on it received adjudication.

The restrictive Bills were passed by parliament without amendments that had been agreed upon between the Parliamentary Committee on Energy, Communication and Information and press organizations including the Kenya Editors’ Guild and the Kenya Correspondents Association. Implementation of these statutes will reverse gains made on freedom of expression and independence of media from state interference. The review period also witnessed a delicate balance between the freedom of expression and its abuse through propaganda, incitement, hate speech and advocacy of hatred. Accusations of hate speech were particularly widespread compared to the rate of convictions for the offence which was minimal. This is in part attributable to the fact that the elements of the offence of hate speech and that of ethnic or racial glorification or incitement. With the 2013 general elections looming and the fear of inciting remarks rife, the National Steering Committee on Media Monitoring to monitor hate speech was set up, particularly speeches during political meetings and social media. Several political leaders, musicians and social activists were caught in the dragnet. The state also issued warnings to the foreign press to avoid incendiary reporting. In March 2013, Ministry of Information Officer, the director of information Joseph Owiti threatened to deport foreign journalists who did not have proper accreditation, despite the fact that authority over accreditation rests with the independent Media Council, not the Information Ministry.

Despite the expansive freedom of expression and of the press as enshrined in the new constitution, the period was marred with incidents of intimidation, threats, arbitrary confinement and even killing (albeit rare) of journalists with most perpetrators not being brought to book. This is in part attributable to the fact that there is need for public officials to tolerate criticism. As such, courts continue to award public officials exorbitant damages in damages over the prescribed maximum fines for civil defamation.

Defamation is still criminalized under the Defamation Act. The Act does not grant any privileges to individuals apart from judges and Parliament officials. The president is considered immune from the provisions of the Act by virtue of being the head of state. However, these privileges have raised concern on their legality considering the African Union resolution 169 of 2010 calling for the repeal of the defamation laws. This in recognition of the fact that there is need for public officials to tolerate criticism. As such, courts continue to award public officials exorbitant amounts in damages over the prescribed maximum fines for civil defamation by journalists.

March 2011 – Juma Kwayera, a political writer with the Standard Newspaper received a phone call from a man who stated in Swahili: “We have come to a point where we can no longer tolerate your work. If you think you are man enough we are going to show you that we have killed more serious people than you. We are going to shoot you. We do not care if the police will be there. We have even robbed in the past and so getting rid of you is nothing to us. The police will be helpless when we come for you. You cannot do what you have been doing and expect us to keep quiet.” Juma had received similar calls prior to this one, one of which was an invitation to coffee that he turned down.

December 2011 – Robert Wanyonyi, a journalist working with the Standard Newspaper received a phone call in response to his story on a scuffle between the police and local villagers in Sirisia Village over an attempted robbery at Namang’olua Coffee Factory. The villagers killed two suspects, and in a violent confrontation with the police, four villagers were killed. The interviewees in his news feature alluded that a senior district official was behind the attempted robbery. The caller stated: “We will kill you and see whether KTN will bury you.”

January 2013 – Photographer Dennis Okeyo and cameraman John Otanga, both from the Nation Media Group, reported to the Media Council of Kenya that they were attacked by members of the General Service Unit while covering politically motivated clashes in Nairobi’s Kibera neighbourhood. Although Okeyo showed the officers his press credentials, they beat him up with clubs and took Okeyo’s camera memory card and 2,000 shillings.

March 2013 – Joseph Owiti, Ministry of Information Director of Information, warned in a press conference that foreign journalists may be deported if they did not have appropriate accreditation to work in the country. These comments were perceived as an attempt to harass the international media.


100 As provided for by the National Cohesion and Integration Act No. 12 of 2008

101 In July 2012, Three Kenyan musicians, Kamande wa Koi, Muigai Wa Njoroje and John and Njoroge were taken to court to answer charges that their songs were intended to cause hatred and hostility between Kenya’s Kikuyu and Luo ethnic groups. If convicted, the musicians could have been imprisoned for up to three years and face fines of about $12,000. On Sep 2012, Ferdinand Waititu, an assistant minister in the water ministry, was charged with hate speech and inciting violence and suspended from his government post. This follows a speech he made against ethnic Maasais that led to the killing of at least two people. He became the second minister after Chirau Ali Mwikware (whose case was thrown out of court after he made a public apology) to be suspended over allegations of inciting violence.

102 Robert Wanyonyi, a journalist with a local TV station, received death threats over footage that was aired on the station showing a pregnant woman giving birth on the floor at Bungoma District Hospital as nurses on duty looked on and at one point slapped her. Also, On April 5, 2012, Osinde Obare, a reporter for the private daily The Standard, and David Musingi, a journalist for Radio Citizen, received threats from stories on a police raid on a market in the western Kenyan town of Kitale. The market had allegedly been selling fake maize seeds, according to news reports. 103 Nairobi, April 1, 2013 - A correspondent for The Star daily newspaper who was investigating fertilizer scandal was found dead Sunday morning in his house in the coastal city of Mombasa. A housemate found reporter Bernard Wanjiru with blood on his nose and mouth at around 11:30 a.m. being the police and government officials. It is however a sigh of relief to note that the number of attacks and threats against the press declined compared with the last elections, with 14 cases reported by early March 2013. There were however reports that there were indirectly avoided reporting on stories that might incite violence during or after the March 4 general elections, for fear of a repeat of the postelection violence of 2007-2008.


105 Journalists continue to be charged with “sedition” or “sedition-like” under Sections 194 and 196 of the Penal Code.

106 In CC No. 542/2007, politician Koigi Wamwere sued The Standard and a journalist, Waweru J’s 2011 judgment punished an insincere media house apology with a Kshs 3m award. Meanwhile, Meru elder Phineas Nyagah sued politician Gikoku Imanyara - Civil Suit No. 697/2009 – seeking defamation, compensatory and exemplary damages, and costs with interest. In 2013, Odunga J. dismissed all pleas because the appellant failed to link the offending words to himself, thereby missing out on a possible Kshs 3m award.

107 There were also 14 cases reported compared with the last elections, with 14 cases reported by early March 2013. There were however reports that there were indirectly avoided reporting on stories that might incite violence during or after the March 4 general elections, for fear of a repeat of the postelection violence of 2007-2008.
Freedom of Information

An individual is only able to enjoy the right to information when they are free to access relevant information. As such, access to information is the practical implementation of the right to information. The review of this right therefore elicits evidence-based analysis of the State’s response in facilitating access, use and sharing of information. In light of this, about 39 percent of Kenyans accessed the internet in 2013. Kenya is the leader in usage in East Africa and boasts a thriving online community, including a series of critical blogs. Due to lack of infrastructure and electricity, internet availability is still limited in rural areas, though expanding mobile-telephone usage has increased access.\(^\text{107}\)

On July 8 2011, President Mwai Kibaki launched the Kenya Open Data Initiative (KODI), the first in sub-Saharan Africa and the second on the continent coming after Morocco, which had made key government data freely available to the public through a single online portal. The initiative has been widely acclaimed globally as one of the most significant steps taken by the nation to improve governance and implement the new Constitution’s provisions on access to information. As of November 2011, there were close to 390 datasets that had been uploaded to the site, with a plan in place to upload more data over the years.\(^\text{108}\) KODI has however faced numerous challenges, key among them being low awareness on KODI among most Kenyans and the reluctance of key informants from government ministries to release data – an attitude that stems from the long established culture of government secrecy reinforced by the Official Secrets Act of 1992 which is still operational.

Section 96 of the County Governments Act, 2012 provides for the right of every citizen in the county to access information. Subsection 4 of the same provision enjoins county governments to enact legislation to facilitate access to information. Pursuant to this, County Governments have come up with legislation for public participation with specific legislative requirements that include, for example, seeking the views of the public when preparing the fiscal strategy papers and the budget processes.

2.1.4 Freedom of Association

The Constitution under article 36 provides for freedom of formation, membership or participation in any association. Membership to an association cannot be compelled on an individual or group. Despite the foregoing, there have been threats to this right, particularly concerning different sectors of the work force in Kenya, including Civil Society Organizations through the proposed amendments to the Public Benefits Organizations Act (PBO) 2013, although the PBO Act itself continues to suffer delay in commencement. The proposed amendments are to the effect that all organizations registered under the Non-Governmental Organizations Act would be re-registered under the PBO Act.

The amendments do away with the possession of a certificate of registration as conclusive proof of registration and give leeway for periodic imposition of terms and conditions for grant of certificates, permits of operation and public benefits organization status. These provisions render registration uncertain and easily retractable. Funding to a PBO is proposed to be made through a federation as opposed to an individual member organization. Moreover, a PBO would not receive more than 15% of its total funding from external donors, unless a higher percentage is approved by the Cabinet Secretary in whose sole discretion the decision lies. This would result in severe reduction in funding to PBOs as it restricts the amount of funding receivable, and the channel through which it is received. It further contravenes international norms on funding from international sources as an important component of freedom of association. The amendments also accord the Cabinet Secretary wide discretion that may be open to abuse and subjective decision-making. The restrictive environment created for the operations of civil society organizations in the draft law is likely to result in shut down or relocation of many PBOs. Consequently, many Kenyans, especially...
those in marginalized areas, who solely depend on PBOs to provide services such as education, health, food and water, will bear the repercussions of the harsh law.

### 2.1.5 Freedom of assembly, demonstration, picketing and petition

The right to assembly, demonstration, picketing and petition is significant in the protection and promotion of human rights. This has been anchored under Article 37 of the Constitution. It is on the foundation of the right of each individual to express their opinion that this right is exercised, facilitating expression of collective views and thereby, political opinions. In so doing, the principle of democracy is realised. The right also anchors the protection of human rights by Human Rights Defenders (HRDs) through advocacy.

The Constitution guarantees this right free from violence or armed resistance of any nature. However, in the period under review, the right was violated in several instances through criminalization of protests, illegal use of force, mass arrests and killings. An additional deterrent are the heavy bail terms that courts are issuing when HRDs are charged in court. This has led to many Human Rights Defenders being reluctant to participate in this right as they cannot raise the bail terms set prior to or during their occurrence. Defamation is also used as a basis for arrest or incarceration. HRDs are also often under surveillance, which forms the basis of threats to their rights. Several activities of HRDs are vulnerable to criminalisation. Most common among them are peaceful protests that are often outlawed prior to or during their occurrence. Defamation is also used as a basis for arrest or incarceration. HRDs have the result of discouraging further HRD activities.

Arbitrary arrest is yet another common threat facing HRDs. The arrests often lead to long periods of incarceration, as bail and bond terms are often too high for some HRDs to meet. Like defamation, arrests have similar effect of discouraging continued activities due to the inconvenience, financial and emotional strain of a court trial. In exercise of the right to institute court proceedings in public interest, HRDs have also been ordered to pay hefty suit costs that have served to derail them. An example is recorded below.

#### 2.1.6 Protection of Human Rights Defenders

HRDs face various threats in the exercise of their duties. The threats are more prevalent for those working on issues touching on good governance and accountability such as ethics and integrity; anti-corruption; democracy; Kenyan cases at the International Criminal Court; truth, justice and reconciliation; legislative restrictions; anti-terrorism; security and land. HRDs are also often under surveillance, which forms the basis of threats to their rights. Several activities of HRDs are vulnerable to criminalisation. Most common among them are peaceful protests that are often outlawed prior to or during their occurrence. Defamation is also used as a basis for arrest or incarceration. HRDs have the result of discouraging further HRD activities due to fear or loss of credibility that defamation have the result of discouraging further HRD activities. Defamation is also used as a basis for arrest or incarceration. HRDs have the result of discouraging further HRD activities. Defamation is also used as a basis for arrest or incarceration. HRDs have the result of discouraging further HRD activities. Defamation is also used as a basis for arrest or incarceration. HRDs have the result of discouraging further HRD activities. Defamation is also used as a basis for arrest or incarceration. HRDs have the result of discouraging further HRD activities.

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In 2012, civil society organizations filed a case in the High Court in public interest, challenging the eligibility to contest elections of the presidential candidate, Uhuru Kenyatta and his running mate, William Ruto.

November 2012 – Omikya Omtatoh Olkoti, human rights activist and director of Kenyans for Justice and Development (KEJUDE) Trust, was assaulted in Nairobi where he lost six teeth, suffered injuries to his face and the back of his head. The attackers demanded that he withdraws a case he had filed demanding accountability in the procurement of biometric voter registration kits due to alleged corruption in the process.

May 2013 – Lydia Mukami and other leaders of the Mwea Foundation, an NGO working on land rights, received death threats and their rice paddies and maize farms were torched.

August 2013 – Hassan Ali Guyo was shot by an army officer as he documented the use of excessive force, including tear gas and live bullets, against demonstrators in Moyale.

September 2013 – Peter Wanyama Wanyonyi, a human rights lawyer, was murdered following several death threats in the preceding months due to his involvement in several human rights cases.

November 2012 – Maina Kiai, a human rights defender and UN Special Rapporteur on the rights to freedom of assembly and association, spoke out on hate speech against him by social media bloggers linked to the presidency and threats to his life by a group known as Nyaribo Support Group.

2013 – Peace Brigades International meeting with an HRD in Nakuru was interrupted when they discovered an intruder hiding and watching through a window.

January 2014 – Amina Mohammed, a community/ gender activist and member of Bunge la Wamama Mashinani (Women’s Parliament at the Grassroots) had her house broken into. She also received death threats for her defence of a victim of sexual assault.

February 2014 – Emily Kwamboka, a grassroots activist from Mathare and founding member of Sauti Yetu (Our Voice) Political Debates Programme was threatened at gun point to stop her human rights activities or otherwise get killed.

February 2014 – Muchangi Nyaga, a human rights defender and co-ordinator of Ghetto Green Foundation, a youth empower initiative based at Huruma Slums in Nairobi, had his home broken into by police officers and his property ransacked. The cash record and minutes record books of his organization were taken. He was then detained for days and physically assaulted. The past killings of university students (University of Nairobi and Egerton University) while conducting peaceful demonstrations illustrated the use of live bullets by police a matter that further violates human rights.

Source: Kenya Policy Brief, March 2015 and ISHR UPR Briefing Paper, EHAHRDP website

#### 2.1.7 National security

During the review period, there were steps taken to reform the Kenya Police. Notably, these steps were set in motion by the Constitution. In 2012, the National Police Service Commission (NPSC) and the Independent Policing Oversight Authority (IPOA) were established as government bodies reporting to Parliament in a bid to improve accountability and transparency of police operations. IPOA has since been involved in holding police officers accountable for respect of human rights in the execution of their duties. The Commission has also set in motion
procedures for vetting of police officers, effectively kick starting reforms in the police. A statement released by the chair of the NPSC on 13th March, 2013 indicates completion of the third phase of the vetting process where 166 officers drawn from the Kenya Police and Administration Police in the ranks of Senior Assistant and Assistant Commissioners of Police were vetted.

The enjoyment of Human Rights is pegged on security issues. In a more secure country, there is the possibility of much more respect to human rights. Additionally citizens who are secure can exercise their freedoms and rights without fear. This is why the involvement of security agencies in creating an enabling environment for the enjoyment of Human Rights.

The Constitution recognizes this fact and anchors the same under Article 238 (2) (b) requiring coordination of National Government estimates to be adequate, released on time and allocated properly remuneration and housing, refurbishment of police stations, purchase of new equipment and trainings. Ransley (2009) recommends that police training and skills training. The Ransley recommended that police training and skills training. The Ransley recommended that police training and skills training.

Community policing strategies introduced almost a decade ago to enhance public confidence, but which have produced little success, are also set to become more effective once the reforms take hold. In October 2013, the government introduced the Nyumba Kumi Initiative as a means of strengthening community policing. Under this initiative, members of a neighborhood are expected to know at least 10 of their neighbors. The initiative would ensure the restructuring of villages under a village elder to 10 units with a clear leadership structure for the security of households concerned. To fully implement the reforms underway, the government should ensure that budgets and funding for the various projects are adequate, released on time and that the reforms remain sensitive to gender and minority concerns.

The police reforms which the Ministry of Interior and Coordination of National Government estimates will cost over Kenya shillings 80 billion over a three-year period will address these challenges through proper remuneration and housing, refurbishment of police stations, purchase of new equipment and vehicles, upgrading communication equipment and skills training. The Ransley recommended that there is need for a standardized curriculum on the training of service personnel with the training facilities being expanded and upgraded in order to meet the training needs of the service. The report also called on the government to improve terms of reference for the police officers with the minimum salary being proposed at 35,000 Kenya shillings. In the sixth chapter of the report, it was noted that police lack enough vehicles and equipment to carry out their functions hence becoming ineffective in their duties. According to the report, insufficient fuel is allocated for the running of the vehicles, which is said to be approximately 10 to 15 litres per vehicle per day, which hardly has any impact on operations. There is also a lack of an appropriate policy, which can be applied in determining the right vehicles for the relevant policing area with a view to ensuring effectiveness.

In Nairobi, the September 2013 Westgate Mall attack claimed the lives of 67 people and left over 100 people injured and millions of property destroyed. On Monday, 24 October 2011, a grenade was hurled in a bar in Nairobi which left one person dead and more than 20 people wounded. On 10th March 2012, six were killed and over sixty were injured after four guided missiles were thrown into a Machakos bus station in Nairobi. On 4th May 2014, on the Thika Highway, terrorists exploded homemade bombs on two commuter buses near simultaneously and about a kilometre apart. According to reports, at least three people were killed and at least sixty-two others injured.

On Tuesday, 15 May 2012, three hand grenades were hurled at the Bella Vista nightclub in Mombasa, killing one and leaving five others injured. On Sunday, 24 June 2012, another grenade attack was reported at a mosque in Mombasa. A man in his 40s was killed and 10 of the dead were Kenyans. The blast was caused by a 1 kg improvised explosive device. A female suicide bomber is reported to have been involved in the blast. The attack on Tandoori Bar in Mombasa, wounding 10 people. On the 4th of March that same year, 2 gunmen stormed a church during a Sunday service, killing 3 people and wounding several others.

In August 2012, a series of ethnic clashes between the Oma and Pokomo tribes of Tana River District resulted in the deaths of at least 18 people. The killing was followed by another ethnic clash that left 118 people dead and more than 13,500 displaced and another more than 30,000 people affected by the ethno-political clashes. Over 50% of the 15,000 were children, the rest being women and the elderly. Similarly, on the 9th January 2013, 11 people were killed in fresh fighting when suspected Pokomo raiders attacked Nduru village, killing 6 Ormas. Villagers countered the attackers and killed 2 raiders on the spot, and 2 more as they pursued them. Another assailant died from injuries while fleeing.

Incidents of extrajudicial killings have been recorded in Kenya. Most of these killings took place in Mombasa and Nairobi. In 2012, Sheikh Aboud Roig, a cleric on the US and UN sanctions list for providing “financial, material, logistical or technical support to Al-Shabaab” was killed in the streets. In October 2013, Sheikh Ibrahim Omar was also shot dead in Mombasa after allegations into the Westgate terrorist attack, and other terror attacks in Mandera in North-Eastern and Kilifi in the coastal region, 2013.
of involvement in the Westgate Mall bombing. Lack of proper data on extrajudicial killings has challenged documentation of the full magnitude of the problem. According to a report by Muslims for Human Rights (MUHURI), a Kenyan police officer once told a detainee: “We are tired of taking you to the court. Next time, we will finish you off in the field.”

The Director of Public Prosecutions formed a task force to look into the controversial killing of Sheikh Aboud Rogo. The taskforce gave its report in 2013 which stated that the killers of the late cleric could not be identified. Its members were however quick to condemn forced disappearances of youth and called on the government to form a public inquiry into the murder of Aboud Rogo.

The police came under heavy criticism for the rise of insecurity. Corruption was singled out as the leading cause. In 2013, a survey conducted by Transparency International (TI) showed that most Kenyans regard the police as the most corrupt body in the country. In the reporting period, the government arrested and charged some officers with various offences, including corruption.

However, according to the Human Rights Watch Report of 2013, police corruption is endemic and police officers are rarely arrested and prosecuted for the vice. Police have often been accused of favouring the wealthy in the country. According to the same report, the police often employ unqualified candidates with political connections or those who have paid bribes.

Police were also involved in a number of human rights violations including arbitrary arrests and harassing of hawkers and traders. In the year 2012, the police were accused of subjecting more than 1,000 ethnic Somalis to torture, rape and arbitrary arrests. The alleged abuses were in apparent response to grenade attacks in Nairobi. Moreover, Kenyan authorities forcibly relocated a number of Somali refugees to camps in north-eastern Kenya. Police responded with similar abuses against residents of the surrounding villages following a grenade attack in Mandera in September 2012 and a gun attack in Garissa in October 2012. The government also increased its hostile rhetoric against Somali refugees in 2013, calling for the refugee camps to be closed and for Somalis to return to Somalia, despite the ongoing conflict and insecurity in Somalia.

There were also cases of cattle rustling which saw a number of persons killed, especially among the Pokot, Samburu and Turkana communities. In November 2012, a series of ethnic clashes between the Samburu and Turkana tribes of Kenya’s Samburu County resulted in the deaths of at least 46 people including police officers sent to quell the violence. Over 40 Kenyan police officers and reservists were killed in the Suguta Valley near Baragoli while on a mission to recover stolen cattle. In April of 2013, a spate of criminal attacks in Bungoma and Busia Counties left more than 15 people killed in horrific manner and at least 150 injured by indescribable gang-like criminals. Bungoma County recorded a death toll of at least 8 people with Kibabii, Kikwechi and Mukwa villages being heavily affected.

A number of groups associated the attacks with politics, although this was never confirmed by the police. At the time of reporting, no single person had been brought to book on the vicious killings. Police too have fallen victim to crime in the line of duty. The table below highlights the number of persons killed due to insecurity in the country between 2010 and 2014. Notably, police officers were also died in the line of duty.

<table>
<thead>
<tr>
<th>Area of Security Concern</th>
<th>Total No. between 2010 and 2014</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total no. of deaths resulting from gunshots</td>
<td>1,894</td>
</tr>
<tr>
<td>Total no. of deaths due to ethnic clashes</td>
<td>574</td>
</tr>
<tr>
<td>Total no. of deaths from armed robberies</td>
<td>260</td>
</tr>
<tr>
<td>Total no. of deaths from terror attacks</td>
<td>277</td>
</tr>
<tr>
<td>Total no. of police killed</td>
<td>91</td>
</tr>
<tr>
<td>Total no. of people displaced</td>
<td>180,500</td>
</tr>
<tr>
<td>Total no. of livestock stolen or killed</td>
<td>3,682</td>
</tr>
<tr>
<td>Total no. of houses burnt due to ethnic clashes</td>
<td>845</td>
</tr>
</tbody>
</table>

### 2.1.8 Transnational Crimes

Over the past 30 years, transnational organized crime has transformed and expanded as a result of globalization which has enabled infiltration of the global market with illicit products and services. In addition, technological advancements have brought with them unprecedented opportunities for the organized criminal groups to further their criminal activities. This has resulted in transnational criminal activities posing a serious threat for national law enforcement and judicial institutions.

States have recognized the negative impact posed by transnational organized crime on security and socio-economic aspects of life, consequently ratifying the United Nations Convention against Transnational Organized Crime (UNTOC), its additional protocols and related conventions to comprehensively provide for a legal framework to fight transnational organized crime. UNTOC in Article 2 (a) defines an organized criminal group to mean “a structured group of three or more persons existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this convention, in order to obtain, directly or indirectly a financial or other material benefit.”

Kenya has ratified UNTOC and in the reporting period, saw an increase in the incidence of transnational crimes. This was coupled with violations of human rights by state and non-state actors. In addition, Kenya has enacted the Prevention of Terrorism Act (No. 30 of 2012), the Proceeds of Crime and Anti-Money Laundering Act (Cap 59B) and the Prevention of Organized Crime Act (Cap 59), among other Acts which form the basis of Kenya’s national legal framework to counter organized crime.

**Terrorism**

The Al-Qaeda bomb attack in Kenya in 1998 ushered a new era of security concerns in Kenya linked to the perceived interaction of domestic and transnational expressions of militant Islam. Since then, terrorism remains a major threat to Kenya’s national security interests. This threat is further precipitated by the incursion of Kenya Defence Forces (KDF) into Somalia in Operation Linda Nchi of 2011 which was met by strong resentment and subsequent terror attacks in Kenya by Al-Shabab.
Drug Trafficking

During the reporting period, a number of Kenya's top politicians, high ranking public officials and prominent businessmen were adversely mentioned in investigations on drug trafficking. These included Harun Mwau, William Kabogo, Ali Hassan Joho, Gideon Mbivu, among others.144 Though they did not face criminal charges following the investigations, their alleged involvement in the illicit drug trade is an indicator of the gravity of drug trafficking in Kenya and the influence of its proceeds in political processes.

Drug trafficking is closely related to institutional decay and the erosion of state legitimacy caused by the erosion of the rule of law and democratic processes as evidenced by studies from Mexico and Colombia, among other South American countries.145

In addition, drug trafficking and its impact poses a threat to human security in Kenya though this causal relationship is rarely debated in the public domain. The threat to human security by drugs has a negative impact on the enjoyment of human rights and freedoms, particularly the right to human dignity.146

The Criminal Procedure Code, the Penal Code, the Proceeds of Crime and Anti-Money Laundering Act, the Dangerous Drugs Act and the Prevention of Organized Crime Act, among others, provide sufficient legal framework to fight drug trafficking in Kenya. Nonetheless, enforcement remains an issue; inadequate funding, poor cooperation among States and deficiency of anti-trafficking expertise hinder efforts to curb drug trafficking in Kenya.147

Trafficking in Persons

Kenya is on the tier 2 watch list with regard to trafficking in persons, and is a source, transit and destination country for men, women and children who are subjected to forced labour and sex exploitation. Women, gay and bisexual men are lured into the Middle East with promises of jobs only to be forced into prostitution and other forms of sexual exploitation.148

Kenya is on the tier 2 watch list because it has not fully complied with the minimum standards for the elimination of trafficking, though significant efforts to do so have been made as highlighted by its ratification of the UNTOC and the Protocol to Prevent, Suppress and Punish Trafficking in Persons. Nationally, Kenya has enacted the Counter-Trafficking in Persons Act, 2012. Though hardly used by prosecutors, the Sexual Offences Act also prescribes penalties that are stringent to prevent trafficking in persons. International Organization for Migration (IOM) assisted the Kenya Association of Private Employment Agencies to develop a recruitment code of conduct to prevent trafficking.149 This code of conduct is also not adhered to, hence the continued trafficking of persons.

The growing trend of trafficking in persons as a result of inaction by security agencies despite existence of a legislative framework has been blamed on rampant corruption and lack of specialized training and equipment to detect, investigate and the vice in Kenya. Trafficking in persons is a violation of rights to freedom and security of the person, and the freedom from slavery, servitude and forced labour. Notable examples of Trafficking in human cases during the reporting period were those of Salma Noor, Asha Ali and Gladys Wanjeri.150

Piracy

Piracy in the Indian Ocean has waned in the last couple of years due to international interventions from developed countries. The proliferation of pirate attacks in Kenyan waters had been attributed to Somalia's instability151 which gave rise to a high proportion of pirates in the Indian Ocean and the Gulf of Aden. Piracy proceeds have had direct benefit in Kenya through the influx of piracy money in the property market, and indirect costs to the shipping industry, tourism, consumer price levels and foreign investment which far outweigh the direct benefits.152


This code of conduct is also not adhered to, hence the continued trafficking of persons.

1. An act of violence or detention or any act of depradation committed for private ends by the crew or the passengers of a private ship or a private aircraft and directed –
- against another ship or aircraft, or against persons or property on board such ship or aircraft;
- against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
2. Any voluntary act of participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft; or

security and a persistent challenge to our law
enforcement agencies, particularly with regard to
drug trafficking and trafficking in persons. There is
urgent need to step up efforts in reduction of these
crimes as their direct and indirect victims suffer
gross violation of human rights and subsequent
misuse of justice.

2.1.9 Corruption

A critical analysis of corruption reflects the impact
that this vice has on Human Rights. It has been
noted that “from this perspective, it is often taken
grant that corruption “violates” human rights. When
people make this claim, they have a range of
issues in mind. They mean that, when corruption is
widespread, people do not have access to justice,
are not secure and cannot protect their livelihoods.
Court officials and the police pay more heed to
bribes than to law. Hospitals do not heal people
because the medical staff give better treatment to
patients who pay backhanders or because clinics
lack supplies due to corrupt public contracting
procedures. Poor families cannot feed themselves
because social security programmes are corrupt or
distorted to support a patronage network. Schools
cannot offer their students a sound education
because the education budget has been looted
and as a result teachers cannot be paid and
books cannot be purchased. Farmers and market
sellers cannot earn a living because police take a
cut of their produce and sales. In numerous ways
like these, corruption encourages discrimination, deprives vulnerable people of income, and
prevents people to allow fullness of their political,
civil, social, cultural and economic rights.”

Kenya scores poorly on corruption as evidenced by
Transparency International’s Corruption Perception
Index and the World Bank’s Governance Indicators.
In 2010, Kenya was position 154 out of 178 countries
ranked. In 2011, the country was ranked 154 out of
182 countries assessed by Transparency
International. In 2012, Kenya was ranked position
139 out of the 174 countries and in 2013, position
136 out of 177 countries assessed.157

[153] CA 198 - 207/2008
[159] As above.

160 During the 2012/2013 financial year, the EACC recovered through court proceedings and out of court settlements, illegally acquired public assets valued at approximately Kenya shillings 567,408,217. The Commission averted the loss of approximately 55 billion shillings worth of public funds through various interventions.

161 This was a scandal that became public in January 2009 over the sale of imported maize. In late 2008, the ban on importation of maize was lifted by the government to allow capable businessmen to import maize to supplement the local produce that was short of the minimum required to satisfy the local market. At that time, the country faced hunger and starvation. The following events might have taken place during the scandal:

Breafcase millers, existing only on paper, some of whom were defunct at the time the scandal unfolded, were awarded large quantities of maize by the Strategic Grain Reserve (SGR). They accomplished this by inflating their milling per-hour capacity and having 4 Permanent Secretaries approve them. The briefcase millers and local businesses that were either awarded quotas as by the SGR or awarded import permits by the NCAPB (National Cereals and Produce Board of Kenya) respectively might have also re-directed the bags of maize outside the country to avoid price controls stated by the government and thus make bigger profits. Some of the maize imported in 2009 by local businesses was certificated unfit for human consumption and might have been released into the market after directions of senior government officials.
Yet another corruption scandal was revealed in the Parliamentary Accounts Committee (PAC) report of 2013 where senior government officials were alleged to have used a secret account at National Bank of Kenya to siphon billions in taxpayers' money. According to the report, senior Internal Security ministry officials used a secret account at the bank to siphon billions of money from public coffers in the run-up to the 2013 General Election. The money disappeared into a slush fund whose purpose remains unknown. A previous report on government spending for the year 2012 had also unearthed the existence of a secret account at National Bank where 2.8 billion shillings was wired and spent on items marked as 'confidential'. The report pointed an accusing finger at former accounting officers in the security docket at the Office of the President. The parliamentary Public Accounts Committee’s audit report for the year ended June 2013 said that former Head of Civil Service, Francis Kimemia, and the then Permanent Secretary for Internal Security, Mutea Iringo, were the accounting officers at the material time.

2.2 ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Socio-economic rights are part of the so-called second generation of human rights, as established in the International Covenant on Economic, Social and Cultural Rights. They include the right to housing, the right to work, the right to social security, the right to health and the right to water and food. Since independence, socio economic rights were taken to be alternative rights. However on the advent of the new constitutional dispensation, socio-economic rights have been anchored under Article 43. These include right to realization of the Constitution the right to adequate housing cannot be aspirational and merely speculative.

2.2.1 The Right to Clean Water and Sanitation

The right to water is anchored in the Constitution of Kenya under Article 43 (1) (d). Being a socio-economic right, it requires that the state undertake measures towards its full realization. The right entitles everyone to sufficient quantities of safe water and sanitation services that are affordable, accessible, and culturally acceptable and which are delivered in a participatory, accountable and non-discriminatory manner. Sadly though, Kenya suffers from poor sanitation and insufficient water sources. However, the Vision 2030 agenda seeks to ensure that water becomes accessible to all Kenyans while at the same time ensuring improved sanitation.

As it stands, the right to water and sanitation is yet to be realized fully. This has led to security breaches especially among communities living in the arid and semi-arid regions. The non-realisation of right to water has impacted negatively on the right to education, health and food. For example, in the pastoralist communities, girls have been forced to drop out of school in order to fetch water. This is largely due to cultural perceptions on the role of the girl-child. Moreover, areas that lack water and clean sanitation are prone to water borne diseases such as cholera and typhoid. Kenya being a country dependent on rain-fed agriculture has been impacted negatively by the ongoing climate change. Moreover, most Kenyans are being exposed to the risk of hunger. Kenya is already one of the countries experiencing severe water shortage in Africa and access to water and sanitation is likely to become further constrained owing to the increasing population growth, economic expansion and changes in rainfall patterns.

Water is a basic commodity that is crucial to the sustenance of human life but remains inaccessible to a majority of Kenyans. Water supply to each person must be continuous and in sufficient quantity for personal and domestic use. According to the World Health Organization (WHO), an individual needs between 50 - 100 litres of water per day to meet their most basic needs. In Kenya, this has not yet been achieved. It is estimated that 41% of the country population lacks access to improved water supply,¹⁶² 17% of this population comes from the urban areas while 48% is in rural areas. Quality of water, whether for drinking, domestic purposes, food production or recreational purposes has a significant impact on health. Both water and sanitation facilities should be of good quality and safe for use. The term ‘safety’ connotes freedom from micro-organisms, chemical substances and radiological hazards that constitute a threat to a person’s health.¹⁶³ Sanitation facilities must be well constructed to ensure physical health, hygiene and safe accessibility to all. It is estimated that 69% of Kenyans do not have access to improved sanitation services. The low rates of access to water and sanitation services translate into social costs and economic inefficiencies that have far reaching implications on human development. Poor sanitation services translate into high incidence of communicable diseases such as cholera which subsequently cost Kenya about USD $324 million annually.¹⁶⁴ This amounts to approximately 0.9% of our GDP annually. Water and sanitation services should be accessible to every person including persons with disabilities and the elderly. Physical accessibility within, or in the immediate vicinity of the household, educational institutions, workplace, or health institutions is imperative. According to WHO, water sources should be within 100 metres of the home and collection time should not exceed 30 minutes. This is not reflective of the situation in the country. In arid and semi-arid areas, people travel more than 20 kilometres and at times remain at the water sources overnight due to scarcity. Incidences of human-wildlife conflict at water points have been noted with fatalities.¹⁶⁵

According to WHO, water should be affordable to all persons irrespective of economic status. Unfortunately this has not been the case in Kenya. People living in the urban informal settlements are much more for water. For example, a 20-litre jerry can of water costs between 30-100 Kenya shillings.¹⁶⁶ All these challenges exist despite clear laws and regulations governing the water sector.


¹⁶³ Mitchell Welfare Society v AG [2013] eKLR

¹⁶⁴ Ibid


¹⁶⁸ J Parry, D Echeverria, J Dekens & J Matima (n.144 above).


¹⁷¹ As above.


The Water Act, No.8 of 2002, provides for the management, conservation, use and control of water resources and for the acquisition and regulation of the right to use water. It also provides for the regulation and management of water supply and sewage services.

The right to water and sanitation is formally recognized in a number of key policies developed in the spirit of introducing water sector reforms. These include the National Water Resources Management Strategy (2005-2008) for the management of water resources in the country, the National Water Services Strategy (2007-2015) aimed at offering sustainable access to safe water and basic sanitation to all; the Water Services Regulatory Board Tariff Guidelines and Model (2007), whose goal is to establish tariffs that balance commercial, social and ecological interests and the Pro-Poor Implementation Plan for Water Supply and Sanitation (PPW - WSS) 2007 aimed at up-scaling and fast-tracking actions for water and sanitation coverage by concentrating on low cost technology and settlements of the urban poor.\(^{174}\) In order to realize the right to water, the state must take certain steps as outlined in Article 12 (1) of the International Covenant on Economic, Social and Cultural rights (ICESCR) that: “Each state party should ensure that people can enjoy sufficient, safe, accessible and affordable water, without discrimination”. State parties should formally recognize the right within their national legislation, and provide policies and regulations to fulfil their essential human rights obligations.

In 2012, the government planned to increase access to safe water and sanitation in both rural and urban areas beyond present levels. In its first Medium Term Plan (MTP) report of 2012-2013,\(^{175}\) the government set a target to increase access to piped water to urban dwellers from 40% to 75% and increase access to water from treated water sources for rural dwellers from 40% to 60%. Moreover, access to sanitation for urban households with individual or shared access to toilet was set to increase from 30% to 50%, while in rural areas; access to sanitation facilities was to increase from 5% to 8%.\(^{176}\)

Some significant initiatives to improve accessibility, particularly in arid and areas with great lack, included completion of the Maruba Dam in Machakos with water storage capacity of 2.4 million cubic meters and treatment capacity of 5,000 million cubic meters, serving a population of 100,000 people.\(^{177}\) In Nairobi, Sasiaua Dam was rehabilitated, restoring 16 million cubic meters of water and substantially reducing water shortage in Nairobi. In Nakuru, Olbanita Water Project has been completed, reducing stress associated with the search for water among the residents of the area and its surroundings. Further, the Kismu Water Supply Project that aimed at doubling the supply of water to Kisumu residents was completed. In addition, 900 small dams and water pans have been constructed mainly in ASAL areas, resulting in supplementary water storage of 17 million cubic meters.\(^{178}\)

More than 100 boreholes were drilled and equipped in 2010, enabling 300,000 more people to access clean water in various parts of the country. Four medium sized multi-purpose dams – Kiserian in Kajiado, Umma in Kitui, Chemasusu in Kibatke and Badassa in Marsabit – are under construction. Construction of a further 16 medium sized dams is planned under the MTP 2 with a storage capacity of 405 million cubic meters. Four other large dams were also planned to be completed by 2015 as a long-term goal. This will have an additional capacity of 2.8 million cubic meters.\(^{179}\)

### 2.2.2 Right to Adequate Food

The human right to adequate food has been recognized in different international instruments, most notably the Universal Declaration of Human Rights (UDHR), the International Covenant on Economic, Social and Cultural Rights (ICESCR); the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); and the Convention on the Rights of the Child (CRC).\(^{180}\) Pursuant to Article 11 of the ICESCR, State parties recognize “the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions”, while pursuant to Article 112 they recognize that more immediate and urgent steps may be needed to attain “the fundamental right to freedom from hunger and malnutrition.”\(^{181}\)

The right to adequate food is of crucial importance for the enjoyment of all rights. The right to adequate food is realized when every man, woman and child, alone or in communion with others, has physical and economic access at all times to adequate food or means for its procurement. It is important at this point to emphasize the elements of the right to food: that food must be available, accessible and adequate. A prerequisite availability of adequate food at the national and local level. Ensuring physical availability in turn entails putting in place sustainable production and procurement methods for current and future generations. Physical accessibility requires that adequate food be available to every man, woman and child, including those with medical problems, and physical or mental limitations. Economic accessibility requires that the financial cost of acquiring adequate food be not too high as to jeopardize the realization of other rights. This extends from the individual level to the national level. The right to food and the principles of equality and non-discrimination require specific attention to be paid to different individuals and groups of individuals in society, particularly those in vulnerable situations. This is due to the fact that the vast majority of people suffering from hunger and malnutrition are the poor and marginalized, who are struggling to survive in rural areas.

The right to adequate food imposes three types of obligations, some levels of obligations are of immediate nature, while other measures are more of a long term character. The obligations to respect, to protect and to fulfill. The obligation to respect requires measures by the State to ensure that enterprises or individuals do not deprive individuals of their access to adequate

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176 As above.


178 As above.

179 As above.

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181 Committee on Economic, Social and Cultural Rights General Comment No.11
food. The obligation to fulfil means the State must proactively engage in activities intended to strengthen people’s access to and utilization of resources and means to ensure their livelihood, including food security.184

184 FAO (The) State of Food Insecurity in the World: Committee on Economic, Social and Cultural Rights: (2012), the Agricultural and Livestock Research food production. Currently, in seeking to provide constituces 30% of the country’s population, a population of 43.5 million persons which in Kenya, it is estimated that 13 million out of the 43.5 million people living in drought-affected areas, and over short-term symptom relief, largely facilitated the occurrence of this increasingly deteriorating situation. Extreme hunger is inextricably linked to the failures within governmental institutions like Kenya Meat Commission (KMC) and Agricultural and Livestock Finance Corporation (AFC). Improper officials who, throughcartels, manipulate the amount paid to farmers that sell their livestock to them incapacitate KMC. On the other hand, the AFC suffers from lack of commitment of its officers to carry out their functions at grassroots level. There is also the over-reliance on maize and potatoes for food security, which are especially vulnerable to environmental vagaries. Kenyan farmers have been resistant to shift their focus from the cultivation of maize and potatoes to indigenous crops because the latter are not considered commercially viable, the seeds are not readily available and generally because most free government advisory services on agriculture focus on maize, wheat and potatoes.186

The Context in Kenya

In Kenya, it is estimated that 13 million out of a population of 43.5 million persons which constitutes 30% of the country’s population, are undernourished.185 Although some slight improvements towards food security in Kenya can be observed, the achievement of food security has remained largely an unmet objective and a key challenge to the government of Kenya. Several food security-related policies developed in the country have been met with limited implementation, thus producing limited outcomes. Food insecurity or the lack of access to adequate food of acceptable quality, by all and at all times, has been one of the challenges facing many counties, particularly in the arid and semi-arid regions, mainly due to the high rates of poverty. Severity of famine and drought has increased during the past three years due to limited rainfall as well as a number of underlying structural problems. These include the high level of inequality, exclusion of the poor and vulnerable groups from the social, economic and political spheres, widespread corruption and lack of investment in sustainable agriculture.187

Ostensibly, past and present agricultural policies have attempted to promote increased domestic food production. Currently, in seeking to provide the right to food, the government has passed the Agriculture, Livestock, Fisheries and Food Authority Act (2013), the Crops Development Act (2012), the Agricultural and Livestock Research Act (2012) and the National Food and Nutrition Policy. This policy aims at achieving good nutrition for the optimum health of all Kenyans; increasing the quantity and quality of food that is available, accessible and affordable to all Kenyans at all times; and protecting vulnerable populations using innovative and cost - effective safety nets linked to long-term development. The policy has been framed in line with the Constitution which states that “every person has the right to be free from hunger, and to have adequate food of acceptable quality.”188 The policy further observes that Kenya supports the progressive realization of the right to adequate food, in the context of national food security. Kenya has taken positive steps towards investing more into agricultural development under the Ministry of Agriculture, Livestock and Fisheries. The State also maintained a multi-year expenditure on recurrent and recurrent expenditure. During the period under review, food imports have been on the increase, currently accounting for about 28% of goods imported into the country. This indicates that the country’s domestic food availability is being eroded. The prices of food and other essential commodities including maize flour (the staple food), milk, bread and vegetables increased throughout the year, largely as a result of levying value added tax (VAT - 16%) on food commodities. This has pushed up the cost of living, making life unbearable for the poor and vulnerable. Recent demonstrations such as those experienced in April 2011, riots and protests (Ugma Revolutions) triggered by high food prices in Kenya are a pointer to the increased vulnerability of the poor. The government has a heavy responsibility at hand and needs to take action towards enhancing access to food.

Kenya has made significant strides in improving agricultural productivity by increasing access to credit, market information systems, strong agro-dealer networks and use of inputs. This has been attributed to the establishment of the National Accelerated Agricultural Input Access Programme (NAAIP), which mainly focuses on providing eligible smallholder farmers with improved seeds and fertilizer in order to lift them out of subsistence farming and promote market-led agriculture. Through the program, farmers are given a Kilimo Plus starter kit comprising 10 kilograms (kg) of certified maize seed, 50kg of base fertilizer, and 50kg of top dressing fertilizer. Currently, about 70 % of farmers use fertilizer and 74 % use certified seeds, mainly of maize. However, 3.5 million smallholder farmers still work without basic agricultural inputs. This has further been crippled by unavailability of adequate information on the right type of farm inputs to use and the appropriate time of application, high cost of key inputs such as seeds, pesticides, fertilizer, drugs and vaccines, and poor quality of inputs.

185 Committee on Economic, Social and Cultural Rights: General Comment No 12. 186 Article 43 (1) of the Constitution of Kenya 187 Institute of Economic Affairs Budget 2013/14: The Onset of the Devolved Government and the Hurdisks Ahead (2013) http://www.ieakenya.or.ke/publications/doc_download/37767-budget-guide-2013-14 (accessed 8 June 2015). 188 FAO. The State of Food Insecurity in the World: Strengthening the Enabling Environment for Food Security and Nutrition (2014) www.fao.org/RoutingModule.aspx (accessed 8 June 2015). 189 FAO The Constitutional and Legal Protection of the Right to Food around the World (2011). Vitamin A supplements to children below 5 years of age.189 The initiative raised a total of 1 billion shillings, i.e. 700 million in cash and 300 million in kind. The drought further complicated the situation in the north region of Kenya where people resorted to eating the wild fruit and roots of trees as their way of overcoming severe hunger and starvation. The insufficient collective action by the government to focus on early action, mitigation, and building long-term resilience of people living in drought-affected areas, and over short-term symptom relief, largely facilitated the occurrence of this increasingly deteriorating situation. Extreme hunger is inextricably linked to the failures within governmental institutions like Kenya Meat Commission (KMC) and Agricultural and Livestock Finance Corporation (AFC). Corrupt officials who, through cartels, manipulate the amount paid to farmers that sell their livestock to them incapacitate KMC. On the other hand, the AFC suffers from lack of commitment of its officers to carry out their functions at grassroots level. There is also the over-reliance on maize and potatoes for food security, which are especially vulnerable to environmental vagaries. Kenyan farmers have been resistant to shift their focus from the cultivation of maize and potatoes to indigenous crops because the latter are not considered commercially viable, the seeds are not readily available and generally because most free government advisory services on agriculture focus on maize, wheat and potatoes.

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2.2.3 Right to Education

The right to education is one of the fundamental human rights that is anchored in international, regional and also the national laws and policies of Kenya. Education is a major driver of the economy
Articles 28 and 29 recognizes the right of children to education and provides that education of the child shall be directed towards:

a. The development of the child’s personality, talents and mental and physical abilities to their fullest potential;
b. The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;
c. The development of respect for the child’s parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, for the country from which he or she may originate, and for civilizations different from his or her own;
d. The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin;
e. The development of respect for the natural environment.

Regional and National Provisions/Legal Instruments on the Right to Education

The Pretoria Declaration on Economic, Social and Cultural Rights in Africa (2004) was adopted at a seminar in Pretoria, South Africa, in September 2004 at which representatives of the African Commission on Human and People’s Rights, 12 African states, national human rights institutions and NGOs participated. The Declaration was adopted by the Commission at its 36th session in December 2004. Among other provisions, Article 3 provided that: “States are therefore called upon to address, with all appropriate measures, their obligations in relation to the full realization of economic, social and cultural rights as well as tackling the following constraints:

- Illiteracy and lack of awareness...”

The Constitution of Kenya

Like the Declaration, the Kenyan Constitution has various provisions that relate to the right to education. The right to education is also among the rights stated under the extensive Bill of Rights enshrined in the Constitution. Although the Constitution must be read as a whole, for the purposes of this report, the following provisions have been spelt out:

- Article 43 (1) (f): Every person has the right to education;
- Article 53: Every child has the right to free and compulsory basic education;
- Article 54 (1) (b): A person with any disability is entitled to access educational institutions and facilities for persons with disabilities that are integrated into society to the extent compatible with the interests of the person;
- Article 55 (a): The State shall take measures, including affirmative action programmes, to ensure that the youth access relevant education and training;
- Article 56 (b): The State shall put in place affirmative action programmes designed to ensure that minorities and marginalized groups are provided special opportunities in educational and economic fields.

The government has formulated various policies and enacted legislation in recent years to guide the provision of education at the different levels in the country. These frameworks reflect the aspirations of the Constitution of Kenya as follows:

The policies developed:

- The Policy Framework for Education and Training, formulated in 2012, guides reforms in the education sector. The policy’s recommendations, which cut across the entire education sector, have largely been implemented through the development of strategies to address such issues as institutional reforms, the management and financing of education, the curriculum, teacher education, teacher development and management, and strategies that would bring digital technology within the reach of every Kenyan child;
- A Sessional Paper on Science, Technology and Innovation that provides the policy framework for the acquisition, development and promotion of science, technology and innovation for national transformation to a knowledge economy;
- The National Special Needs Education Policy Framework which was designed by the Ministry of Education in 2009 addresses some of the critical issues which determine delivery of quality and relevant education to learners with special needs. It also addresses issues of equity and improvement of learning environments in all schools. This ensures that inclusive education is a reality and consequently improves the participation and involvement of people with special needs in national development in general.

Enacted Laws:

- The Basic Education Act (No. 14 of 2013) has been passed into law to regulate the provision of basic education and adult basic education in the country. The law also clarifies the role of the government, both at the national and county level with regard to education as provided for in the Fourth Schedule of the Constitution. Further, Adult and Continuing Education (ACE) are now included in the Basic Education Act (No. 14 of 2013);
- The Universities Act (No. 42 of 2012) has laid down the framework for higher education reforms which includes the incorporation of private universities into the selection body that will in future select state-funded students to both public and private universities.

Still on a policy level, 2.5 billion shillings has been provided for the school feeding programme and 400 million for sanitary towels to ensure that no child misses out on school due to hunger or menstruation. To improve the quality and accessibility of education to all school-going children, a comprehensive e-learning program remains priority policy to the government. As such, a total of 17.4 billion shillings has been set
The prevalence of out-of-school children is accelerated by incidences of children who are unable to access education due to extra fees, levies and charges in public schools despite articulation of basic education as free and compulsory under Article 53(1) (b) of the Constitution and the Basic Education Act (2013). This has particularly affected children from poor backgrounds who perform well but are unable to transit from primary to secondary education because of inability to raise the required fees. It has been reported that for a Form One student to access a national public secondary school, he or she has to pay school fees in the average of 60,000 Kenya shillings annually, an amount that is very high for the 50% of the entire Kenyan population that lives below the poverty line.

The high number of out-of-school children in Kenya is a pointer to denial of the right to education. There is quite a good number of children in the streets and informal settlements that have no access to education. Other children are unable to access primary education due to negative cultural practices. In communities like the Samburu, Turkana, Pokot and other pastoralist communities, practices such as female genital mutilation (FGM) and early marriages are a serious hindrance to education for girls.

Besides negative cultural practices, a national research conducted by Girl Child Network (GCN) established that the participation of the girl child in education is greatly hindered by the difficulty involved in managing menstruation. Indeed, it emerged that a girl would miss school for an average of 3 to 5 days a month due to lack of sanitary towels; cumulatively resulting into missing 12 to 15 days a term and a total of 39 to 45 days a year. In response thereto, the State introduced the National Schools Sanitary Towel Program in 2011 to, amongst other things, deal with gender disparities in education and particularly girl child education in ASAL and other marginalized regions. It has been established that the budgetary allocation required Programme at KIE! By May 2012 http://www.education.go.ke/ShowPage.aspx?departm%20ent=1&id=1168, an amount that is very high for the 50% of the entire Kenyan population that lives below the poverty line.

There are several barriers to access to free and compulsory basic education in Kenya. These include low teacher to student ratio, the shortage of teachers due to the massive enrolment of pupils, insufficient learning facilities, and poor learning environment particularly in arid and semi-arid areas and urban slums. Further, it is estimated that there are approximately over one million children who are still out-of-school, the majority of whom are in ASAL areas, pockets of poverty and urban slums.197

The World Disability Report of 2011 indicated that persons with disability constituted 15% of the world’s population. In Kenya, this group makes up 4.6% of the population or 1.7 million people. Persons with Disability

Public education is also characterized by lack of sufficient, adequate, accessible and quality special schools or schools that can integrate children with special needs. Educational facilities do not adequately cater for children with disabilities in terms of teachers trained on special needs education and learning materials used by special children. Most of the educational facilities offering free primary education are also not easily accessible to learners with physical disabilities. In response to these challenges, the government launched a Special Needs Education (SNE) Policy Framework that addresses government’s intention to work with stakeholders to transition to an inclusive education approach in line with the aspiration of the Jomtien Declaration, education for all by 2015.198 Though the plight of children with special needs is also addressed in the Basic Education Act, integration of children with special needs into the regular school system is still a challenge at both primary and secondary school level. Transition levels for children with special needs to the secondary school is equally a challenge as these children are required to attain the same pass marks as other children, their unique circumstances notwithstanding. Access to education is not always inclusive. Persons with disability have had a major challenge accessing equal opportunities in the Kenyan education sector despite national commitment to provide equal access to education in international and regional instruments, the Constitution and other national laws.

The Ministry of Education is mandated to monitor the quality of education offered in schools including the implementation of the school curriculum and syllabus, and the assessment of students. Though the Ministry of Education is mandated to monitor the quality of education offered in schools including the implementation of the school curriculum, there is lack of effective and regular monitoring. Consequently, low learning outcomes increasingly typifies public education. A number of factors have contributed to the poor quality of education in public schools. These include shortage of teachers and poor facilities in public schools. There are remarkable imbalances in the distribution of available teachers. Schools in the arid and semi-arid areas normally have high teacher-to-pupil ratios as opposed to public schools in other regions. Facilities in public schools are another major challenge to quality of education. The supporting infrastructure is insufficient; classrooms, textbooks and exercise books are inadequate to serve the large population of pupils.

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A report by the KNCHR in 2014 indicated that there are 3,464 schools for special needs in the country, 2,713 of which are integrated institutions while 751 are special needs schools. Out of this number, there are 17 secondary schools in the country for persons with disabilities including 10 for those with hearing impairments, 3 for those with physical disabilities and 4 for the visually impaired. These numbers disabilities to secondary schools. A survey report published in 2008 by the Kenya National Bureau clearly show that there is severe limitation of facilities for effective transition of people with disabilities Statistics indicated that 67% of PWDs attained primary educations, 19% secondary education and only 2% attained tertiary education.

Access to Secondary and Higher Education

In the past decade, the level of enrolment in primary schools has increased while the transition to secondary schools has remained significantly low. 2009 World Bank statistics indicated that the transition was at 50%. Although there has been an increase in the transition rate over the years, the numbers remain relatively low. There are about 26,000 public primary schools against only about 6,500 public secondary schools.

The government has made tremendous progress in providing universal access to secondary education. To ease the financial burden shouldered by many households with secondary school-going children, the budgetary allocation for free tuition in secondary schools was increased by 33 % to 28.2 billion shillings in the 2014/2015 fiscal budget. This development will hopefully see secondary education truly free within the next three years.

2.2.4 Right to Health

Kenya is a state party to the Convention on the Rights of the Child (CRC), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), and the African Charter on Human and Peoples’ Rights as well as other human rights treaties and agreements that recognize the right to health.

Cognizant of States’ different levels of resources, the ICESCR provides that the rights guaranteed by it, including the right to health, are subject to “progressive realization,” meaning that a State should “take steps to the maximum of its available resources” to achieve full realization of these rights. States are obligated to work towards conditions that would ensure access for all to receive medical services and medical attention in the event of illness.

Under the ICESCR, each state party is obligated to take steps, individually and through international assistance and cooperation, towards the full realization of the rights recognized therein, such as the right to health. It is impermissible for a government to take retrogressive measures in relation to the right to health, such as might be implied in the lowering of the percentage of the health budget as compared to the overall government budget. In addition, the ICESCR outlines several core obligations for governments which define “minimum essential levels” of rights that are not subject to progressive realization but which must be realized immediately and at all times.

Article 43 of the Constitution provides that every person has the right to the highest attainable standard of health, which includes the right to reproductive health care services. It further outlines that a person shall not be denied emergency medical treatment and that the State shall provide appropriate social security for persons who are unable to financially support themselves and their dependents.

The Kenya Health Policy 2012-2030 provides guidance to the health sector in terms of identifying and outlining the requisite activities towards the achievement of government’s health goals. The policy is aligned to Kenya’s Vision 2030 (Kenya’s national development agenda), the Constitution of Kenya and global health commitments (e.g. the Millennium Development Goals). The policy also provides an institutional framework that specifies the new institutional and management arrangements required under the devolved system of health care. The policy acknowledges the need for new governance and management arrangements at both levels of government and outlines governance objectives.

Provision of health care in Kenya is a devolved function to be executed by the county governments in line with the provisions of the fourth schedule of the Constitution. At the national level, the Ministry of Health is responsible for development of national health policies, provision of technical support at all levels, monitoring quality and standards in the provision of health services, provision of guidelines on health services tariffs and conducting studies required for administrative or management purposes.

Health Care Financing

Increasing allocation of resources to the health sector is critical to the achievement of sustained social and economic development. Ideally, national budgetary allocations are the conventional expression of government’s commitment to address the social and economic challenges facing its people.

The budgetary allocation to the health sector for financial year 2010/11 was a total of 45.7 billion shillings of government resources, representing 6.5% of the total estimated government budget for that financial year and 1.5% of the Gross Domestic Product (GDP). Resources allocated to the health sector included nominally in the years that followed. When compared to the 2010/11 fiscal year, the health budget for 2011/12 increased from 45.7 billion to 49.7 billion shillings; an increase of approximately 4 billion that translates to an 8.8% improvement while the health budget in 2012/13 increased by 16.9% to reach 85 billion shillings. The additional resources were used to fund employment of 5,200 health workers and 915 doctors, and implementation of the second phase of allowances for health workers.

Despite increments to the health budget over the years, the allocations have still been way below the target of 15 % of national budget as anticipated by the Abuja Declaration.


206 As above.

207 As above.


209 As above.


Access to Health Care

Access to basic health care in Kenya is a challenge to majority of the people, particularly the low income earners. The National Hospital Insurance Fund (NHIF) only covers a small percentage of Kenyans, leaving the majority vulnerable and highly dependent on their resources to finance their health care needs. Overall health insurance coverage levels for formal and informal sector populations have reached 4.5 million people (11% of the Kenyan population). While the coverage is high for the formal sector (98%), coverage of the informal sector which accounts for over 80% of Kenya’s workforce has proven to be more challenging, and remains low at 16% of this population group.

Health Care Workforce

Kenya is one of the countries identified by the World Health Organization (WHO) as having a “critical shortage” of health care workers. The WHO has set a minimum threshold of 23 doctors, nurses and midwives per population of 10,000 as the prerequisite for delivery of essential child and maternal health services. In contrast, Kenya’s most recent ratio stands at 13 health care workers per 10,000 people. This shortage is marked worse in rural areas where the situation is compounded by frequent health care worker strikes over increased pay and opposition to devolution and management of the health sector by county governments.

Child Mortality

The Kenya Demographic Health Survey (KDHS) 2008/09 in comparison to the 2003 KDHS, shows improvement in the Infant Mortality Rate (IMR) from 77 to 52 per 1000 live births while the Under Five Mortality Rate improved to 74 from 115 per 1000 live births. However, the neonatal mortality rate only reduced marginally from 33 to 31 per 1000 live births and contributed to 42% of the under-five child deaths compared to 29% in 2003 (KDHS). Despite renewed focus and recent progress in child survival, achieving the Millennium Development Goal targets for under-five mortality (33/1000) and infant mortality (26/1000) by 2015 will be a challenge unless neonatal care, which is closely linked to maternal care, is improved. The women make the four antenatal visits recommended by WHO and only 7.3% have their first antenatal visit in the first trimester. Despite the noted improvement, therefore, antenatal services still fail to meet expected quality and standards.

Maternal Mortality

Maternal Mortality Rate (MMR) in Kenya has remained unacceptably high at 488 maternal deaths per 100,000 live births (with some regions reporting MMR of 1000/100,000 live births) in 2008/9, which is an increase from 414/100,000 in 2003, and an improvement from 590/100,000 in 1998. Most maternal deaths are due to causes directly related to pregnancy and childbirth, unsafe abortion and obstetric complications such as severe bleeding, infection, hypertensive disorders, and obstructed labour. Evidence suggests that maternal morbidity, which is comparatively higher than maternal mortality, continues to receive less attention than the latter. Yet for every woman who dies, another 20-30 women suffer serious injury or disability.

Emergency Obstetric Care

Facilities in rural areas are not well equipped to handle emergency deliveries. Women who need C-sections in small facilities died, in some cases together with their babies, if they could not be transferred in good time to larger facilities. Among the facilities that offer normal delivery services, only half of them are equipped with additional supplies to treat common complications.

Abortion

Article 26(4) of the constitution expressly permits abortion in cases of emergency, when the life of a pregnant woman is at risk, or if permitted by any other law.

Before the promulgation of the Constitution the Penal code outlawed abortion. Section 240 made provision for the protection of a person who performs a surgical procedure in good faith and with reasonable care and skill for the benefit of the preserving the life of the mother or that of the unborn child having regard to the patients state at the time and the circumstances of the case.

Despite the express provision in the constitution the penal code has not been amended to align it with the constitutional provision; whereas the constitutional provisions are supreme to the Acts of parliament so such declaration has been rendered by the courts. The right to abortion in Kenya remains uncertain given that the provisions of the penal code and the constitution are not in tandem this has had a negative effect in ensuring the fulfillment and exercise of these rights by citizens.

According to the constitution of World Health Organization, Reproductive health “is a state of complete physical, Mental and Social wellbeing and not merely the absence of disease or infirmity, in all matters relating to the reproductive health system and to its functions and processes.”

Kenya was a colony of the Britain and only attained its independence in 1963; it inherited a vast majority of laws from Britain. Kenya is a common law jurisdiction and therefore there is a reliance on the English Common law doctrine of equity and statutes of general application applicable in England in force in England on 12th August 1877 and procedure and practice observed in courts of justice on the date....


221 Echoka E et al, Existence and functionality of emergency obstetric care services at district level in Kenya: theological coverage versus reality. Among the 40 facilities assessed, 29 were government owned, seven were private and four were voluntary organisations. The ratio of EmOC facilities to population size was met (6.2/5000), compared to the recommended 5/5000. However, using the strict WHO definition, none of the facilities met the EmOC requirements, since assisted delivery, by vacuum or forceps was not provided in any facility. Rural-urban inequalities in geographical distribution of facilities were observed. The facilities were not providing sufficient life-saving care as measured by caesarean section rates, which were below recommended levels (3.7% in 2008 and 4.5% in 2009) in rural areas (2.1% vs. 6.8%; p < 0.001 ) in 2008 and (2.7% vs. 7.7%; p < 0.001) in 2009. The rates were lower in the rural than in urban areas (2.1% vs. 6.8%; p < 0.001 ) in 2008 and (2.7% vs. 7.7%; p < 0.001) in 2009. Available on http://www.who.int/bulletin/volumes/87/2/09-152965/en/ (accessed 8 June 2015).

222 As above.


the right to health is crucial to the realization of other rights. Article 12 of the Covenant on Economic, Social and Cultural Rights guarantees the right to housing as one of the fundamental rights and freedoms and includes the right of all to health facilities, as well as access to goods and services, without discrimination of any kind.

The African Charter on Human and Peoples Rights guarantees the right to health, in interpreting Article 16 of the Charter, held inter alia that the right to health is crucial to the realisation of other fundamental rights and freedoms and includes the right of all to health facilities, as well as access to goods and services, without discrimination of any kind. According to G. Sedgh et al., Women with unwanted pregnancies are likely to have an abortion regardless of whether the abortion is permitted under the law. It can be argued that domestic laws are a great determinant as to whether women will have safe or unsafe abortions. The place of laws should be to facilitate women to access their reproductive health rights and choices but should not fetter this right, the law has a role in ensuring the abortions that would otherwise been unsafe are safe.

The doctrine of stare decisis and precedence by courts have been extended to abortion. The doctrine of stare decisis and precedence by courts is a principle that says that courts are bound by previous decisions of the higher courts or by lower courts. The doctrine of stare decisis is a legal maxim that means “let the decision stand as a precedent.” This means that courts are bound by previous decisions of the higher courts or by lower courts.

The rise in informal settlement coupled by the government’s inability to build additional households has continuously exposed people to perennial danger. For example, in September 2012, more than 100 people died after a petrol pipeline explosion in an informal settlement. The fire spread quickly as a result of the housing congestion in the area coupled with poor building materials and lack of access to road for emergency response. The news was covered by the local media and the international community. The fire caused widespread damage and displaced many people. The government was criticized for its slow response and lack of adequate resources to deal with the crisis.

The right to housing is anchored as a socio-economic right under Article 43(1) (b) of the Constitution. The Constitution foresees that every Kenyan should be able to acquire affordable housing which must also be available. Vision 2030 recognizes the right to housing as one of the fundamental rights under the social pillar. Progress in the realization of this right has been shaped by diverse factors including social-political, economic and policy dynamics. Some level of success has been achieved but considerable challenges still exist.

Kenya has achieved great milestones in an effort to realize the right to housing especially in the MTP1 period, including the following:

- Drafting of the Housing Bill, 2011 which seeks to facilitate the provision of decent and affordable housing to all Kenyans;
- 991 civil servants housing units have been constructed in Nairobi while 222 units are under construction;
- 900 units were constructed in Kibera under the Slum Upgrading program;
- 81 constituency Appropriate Building and Technologies (ABTs) centres have been established and operationalized;
- The Kenya Informal Settlements Improvement Project (KISIP) has commenced;
- Construction of markets in Nyeri and Kisumu and installation of high mast floodlighting structures has been completed.

The housing sector has over the years been struggling to accommodate the housing demands of a rising population, especially in the urban areas. Rapid urbanization (at about 4.2% in the last census report) and ethnic violence displacements (especially the 2008 post elections violence that left over 600,000 people displaced and over 70,000 houses destroyed) have made the situation worse. It is estimated that out of a total of 150,000 housing units required in urban areas every year, only an estimated 35,000 units are produced. The shortage of housing for low income households, especially in the urban areas, is acute with an estimated 20%, or 6000 units, being produced to cater for low income residents.

The price of housing in Kenya has also shot up, negatively impacting the right to housing as very few people can afford houses at the current market rates. For instance, the average price of property in Nairobi’s up-market suburb shot up by 29% from an average of 15.7 million shillings in 2006 to 20.2 million in 2012. Inexorably linked to the right to housing is the sanitation of the dwellings. In 2011, the government was accused of failure to enforce existing laws and standards of sanitation in slums and informal settlements. Selective application of sanitation laws and standards has left many people without access to toilets and private washing facilities. The lack of access to sanitation facilities in the immediate household vicinity, combined with an absence of effective police presence in the slums and settlements, placed women at risk of sexual violence and harassment. In March 2010, the government through the state owned Kenya railways Corporation, issued a 30 day notice of eviction to the more than 50,000 people living along the railway line. The corporation attributed this to an upgrading project. Even though the so-called upgrade did not take place, the government never provided alternative measures to resettle these people or any form of compensation.

Similarly, in July of 2011, the Nairobi City Council bulldozers destroyed more than 100 homes and 470 market stalls in Kabete. In the process, a 74 year old man was shot dead at close range. The year also witnessed plans to evict thousands of people from the Mau Forest complex. Although this was done in a properly planned government procedure, a number of evictions from the Mau Forest remained in makeshift settlements.

The right to housing is the right to housing as one of the fundamental rights and freedoms and includes the right of all to health facilities, as well as access to goods and services, without discrimination of any kind. According to G. Sedgh et al., Women with unwanted pregnancies are likely to have an abortion regardless of whether the abortion is permitted under the law. It can be argued that domestic laws are a great determinant as to whether women will have safe or unsafe abortions. The place of laws should be to facilitate women to access their reproductive health rights and choices but should not fetter this right, the law has a role in ensuring the abortions that would otherwise been unsafe are safe.

RJ Cook et al., postulates that a women’s ability to access safe abortion is affected by the domestic laws and how those laws are interpreted and administered. In practice, and how the healthcare provider perceives the laws. The net effect of this is that women will not be able to access especially where the health care professionals and women do not understand the vaguely worded legal provisions.

Unsafe abortions in Kenya are estimated to cause 35-50% of all maternal deaths; these rates are extremely high when compared with the global estimates of abortion-related maternal deaths which stand at 13%. The lack of abortion services in Kenya, coupled with a strict legal regime, has driven those seeking to procure abortion to resort to crude and unsafe methods, which in several cases has led to death and in other cases permanent damage to the uterus.

2.2.5 Right to Housing

The right to housing is anchored as a socio-economic right under Article 43(1) (b) of the Constitution. The Constitution foresees that every Kenyan should be able to acquire affordable housing which must also be available. Vision 2030 recognizes the right to housing as one of the fundamental rights under the social pillar. Progress in the realization of this right has been shaped by diverse factors including social-political, economic and policy dynamics. Some level of success has been achieved but considerable challenges still exist.

Kenya has achieved great milestones in an effort to realize the right to housing especially in the MTP1 period, including the following:

- Drafting of the Housing Bill, 2011 which seeks to facilitate the provision of decent and affordable housing to all Kenyans;
- 991 civil servants housing units have been constructed in Nairobi while 222 units are under construction;
- 900 units were constructed in Kibera under the Slum Upgrading program;
- 81 constituency Appropriate Building and Technologies (ABTs) centres have been established and operationalized;
- The Kenya Informal Settlements Improvement Project (KISIP) has commenced;
- Construction of markets in Nyeri and Kisumu and installation of high mast floodlighting structures has been completed.

The housing sector has over the years been struggling to accommodate the housing demands of a rising population, especially in the urban areas. Rapid urbanization (at about 4.2% in the last census report) and ethnic violence displacements (especially the 2008 post elections violence that left over 600,000 people displaced and over 70,000 houses destroyed) have made the situation worse. It is estimated that out of a total of 150,000 housing units required in urban areas every year, only an estimated 35,000 units are produced. The shortage of housing for low income households, especially in the urban areas, is acute with an estimated 20%, or 6000 units, being produced to cater for low income residents.

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The rise in informal settlement coupled by the government’s inability to build additional households has continuously exposed people to perennial danger. For example, in September 2012, more than 100 people died after a petrol pipeline exploded in an informal settlement. The fire spread quickly as a result of the housing congestion in the area coupled with poor building materials and lack of access to road for emergency response.
services. To date, there is an ongoing case on the compensation of the victims of the horrific fire. The same year witnessed mass demolition of houses and forced evictions in at least five areas mostly in the informal settlement areas. As a result, thousands have been rendered homeless.

Similarly, the Kenya Airports Authority conducted forced evictions in the Kyang’ombe settlement area along Jomo Kenyatta International Airport. This was done despite a court order prohibiting the area along Jomo Kenyatta International Airport. forced evictions in the Kyang’ombe settlement of houses and forced evictions in at least five areas while in September of the same year, a building and killed innocent Kenyans. The standards for the substandard constructions often collapsed constructing substandard buildings in order to acquire or own property is provided by Article 249 Kituo Cha Sheria, Baseline Survey on Human Rights within the Kenyan legislative framework. The right to acquire or own property is provided by Article 248 S Gatimu ‘The Role of Land Issues in Kenya’s Rising Cases of Insecurity – Lamu Violence’ ISS Africa – News and Analysts 20 August 2014 http://www.issaf rica.org/iss-today/the-role-of-land-issues-in-kenyas-rising-insecurity (accessed 8 June 2015).

2.2.6 Land

The Constitution dedicates an entire chapter to land policy and governance. This intentional emphasis is premised on the role that land issues have played in several injustices dating back to the colonial period. The Kenyan public has a large sense of injustice emanating particularly in take-over of individual and community land; benefit from settlement schemes; forceful eviction and land grabbing – all these aggravated by corruption and malpractice that have also played significant roles in land woes. To put the land problem into perspective, 50% of arable land in Kenya is owned by only 20% of the population while 13% of Kenyans are landless and 67% own less than an acre per person.

The doctrine of sanctity of title is well provided for within the Kenyan legislative framework. The right to acquire or own property is provided by Article 40 of the Constitution. Article 60 outlines equitable access to land, security of land rights, transparent and cost effective administration of land and encouragement to settle land disputes through local community initiatives, as the principles in the use and management of land. Article 67 further provides for the National Land Commission whose key role is the management and administration of public land in Kenya.

Land rights have and continue to face potential violation in the implementation of Kenya’s Vision 2030. A report prepared by Kituo Cha Sheria outlines challenges in the implementation of the LAPSET project. The report states that residents of Lamu County, particularly the Aweer (Boni) community, did not enjoy their rights to freedom of information as pertains the project plans, therefore there was lack or minimal public participation and inadequate compensation to deserving dispossessed proprietors.

In 2013, the Maasai community in Narasha, Olkaria region of their ancestral land were dispossessed in 2013. In 2012, residents of Kibera slum were also unsatisfied with the compensation activities of the Kenya Railways Corporation. This followed the unveiling of a project by the latter of the construction of a railway line along the railway reserve in the slum area. The encroachment on the site and eviction of homeowners were met with claims for compensation by residents, following the commencement of the project, resulted in a court case. In this case, the court permitted the project to progress albeit with adequate and prompt compensation to deserving individuals.

Evictions not only threaten the right to own and acquire property but also threaten several other human rights such as: right to security, socioeconomic rights and human dignity among others.

The Land Act No. 6 of 2012 provides for compulsory acquisition of land by government and further, for prompt compensation to all affected persons. The Land Registration Act No. 3 of 2012 limits the proof of title to the Certificate of Title. In John Gitonga Gachui and 4 others vs. Commissioner of Lands and 5 others (2013) Eikr, the courts also reiterated the right to compensation in the case relating to compulsory acquisition for construction of the Nairobi Southern by-pass.

Another study conducted in Keru Town Council (Wigia, Up in smoke? Maasai rights in the Olkaria Geothermal area, Kenya, November 2013).

251 Kepha Omondi Onjoro & others v Attorney General & 5 others [2015] eKLR

252 As evictions tend to be violent in nature, with destruction to property and injury to human beings and animals.

253 They result in the inadequate or lack of access to food, health care, clean and safe water, adequate sanitation and education, particularly during the periods of displacement.

254 Displaced persons are often subjected to deplorable living conditions.

255 Aggrey Daniel Matha Thuo Ph.D, Impacts of Urbanization on Land Use Planning, Livelihood and Environment in the Nairobi Rural-Urban Fringe, Kenya

highlighted the dangers of uncontrolled land subdivision, in efforts to promote commercial investment on farm land. It stated that there is an absence of uniformity and coordination in the development of the real estate sector, resulting in a rise in costs of services and facilities in residential areas.

The research also concluded that the lack of coordination has also led to poor domestic waste disposal due to poor sewerage systems and an inadequacy of piped water. Disposal of solid wastes in the research area as an illustration is carried out in open air sites with little or no provision for protection of the surrounding soil, water and vegetation from contamination. Pollution of surface water from surface run off carrying sewage matter, garbage, sediment from homes, construction sites and waste matter are emptied in river channels.

Moreover, another effect of land conversion is the obvious depletion of vegetation cover resulting in deforestation. This is the top soils eroding and contributing to siltation and ultimate blockage of drains. This in turn contributes to flooding, particularly during the long and short rainy seasons.

This is in spite of the Constitutional provision under Article 60 that provides for the sustainable and productive management of resources, conservation and protection of ecologically sensitive areas as principles of land policy.

Environmental rights are human rights on the basis of Article 42 of the Constitution. Both this Article and the Environmental Management and Coordination Act 1998 provide for the right to a clean and healthy environment. The Act also establishes an authority whose core function is to establish and review land use guidelines, identify projects and programmes on which environmental audit/monitoring must be conducted.

The aforementioned study also found that land use had negative impacts on the availability of water, where boreholes have been resorted to as

256 Others include: elimination of gender discrimination in legislation, custom and practices, as principles of land policy

257 National Environmental Management Authority (NEMA)
the predominant domestic water source due to scarcity of surface water. In addition, food security has similarly been negatively impacted upon due to the conversion of agricultural land to residential land. Moreover, there is further restriction on agricultural activities due to the uncoordinated land use that leaves few scattered parcels and general decline in the productivity of farm land. Disgruntlement resulting from land issues have also often occasioned violence and disruptions in Kenya. A 2012 study by the National Crime Research Centre identifies land as a major contributory factor to induction of youth to organized criminal gangs like the outlawed Sabaot Land Defence Force, Mungiki and Mombasa Republican Council.

The Truth Justice and Reconciliation Commission (TJRC) presented its report to the president in 2013. The report highlighted the illegal acquisition of foreign funded settlement schemes aimed at benefitting persons displaced in the colonial era and other land such as Karura and Ngong forests. Illegal takeovers of individual and community land by public and private institutions, illegal hiving of public and trust lands, preference to members of certain communities for resettlement, forcible resettlement outside community homeland, forceful eviction and land grabbing by government officials. The report stated that injustices had a greater prominence in the Coastal region resulting in its under-development and the prolonged lack of address of landlessness in the country has been a major cause of violence.

The commission proceeded to recommend that survey, demarcation and registration of public land, and design be carried out by the ministry responsible for land or other appropriate ministry, adjudication and registration of land at the Ministry of land. The commission were tasked to jointly design and implement an implementation mechanism together with the National Land Commission. Both the ministry and the National Land Commission. The commission proceeded to recommend that

The implementation of the recommendations of the TJRC have further been delayed by wrangles between the National Land Commission and the Ministry of land. A survey conducted between April and May 2014 illustrates that 93% of the sample group of 803 respondents sourced from 27 counties had not interacted with the National Land Commission. Only 32% of the respondents were aware of the mandate of the Commission. Moreover, centralization of the commission does not promote awareness and access to its services.

The differences between the two agencies took various forms within the period, including: issuance and renewal of land leases; management of private land; appointment of Registrar of Title Deeds; ownership and use of assets; and claims of differential budgetary allocation. These challenges hinder Kenyans from benefitting from the intended functions of the commission, particularly, the conclusion of a national land policy, formulation and implementation of a programme for the registration of titles, research on land and the use of natural resources, investigations on land injustices and assessment of tax on land and premiums on immovable property, and land use planning. Hinder the access of these services to the Kenyan people is a violation of the will of the people in the establishment of the commission and its functions at the referendum that preceded the coming into force of the Constitution.

2.2.7 Right to Fair Labour Practices

The Kenya National Bureau of Statistics (KNBS) recorded an inflation rate of 4.1% in 2010, 14% in 2011, 9.4% in 2012 and 5.7% in 2013. The number of people engaged in both formal and informal employment sectors in 2012 was 12.8 million, and rose to 13.5% in 2013. The gross domestic product in 2012 was 4.6% and increased to 4.7% in 2013. The domestic economy was at 5.8% in 2010, dropping to 5.1% in 2011 to rise to 4.6% in 2012, and rose again to 4.7% in 2013. However, even with the growth in the economy, the World Bank reported that each year 800,000 persons entered the job market competing for 50,000 jobs.

The Constitution accords workers with the right to fair remuneration, reasonable working conditions, right to go on strike, among others. Despite these provisions, labour relations have been a topical issue in the period under review. The Ministry of Labour reported that there were 17 strikes in the private sector, in which 4,694 workers were involved and 51,588 work hours lost in 2012. Most prominent of industrial action issues has been the remuneration (of workers under the Central Organization of Trade Unions, teachers, lecturers, medical service providers, domestic workers, among others) and poor working conditions.

In June 2013, the Kenya National Union of Teachers (KNUT) and the Kenya Union of Post-Primary Education Teachers (KUPPET) went on strike following failed negotiations on payment of allowances claimed to have been agreed in 1997. This led to closure of schools, firing of some teachers and threats of no pay for time spent on strike. The strike later ended with an agreement on pay of commuter allowance and hire of 10,000 new teachers.

In July 2013 nurses at the Kenyatta National Hospital went on strike accusing their management of failing to honour a salary increment agreement of 46% and 23% housing allowance reached in April 2013. The strike was ended with the government promising to pay all the allowances. 11,000 employees of the Nairobi County Government planned a strike to demand implementation of collective bargaining agreement signed in 2012. The strike was however suspended by the Industrial Court in September 2013.

Another issue that affected the labour sector was the minimum wage. On May 1 2013, President Kenyatta announced that the national minimum wage would increase by 14%. The announcement was met with criticism from the Federation of Kenya Employers who laments that the wages were becoming too high in relation to the costs of doing business. On the contrary however, the cost of living still outpaced the increased wages during the review period. The law puts the minimum wage for a general labourer at 9,780 shillings ($115) per month, 11,085 ($128) to 15,064 shillings ($174) per month for machine operators; and an average of 13,674 shillings ($158) per month for urban skilled workers. The lowest agricultural minimum wage for unskilled employees was increased to 4,854 shillings ($56) per month, excluding housing allowance. Due to the insufficiency of the minimum wage, focus should be directed towards provision of a living wage in its stead.

The review period also saw a sharp increase in reporting of cases of abuse of migrant workers, particularly those in the Gulf countries. This resulted in a temporary ban of recruitment of workers to the region to allow for auditing of employment agencies. The agencies had been accused of negligence in the protection of migrant workers. The plight of migrant workers illustrates violation of several fundamental rights, particularly those prohibiting torture and cruel, inhuman and degrading treatment, slavery and servitude, the right to respect and protection of human dignity, and fair working conditions. In extreme cases, mistreatment of migrant workers is a violation of the right to life.

An explanation for the influx of migrant workers
into countries in the Gulf is the superficially attractive entrenchment of the Bedouin principle of kafala in employment contracts of prospective migrant workers. The principle is a code of hospitality that calls for families to treat travelling strangers as one of their own. Reality however points to abuse of the principle by employers in ways such as withholding of wages, confiscation of passports and subjecting workers to long working hours in sub-standard or unsafe conditions. Other violations have included physical abuse, sexual violence, and cruelty. Moreover, migrant workers execute their duties in an environment devoid of labour laws for migrants.

Unreasonable working conditions have also been an epidemic domestically. Workers in the flower industry have been subjected to exploitation due to poverty and vulnerability. Common forms of exploitation include low wages, lack of protection from repetitive strain injuries and toxic pesticides, irregular schedules especially in peak seasons, sexual harassment of female workers in most instances, and inadequacy of benefits such as maternity cover and childcare allowances. A study conducted on flower farms in Timau, Imenti North in 2011 illustrated that 95.2% of workers did not use protective equipment as they were unavailable. Pre-placement medical examination had only been carried out on 21.5% of workers. Respiratory tract problems affected 42.5%, gastrointestinal problems affected 16.7%, malaria affected 14.8%, pneumonia affected 8.9%, skin problems affected 6.5%, and eye problems affected 2.4% while 6.5% of workers had suffered injuries and accidents.

Despite the enactment of the Employment Act 2007 and stipulation of labour rights under the Constitution, domestic workers are another of the least protected worker groups. Most still lack protective equipment as they were unavailable.

2.2.8 Right to Social Security

The right to social security is of central importance in guaranteeing human dignity for all persons when they are faced with circumstances that deprive them of their capacity to fully realize their human potential or to enable participation in different aspects of society. This right is enshrined in the Universal Declaration of Human Rights and in the International Covenant on Economic, Social and Cultural Rights (ICESCR). Adequacy: Benefits, whether in cash or in kind, must be adequate in amount and duration in order that public authorities must take responsibility for the effective administration of this system. This requires that a country must, within its maximum available resources, ensure access to a social security scheme that provides a minimum essential level of benefits to all individuals and families that will enable them to acquire at least essential health care, basic shelter and housing, water and sanitation, foodstuffs, and the most basic forms of education as a matter of priority.

They are denied freedom of association, and in some cases subjected to sexual harassment by employers. Below are some documented accounts of infringements of the right to fair labour practices during the period under review.

2011 - Carol Wangui forced her deportation back to Kenya after three weeks of torture. She was nursing serious back injuries and had stitches following abuse by her employer. She complained of working under very harsh conditions and general mistreatment. Her employer never paid her.

2011 - Makku Morocha’s family lost touch with her after she left Kenya. The agent who helped her secure employment claimed not to know of her contacts and whereabouts.

2011 - Bahati Ramadhan Bahati had not received a salary for the previous one and a half years and was neither allowed to return home. She reported being subjected to severe physical abuse.

2011 - Amina Jundo complained that she was unwell and was not receiving any medical treatment or salary for the previous six months.

2011 - Bindi Sadii ceased communicating upon arrival in Saudi Arabia. Efforts to have her agent intervene proved futile.

2011 - Ushi Hussein complained of being very sick and extremely overworked since October 2010. Her pleas to be deported failed and she was being held incommunicado in Tabouk, Jeddah, since June 2011.

The UN Committee has stated that implementing the right to social security requires that a system be established under domestic law, and that public authorities must take responsibility for the effective administration of this system. This requires that a country must, within its maximum available resources, ensure access to a social security scheme that provides a minimum essential level of benefits to all individuals and families that will enable them to acquire at least essential health care, basic shelter and housing, water and sanitation, foodstuffs, and the most basic forms of education as a matter of priority.

Sources


268 As above.


273 General Comment No. 19: The right to social security (art. 9)

274 UN Independent Expert: “Social pensions are critical to human rights”

275 Articles 71 and 72 of ILO Convention 102 (1952) on Unemployment Insurance (Minimum Standards) set out similar requirements.

Elements of the right to social security

The key principles underlying the right to social security include: comprehensiveness, universality, adequacy and appropriateness, respect for equality and Respect for Procedural Rights. The Special Rapporteur has set out an elaborate frame work for social protection, identifying best practices. Her approach involves the application of the central human rights principles of the human rights framework – equality and non-discrimination (including accessibility, adaptability, acceptability, adequacy and the incorporation of the gender perspective), participation, transparency and accountability to the design, implementation, monitoring and evaluation of social protection systems.

Availability: State should ensure that the right to social security is available and in place to ensure that benefits are provided for the relevant social risks and contingencies. The schemes should also be sustainable, including those concerning provision of pensions, in order to ensure that the right can be realized for present and future generations.

Social risks and contingencies: The social security system should provide for the coverage of the following nine principal branches of social security: Health care, Sickness, Old age, Unemployment, Employment injury, Family and child support, Maternity, Disability and Survivors and orphans.

Adequacy: Benefits, whether in cash or in kind, must be adequate in amount and duration in order that everyone may realize his or her rights to family protection and assistance, an adequate standard of living and adequate access to health care. The adequacy criteria should be monitored regularly to ensure that beneficiaries are able to afford the...
goods and services they require to realize their Covenant rights.

Coverage: All persons should be covered by the social security system, especially individuals belonging to the most disadvantaged and marginalized groups, without discrimination on any of the grounds prohibited under article 28 of the Constitution of Kenya.

Eligibility: Qualifying conditions for benefits must be reasonable, proportionate and transparent. The withdrawal, reduction or suspension of benefits should be circumscribed, based on grounds that are reasonable, subject to due process, and provided for in national law.

Affordability: If a social security scheme requires contributions, those contributions should be stipulated in advance. The direct and indirect costs and charges associated with making contributions must be affordable for all, and must not compromise the realization of other Covenant rights.

Participation and information: Beneficiaries of social security schemes must be able to participate in the administration of the social security system. The system should be established under national law and ensure the right of individuals and organizations to seek, receive and impart information on all social security entitlements in a clear and transparent manner and institutional framework regulating pension schemes must guarantee accessible mechanisms for accountability.

Social protection in Kenya is implemented in three fold: social assistance, social security and health insurance. All those are regulated and provided for under a plethora of laws- the Retirement Benefits Act, 1997, the Retirement Benefits (Amendment) Act, 1998, the National Social Security Fund Act, the National Health Insurance Fund Act and the Pensions Act. In interpreting social security aspects, it should be borne in mind that social security should be treated as a social good, and not primarily as a mere instrument of economics. The Critical targets of attaining Gender Equality in any country have been summarized and articulated by many Scholars as follows:

- Freedom from Violence for women and girls. The levels of violence against women has reached alarming promotion with one in three women experiencing some physical or sexual violence worldwide.
- Access to opportunities and resources. This means recognizing, reducing and redistributing the burden of unpaid care work; ensuring equal access to assets and resources such as education, land and finance; equal pay and working conditions; and guaranteeing sexual and reproductive health and rights.
- Equality in agency, voice, participation and full leadership across the full range of decision making arenas in public and private institutions.
- Safety and security of women and girls from all forms of violence, human rights, including sexual and reproductive rights, education, land rights, equal pay, recognition of unpaid care and all the rights and opportunities to which she is entitled.
- Women’s Empowerment in Kenya. Even though galvanizing resources for Gender Equality and guaranteeing sexual and reproductive health and finance; equal pay and working conditions; equal pay, recognition of unpaid care and all the rights and opportunities to which she is entitled.
- Women's Empowerment in Kenya.
- The critical targets of attaining Gender Equality in any country have been summarized and articulated by many Scholars as follows:

- Scandals at NHIF have seen its former CEO and four other executives charged in court with fraud. Investigations indicated that 121 million shillings was allocated to non-existent clinics of Meridian Medical Centre and Clinic Health Care.

2.3 GROUP RIGHTS

2.3.1 Rights of Women

Gender equality and empowerment of women has been in Kenya’s policy-making mainstream for a long time. This has led to numerous policy initiatives being implemented such as the establishment of a Women Enterprise Funds (WEF) and 30% Public Procurement Preferences and Reservations for Women, Youth and Persons living with Disabilities (PWDs) among other interventions so as to ensure socio-economic empowerment of women. Within the public sector, one third of all appointments have been reserved for women as a way of increasing the number of women in decision-making positions. Gender equality issues have also been prioritized in the Medium Term Plan I and Medium Term Plan II of the Kenya Vision 2030. The government has also included gender targets in the performance contracts to mainstream gender concerns within the public sector.

The Kenyan Constitution 2010, MDG’s and Building up of Beijing + efforts have also contributed to galvanizing resources for Gender Equality and Women’s Empowerment in Kenya. Even though women form a majority of the Kenya’s population play an active role in the development of the society, Kenya remains a very patriarchal society, and the male dominance still prevails in many aspects of life. This situation has been reinforced by the social-cultural factors and the women continue to be marginalized and discriminated. However, Kenya has gone steps ahead in instituting new laws and policies that are continually redressing the situation. The MDGs for instance are a blue print agreed to by all the world’s countries and all the world’s leading development institutions. The goals establish measurable and universally agreed objectives for eradicating extreme poverty, hunger and expanding educational opportunities to all children.

The goals aim at preventing deadly diseases as well as reducing child mortality. They also promote Gender Equality, ensuring Environmental sustainability and developing a global partnership for development among other development imperatives. Inclusion within the MDG framework has been important in highlighting gender inequality. The year 2015, the world marks 20 years since the Beijing declaration on gender equality. After the 20 years of intense lobbying for women rights, there is a feeling of disenfranchisement with the slow pace of progress. Although MDG 3 recognizes the crucial role that economic and political participation, play in women’s empowerment, agriculture and the proportion of seats held by women, there are no firm targets and a scarcity of data in these areas suggest that these aspects of women’s empowerment are not seen as political priorities by governments and Countries including Kenya.

Challenges to Gender Equality and Empowerment

Kenya National Commission on Human Rights
of legislation enacted in the recent past, the Kenyan society is still predominantly patriarchal, and women are consistently marginalized and discriminated at family, community and societal level. The Constitution of Kenya’s Bill of Rights guarantees every person, regardless of gender, equal rights and freedoms. In spite of this, the Kenyan society is still grappling with entitlement of women to enjoy certain rights. The Constitution further introduced reforms in other areas that predominantly affected women’s lives including electoral reforms and an expanded Bill of Rights that provides for economic and socio-cultural rights of individuals and also affirms the rights of vulnerable groups including women and children. According to the 2009 census, women constitute 51.4% of the population.

2.3.1.1 The Constitution of Kenya

The following is a review of the Articles of the Constitution that safeguard the rights of women with a view to reducing their vulnerability to human rights violations.

The Constitution of Kenya was promulgated on the 27th of August 2010, after two decades of struggle for constitutional reform. The Constitution is deemed to be a progressive document that will cure many of the historical injustices coming after decades of poor governance. It has introduced reforms in different areas that affect Kenyans’ lives, including reforms in key institutions such as the judiciary and the police. It has brought reforms to the land and electoral frameworks, as well as expanded the Bill of Rights which provides for economic and socio-cultural rights. Further, it introduces safeguards for the rights of vulnerable groups such as women, children, older members of the society, persons with disability and marginalized and minority groups.

However, contrary to the presence of the empowering law, women still suffer human rights violations due to a weak structural framework that does not adequately address the inequity and discriminations suffered in a male-dominated society. The weak structural framework has further allowed the application of harmful cultural practices such as female genital mutilation/cutting (FGM/C), early marriages, widow cleansing, forced evictions, widow inheritance and discriminatory property inheritance practices which prevent women from inheriting property, in turn increasing their vulnerability to abuse.

a. Protection from Harmful cultural practices

Article 2(4) of the Constitution states that any law, including customary law, which is inconsistent to the Constitution, is void to the extent of the inconsistency and any act or omission in contravention of the Constitution is invalid. This provision protects women from harmful cultural practices such as FGM/C, early marriages, widow cleansing, forced evictions, widow inheritance and dispossession of land.

b. Citizenship

Article 14(1) of the Constitution ensures that Kenyan women will be able to pass on citizenship to their children, whether or not they are married to Kenyans.

c. Identification of women as a vulnerable group

The Constitution in Article 2(3) recognizes that women may fall into the category of vulnerable groups within the society. It places a duty on all State organs and public officers to address the needs of vulnerable groups within the society.

d. Equality and freedom from discrimination

The Constitution in Article 260 defines affirmative action as any measure designed to overcome or ameliorate (improve) inequity (unfairness, injustice, inequality or imbalance) or systemic denial or infringement of a right or fundamental freedom. Article 27 (6) tasks the State to take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination. Article 10 of the Constitution deals with national values and principles of governance: Sub-article (2) (b) of it states that national values and principles of governance include human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized. These values are echoed in Article 27 of the Constitution which is central to safeguarding women’s rights as it provides for equality and freedom from discrimination. However, the aims of this Article have not sufficiently come to fruition in letter and spirit. The continued delay in implementation of the principle that no more than two-thirds of the members of elective or appointive bodies should be of the same gender is a case in point.

e. Recognition of the rights of special or vulnerable groups

Constitutional provisions under this part elaborate certain rights to ensure that groups which are vulnerable or are faced with unique circumstances are able to access their rights and fundamental freedoms. Women stand to gain from the provisions.

Article 260 confirms that women fall under this category as they have suffered historical injustices through laws or practices that are discriminatory on the basis of sex, marital status, pregnancy and culture, among others. As a marginalized group, under Article 56, women will benefit from the State’s obligation to put in place affirmative action programs that will encourage female participation in governance; provide special opportunities in educational and economic fields; and ensure access to employment, water, health services and infrastructure.

Further, pursuant to Article 100, Parliament is under obligation to enact legislation that promotes the representation of women in Parliament and elimination of gender discrimination through national laws, customs and practices related to land. Under Article 60, the Constitution provides that land in Kenya shall be held, used and managed in a manner that is equitable, efficient, productive and sustainable, and in accordance with the stated principles, including elimination of gender discrimination in law, customs and practices related to land and property in land.

f. Public service

The values and principles of public service under Article 232 (1) (i) of the Constitution include the provision of adequate and equal opportunities for appointment, training and advancement of women at all levels of the service.

g. Recognition of international human rights instruments and law in the constitution of Kenya

There is recognition of international human rights instruments and law in the constitution of Kenya. Under Article 2(5) of the Constitution, the general rules of international law form part of the laws of Kenya. Article 2(6) further provides that any treaty or convention ratified by Kenya forms part of the law of Kenya. The recognition of ratified international laws as part of Kenyan law allows women to demand for their rights as provided in such treaties and conventions.

The Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (the Maputo Protocol) is one such treaty. In similar vein is the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) which obligates the government to refrain from acts of discrimination against women and work proactively to modify social and cultural conduct of men and women in order to eliminate prejudices in customs and practices. The International Covenant on Economic Social and Cultural Rights (ICESCR), under Article 3, provides that “States should ensure the equal right of women and men to the enjoyment of all economic, social and cultural rights.”

Despite the new constitutional dispensation above, women’s social and economic status continues to be largely defined by customary rules that are deeply rooted in practices of diverse Kenyan communities. Most of these communities have relegated women to an inferior position. The causes of women’s subordination and unequal relations are themselves attributable to history, religions, culture, legal systems, political institutions and social attitudes which have legitimized male
dominance over property and women. 2.3.12 Discrimination of Women by Law

The centrality of customary law in defining women’s rights, and especially land rights, has led to discriminatory practices against women in the area of ownership, access and control of land and other property. Women’s access to land according to African customs is dictated by male members of the family. This is exacerbated by the fact that customary law is fluid, flexible and dynamic – rendering itself to gross manipulation by those in dominant positions such as men. The inherent superiority of men is further strengthened by legislation discriminating women. An example is Section 32 of the Law of Succession Act.

The Law of Succession Act (1981) is the piece of legislation that governs the division of property after one’s death in Kenya. To a large extent, the Act provides for the equal inheritance of property between women and men and defines “child” without any discrimination on grounds of gender in so far as property control and management in Kenya is concerned. However, Section 32 of the Act excludes the application of its provisions to certain pastoralist districts within the country and permits the application of customary laws to these districts on matters of succession. The exclusion of the law of succession to these areas, at least on paper, amounts to legitimization of discriminatory customary practices in the specified districts. In practice, the courts have held that the section cannot be used to enforce cultural discrimination against women on property rights when the Constitution and binding international human rights instruments forbid the discrimination.286

As illustrated by the foregoing, the constitutional framework creates room for strategic litigation; affording an opportunity to enhance jurisprudence on the rights of women in relation to land. With Article 40(1) (f) of the Constitution which requires that land be held, used and managed in accordance with the principle of eliminating gender discrimination in law, customs and practices, it is possible to develop extensive jurisprudence on the rights of women in relation to land. So far however, not much attention has developed from this Article’s provisions.

2.3.13 Violence against Women

The Declaration on the Elimination of Violence against Women (1993)287 recognizes that violence against women is a manifestation of the historically unequal power relations between men and women which have led to domination over and discrimination against women by men. This has hindered the full advancement of women. Violence against women is one of the crucial social mechanisms by which women are forced into subordinate positions compared with men.

Violence against women has negative impacts on women as it results in the violation of rights and fundamental freedoms of women and is an obstacle to the achievement of equality, development and peace. Further, it subordinates women to men through perpetuation of harmful cultural practices such as female genital mutilation/cutting, wife inheritance, early marriage, widow cleansing and domestic violence – all which rob women of their psychological and physical health, and integrity.

Causes of violence against women can be cultural, economic or legal. However, the underlying cause of all violence – physical, sexual and psychological violence occurring in the family including battering, sexual exploitation, sexual abuse of children, dowry related violence, marital rape, female genital mutilation/cutting and other traditional practices harmful to women, non-spousal violence and violence related to exploitation – is archaic customs and the historically weaker economic bargaining position of women which have led to domination over property and women.

Violence against women is a manifestation of the status quo – rendering itself to gross manipulation by those in dominant positions such as men. It may also involve the giving or receiving of payments or benefits to achieve similar consent. Exploitation includes at a minimum, the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs. Kenya is identified as a growing source, transit and destination country for trafficking of women and girls.288 Women who have been trafficked to Middle East countries as domestic workers have often been abused or kept in confinement; with their identification documents confiscated and in some instances murdered.

2.3.14 Changing the Status Quo

A state cannot be said to be democratic when more than half of its population is denied its fundamental rights and freedoms. Under-recognition and undervaluation of the contribution of women to nation building ought to cease; first, by dispelling traditional beliefs and myths as to gender roles and the status of women in Kenyan society. To tackle the underlying causes of discrimination, the Government of Kenya must prioritize gender equality and proactively demonstrate its will and commitment towards elevating the status of women in the country. There is need for more
legislation and for community education that emphasizes that women's rights are human rights and discriminating any one gender is a violation of human rights in general.

Highlighted below are specific implementation measures taken in the period under review to enforce the constitutional rights of women.

a. Right to health

Article 43(1) of the Constitution safeguards the economic and social rights of women and provides that every person has the right to the highest attainable standard of health which includes the right to access health care services, including reproductive health care. Obtaining from this premise, the country has put in place various legislative and policy measures relevant to health concerns of women in gender based violence and HIV & AIDS. These include:

1. The Constitution of Kenya (2010) which is based on the principles of equality, social justice and non-discrimination;
2. The Sexual Offences Act (2006) which prohibits various forms of sexual offences committed against men and women;
3. The Counter-Trafficking in Persons Act (2011) which prevents, suppresses and punishes trafficking in persons, especially women and children;
4. The Prohibition of Female Genital Mutilation Act (2011) which outlaws FGM to safeguard against the violations of a person's mental and physical integrity through the practice;
5. The National Commission on Gender and Equality Commission Act (2010) which is a vehicle for enhancing gender equality;
6. The government has also redrafted and redefined through the Constitution, gender responsive laws including the Protection Against Domestic Violence Bill (2013), the Marriage Act (2014), and the Matrimonial Property Act (2013);
7. With the support of development partners, the government has also established the Gender Based Violence Information System and Gender Based Violence Recovery Centres.

b. Legislative framework on the Right to Health

Several laws have been enacted that prohibit sexual and gender based violence and further put in place mechanisms to protect women and punish offenders in line with Article 50(8) of the Constitution which provides for protection of witnesses or vulnerable persons; Article 50(9) which protects the rights and welfare of victims of offences; and Article 43(1) (a) which safeguards reproductive health rights of women. Relevant laws are highlighted below:

The Sexual Offences Act (2006)

The Office of the President, through the then Ministry of Provincial Administration and Internal Security, incorporated the Sexual Offences Act provisions in the induction curriculum offered to chiefs and assistant chiefs. As a result of this, chiefs and assistant chiefs have been trained on the offences and evidentiary requirements under the Sexual Offences Act. The Department of Public Prosecutions has conducted specialized training for state counsel and police prosecutors. It has further revised the police training manual in order to improve police education related to implementation of the Sexual Offences Act. The Ministry of Medical Services has also developed the National Guidelines for the Management of Sexual Violence and post rape Care form. The Ministry of Public Health and Sanitation, Division of Reproductive Health has built the capacity of 50 assault forensic examiners to give expert testimony in court. Support to SGBV survivors and access to justice are being offered by the National Police Service.

This Act introduced the following reforms in the prosecution of sexual and gender based crimes and protection of victims:

1. The Sexual Offences Act consolidated and revised provisions relating to sexual and gender based violence which were previously contained in various laws;
2. Sexual crimes are no longer categorized as crimes against morality, but as crimes of violence;
3. The Act created new crimes such as sexual assault, gang rape, child trafficking, intentional transmission of HIV and other life threatening conditions;
4. The Act is gender neutral, thus men and boys can be victims and females can be perpetrators;
5. The Act establishes minimum sentences for some of the most serious sexual offences.

Following enactment of the Sexual Offences Act, a task force to oversee implementation of the Act was established by the Attorney General on 16th March, 2007. The task force has achieved the following milestones:

1. Development of Sexual Offences Regulations;
2. Development of a national policy framework on the Act;
3. Public awareness and outreach programs;
4. Setting up of gender desks by the police department across police stations in Kenya;
5. Incorporation of the Sexual Offences Act provisions in the induction curriculum of chiefs and assistant chiefs;
6. Revision of the prosecutor’s manual on sexual violence;
7. Development of a gender training manual in conjunction with FIDA Kenya;

To further support the objectives of the Sexual Offences Act, civil society organizations at the national level and grass roots level have stepped in to fill the gap of assisting victims of sexual and gender based violence to receive assistance and access justice. The assistance provided includes:

i. Legal representation – Provision of legal services to survivors of sexual and gender based violence. This involves providing legal advice to clients and filing of court cases on behalf of survivors;

ii. Community awareness programs – These have been done through community trainings and media coverage. The main aim is to enhance awareness of the nature, manifestation, dynamics and impact of sexual and gender based violence with the aim of influencing public opinion and perceptions.

iii. Social assistance – Abused women are hosted in shelters, provided financial assistance and provided opportunities for economic empowerment. Women are also provided psychosocial support;

iv. Civic engagement – Civil society organizations have engaged with police, military, public administration and county civil servants to enhance their capacity to assist sexual and gender based violence survivors;

v. Constitutional and legislative reforms – Civil society has engaged key stakeholders in the development of legislation that enhances survivors’ access to justice. Laws that have been developed with contribution of civil society include the Sexual Offences Act, the Children Act, the Constitution of Kenya, and the Prohibition of Female Genital Mutilation Act. Further, due to civil society pressure, the government has signed and ratified treaties and optional protocols such as the Maputo Protocol whose provisions significantly protect women.

Prohibition of Female Genital Mutilation Act (2011)

The Female Genital Mutilation Act makes it illegal to practice female circumcision; procure the services of a circumciser; or send somebody out of the country to undergo female genital mutilation. Offenders under this Act will serve up to 7 years in prison and be liable for payment of fines of up to 500,000 shillings. Further, a person will be liable to a sentence of life imprisonment for causing a death in the process of carrying out FGM/C. In addition, providing premises for the purposes of carrying out FGM/C, possession of tools associated with FGM/C or failure to report an incident of FGM/C within one’s knowledge are also punishable by law. The Act provides for the constitution of an implementation board to coordinate implementation of activities of the Act.


The objective of the Act is to provide measures for the prevention, management and control of
HIV and AIDS. The Act creates public awareness on causes, modes of transmission, consequences and means of prevention and control of HIV and AIDS. It protects the rights of the infected and affected and outlaws discrimination in all its forms against persons living with HIV and AIDS or those perceived to have HIV/AIDS.

Counter-Trafficking in Persons Act (2010)

This Act prevents, suppresses and punishes trafficking in persons, especially women and children, and creates various offences aimed at eliminating sexual exploitation.

a. Medical Support for Gender Based Violence Victims

During the review period, survivors of gender based violence were provided with comprehensive medical examination and treatment by key institutions such as Gender Violence Recovery Centers established by the Division of Public Health under the then Ministry of Public Health and Sanitation within hospitals in Nairobi, Coast, Rift Valley and Nyanza regions. The services included provision of post exposure prophylaxis (PEP) and emergency contraceptives – Postinor, Eunavax and ARVs; laboratory tests (pregnancy, HIV/AIDS, high vaginal swab, hepatitis urinalysis, liver function, STDs); reproductive health care including family planning option; clinical and forensic examinations; and treatment of physical injuries. There was also psychosocial support for survivors as well as training and capacity building of key stakeholders to carry out interventions on behalf of victims of sexual and gender-based violence.

b. Representation

The Constitution enables women to actively participate in the political space by increasing women representation. Article 27(8) of the Constitution obliges the state to put in place legislative and other measures to implement the Constitution. This goes to show that any legislation that prescribes a formula for implementing the two-thirds principle, it is possible to apply it in practice. However, a policy proposition is necessary on legislative and other measures that will complement those already in place to enhance representation of women in decision making.

According to the 2019 census, women constitute 51.4% of the population and 47% of the registered voters in Kenya. This numerical strength is however not reflected in women representation in public life generally, and Parliament, in particular.

From the first post-independence Parliament up to the 10th Parliament which was elected in 2007, less than 50 women had been elected to Parliament compared to 1,806 men. These numbers have increased marginally from zero to 9.8% women representation in 2007. During the 2013 elections, 16 women and 274 men were elected to the National Assembly.

A. Further 47 women were elected as County Women Representatives who also sit in the National Assembly while 5 were nominated from special interest groups, making a total of 58 women in the National Assembly. This represents 19% of the membership of the National Assembly. No women were elected as governors or senators.

In the Executive arm of government, the Cabinet is composed of 18 cabinet secretaries; 6 of whom are women. This is the highest number of women to sit in the Cabinet in Kenyan history. Kenya’s performance with regard to women representation in Parliament is however still below par, even in comparison to neighbouring East African countries. Rwanda’s Parliament has 56% women representation, the highest in the region. Tanzania follows with 36% representation. Uganda has 35% and Burundi, 30%. Kenya, therefore, ranks last.

In the 47 County Assemblies, women won 82 out of 1,450 seats in the 2013 elections. This represents 5% of the total number of seats.

In 2007, 33 women were elected to the National Assembly while 5 were nominated from special interest groups, making a total of 38 women in the National Assembly. This represents 9% of the membership of the National Assembly. No women were elected as governors or senators.

Of the 18 women in the senate were nominated pursuant to the provisions of the Constitution. The women senators make up 27% of the Senate.

In the Executive arm of government, the Cabinet is composed of 18 cabinet secretaries; 6 of whom are women. This is the highest number of women to sit in the Cabinet in Kenyan history. Kenya’s performance with regard to women representation in Parliament is however still below par, even in comparison to neighbouring East African countries. Rwanda’s Parliament has 56% women representation, the highest in the region. Tanzania follows with 36% representation. Uganda has 35% and Burundi, 30%. Kenya, therefore, ranks last.

In the 47 County Assemblies, women won 82 out of 1,450 seats in the 2013 elections. This represents 5% of the total number of seats. An additional number of 680 women were nominated in order to meet the two-thirds principle pursuant to the provisions of Article 177 of the Constitution. This goes to show that where the Constitution prescribes a formula for implementing the two-thirds formula, it is possible to apply it in practice. However, a policy proposition is necessary on legislative and other measures that will complement those already in place to enhance representation of women in decision making.

Accordingly, Article 97(1) (b) provides that 47 elective seats in the National Assembly shall be reserved for women; Article 98(1) (b) reserves 16 seats in the Senate for women members who shall be nominated by political parties. Article 98 further ensures that seats in the Senate are reserved for youth and persons with disability and that the seats are equally filled by men and women. Article 100 places responsibility on Parliament to promote the representation of women in Parliament by enacting legislation to safeguard that right.

c. Family

Article 45(3) protects women’s rights in a marriage by providing that parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage. Article 53(1) (e) ensures that parental responsibility is shared between parents, regardless of marital status. Further, under Article 68 (c) (iii) of the Constitution, Parliament is entrusted to enact legislation to regulate the recognition and protection of matrimonial property and in particular, the matrimonial home, during and on termination of the marriage. The legislation has already been enacted.

d. Establishment of the Kenya National Commission on Human Rights and the Gender and Equality Commission

Article 59 of the Constitution established the Kenya National Human Rights and Equality Commissions whose core function is to promote respect for human rights and develop a culture of human rights in the Republic and, under Article 59(2) (b), promote gender equality and equity and to coordinate and facilitate gender mainstreaming in national development. Article 59(3) gives every person the right to complain to the Commission, alleging that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is being threatened. Both the KNCHR and the NGEC have been at the forefront of vindicating women’s rights during the period under review.

e. Treaty Monitoring and Research

In monitoring government compliance with international instruments affecting the rights of women, civil society organizations have undertaken research and prepared shadow reports of findings to provide information on the status of women’s rights. Give details, country report to CEDAW.

African commission have we engaged on women’s rights. Give details, country report to CEDAW. African commission have we engaged on women’s rights. Give details, country report to CEDAW.

The Children Act™ of 2001 defines a child as any person under the age of eighteen years; the Act however makes a distinction between a child and a child of tender years and defines the latter as a child under the age of ten years.

Article 53 of the Constitution of Kenya specifically acknowledges children as a special interest group that requires special protection. Kenya is a signatory to various international and regional instruments for the protection and promotion of the rights of the child. With respect to international instruments, Kenya has ratified the Convention on the Rights of the Child (CRC), and regionally, the country has ratified the African Covenant on the Rights and Welfare of the Child (ACRWC) under the aegis of the African Union (AU) and pursuant to the African Charter. The Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child are applicable to Kenya as part of the domestic law by virtue of Article 2(5) and (6) of the Constitution. On the Optional Protocols to the UNCRC, the state signed the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography in 2008 but is yet to ratify it.

The Children’s Act seeks to domesticate the provisions of the CRC and provides a framework for protection of children in Kenya. Since 2015, the Kenyan government has been considering the ratification of these instruments. The Kenyan government has also been implementing the CRC and other international instruments. In 2015, the Kenyan government signed the Optional Protocol to the Convention on the Rights of Persons with Disabilities.

In conclusion, the Kenyan government has made significant progress in the implementation of the CRC. However, there is still much work to be done to ensure that all children in Kenya have access to their rights. The Kenyan government should continue to prioritize the implementation of the CRC and other international instruments to protect the rights of children in Kenya.
promulgation of the Constitution, there have been attempts to amend the Act through the Child Amendment Bill. Before then, the amendment of the Children’s Act (2001) has been ongoing since 2006 and has not yet been completed. There have also been proposals to enact a Child Justice Bill which seeks, among other things, to raise the age of criminal responsibility of a child from 8 years to 12 years in line with international standards.

The Children’s Act incorporates 4 general principles which underlie the child rights framework set out in the CRC. The four principles are the best interest of the child, non-discrimination and equal treatment; the right to life, survival and development; and respect for the views of the child. Despite the obtaining legal framework on the rights of the child, the actual situation on the ground in respect to the promotion, protection and fulfilment of the rights of children in Kenya is wanting.

2.3.2.2 Access to Justice

Access to justice revolves around the ease with which ordinary citizens are able to make use of the laws, legal procedures and legal institutions to resolve their problems in general and particularly to secure their rights. Human rights would be futile without an effective means of seeking redress for their breach. Some of the essential components of access to justice include: laws that are fair and accessible to the citizens in their form and language; the availability of a variety of easily accessible and effective mechanisms for resolving disputes that are adequately resourced and organized; simple and affordable procedures for achieving justice; fairness in the results of dispute resolution processes; and knowledge on the part of citizens to enable them easily use the law and legal institutions.

The Children’s Act guarantees the right to due process for children in conflict with the law. These include the child’s right to prompt and direct notification of the charges, the right to legal representation provided by the government (if the child is unable to obtain such representation), the right to a prompt determination of the case, the right to free assistance by a court interpreter where necessary, and the right to appeal against a decision of a lower court. In relation to the right to legal representation, it is noteworthy that although the government has published a legal aid bill, it is an institutionalized legal aid scheme, not only for children but also for the general Kenyan populace, which is largely non-existent and still ranks low in the

294 The Children’s Act provides that “the best interest of the child shall be the primary consideration in all actions concerning children, whether undertaken by public or private welfare institutions, courts of law, administrative authorities or legislative bodies.”

295 Articles 26, 43 and 53 of the Constitution of Kenya provide the basis for the enjoyment of rights to life, survival and development as articulated by Section 4(1) of the Children’s Act.

296 See Section 4(4) of the Children’s Act and Article 12 of the Convention on the Rights of the Child.


299 Child marriages and female genital mutilation (FGM) are especially prevalent in North Eastern, Eastern and Rift Valley regions in the country.

300 Cap 63 Laws of Kenya

Kenyan government’s priorities. To access their rights, children are thus often required to obtain legal advice at their own cost. This contravenes provisions of the Children’s Act which place the government under obligation to “take steps with a view to progressively achieve the full realization of the rights of the child” in a State where legal aid is not an operationalized right and where there is no public defender system, it is incumbent upon relevant bodies to develop a comprehensive system that can facilitate access to legal advice for children.

Children come into conflict with the law and because of their status cannot be treated like adults; these children are entitled to the protection of their rights as outlined in human rights law. Remanding of children, the right to legal representation, the age of criminal responsibility and the lack of legislative framework for division have been identified as the key challenges to access to justice by children.

2.3.2.3 Rights of Intersex Children

The intersex have finally been defined and protected under the Persons Deprived of Liberty Act of Kenya. Previously, Kenyan laws have been silent on intersex persons/children. Whereas the Registration of Births and Deaths Act prescribed particulars for registration to mean the name, sex, date and nationality of the parents; the term “sex” had neither been defined in the Act nor in the Interpretation and General Provisions Act (Cap. 2, Laws of Kenya). Form 1 of the Register of Births in the Schedule to the Registration of Births and Deaths Act only indicates that the sex of a child is either male or female, which in itself is discriminatory as it fails to cater for children born with both male and female genitalia. Petition no. 266/13 at the Constitutional and Human Rights Division of the High Court challenged this position when a baby (Baby A) who had been born at Kenyatta National Hospital could not be registered due to the restriction of definition of sex to the male and female genders only. One of the orders that were issued in the petition was a directive to the Registrar of Births and Deaths to register Baby A as an intersex.

2.3.2.4 Child Trafficking

Despite the gazettement of the Counter Trafficking in Persons Act in 2012, the US State Department places Kenya on tier 2 watch list of countries with numbers of child trafficking. Law enforcement agencies are still not well-versed with the provisions of the law, thereby impeding enforcement. The media has brought attention to the issue of child trafficking by highlighting some cases, though there have been charges filed under Penal Code offences such as child stealing as opposed to trafficking in persons.

2.3.3 Rights of Indigenous Persons

Article 260 of the Constitution does not define indigenous people; it however defines “marginalized community” to include, inter alia, an indigenous community that has retained and maintained a traditional lifestyle and livelihood based on hunter or gatherer economy, or pastoral persons and communities, whether they are nomadic or settled, and who, because of their relative geographic isolation, have experienced only marginal participation in integrated social and economic life of Kenya as a whole.

The Article also defines marginalized group to mean a group of people who, because of laws or practices before, on, or after the effective date of the 2010 Constitution, are disadvantaged because of discrimination on one of the grounds stated in

234 Persons with Disabilities

The Constitution of Kenya (2010) protects the rights of persons with disabilities (PWDs) in Article 54. It provides that PWDs are entitled to be treated with dignity and respect; to have access to education; access to all places, public transportation and information; they are entitled to use sign language, braille and other appropriate means of communication. In Article 54(2), the state is tasked to ensure the progressive realization of the principle that at least 5% of the members in elective and appointive bodies are PWDs. This principle is also provided for in the Employment and Labour Relations Acts and the Persons with Disabilities Act. Section 13 of the Persons with Disabilities Act creates a 5% reservation of all casual, emergency and contractual positions in employment in the public and private sectors for persons with disabilities. The Constitution also prohibits any form of discrimination against all persons including persons with disabilities in any setting. This is provided for under Article 27 (4) of the Constitution of Kenya.

Kenya ratified the UN Convention on the Rights of Persons with Disabilities (UNCRPD) in 2008. The UNCRPD is a progressive and ground-breaking treaty that provides protection for the rights of PWDs. This convention is part of Kenyan law by dint of Article 2 (6) of the Constitution of Kenya which makes part of Kenyan law all international treaties and conventions ratified by Kenya. The National Council for Persons with Disabilities (NCPWD) initiated revision of the PWD Act in the period under review. The Act is still currently undergoing evaluation geared to bring it to conformity with the Constitution and the UNCRPD.

2.3.4.1 Awareness Raising

Persons with disabilities continue to face stigma in the society. This is mostly due to the society lacking awareness on the rights of PWDs despite government policy on mainstreaming disability in all ministries. There have been limited opportunities to promote positive perception and awareness of PWDs’ contribution to society. It is also important to note that some persons with disabilities have not been aggressive to participate in public life. The findings of a KNCHR survey indicated that many persons with disabilities were not aware of their rights including the various legislations put in place to protect and promote their rights. The Committee on the Rights of Persons with Disabilities (CRPD) while considering Kenya’s first State Report under the UNCRPD also raised concern on awareness raising. The committee requested the state to indicate whether there had been awareness raising, trainings and campaigns on disability in civil service, schools, media, and cultural and religious-run institutions and initiatives aimed at general public, including the private sector.

2.3.4.2 Accessibility

A monitoring assessment of both private and public buildings was done in 12 counties in Kenya during the review period. It revealed that physical accessibility for persons with disabilities is still lacking. Accessibility to transport and information and communication by PWDs is also inadequate. The PWD Act gave a grace period within which all proprietors of public service vehicles should make them accessible to PWDs which will expire in December 2015 and yet accessibility remains a big challenge. Though the monitoring assessment report revealed that a few health facilities had made adjustments and had made adjustments to their buildings; several more, including buildings that house national and county government offices, courts, hotels, public toilets and police stations, among others, do not comply with current accessibility standards as provided for in the Constitution, the UNCRPD and the Persons with Disabilities Act. It was noted with concern that even houses of persons with disabilities were also inaccessible. CRPD also raised concerns on accessibility. It tasked the State to provide concrete information on outcomes of the implementation of a comprehensive legal and policy framework on accessibility, including information on the accessibility to health care facilities.
2.3.4.3 Legal Capacity for PWDs

Persons with certain disabilities in Kenya lack legal capacity. This is more so for those with psychosocial and mental disabilities. There is no formal guardianship for PWDs in the country yet PWDs still do not make decisions about their lives. The persons taking care of them end up making decisions for them including on what to eat, wear, where to live, what recreational activities to do and who to associate with.\(^{322}\)

Article 27 (1) of the Constitution of Kenya provides for equality before the law, the right to equal protection and equal benefit of the law for all persons. Article 12 of UNCRPD also provides for the right to legal capacity for PWDs. These two provisions are yet to be implemented in Kenya. The right to make a decision is the bedrock of the other rights. It signifies the dignity of an individual before the law. Legal capacity enables an individual to own property, contract marriage, and the right to make a decision is the bedrock of the other rights.

Legal Capacity

Legal capacity enshrined in the Constitution is a bedrock for many of the human rights that are protected. Article 12 of the UNCRPD provides for the right to legal capacity as one of the key human rights that need to be respected by the state. Legal capacity is crucial in ensuring that an individual is able to make decisions about their life. It is an essential right that enables an individual to participate in society and exercise their other human rights.

2.3.5 Rights of Gender Minorities

Transsexual persons live in an environment characterized by stigma, gross human rights abuse and violations propagated both by state and non-state actors. Additionally, there exists a myriad of misconceptions about transsexual people. Transsexual persons are commonly confused for homosexuals (gays and lesbians). Trans-sexuality is an issue of one’s gender identity and gender expression, and has been designated as a medical condition not characterized by sexuality or sexual orientation. This group is often confused with people having intersex conditions. Transsexuals are a minority and are a vulnerable group because they face discrimination, are a non-dominant group having no interest in the running of the state, are a statistical minority and are at a higher risk of poverty and social exclusion, among others. They face discrimination in accessing services such as medical services, change of names, and recruitment into employment. They are also not spared violence by state (including police officers and health workers) and non-state actors.

Within the period under review, there were deliberate attempts by transsexual people to seek legal redress where the state had propagated discrimination against them. The courts widely interpreted rights in favour of transsexual groups and individuals.\(^{324}\) The Transgender Education and Advocacy group sued the government for refusing to register the group as an international NGO. It accused the NGO Council of discrimination and “escalating an internalized stigma amongst transsexuals.” A transgenic Kenyan also sued the Kenya National Examination Council (KNEC) for refusing to recognize her gender identity on her school records. The council had previously registered her as male but she had taken steps to change her gender to female.\(^{325}\)

2.3.6 Rights of Sexual Minorities

Same-sex relationships are punishable with up to 14 years imprisonment in Kenya. According to a recent Pew Poll, 88% of Kenyans feel that homosexuality is “morally unacceptable.” Since the passage of the Ugandan anti-homosexuality law in 2014, LGBT Kenyans have been fearful that similar legislation could be introduced in Kenya.\(^{326}\) Members of Parliament have in fact formed a caucus to fight homosexuality and to assess why the Attorney General has not engaged in more aggressive prosecutions under the Penal Code.\(^{327}\) Although there is a active LGBT organization in the country, they often face harassment by the police and the government.

Security organs have often used arbitrary arrests as a means of intimidating those suspected to profess homosexuality. This goes against freedom of expression and association as protected under the Constitution and the various international human rights instruments that Kenya is party to. Society has also been at the forefront of seeking out LGBT with the aim of evicting them from the community, even to the extent of maiming, harming and injuring LGBT. Some voices of the LGBT on these violations are captured below.


\(^{323}\) KNCHR (n 265 above) 36.

\(^{324}\) As above.

\(^{325}\) The High Court in HCCC 705/2007, Richard Muasya vs the AG, CJP and two others held that the rights of Richard Muasya, an intersex person, had been discriminated on the basis of sex and that his right to protection from inhuman treatment had been violated by prison officials.

21st June, 2013, Mombasa – “A member of our community was slashed with a machete/panga” several times especially around the neck /throat area. His attacker later threw him out of a moving vehicle and left him for the dead. Fortunately he was rescued and taken to hospital. He has received medical attention and continues to recover.

21st – 27th June, 2013, Kisumu – “There have been reports of intimidation and beating of persons perceived to be gay by vigilante groups. These incidents haven't been reported to the police since it is known that even the police in the area fear these vigilante gangs.”

Despite the fact that the members of the LGBTI community have reported these attacks to the police, there has been reluctance to investigate and bring to book the assailants who are known to the victims in most cases.

From the standpoint of the right to freedom of association, the Non-Governmental Organizations Coordination Board refused to register the National Gay and Lesbian Human Rights Commission of Kenya. The Court claimed that the name of the organization was unacceptable, adding that it would be illegal to register it because the Kenyan Penal Code criminalizes gay and lesbian liaisons. This goes against Article 36 of the Constitution of Kenya which provides that every person has the right to the freedom of association, which includes the right to form, join or participate in activities. Despite Article 36, conceptions of morality have served as a justification to limit fundamental rights. This kind of limitation further contravenes Article 22 of the ICCPR, to which Kenya is party. The Article is categorical that any restrictions to the right to freedom of association must be limited to cases where it is absolutely necessary, taking into consideration the principles of a democratic society.

Violations levied on the LGBTI community are not limited to security and the freedom of association. There have also been infringements on the group’s right...
to access the highest attainable standard of health. Often times, they face ridicule from health workers who expose them to the community. They are sometimes denied treatment under the pretext of more genuine and deserving cases. Stigma and discrimination by health care givers has been a considerable barrier to the access and uptake of sexual and reproductive health information and services in general and STI and HIV services in particular among sexual minority persons. This kind of discrimination has far-reaching ramifications on the psychological well-being of the victims, putting to jeopardy their mental health as well. It is inapposite to the exercise of the rights enshrined in the Constitution and the attainment of the highest standard of health for all. Perhaps encouraging though, agents of the state have publicly taken cognizance of the obligation of the state to fulfil the rights of all, including sexual minorities. On the 3rd July, 2013, Deputy President William Ruto stated the following:

“Although Kenya has diverse religious and cultural positions, the government has an obligation to provide inclusive and effective services to all including sex workers, people who use drugs, men who have sex with men and people in prisons.”

3.0 CONCLUSIONS AND RECOMMENDATIONS

In the period under review there were wide ranging achievements in the passage and adoption of legislative and policy frameworks; this was given impetus to by the passage of the constitution of Kenya in 2010 which among other things required passage of various pieces of legislations and attendant policies in order to give effect to the various provisions of the constitution.

Various policies such as the Vision 2030 and in particular the second medium term plan were aligned to the constitution. Whereas there was success in putting in place of policy and legislative framework not so much progress was achieved in terms of citizens being able to enjoy the rights guaranteed in the constitution to the greatest extent possible; this status could be attributed to the lack of political will to ensure that the aspirations articulated in constitution and legislative instruments was achieved.

The human rights Policy and action plan has been pending since its completion in 2010, despite the fact that the development of the action plan was a joint initiative between the state and non-state actors there has been delay on the part of the state to enact it. The effect of the HRPAP has had a negative effect in that whereas there is a blue print for development there is no blue print that would set out the human rights priorities for state with the aim of making Kenya a human rights state.

In theory the civil political rights have been expanded since the constitution guarantees these rights but in practice there have been instances that are indicative that the state through its agents has consistently breached these rights. The conduct by the state and its agencies actually allude to the fact that these rights are shrinking a case in point is the fact that the state has responded to peaceful demonstrations with brutality in breach of Article 37 of the Constitution and other international instruments and conventions that the state is a party to.

The space of Civil society in the period under review continued to shrink with the state coming up with measures that have been interpreted as those aiming at limiting the operation/s of civil society organizations in the country. This action has had the effect of undermining the important work of Civil society organizations and making the operating environment for Civil society difficult. Coupled with the challenges faced by Civil society organizations human rights defenders faced increased state reprisals with some of them losing life and some being tried in courts of law. The challenges has been that the state does not seem to understand the role of human rights defenders. Cases of violation of the rights of human rights defenders reported by human rights defenders are hardly investigated fully by the state despite overwhelming evidence to support conviction of the perpetrators.

The enactment of prevention of torture legislation has taken inordinately long, the investigation of reported cases of torture have not been undertaken satisfactorily especially as it relates complaints emanating from places of detention the problem has been aggravated by the high cost and the difficulty in accessing the P3 forms. Due to increased terror attacks witnessed in the period under review there were reports of ethnic profiling and torture by security officers undertaking the operation, these claims were not investigated further blighting the human rights record of the state.

Whereas the Commission appreciates the need to deal with terror and terrorism brought about by extremism, such efforts must be carried out in strict compliances with the constitution and international human rights law.

Access to justice slightly improved in the reporting period this can largely be attributed to increased personnel in the judiciary and the increased confidence in the judicial system due to the vetting of the judicial officers. There is however more that needs to be done such as the passage into law of the Small Claims Court Act and The Legal Aid Bill among other measures.

Not much progress was made in respect to Transitional Justice, despite the fact that the Truth Justice and Reconciliation report was made public. Very little progress in terms of implementation has been made by the state therefore raising serious questions as to the it’s commitment to ensuring that past injustices are redressed.

The constitution of Kenya 2010 made economic, social and cultural rights to be an integral part of its expansive bill of rights, the Vision 2030 is also strong on these rights under its economic and social pillars. It is important to note the constitution in schedule 4 gave most functions related to ECOSOC rights to the county governments.

Whereas ECOSOC are to be progressively realized subject to the maximum available resources great strides have been made in the areas of health especially in terms of reduction of maternal mortality due to efforts to achieve Millennium development goals and Vision 2030; the efforts by the first lady (Beyond Zero Campaign) has also contributed to the reduction of Maternal and infant mortality. The funding to the health sector did not however, increase significantly. Challenges that the sector has faced is the constant strikes by health care workers over delayed payment, poor working conditions and other factors have negatively contributed to the slow pace of progress in the sector.

Education sector in general recorded a slight improvement with more children enrolling in primary school and attaining basic education, the transition of children from primary school to secondary school improved with a slight increase in the completion rate at secondary level. Challenges continued plaguing the sector including industrial strikes and low/delayed funding among others, resulting in the law quality of education.

Whereas the provision of water and sanitation is a function of the county governments as provided for under the constitution access to water and sanitation is still an aspirational right. Most county governments have not prioritized the provision of water and sanitation and in instances in which it has been prioritized the budget for water and sanitation is lumped together with sanitation getting the least. This has led to many citizens defecating in open areas posing a serious health risk therefore breaching their right to dignity.

Finally the state has made tremendous steps in the area of business and human rights by putting in place robust legal framework to protect local communities at the same time ensuring the businesses operate in a favourable environment; the state only needs to ensure that the laws as enacted are adhered to by all.

Despite the protection of children, women, persons with disabilities, ethnic minorities, gender minorities and sexual minorities as special interest groups in the constitution, they still continue to be excluded from processes both by the national and county governments Whereas there has been attempts at including these groups in all processes they continue to face marginalization due to their vulnerabilities brought about by exclusivity of the programmes designed for their benefit.
CIVIL AND POLITICAL RIGHTS

Criminal Justice Sector
1. The Witness Protection Agency (WPA) needs to be delinked from the Office of the President. The composition of its board ought to be revised to include non-state actors.

2. The State needs to provide adequate funding to the WPA to enhance its efficiency and proper dispensation of its mandate.

3. There is need for proper coordination of the criminal justice actors (the Police, Office of the Director of Public Prosecutions and the Judiciary) and the WPA for effective implementation of its mandate.

4. The WPA needs to embark on public awareness campaigns to sensitize members of the public on its existence and mandate.

Transitional Justice
1. With the TJRC having submitted its report, measures need to be taken to implement the report’s recommendations.

2. Priority should be given to the establishment of the reparation mechanism, identification of victims and the implementation of the reparations.

3. Priority areas for intervention by government include land, elimination of corruption and government waste, human rights protection, resource management and distribution, and immediate attention to vulnerable groups.

4. There is need for Kenya to address questions relating to socio-economic and legal-historical distributive justice such as poverty, inequality and marginalization which tends to obscure any real success that may be achieved by the TJRC report in the long term.

CIVIL AND POLITICAL RIGHTS

Transnational Crimes
1. Enforcement of anti-trafficking law to prosecute and convict trafficking offences, and punish trafficking offenders, including government officials suspected of involvement in human trafficking.

2. Provide regular and relevant training particularly to law enforcement officials, on identifying and responding to trafficking crimes and increase protective services available to adult trafficking victims, particularly those identified in and returned from the Middle East.

3. Establish an official procedural guideline for law enforcement officials to refer trafficking victims for assistance (psychosocial assistance).

4. Be more stringent in enforcing oversight of and accountability on overseas recruitment agencies in Kenya and prosecute and revoke the licenses of recruitment agencies found to be perpetrating trafficking.

5. Establish the board of trustees to oversee the National Assistance Trust Fund for Victims of Trafficking and allocate money to endow this fund and also launch and implement a national plan of action.

Right to Life
1. The state should ensure investigations on cases of extrajudicial killing and disappearances are concluded in a timely manner and the perpetrators prosecuted.

2. The state should review application of the death sentence in Kenya with the aim of abolishing the same.

Freedom of Expression, Information and Media
1. Kenya needs to extend an invitation to the Special Rapporteur on Freedom of Expression and Access to Information to undertake a mission with a view to reviewing media regulation in areas including but not limited to decriminalization of defamation, safeguarding media freedoms and internet freedoms.

2. Develop a policy and law as the basis for the protection of whistle-blowers.

3. There is need for urgent review of the Media Council of Kenya Act, Books and Newspaper Registration Act, Defamation Act, Kenya Broadcasting Corporation Act, Preservation of Public Security Act, among others, to make them compliant with the Constitution.

4. The government should increase awareness on the KODI platform.

CIVIL AND POLITICAL RIGHTS


6. The KODI needs to be frequently updated and more data sets included.

7. Ensure that internet freedom is safeguarded and develop policies on the use of the internet. Such policies should balance between the need to curb incitement to hatred as well as protect freedom of expression and the right to privacy.

Freedom of Association
1. The PBO Act needs to be given a commencement date immediately for CSOs and the public to benefit from its provisions. However, amendments should not be made to the Act to introduce funding restrictions and it should be ensured that registration requirements do not infringe on freedoms such as association and assembly. CSOs should also be encouraged to voluntarily migrate to the PBO Act regime.

ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Right to Food
1. The government should implement the twin-track approach that addresses the immediate and underlying causes of food insecurity and malnutrition. This involves combining immediate hunger relief interventions with long-term actions for sustainable growth, especially in agriculture and the rural economy.

2. The government should promote the advancement of food production technology and undertake stringent measures to promote the transfer, adaptation and dissemination of appropriate food production technology for the benefit of communities.

Right to Health
1. Increase the number and strengthen the role of community health workers, including providing them with basic supplies, transportation where needed, and compensation for their services.

2. Strengthen the referral system, by strengthening coordination between facilities.

3. Prioritize the completion and implementation of the National Social Health Insurance Fund to improve access to maternal and child health care.

4. With regard to obstetric care, increase the number of health care facilities that offer emergency obstetric care; increase the number of midwives and develop guidelines for obstetric fistula repairs in provincial and district hospitals and provide free fistula surgeries for needy patients.

5. Increase the budget allocation for health in line with the Abuja Declaration.

6. Fast track the implementation of universal insurance coverage.
Right to Housing

1. Implement the National Policy on Housing.

2. Empower county governments to ensure that buildings under construction are properly supervised to ensure that the rights of tenants are protected.

3. Invest in enabling policies and plans to involve slum dwellers in development of decent housing. This calls for proper stakeholder consultation to ensure that the needs of the beneficiaries are properly looked into. The ongoing slum upgrading projects need to be as inclusive as possible.

4. Ensure compliance with court orders especially on the prohibition of forced evictions in the country and publish the National Guidelines on Forced Evictions.

Right to Land

1. Land issues need to be addressed comprehensively, conclusively and meaningfully.

2. The NLC should be facilitated to carry out its mandate effectively. There is also need for civic education on the commission’s mandate to increase its engagement with the public.

3. Review and harmonize conflicting sections of Land Acts and have them conform to the Constitution.

4. Ensure compliance with court orders especially on the prohibition of forced evictions in the country and publish the National Guidelines on Forced Evictions.

Rights of the Child

1. Fully implement the prohibition of Female Genital Mutilation Act (No. 32 of 2011).

2. Fully implement the Sexual Offences Act (2003) which provides a comprehensive framework for the protection of women and girls from Sexual and Gender-Based Violence (SGBV).

3. Implement affirmative action on the basis of sex/gender through such processes as admission of females in public universities and institutions of higher learning at a lower grade as compared to their male counterparts.

4. Take measures to comply with the decision of the African Commission in respect to the Nubian children case.

5. Increase the budget allocated to healthcare services, intensify efforts to train and educate health care staff, and also continuously strive to provide better health facilities. Take all the necessary steps to reduce teenage pregnancy by educating teenagers and their parents on early pregnancies and also by properly implementing the Sexual Offences Act.

6. Devise and plan strategies to efficiently address the issue of malnutrition in children.

7. Provide sanitary towels to school girls who have reached puberty to ensure that their participation in school and social activities is not disrupted due to menstruation.

Rights of Indigenous People (IPs)

1. The state should implement the decision of the African Commission on Human and People’s Rights in the Endorois case and other related cases.

2. The state should ratify ILO Convention No. 169 to further promote and protect the rights of indigenous people.

3. The state should put in place a legislative framework that will give effect to the UN Guiding Principles on Business and Human Rights.

4. The state should provide security to indigenous communities and conduct disarmament in accordance to human rights principles.

5. Strengthen technical working groups on gender based violence and HIV & AIDS;

6. Strengthen provision of medical interventions for gender based violence survivors; and

7. Strengthen the legal and justice systems for reclamation of women’s rights.

Rights of women

The Government of Kenya should take the following priority actions to achieve gender equality:

1. Develop approaches for participatory and experiential training and capacity building in gender, femininities and masculinities;

2. Strengthen political commitment to women leadership;

3. Review the country’s gender policy framework and action plan;

4. Allocate adequate human and financial resources for implementing the gender policy and action plan;

5. Establish one-stop centres to provide comprehensive services to survivors of gender based violence;

6. Strengthen technical working groups on gender based violence and HIV & AIDS;

7. Strengthen provision of medical interventions for gender based violence survivors; and

8. Strengthen the legal and justice systems for reclamation of women’s rights.

GROUP RIGHTS

Rights of Persons with Disability (PWD)

1. The government should organize and execute public awareness raising forums on the rights of PWDs.

2. It is recommended that the state focuses on promotion and implementation of the principles of universal design and reasonable accommodation; that all buildings, transportation networks, information and communication should be designed to be accessible to all from the onset.

3. It is recommended that Kenya reviews and amends its laws to provide for legal capacity for persons with disability in keeping with the Constitution and the UNCRPD.

4. The state should ensure that there is effective accommodation for PWDs in government institutions including provision of sign language interpreters, information in braille and assistants to support PWDs when they seek services.

5. Renew focus on affirmative action on the basis of sex/gender through such processes as admission of females in public universities and institutions of higher learning at a lower grade as compared to their male counterparts.

6. Take measures to comply with the decision of the African Commission in respect to the Nubian children case.

7. Increase the budget allocated to healthcare services, intensify efforts to train and educate health care staff, and also continuously strive to provide better health facilities. Take all the necessary steps to reduce teenage pregnancy by educating teenagers and their parents on early pregnancies and also by properly implementing the Sexual Offences Act.

8. Strengthen the legal and justice systems for reclamation of women’s rights.
““All **Human Beings** are born free and equal in **Dignity** and **Rights**
ANNEX 1: INTERNATIONAL HUMAN RIGHTS TREATIES OF WHICH KENYA IS A STATE PARTY 184

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<td>16th December 1963</td>
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<td>Universal Declaration of Human Rights (UDHR)</td>
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<td>Amendment to article 43 (2) of the Convention on the Rights of the Child</td>
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UN Convention Against Corruption, New York: Ratification 9.12.2003
OAU Convention on Preventing and Combating Corruption, New York: Accession 03.02.2007
International Convention against Apartheid in Sports, New York: Signature 16.05.1986
International Humanitarian Law

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African Union Treaties, Conventions, Protocols, and Charters

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Refugees and Stateless Persons

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**ANNEX 3: NATIONAL POLICIES ON HUMAN RIGHTS**

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“To deny people their Human Rights is to challenge their very humanity.”

Nelson Mandela