KENYA NATIONAL COMMISSION ON HUMAN RIGHTS

KENYA @ 10: A DECADE AFTER: THE STATE OF HUMAN RIGHTS POST THE 2010 PROMULGATION OF THE CONSTITUTION

A HUMAN RIGHTS SCORECARD

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PART I: TRANSITION FROM THE OLD TO A NEW ORDER

1. BACKGROUND:

Pursuant to the Constitution of Kenya (Amendment) Act, 2008 and the Constitution of Kenya Review Act, 2008, the people of Kenya debated and reviewed the then Constitution. In exercise of their sovereignty through a referendum held on 4th August 2010, they bequeathed themselves and future generations a historical document, the supreme law of the land. Through the promulgation of the Constitution of Kenya, 2010 on 27th August 2010, Kenyans aspired for a radical shift in the form and manner of governance in the country. A government that was responsive, where the national cake was equitably shared regardless of political, ethnic, religious or other affiliations, a nation where democracy, rule of law and accountability reigned supreme. The people of Kenya yearned, (as documented in the preambular section and instrument of promulgation¹), for a government that was based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law; values that were conspicuously absent in the former regimes. The 2010 Constitution symbolised a written covenant, a collective promise, a bright future and a beacon of hope particularly for the disenfranchised majority. A new dawn!

A unique Charter

A central landmark feature of the 2010 Constitution was devolution. This is not to say that previously Kenya has not had decentralised forms of governance. Indeed, devolution efforts in Kenya predate the country’s independence in 1963 from the colonial period marked by executive dominance and supremacy of the then Governor flagged by discriminatory colonial laws and policies.² The independence Constitution or Majimbo Constitution represented a federal governance complete with seven regions, a bicameral

¹Legal Notice 133/2010.
Parliament, a Prime Minister and Cabinet drawn from Parliament. Subsequent constitutional amendments in the 1960’s would however see the federal governance demolished to a centralist state and a recharged provincial administration. As observed by the Constitution of Kenya Review Commission (2005), the net effect of these amendments was to consolidate power in the presidency, thus undermining democracy and eroding the principle of checks and balances; effectively opening floodgates for abuse and misuse of power. The all powerful presidency under the centralist independent state perpetuated abuse of power, favouritism and the marginalisation of some areas through skewed developmental policies and rooted political patronage. Human rights were a privilege, rather than an inherent right; thus, political dissents were severely punished. And some had to pay the ultimate price - life itself. The Nyayo torture chambers remain a stark reminder of the heinous human rights violations committed by public officers of the Kenyan government in 1982-1992, with impunity.

With the stage set on 9th June 1982 by the Kenyan Parliament through the rushed Constitution of Kenya Amendment No. 7 of 1982 under the Repealed Constitution of Kenya that transformed Kenya into a de jure one party state, this opened floodgates for systematic abuse of fundamental rights and freedoms targeted against those who held or were perceived to hold different political opinions from the then KANU regime. The Kenya National Commission on Human Rights has documented the extreme high cost of these human rights breaches (in monetary terms) although the cost is priceless given the loss of human dignity and life.

Thus, when Kenyans voted to pass the 2010 Constitution with a devolved system of governance, it was a conscious decision, a calculated move, well informed by history and experience. It was seen to as a panacea to a more open, transparent, participatory and

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3Ibid p 11.
inclusive governance and equal sharing of the country’s resources and opportunities right to the grassroots. Hence, it is no wonder that promotion of democratic and accountable exercise of power; fostering national unity, promoting social economic development and the provision of proximate, easily accessible services across Kenya; ensuring equitable sharing of national and local resources and enhancing checks and balances had to be aptly captured under Article 174 of the Constitution as some of the objects of devolution, lest anyone ever forgets.

This way, it was intended that the hitherto unilateral whimsical decision making was to be replaced by an accountable exercise of power; hence public participation was firmly etched as the golden thread that would permeate the exercise of any policy or action under the Constitution. Thus, a new Republic was birthed. The old order was gone, a new one had come!

Besides devolution of power, the 2010 Constitution is a unique Charter in many respects; some of which are highlighted below:

**Sovereignty of the People**

Under the new governance order, power of governance was no longer a reserve of a sovereign mortal being, but the people. Thus, the supreme law decrees that all sovereign power of the Republic vests in the people of Kenya, to be exercised in accordance to the Constitution (Article 1(1)). The state machinery merely exercises delegated power that is derived from the people whether as Parliament and county legislative assemblies, national and county executives or Judiciary and Independent Tribunals. These bodies are duty-bound to perform their functions in line with the Constitution (Article 1(3)). This was a fundamental shift in how the Government exercised power. It was to serve and not to rule. On the other end of the spectrum, it was an empowering recognition for the people, that destiny was now not on the ruling class but upon them; which then called on the people to take ownership and participate in the democratic and civic governance of the new republic thus birthed.
**Constitutional Supremacy**

A departure from the old order, the 2010 Constitution ushered in the supremacy of the Constitution, a far cry from the parliamentary supremacy and executive autocracy previously. Thus, all government actions, and actions of any state officer, public officer, whether at the national or county levels of government, whether an individual or private entity, were to be evaluated against the high standards and principles set out in Constitution. Everyone (whether individuals or as corporate) and regardless of rank were to operate under the new law. Furthermore, all laws were to be subordinate to the Constitution and any law or action that contravened it was null and void.\(^7\) Given the painful history of centralised power, for the avoidance of doubt, it is thus no mere coincidence that Chapter nine of the Constitution did not mince words in prescribing the source and manner in which executive authority was to be exercised: Executive authority was derived from the people of Kenya and was to be exercised ‘in accordance with [the] Constitution’. Further, the same was to be exercised, ‘in a manner compatible with the principles of service to the people of Kenya, and for their well-being and benefit.’\(^8\)

**National Values and Principles of governance**

The rebirthed Republic was founded on national values and principles of governance referred to in Article 10 of the Constitution.\(^9\) In writing the Constitution, Kenyans yearned for a government ‘based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law’ (Preamble to the Constitution). A nation’s values define a people’s identity. They are fundamental beliefs of a nation guiding the choices, actions and behaviour.\(^10\) Kenya’s dark history characterised by weak values, unresponsive institutions, corruption, ineptitude, weak social cohesion and skewed development necessitated a radical shift, a transformational approach to the manner of transacting business. There was need for a value system that would redefine governance and the nation at all levels to achieve the much needed economic development and social cohesion. As such, the 2010 Constitution was not just structurally based; ‘it is a value-

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\(^7\) Article 2, Constitution of Kenya, 2010.
\(^9\) Article 4(2) Constitution of Kenya, 2010
oriented Constitution[and therefore] [I]It’s interpretation and application must therefore not be a mechanical one but must be guided by the spirit and the soul of the Constitution itself as ingrained in the national values and principles of governance...’

As aptly captured by the Courts, the Constitution of Kenya, 2010 is a unique governance charter, quite a departure from the two [1963 and 1969] earlier Constitutions of the post-Independence period. Whereas the earlier Constitutions were essentially programme documents for regulating governance arrangements, in a manner encapsulating the dominant political theme of centralized (Presidential) authority, the new Constitution not only departs from that scheme, but also lays a foundation for values and principles that must imbue public decision-making...

An interpretation that was well espoused by the Supreme Court when it pronounced that, ‘Kenya’s Constitution of 2010 is a transformative charter. Unlike the conventional “liberal” Constitutions of the earlier decades which essentially sought the control and legitimization of public power, the avowed goal of today’s Constitution is to institute social change and reform, through values such as social justice, equality, devolution, human rights, rule of law, freedom and democracy. This is clear right from the preambular ... And the principle is fleshed out in Article 10 of the Constitution, which specifies the “national values and principles of governance”, and more particularly in Chapter Four (Articles 19-59) on the Bill of Rights, and Chapter Eleven (Articles 174-200) on devolved government.’ [Emphasis added]

**Separation of Powers and checks and balances**

Separation of powers is a core feature of the constitutional design and a per-commitment in our Constitutional edifice. As per the Supreme Court, ‘The system of checks and balances serves the cause of accountability, and it is a two-way motion between different State organs, and among bodies which exercise public power...The spirit and vision behind separation of powers is that there be checks and balances, and that no single

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12 In *Luka Kitumi & 8 Others v Commissioner Of Mines & Geology & another* [2010] eKLR
15 Court of Appeal in *Mumo Matemu v. Trusted Society of Human Rights Alliance & 5 Others*, eKLR [2012]
person or institution should have a monopoly of all powers." This separation of powers not only applies vertically between the national and county governments, but also horizontally across all the various arms and organs within each of the two levels of government.

**Constitutional Commissions**

Another ingenious introduction of the Constitution of Kenya 2010 was the creation of constitutional Commissions with the mandate 'to provide an oversight function over some primary arms of government'. The commissions and independent offices would serve to enhance the system of checks and balances by restraining the arms of Government and other State organs, and vice versa. This architectural design of constitutional Commissions was necessary and different from the old constitutional order where this function was left to the legislative arm of government which in itself presented unique challenges 'as Members of Parliament also worked in the Cabinet wing of the Executive arm of Government; and State machinery and bureaucracy proved too large for monitoring purposes in an efficient and transparent manner.' Hence Chapter fifteen of the Constitution listed the Commissions and independent offices and went on to secure their independence. Irrespective of their specific mandates, the Constitution summed up their objectives into three as, protecting the sovereignty of the people; securing the observance by all state organs of democratic values and principles and promoting constitutionalism.

**Leadership**

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16 In the Matter of the National Land Commission Para 193.
18 In the Matter of the National Land Commission Para 193.
Kenyans desired a transformational, corrupt-free and servant leadership; a departure from the political patronage, high-handed, whimsical and corrupt system of rule witnessed in the yester regimes. It is no coincidence therefore that the framers of the Constitution found befitting to dedicate a whole chapter on leadership and integrity (Chapter six); and quite tellingly, right before the chapter on representation of the people. Importantly, the chapter underscored the fact that authority of a state officer was a public trust to be exercised in a manner that brings honour, respect to the nation and the people. Further, that the state power, ‘vests in the State officer the ‘responsibility to serve the people, rather than the power to rule them’. The Chapter emphasises the guiding principles of leadership to include selection on the basis of integrity and competence; objectivity and impartiality in decision making; selfless service solely on the public interest; accountability to the public and discipline and commitment in service to the people. Nearly similar provisions were echoed in the chapter on public service (Chapter 13) which demanded high standards of professional ethics, responsive, prompt, effective and impartial provision of services and accountability for administrative acts among public officers.

**The Bill of Rights**

Perhaps one of the most significant hall marks of our Constitution, close to the mwananchi was the progressive expansive Bill of Rights ingrained under Chapter 4. As observed by the Supreme Court, ‘[our] Constitution has a most modern Bill of Rights, which envisions human rights based and social justice oriented state and society.’ In the dark era, it was evident that human rights were an extraneous concept in governance, perhaps a ‘western’ concept. Thus, blatant egregious human rights violations persisted. It was therefore paramount that in the new constitutional order, the Bill of Rights was made the fulcrum of the Kenyan State and framework for driving all social, economic and cultural policies. It was of particular significance that the Chapter recognised that rights and

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23 Article 73(1)(a) Constitution of Kenya, 2010  
24 Article 73(1)(b) Constitution of Kenya, 2010  
25 Article 73(2) Constitution of Kenya, 2010  
26 Article 232 Constitution of Kenya, 2010  
fundamental freedoms in the Bill of Rights were inherent to each individual and were not granted by the State. That meant, therefore, that human rights were no longer to be seen as ‘privileges’ to be doled out at the executive’s pleasure or anyone for that matter. Human rights had to be jealously safeguarded and forms of redressing violations provided. This would be a starting point to restoring the hitherto lost dignity of individuals and communities. Indeed, the Constitution recognised that protecting human rights and individuals was critical to promoting social justice and the realisation of the potential of all human beings.29

The rights and fundamental freedoms could only be limited upon satisfaction of certain stringent conditions set out in the Constitution itself.30 Notwithstanding, and in light of the past history and international human rights law, some rights comprising jus cogens norms could not be limited.31 The hitherto bottlenecks to accessing justice such as the locus standi were turned on their head as the Constitution bestowed the mandate of defending the Constitution on all persons; and further opened the court doors to class suits, whether or not there was a direct interest by the entity/individual suing.32 An interpretation that most favoured the enforcement of a right or fundamental freedom was to be adopted as opposed to a constrictive one.33 The Judiciary was also duty bound to adopt a rule of constitutional interpretation that promoted the purposes, values and principles enshrined in the Constitution; that advanced the rule of law, human rights and fundamental freedoms in the Bill of Rights; that permitted the development of the law and an interpretation that promoted good governance’.34

The place of international human rights instruments in the local sphere was a useful cog to advancing human rights in as far as the international and regional human rights treaties

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29 Article 19(2) Constitution of Kenya, 2010. The provision states that, ‘[t]he purpose of recognising and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings’.
30 Articles 19(3)(c) & 24, Constitution of Kenya, 2010
31 Under Article 25 of the Constitution, freedom from torture and cruel, inhuman or degrading treatment or punishment; freedom from slavery or servitude; the right to a fair trial and the right to an order of habeas corpus cannot not be limited
32 Article 22, Constitution of Kenya, 2010
33 Article 20(3)(b) Constitution of Kenya, 2010
ratified by Kenya and general principles were espoused into the national human rights system. Under the 2010 Constitution, those norms were no longer to be seen as ‘western’ instruments but actually formed part and parcel of the laws of Kenya.\textsuperscript{35} This was a progressive move and a departure from the previous regime where there appeared to be two parallel systems that were not necessarily mutually reinforcing.

Part 2 of Chapter four lists **twenty six Articles** securing various rights. Worth noting is that, this is not an exhaustive list; thus other rights and fundamental freedoms recognised by law also apply, so long as they are not inconsistent with the Bill of Rights.\textsuperscript{36}

The Kenya National Commission on Human Rights was established under Article 59 of the Constitution as read with the Kenya National Commission on Human Rights Act, 2011 with the special mandate to oversight over the Bill of Rights. The Commission was to work to promote respect for human rights and develop a culture of human rights in the Republic; and promote the protection and observance of human rights in public and private institutions. The Commission is bound in line with its mandate under Article 249 of the Constitution, as an independent Commission, to promote constitutionalism and secure observance by all State organs of democratic values and principles. This is also in consonance with the National Human Rights Policy and Action Plan and regional and international undertakings as a National Human Rights Institution (NHRI), affiliated to the African Commission on Human and Peoples’ Rights and as an “A” status NHRI governed by the Paris Principles.

In a 2018 Human Rights Survey\textsuperscript{37}, a majority of Kenyans, seven out of ten (69\%) agree that the human rights situation has improved since the promulgation of the Constitution of Kenya 2010. Kenyans however believe there is inequality in application of the law in favour of the corrupt and wealthy. Infotrack Research, Amnesty International (Kenya), Kenya National Commission on Human Rights and other human rights bodies

\textsuperscript{35}Article 2(5)(6) Constitution of Kenya,2010 
\textsuperscript{36} Article 19(3)b) Constitution of Kenya,2010 
commissioned a survey from 16th August to 21st August 2020 targeting 1500 respondents and qualitative key informant interviews with eleven (11) stakeholders knowledgeable in the area of the Constitution and the Bill of Rights. The finding was that the Bill of Rights was the most familiar chapter of the Constitution to the respondents by 50%. However, 55% of the respondents cited corruption and impunity are the greatest hindrances to Kenyans enjoying their rights. With regards to violations, police brutality remained the most common form of human rights violation meted by the police and the executive because of the control of instruments of power, coercion and force yet majority of respondents (36%) did not seek any action after the violation. The Commission was cited by majority (39%) of respondents as the institution at the forefront of protection and promotion of human rights in the country hence it should be strengthened to enhance the implementation of the Bill of Rights (by 45% of respondents). 60% of respondents felt that the Bill of Rights needs to be enforced so as to improve the human rights situation in the country.  

The subsequent section will review the gains and losses made in the realisation of the Bill of Rights set out under the various Articles in the Bill of Rights, each in turn

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38 See Infotak and Amnesty International - 2020 Human Rights and Katiba@10 Public Opinion Survey
PART II: TAKING STOCK ON SPECIFIC RIGHTS AND FUNDAMENTAL FREEDOMS
A DECADE ON

1. RIGHT TO LIFE (ARTICLE 26)

Article 26(1) of the Constitution protects the rights to life and stipulates that no one should be deprived of life intentionally except to the extent authorised by the Constitution or other written law. The right to life is a universally recognised right protected in a number of international and regional human rights instruments that Kenya has ratified including article 6 of the International Covenant on Civil and Political Rights and article 4 of the African Charter on Human and Peoples’ Rights. The right not to be intentionally deprived of one’s life is recognised as part of customary international law and norm of *jus cogens* universally binding at all times. The right to life entails the right to be free from actions or omissions that are intended or expected to cause unnatural or premature death. The deprivation of life is considered arbitrary if it is against international law and domestic law. The Human Rights Committee has clarified that the notion of arbitrariness is not fully equated with being against the law but ought to be interpreted broadly to include elements of inappropriateness, injustice, lack of predictability and due process of the law. The right to life creates a positive obligation upon the State to take measures to prevent arbitrary deprivation of life, conduct prompt and thorough investigations into deprivation of life, holding those responsible to account and providing effective remedy for victims or victims including immediate family and dependents.

A major win of the 2010 Constitution was the stipulation of the precincts within which national security organs are to operate. Fundamentally, national security is subject to the Constitution and Parliament. Article 238(2) is categorical that, national security is to be

39*General Comment No 3 on the African Charter on Human and Peoples Rights: The Right to Life (Article 4) (Adopted during the 57th Session of the African Commission on Human and Peoples Rights)*
40*General Comment No 36 on the International Covenant on Civil and Political Rights: The Right to Life (Article 6) (Adopted by the Human Right Committee on the 30th October 2018)*
41Ibid at 3
42*General Comment No 3 on the African Charter on Human and Peoples Rights (n1) at 10*
pursued in compliance with the law and with the utmost respect for the rule of law, democracy, human rights and fundamental freedoms’.

Despite constitutional safeguards which protect individuals from arbitrary deprivation of life, the Commission is concerned of ongoing violation to the right to life. In the ten years since the passage of the Constitution, the Commission continues to receive complaints of extrajudicial and arbitrary executions at the hands of law enforcement agencies in the context of securing national security. The period has seen loss of life related to electoral violence witnessed during the 2017 general elections. The Commission in the context of monitoring elections has documented 101 cases of person who died, 247 cases of injuries and 37 cases of damage to property in election related violence.43

Members of the Police Service have come under increased oversight to ensure compliance with the law when executing their duties. The Court in a case involving the death of a 6 months old child (Baby Samantha Pendo) established in KSM CMC Inquest No. 6 of 2017 that there was sufficient evidence pointing the culpability of members of the National Police Service in the death of Baby Pendo and their aggressive militarised response and show of force lead to the death of a baby. In addition, the Court established that under the doctrine of command responsibility, the respective commanders failed to take reasonable measures to prevent the criminal action of killing of a baby and should incur liability for the subordinates’ unlawful conduct by failing to take action to redress the situation. The ODPP is working at implementing the inquest findings.

The Independent Policing Oversight Authority established following that the passage of the Constitution has continued to provide civilian oversight to the work of the Police. This has resulted in the conviction of 6 police officers for excessive use of force and extra-

judicial killings. The Commission is however concerned over the low rate of investigation and prosecution of security officers for extra-judicial killings and excessive use of force *vis a vis* the number of complaints. The Commission as of 2015 (excluding the period of the 2017 General Election) has received 54 complaints of non-fatal police shooting, 32 complaints of fatal police shooting, 28 complaints of death in police custody, 123 cases of extra-judicial executions, 45 cases of shooting by other armed services/forces and 2 cases of death in prison custody. The top government agency against whom complaints were made against was the Kenya Police Service (146 complaints) and the Kenya Wildlife Services (38 complaints). Data on allegations of extrajudicial executions suggest that this has affected youth persons from informal settlements.

The rising numbers of cases of extra-judicial killings and summary execution have been the subject of concern before the African Commission on Human and Peoples’ Rights. The African Commission on 26th April 2017 issued a letter of appeal where it expressed concern over “widespread patterns of extrajudicial killings implicating the police in Kenya and the equally unsettling lack of investigation and prosecution of such cases of extra-judicial killings.” The Commission opines that the failure of the state to transparently take all necessary measures to investigate suspicious death and killings by state agents and to identify those responsible constitutes a violation of the right to life itself and contributes to a culture of impunity.

While lauding the enactment of important statutes such as the Prevention of Torture Act, 2017 (No. 12 of 2017) and the National Coroners Service Act (No. 18 of 2017), the Commission encourages and will continue to support the fast racking of the ongoing efforts at fully operationalising the laws including the finalisation of rules under the Victim Protection Act.

**Death Penalty**

44 https://www.achpr.org/news/2017/06/d290
Kenya still retains within its statute books the death penalty despite calls to abolish it by treaty body mechanisms. The State in 2015 accepted four recommendations to support efforts towards abolishing the death penalty under the Universal Periodic Review process. The death penalty has not been applied since 1984. Moratoriums commuting death penalty to life sentence for 4000 and 2,747 persons have been issued on two occasions. Nonetheless, positive developments have been witnessed towards the abolition of the death penalty. Notably the Supreme Court of Kenya in Francis Muruatetu case declared the mandatory nature of the death sentence as unconstitutional and directed for the necessary amendments to the law to give effect to the judgment and resentencing hearings for persons affected. The judgment further ordered for the establishment of a Taskforce on the Implementation of the Supreme Court Ruling on the Death Penalty. Whereas the judgement is a positive step in addressing the death penalty sentence, the judgement fell short of fully abolishing the death penalty in the Penal Code. Subsequently, the Hon Attorney General in 2018 established a taskforce to guide in the implementation of the Supreme Court ruling. The Taskforce proposes a resentencing hearing model in which the judiciary will designate a specified number of judges who will be responsible for presiding over the resentencing hearings, which will take place in or as close as possible to each prison where eligible offenders are held over the course of a number of consecutive days, with a view to conducting as many hearings as possible in the timeframe.

2. EQUALITY AND FREEDOM FROM DISCRIMINATION (ARTICLE 27)

The preamble to the Constitution affirms the people’s pride for the ethnic, cultural and religious diversity, and expresses the determination to live in peace and unity as ‘one indivisible sovereign nation’. In passing the Constitution, the people of Kenya endorsed a new way of doing business where every person, regardless of their origin, social status, religion, sex or other disparities belonged. After all, Kenya is a multi-party, multi-cultural, multi-ethnic, multi-religious and multi-linguistic society.

The theme of diversity, equality and freedom from discrimination runs throughout the Constitution. Article 10(2) of the Constitution outlines human dignity, equity, inclusiveness, equality, non-discrimination and protection of the marginalised as national values and principles of governance that applies to all when they apply or interpret the Constitution. Article 21(3) of the Constitution obliges all State organs and all public officers to address the needs of vulnerable groups within society, including women, older members of society, persons with disabilities, children, youth, members of minority or marginalised communities, and members of particular ethnic, religious or cultural communities. Article 27 recognises the right of every person to equality and freedom from discrimination. The State is further bound under Article 56 to put in place affirmative action programmes to ensure that minorities and marginalised groups participate in the political, economic, social and cultural spheres. A Marginalised group is defined under the Constitution to mean, ‘a group of people who, because of laws or practices before, on, or after the effective date, were or are disadvantaged by discrimination on one or more of the grounds in Article 27(4)’. Article 100 mandates Parliament to enact legislation to promote the representation in Parliament of women; persons with disabilities; youth; ethnic and other minorities; and marginalised communities.

1.1 Women

Article 27 (8) and Article 81 (b) of the Constitution requires Parliament to enact legislation to address gender inequality in the political sphere by ensuring that not more than two
thirds of members of elective or appointive bodies shall be of the same gender (two thirds gender principle). Article 10 of the Constitution further outlines human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of marginalized groups amongst others as national values and principles of governance. The Constitution binds Parliament to enact legislation to promote the representation in Parliament of women, persons with disabilities, youth, ethnic and other minorities as well as marginalised communities (Article 100). Further, one of the principles for the electoral system is that not more than two-thirds of the members of the elective public bodies shall be of the same gender (Article 81 (b)). Notably, the Constitution (Fifth Schedule) stipulated a timeline of five years within which Parliament must have enacted the legislation. This has never been done a decade later.

Despite the above lofty provisions, much remains to be realised in practice. For instance in the 2013 general elections, out of the 349 seats, women garnered a paltry 19.7% of the seats or 68 seats. Total female representation in the bicameral parliament stood at 26% comprising National Assembly 19.7% and Senate 26.5 % all made possible because of the affirmative action using both the party quotas and seats reserved for women. Only 16 women were elected out of the 290 open constituency seats available. [Article 97 of the Constitution, sets the number of legislators at 349 seats, 290 of who are for those elected directly from Kenya’s 290 constituencies, 47 are for women elected to represent each county, and 12 seats for nominated individuals to represent youth, persons with disabilities and workers]. Notably, there was no woman elected as a Senator. Similarly, at the County level, there was no woman Governor. Over 750 women were nominated in the assemblies to meet the not more than two thirds gender rule courtesy of the principle in Articles 177 (1) (b) and (c).

In the subsequent General Elections of 2017, the composition of the 12th Parliament fell below the constitutional threshold that would require at least 117 women in the National Assembly and 23 women in the Senate. Currently, there are 23 women elected to single constituency sit, 47 elected as county women representatives and six women nominated by political parties bringing the tally to 76 and a deficit of 47. Senate has three women
elected and 18 women nominated by political parties bringing the tally to 21 women and deficit of two (2).

Similarly, the levels of representation remain low in both the highest public service (cabinet) as well as Boards. Compared to its East African neighbours, Kenyan women’s representation in Parliament still lags behind; with Rwanda (practising proportional representation) topping up at **61.3 per cent**. According to Inter-Parliamentary Union 2019 report⁴⁹, African parliaments witnessed relatively modest progress in 2018. The regional average of women parliamentarians stood at 23.7 per cent. The share of women in national parliaments increased nearly a percentage point, growing from 23.4 per cent in 2017 to 24.3 per cent in 2018 (+0.9 points).

Parliament is yet to put in place legislative measures as required in the Constitution to address gender inequality in the political sphere despite court decisions compelling it to do so: the quest to determine the timeline for implementation of the two-thirds gender rule began in 2012 when the then Attorney General sought an advisory opinion from the Supreme Court on whether the two-thirds gender rule was to be implemented progressively or was applicable immediately. The Supreme Court of Kenya in its Advisory Opinion *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate [2012] eKLR*, pronounced itself that the legislative measures for giving effect to the two thirds gender principle under Article 81 (b) of the Constitution should be implemented progressively, but instructed that legislation thereof must be passed no later than 27th August 2015. The deadline provided by the Supreme Court (and even an extension of one year that Parliament gave itself) lapsed with no law having been put in place to operationalize the two-thirds gender rule in Parliament⁵⁰. As at 27th August 2016, Parliament had failed to enact legislation to implement the two thirds gender principle. This prompted a petition to the High Court pursuant to Article 261 (5) and (6) of the Constitution.

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⁴⁹ Inter-Parliamentary Union, *Women in parliament in 2018 The year in review.*
⁵⁰ *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate*
The High Court in the *Centre for Rights Education and Awareness and another Vs Speaker of National Assembly and 5 others* (2017) eKLR held that the failure of Parliament to enact legislation by 27th August 2016 to implement the two thirds gender principle was a violation of the obligation of the state under Article 21 to observe, respect, protect, promote, and fulfil the rights of men and women to equality under Article 27 of the Constitution. The Court issued an order of mandamus, compelling Parliament to enact legislation within 60 days of the order (29th May 2017) and report progress to the Chief Justice. The petitioners were at liberty at the time to petition the Honourable Chief Justice to advise the President to dissolve Parliament in the event Parliament failed to enact the said legislation in line with Article 261(7) of the Constitution. To date, Parliament has not enacted the legislation despite the court Orders. In addition to the cases asking for the dissolution of Parliament for failure to pass the necessary law within the time stipulated under the Constitution, there have been several matters taken to Court asking dissolution of Cabinet for not applying the rule, and also a case against IEBC for not instilling requirement for political parties to comply with the two-thirds rule.

Nonetheless, there have been some shy attempts in the legislative front addressing the two thirds gender rule in elective politics including the following:

Parliament (National Assembly) through the *Representation of Special Interest Groups Laws (Amendment) Bill 2019* National Assembly Bill No. 52 of 2019 dated 3rd July 2019 sought to amend various existing laws in order to give further effect to Article 100 of the Constitution. In its submissions, the Commission welcomed the positive move towards recognition of the rights of special interest groups but noted the absence of express mechanisms to ensure representation of the youth, ethnic minorities as well as marginalized communities and called for incorporation of the same. As at reporting, the Bill had been passed by the National Assembly and forwarded to the Senate for consideration.

51 *Centre for Rights Education and Awareness v Speaker the National Assembly (above).*
52 *Marilyn Muthoni Kamuru v. Attorney General.*
53 *Katiba Institute v Independent Electoral & Boundaries Commission.*
54 The Bill sought to amend the Persons with Disabilities Act No. 14 of 2003; the Independent Electoral and Boundaries Commission Act No. 9 of 2011; the Political Parties Act No. 11 of 2011; the National Gender and Equality Commission Act No. 15 of 2011; the Elections Act No. 24 of 2011; the Election Campaign Financing Act No. 42 of 2013 and the Election Offences Act No. 37 of 2016.
The National Assembly, through the Justice and Legal Affairs Committee has recently invited the public to submit representations on *The Constitution of Kenya (Amendment) Bill, 2018* National Assembly Bill No. 4 of 2018 dated 12th February 2018. The principal object of this Bill is to amend the Constitution to ensure that the membership of the National Assembly and the Senate conforms to the two-thirds gender principle provided for in Article 81(b) of the Constitution. The Bill seeks to give effect to the two-thirds gender principle through the creation of special seats that will ensure that the gender principle is realized in Parliament over a period of twenty years from the next general election, in this case 2022. It is hoped that by that time, both genders will have been given a level playing field and will be able to compete on an equal plane. The Bill therefore proposes to amend Articles 90, 97 and 98 of the Constitution.

The Commission opines that the failure to pass legislation to realise the two-thirds threshold is of fateful significance, in terms of the sustainability of the constitutional order itself. Where Parliament does not enact legislation to include women, then it threatens to perpetuate the status quo where women continue to be marginalized from decision making spaces particularly at the national level. The Commission therefore recommends that the State enact legislation to enable the realization of the two thirds threshold as required in article 27 (8) of the Constitution of Kenya, 2010.

1.2 Children

Children or those aged 0-17 years form nearly half of the Kenyan population at 21,923,187 according to the 2019 Kenya Population and Housing Census.\(^55\) Kenya is a party to the African Charter on the Rights and Welfare of the Child (ACRWC) as well as the UN Convention on the Rights of the Child (CRC), facets of which have been domesticated in the Children Act, 2001, which requires the state to uphold the best interest of the child at all times when addressing children’s concerns. In Kenya the state

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obligation on children is informed by Articles 2 (5), 20, 21, 53 of the 2010 Constitution, the 2001 Children Act, as well as other written laws that address children concerns.

Article 53 safeguards the rights of children including the right to a name and nationality from birth; to free and compulsory basic education; to basic nutrition, shelter and health care; to be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment, and hazardous or exploitative labour; to parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not; and (f) not to be detained, except as a measure of last resort, and when detained, to be held — (i) for the shortest appropriate period of time; and (ii) Separate from adults and in conditions that take account of the child’s sex and age. Furthermore, ‘A child’s best interests are of paramount importance in every matter concerning the child.’

Pursuant to this provision the government of Kenya has made progress in realizing the right of children in Kenya. For instance, the Government has made good strides in ensuring children access basic education through the free primary and secondary education, access to universal health with Linda mama package, promoting registration of self-employed families in the NHIF among other programmes that indirectly benefit children like the women empowerment programmes. The KNCHR also welcomes the review of the Children Act, 2001 to align it with the Constitution of Kenya, 2010. The Proposed law will enhance protection and promotion of the rights of the Child. The Bill places intersex children among the category of children that are in need of care and protection. The National Commission also welcomes the progressive move by the Kenya National Bureau of Statistics to enumerate the intersex children and adults in the 2019 Kenya Population and Household Census.

In spite of the progress, there are several drawbacks which have militated against the full enjoyment of the rights of children in Kenya:

56(Article 53(2) Constitution of Kenya, 2010)
Poverty and Social Assistance

According to a recent survey on equality and inclusion, many children still live in deprivation.\textsuperscript{57} For instance, 18.6 per cent of children live in households that sleep hungry, and only 60 per cent live in households that can afford 3 meals a day. Only 2 per cent of children live in households that have previously received cash transfers. According to the 2015/16 Kenya Integrated and Budget Survey (KIBHS), analysis of food poverty among children shows that nationally 35.8 per cent were food poor. The tabulation of child food poverty by age group indicates that 37.7 per cent of children aged 6-13 years are food poor, compared to 42.5 per cent of children aged 14-17 years.\textsuperscript{58} In terms of poverty, nationally, 41.5 per cent of all children (aged 17 or less) are categorised as poor. In other words, slightly more than 9 million children live in poor households. Among all the primary school going age group (aged 6-13 years), 43.9 per cent are poor; similarly, among all the secondary school going age group (aged 14-17 years), 43.8 per cent are poor.\textsuperscript{59} The cash transfers which target (Orphans and Vulnerable Children) (OVC) only, are not adequate to benefit all the OVCs in need. About 14.4 per cent of children benefit from membership in health insurance schemes. According to County Government budgeting, there are no special funds targeting children and, where they exist, they are negligible.

Intersex Children

According to the report by the Taskforce on Policy, Legal, institutional and Administrative Reforms regarding Intersex Persons in Kenya, right form birth, intersex persons have to contend with statutory and administrative bottlenecks whenever they pursue identity documents.\textsuperscript{60} Even when they finally obtain the documents, they have to later in life to contend being in conflict with the law due to disharmony between the recorded sex and the self-recognised sex. The survey by the Taskforce further revealed existing obstacles and barriers for the intersex population to access education, and when they do, ridicule

and stigma and lack of support chases them away from places of learning.\textsuperscript{61} The National Commission is concerned about the violation of the rights of intersex children including exclusion/non-recognition and lack of proper documentation, forced non-consensual surgeries and their further marginalisation in education, employment, financial and other social/economic spheres. The KNCHR welcomes the Government’s move to establish the now defunct Taskforce on Policy, Legal, Administrative and Institutional Reforms on Inter-sex Persons that completed its mandate and handed over its final report to the Office of the Attorney General in March 2019. The National Commission is pleased at the establishment of Intersex Persons Implementation Coordination Committee in April 2019 by the Hon Attorney General to oversee the implementation of the recommendations. The National Commission chairs this multi-sectoral Committee.

To better protect rights of intersex persons, the Commission notes the need to fast-track the amendment to the 2001 Children Act and section 3 of the Interpretation and General Provisions Act Cap 2 Laws of Kenya to define intersex as a third sex marker. The Commission further implores on all duty bearers to fully implement all the recommendations contained in the Taskforce Report and on care and treatment of intersex persons.

\textit{Street children}

The government, at both levels of government has failed to focus on the issue of children working and living in our streets. This problem has affected not just the Nairobi City County but a number of various other Counties across the country. The media reports have shown how some counties opt to round up the street children and families, pile them in a government lorry and dump them to various technical institutions, children statutory facilities in an unprecedented manner while others decide to repatriate the children to the supposed counties of origin. The above conducts and operations by the Government officials continue to increase vulnerability and marginalization of these children and constitute violation of human rights and the best interests of the child.

\textsuperscript{61} Taskforce Report p 175.
KNCHR reiterates the responsibility of the State to secure the welfare of all children in Kenya, and this power has been delegated to the director of children services within the Ministry of Labour and Social Protection. However, the lack of prioritization on the issue of children in the streets pauses a greater threat to Kenya’s human rights record in actualizing access to basic rights for children and the good will inferred from ratifying child related conventions. Lack of a human rights based approach (HRBA) and child centred approach to addressing the issue of street children pauses a great challenge to security, development but also to adherence to human rights in this Country. Moreover, lack of a comprehensive policy to guide on emerging human rights issues that increase vulnerability of children to abuse and exploitation forcing some of them to resort to street life. Some of these aspects include; lack of a follow up mechanism to monitor child abuse and child labour practices that promote street life for children, lack of appropriate measures to address recognition of intersex children, children with disability and children who drop out of school due to inability to pay the assigned amounts by the schools.

**Institutionalization of children**

The problem of child victims and witnesses being remanded in statutory institutions as a witness protection mechanism should be abhorred by all in the society. This is because it exposes the said child to increased child vulnerability. For instance, if a child victim or witness is housed in a statutory institution (institutionalized) that is ideally supposed to assist in rehabilitation of children in conflict with the law, then automatically, the government participates in denying such a child enjoyment of their basic rights starting with parental guidance, education and also failing to provide the necessary programme or support merited by such a child. Institutionalization of children with disabilities continues to be an ongoing challenge due to lack of state funded supports to facilitate community living.

There is also the grave concern about detention of child migrants largely because of lack of facilities and a policy to govern the handling of these children. Often times the children are arrested together with their families or the accompanying adults while often times they are left alone in custody of people whose backgrounds are unknown thus increasing their
vulnerability. Other challenges that have hindered the full realisation of children rights include the following:

- Lack of a well-coordinated inter-agency working mechanism to address the root cause of the problem leading to children in the streets. As most Government agencies resort to blame game as to who has the mandate and finances to implement the work.
- The lack of a proper mechanism of handling children who are witnesses or victims of various offences.
- Lack of policy direction and institutional reform to govern on how migrant children cases are handled while safeguarding their dignity and human rights.
- Lack of mechanisms to fund and support deinstitutionalization of children with disabilities and support community living in line with recommendations of the Committee on the Rights of Persons with Disabilities.
- Existence of a Children Act, 2001 that is not coherent with the current Constitutional dispensation that is the Constitution, 2010. This points to lack of prioritization of children agenda by the State, whereas; ‘the future of the nation is dependent on the children and the education they get.’

1.3 Persons with disabilities

Kenya ratified the Convention on the Rights of Persons with Disabilities in 2008 creating an obligation upon Kenya to respect, protect and fulfil the rights of persons with disabilities. A major win in the 2010 Constitution is Article 54 stipulating the rights of persons with disabilities in the Bill of Rights. A person with any disability is entitled—

(a) to be treated with dignity and respect and to be addressed and referred to in a manner that is not demeaning;
(b) 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;
(c) to reasonable access to all places, public transport and information;
(d) to use Sign language, Braille or other appropriate means of communication;
(e) to access materials and devices to overcome constraints arising from the person’s disability.
(2) The State shall ensure the progressive implementation of the principle that at least five percent of the members of the public in elective and appointive bodies are persons with disabilities.

Despite the equality provisions and the constitutional safeguard in the Bill of Rights, persons with disabilities continue to face legislative and social hurdles which hinder them from participating in society on an equal basis with others. It is then no wonder that according to a recent *Survey on Equality and Inclusion in Kenya*, nearly half (46%) of PWDs cannot afford to eat three meals in a day, while 9% cannot afford a meal a day.62

Legislative hurdles stem from out-dated Persons with Disabilities Act of 2003 which has not been amended to conform to the Constitution of Kenya, 2010 and the Convention on the Rights of Persons with Disabilities ratified in 2008. The Commission remains concerned that despite constitutional edicts proscribing reference to persons with disabilities in a degrading manner, Kenya retains within its statute books derogatory language referring to persons with disabilities. Legislation including the Penal Code uses derogatory language that refers to persons with intellectual or psychosocial disabilities such as ‘imbeciles’, ‘idiots’, ‘person with mental disorders’, ‘retarded’ or ‘lunatics’. This is in violation of Article 3(a) of the Convention on the Rights of Persons with Disabilities63 and Article 28 of the Constitution.64

On matters employment, the government is yet to meet the five percent employment quota for persons with disabilities in the public sector in compliance with the dictates of Article 54 (2) of the Constitution. The provision obligates the State to ‘ensure the progressive implementation of the principle that at least five percent of the members of the public in elective and appointive bodies are persons with disabilities’. Section 13 of the Persons with Disabilities Act, 2003 obliges the National Council for Persons with Disabilities to, ‘secure the reservation of five percent of all casual, emergency and

63 The Article provides for the ‘Respect for inherent dignity, individual autonomy including the freedom to make one’s own choices, and independence of persons’
64 Article 28 of the Constitution is one that states that, ‘Every person has inherent dignity and the right to have that dignity respected and protected’.
contractual positions in employment in the public and private sectors for persons with disabilities'. Data from the Public Service Commission indicates that of 251 institutions evaluated on inclusion of persons with disabilities in the financial year of 2017/18, only 10 institutions complied with the 5% requirement for employment of persons with disabilities. The report further indicates that there are only 2,155 persons with disabilities represented translating to 1.1% of the total number of persons in post. The limited representation still exists nine years after the promulgation of the new constitution in 2010.

On Social Protection, the Government of Kenya through the Ministry of Labour and Social Protection and the National Council for Persons with Disabilities implements a cash transfer program for Orphaned and Vulnerable Children, Older Persons and persons with severe disability. The objective of the fund is to enhance the capacities of caregivers to provide care and improve livelihoods for persons with disabilities. The Persons with Severe Disabilities Cash Transfer (PWSD-CT) programme which began in the year 2010, targets persons with severe disabilities that is, ‘those who need permanent care including feeding, toiletry, protection from danger by other persons. Full time support has to be offered by a caregiver to ensure their needs are attended to’. However, the implementation of the cash transfer program has been fraught with delays and inconsistent disbursement schedules of funds. This means the beneficiaries cannot plan and are deprived of the immediate needs that the cash was meant to cure in the first place. Indeed, a survey report (2016) by the Nation Gender and Equality Commission notes that, ‘The national budgetary allocation for PWD-CT is very small. Only 8.7 per cent have ever received social assistance from the government. This could be as a result of the targeting, which only caters for People with Severe Disabilities (PWSD). Access to health insurance remains a challenge to PWDs, with only 12.7 per cent having access to health insurance.’

The above findings on inadequacy and coverage of the cash disbursement corroborate the concerns made by the Committee (monitoring body under CRPD) in the last review of

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65 Initial Report of Kenya to the Committee on the Rights of Persons with Disabilities (28th July 2014) (CRPD/C/KEN/1).
Kenya under the CRPD (2015), about the situation of poverty in households with persons with disabilities both in rural and urban areas and in particular among persons with disabilities in ethnic minority groups. The Committee was also concerned about the lack of regularity in the distribution of support and services in rural areas and the absence of monitoring social assistance services for persons with disabilities. The Committee recommended inter alia, that Kenya should, ‘take steps to extend urgently the coverage of social protection schemes beyond persons with “severe disabilities” in order to ensure an adequate standard of living to all persons with disabilities who are not currently eligible for social protection schemes, and ensure that support services and social assistance for persons with disabilities are distributed on a regular basis and that progress in the living conditions of persons with disabilities is monitored’.  

1.4 Sexual Orientation and Gender Identity

Consensual adult private sexual conduct between persons of the same sex is a crime in Kenya under sections 162 (a) and (c) and 165 of the Penal Code. A petition filed in the High Court challenging the constitutionality of these sections was rejected (Eric Gitari & 7 Others versus Attorney General and Others). Though rarely enforced, the provisions criminalizing same sex conduct underpin violence, discrimination and stigmatization of lesbian, gay, bisexual and transgender persons in Kenya. In the second cycle of the Universal Periodic Review in the year 2015, the State accepted a recommendation to enact a comprehensive equality and anti-discrimination law that affords protection to all persons regardless of their sexual orientation or gender identity. The Commission notes that the State is yet to implement this recommendation which it voluntarily supported in 2015. The National Commission continues to impress upon the State to enact a comprehensive equality and non-discrimination legislation affording protection to all

68 Concluding observations on the initial report of Kenya (Adopted by the Committee at its fourteenth session (17 August-4 September 2015). Para 49, 50
69 Eric Gitari & 7 Others versus Attorney General and Others Petition No 150 & 234 of 2016 (Consolidated); Available at http://kenyalaw.org/caselaw/cases/view/173946/
persons regardless of their sexual orientation or gender identity. The National Commission, whilst respecting the High Court ruling, maintains its position on the need for the State to decriminalize consensual same sex conduct through repeal of sections 162 (a) & (c) and 165 of the Penal Code

1.5 Indigenous/marginalised communities
The KNCHR acknowledges the steps made in advancing the rights of indigenous persons including the enactment of various laws and policies such as the Community Land Act, 2016 and Mining Act, 2016 and the establishment of Taskforces. The Commission however remains concerned at the slow pace of implementation of the decisions of the regional human rights mechanism as well as the delayed protection of the rights of indigenous peoples and their ancestral lands.

3. HUMAN DIGNITY; FREEDOM AND SECURITY OF THE PERSON; (ARTICLES 28, 29)

Under the Constitution of Kenya 2010, the core purpose of protection of the Bill of Rights is to preserve the dignity of individuals and communities. In the words of the Universal Declaration of Human Rights, ‘All human beings are born free and equal in dignity and rights.’ Therefore any breach of any of the human rights, whether civil, political or economic social rights erode the inherent dignity of the human persons and communities.

The punishment of petty offences through arbitrary arrests has not only violated the freedom and security of the person but also created a panacea for the violation of human rights of especially the poor, marginalized and vulnerable people. They seem to punish the status of the person. The National Committee on Criminal Justice Reforms has in the period prepared policy briefs recommending review, amendment or repeal of the laws

71 Article 19(2) Constitution of Kenya, 2010
72 Article 1 Universal Declaration of Human Rights
and policies. The Committee identified legislation that requires various amendments and these include: the Penal Code, The Narcotics and Psychotropic Substances (Control) Act, offences under the legislation in Kisumu, Mombasa and Nairobi Counties’ By-Laws, among others. Notably petty offences are linked to socio-economic issues thus need for an integrated societal approach towards tackling the issue. The existent of petty offences in our statute books coupled with corruption and harassment among security agencies are factors that have all conspired to violate the fundamental right to dignity and security of the person.

Insecurity remains a major threat to the people of Kenya. Kenya has also continued to experience high crime rates of which both civilians and police were victims of crime. The decade past has seen Kenya become victim of several acts of terrorism. These have led to the loss of innocent lives. These include the attacks on Westgate Shopping Mall attack (September 2013), Garissa University College (April 2015), Marsabit attacks, 14 Riverside Drive Complex -DusitD2 (January 2019) amongst other numerous multiple attacks in Lamu, Mandera, Mpeketoni and Liboi.

Notwithstanding, the manner in which the national security forces have responded to the attacks has raised major serious human rights concerns. The Commission has recorded these violations in the various reports. In a security operation dubbed Operation Usalama Watch in April 2014 aimed at flushing out foreigners linked to terrorism in Nairobi and Mombasa, for instance, the Commission documented multiple human rights violations and breaches of the law targeting members of the Somali Community.

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human rights violations and breaches of the law documented include arbitrary arrest, extortion, theft, looting of business and homesteads, sexual harassments, arbitrary detention, illegal deportations and torture, cruel, inhuman and degrading treatment.\textsuperscript{75} The Independent Policing Oversight Authority established that the ‘various aspects of the operation were carried out without adherence to the laid down statutory requirements, rules, and procedural regulations… discipline and professional standards.’\textsuperscript{76} The Authority further established that rights of individuals were violated during the operation.\textsuperscript{77}

In its report on the \textit{Error of Fighting Terror with Terror (2015)}\textsuperscript{78}, the Commission established a pattern of conduct by security agencies\textsuperscript{79} that amounts to gross violation of law and human rights of individuals associated with terror attacks across various parts of the country. The Commission has documented 120 cases of egregious human rights violations including 25 cases of extra-judicial killings and 81 cases of enforced disappearances.\textsuperscript{80} The Commission noted that the violations were ‘widespread, systematic and co-ordinated and include but are not limited to arbitrary arrests, extortion, illegal detention, torture, killings and disappearances.’\textsuperscript{81} Moreover, the Commission has documented cases of torture in detention with victims sustaining serious physical injuries and psychological harm. Reactive policing as opposed to intelligence led policing has been noted as a major contributing factor to rights violations witnesses during security operations in the context of the war against terror.\textsuperscript{82}

\textsuperscript{75}Ibid page 4.
\textsuperscript{77}Ibid pages 11-14.
\textsuperscript{79}Include the Kenya Defence Forces, the National Intelligence Service, the Kenya Wildlife Service, the National Police Service including the Anti-Terrorism Police Unit, the Kenya Police Reservist, Rapid Deployment Unit of the Administration Police, Border Patrol Unit and the General Service Unit.
\textsuperscript{80} Ibid page 7.
\textsuperscript{81}Ibid page 7.
\textsuperscript{82}Independent Policing Oversight Authority, ‘Monitoring Report on Operation Sanitization Eastleigh Publically Known as Operation Usalama Watch’ page 16.
The past decade has also been marked by heightened insecurity and tribal conflicts in various parts of the country. Multiple attacks, counter-attacks, reprisals and displacements have been witnessed in the North Rift region. In its public inquiry report, *Mending the Rift* the Commission found massive violations ranging from deaths, disappearance of persons, torture, confiscation of property, destruction of businesses, homesteads, schools, churches, markets, shooting and slaughter of livestock and looting of shops. The inquiry hearings conducted between May-July 2016 also revealed that Kenya Defence Forces, the National Police Service as well as the local communities (one against the other) were violators of human rights. Similarly, in KNCHR’s *Guarding the Coast*, the Commission documents findings of a Public Inquiry on Insecurity in the Coast Region conducted between 2012 and 2016. The public inquiry established historical injustices, religion and land as among the major causes of conflict in the region. Perceived marginalization of the Coastal region and its peoples has also further exacerbated insecurity in the region. The repercussions of insecurity were violations of numerous other fundamental rights and freedoms including socio-economic rights. There have also been more recent attacks including Community conflicts in Olposimoru and Narok/Nakuru border as well as the land conflict at the border of Nandi and Kakamega counties.

The rise in cases of sexual and gender-based violence continues to infringe on the dignity and freedom of security especially of women and young girls. A wave of femicide cases in the first half of the year 2019 was worrying. Sexual violence during the electioneering period gravely violated the security of women and children in the country amongst other rights. As reported by the Commission following the 2017 presidential election and repeat presidential election, there were 201 reported cases of sexual violence, with women at

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87 Okiya Omtatah Okoti v Communication Authority of Kenya & 8 others [2018] eKLR
96.26% while men were at 3.74%. On the legislative and policy front, progressive steps have been made through the enactment of the Prevention of Torture Act which classifies rape and sexual abuse as a form of physical torture; the development of the National Guidelines on Management of Sexual Violence in Kenya which addresses the clinical management of survivors of sexual violence and forensic management of evidence needed for legal action, as well as the National Gender and Equality Commission has formulated a model policy framework on sexual and gender based violence. Justice for the victims as well as provision of adequate safe houses however remains a mirage.

4. PRIVACY (ARTICLE 31)

The Constitution secures the right of every person not to have ‘their person, home or property searched; their possessions seized; information relating to their family or private affairs unnecessarily required or revealed or the right not to have the privacy of their communications infringed’. The Court in Kenya Legal and Ethical Network on HIV & AIDS (KELIN) & 3 others v Cabinet Secretary Ministry of Health & 4 others [2016] eKLR stated that privacy “protects against the unnecessary revelation of information relating to family or private affairs of an individual. Private affairs are those matters whose disclosure will cause mental distress and injury to a person and there is thus need to keep such information confidential. Taken in that context, the right to privacy protects the very core of the personal sphere of an individual and basically envisages the right to live one’s own life with minimum interference. The right also restricts the collection, use of and disclosure of private information.” The right to privacy can be limited. In Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya &10; others [2015] eKLR, the court held that the right to privacy can never be absolute, and that a balancing test has to be

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92 KELIN Case, available at http://kenyalaw.org/caselaw/cases/view/132167/
applied to determine whether the intrusion into an individual’s privacy is proportionate to the public interest to be served by the intrusion.93

The enactment of the Data Protection Act (No. 24 of 2019) and its coming into operation on 25th November 2019 is a welcome and progressive move towards protecting the security and privacy of personal data. The Act gives effect to Article 31(c) and (d) of the Constitution; establishes the Office of the Data Protection Commissioner; makes provision for the regulation of the processing of personal data; provides for the rights of data subjects and obligations of data controllers and processors.

Prior to that and in an attempt to reform the identity ecosystem in Kenya by adopting the foundational identity system model, the Ministry of Interior and Coordination of National Government introduced the Huduma Bill, 2019. Prior to the passing of the law, the Huduma namba had been rolled out to various parts of the country amidst complaints that the process was rushed, that there was no adequate public participation and that there lacked a legal framework governing the operation of the Huduma namba including the data protection mechanism. There were also concerns of disenfranchisement of certain communities, refugees and other vulnerable persons who lacked identity documents. In the Nubian Rights Forum case,94 the High Court gave a nod to operationalise the Huduma namba (but subject to the set conditions). In the judgment delivered on 1st April 2020, the government was free to proceed with the collection of personal information and data under the National Integrated Information System (NIIMS) so long as; no member of the public was compelled to participate in the collection of personal information and data in NIIMS; the collection of personal information and data in NIIMS was not made a condition precedent for the provision of any Government or public services, or access to any Government or public facilities and that the Government shall not share or disseminate any of the personal information or data collected in NIIMS with any other national or international government or non-governmental agencies or any person. As at the time of

93 CORD Case, available at http://kenyalaw.org/caselaw/cases/view/106083/
94 Nubian Rights Forum & 2 others v Attorney-General & 6 others; Child Welfare Society & 8 others(Interested Parties); Centre For Intellectual Property & Information Technology(Proposed Amicus Curiae) [2019] eKLR http://kenyalaw.org/caselaw/cases/view/172447/
writing this report, it was not clear what became of the implementation of this project despite the call by the Ministry of Interior for inputs in the earlier months of 2020 on the Registration of Persons (National Integrated Identity Management System) Regulations 2020 which purportedly included similar substantive provisions to operationalise the Huduma namba.

The right to privacy became subject of controversy when the Communications Authority of Kenya sought to install Mobile Management System (DMS) feared to tap private phone conversations and messages. The Court in Okiya Omtatah Okoiti v Communication Authority of Kenya & 8 others held that the move to tap conversations and messages is a threat to the subscribers’ privacy, hence a breach of the subscribers’ constitutionally guaranteed rights to privacy, therefore unconstitutional, null and void. On appeal, the orders were set aside as the appellate court on 24th April of 2020 decreed that in developing a DMS system and the technical and consumer guidelines, the Communications Authority was bound to apply public participation and consultations with stakeholders and mobile network operators.

5. FREEDOM OF CONSCIENCE, RELIGION, BELIEF AND OPINION (ARTICLE 32)

The Constitution under Article 8 declares that there is no State religion. Every person has the right to freedom of conscience, religion, thought, belief and opinion and this may be exercised individually or in community with others. Religion shall not be used as a ground of discrimination and a person shall not be compelled to act or engage in any act that is contrary to their belief or religion.

In the decade past, we have witnessed peaceful religious tolerance generally including the joint prayer/breakfast services and national celebration of religious holidays.

Nonetheless, certain actions have watered down the full enjoyment of this right. For instance, the Deputy registrar of societies on 29th April 2016 gave a 7 day notice to the Atheists Society that the society would stand dissolved at the expiry of 7 days with effect from the 29th of April 2016. The reasons for suspension and de-registration were hinged on Section 12(1) (b) of the Societies which provides for de-registration on the basis that a society is “...Prejudicial and incompatible with peace, stability and good order of the Republic of Kenya. The Society has since filed a petition *Atheists In Kenya & another v Registrar of Societies & 2 others [2018] eKLR* challenging de-registration of the Society citing breach of Article 47 on fair administrative action by the Respondents and Article 50 on fair hearing. The court declared that the respondents violated the petitioners’ constitutional and statutory rights as set out under Articles 47 of the Constitution, the Fair Administrative Act and Section 12 of the Societies Act. The Judge further gave an order quashing the letter by the 2nd respondent dated 29th April 2016 purportedly suspending registration of the Atheists Society in Kenya. In some instances school going children who wear religious cloths such as the Hijab have been discriminated and required to conform to the standard school uniform. The Court of Appeal has however clarified in the case of *Mohamed Fugicha versus Methodist Church in Kenya (suing through its registered trustees) and three others (2016) eKLR*, inter alia that it is not unlawful and unconstitutional for Muslim children to wear Hijab in school. As at the time of the report, a petition had been filed challenging decision to bar Muslim students from performing prayers at the school and the case awaited empanelling of a bench under Article 165(4) of the Constitution.

6. FREEDOM OF EXPRESSION AND FREEDOM OF THE MEDIA, ACCESS TO INFORMATION (ARTICLES 33, 34 & 35)

The enactment of the Access to Information Act, 2016 (No. 31 of 2016) is a progressive step towards realisation of the right to access to information secured under Article 35 of the Constitution. The Act provides a framework for public entities and private bodies to

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97 In the case of *Mohamed Fugicha versus Methodist Church in Kenya (suing through its registered trustees) and three others (2016) eKLR*, inter alia http://kenyalaw.org/caselaw/cases/view/165289/
98 *Mohamed Arif Khan and Another versus Visa Oshwal Academy and Others Petition No. 74 of 2019*
proactively disclose information that they hold and to provide information upon request in line with the constitutional principles. The establishment of the Taskforce on Improvement of Government Information and Public Communications Function to align it with Emerging Public Sector Dynamics and Expectation under the Ministry of ICT was a great move. Following submission of views to the Taskforce in mid of 2019, it is hoped that tangible efforts will be seen to be made towards improving government communications.

Overall, one can say there has been some progress in this area compared to the dark days where secrecy and the official secrets laws were used to gag civil servants and create an eclipse in governance affairs. However, a lot more still remains to be done to proactively disclose information of public interest by the government at not only the national government but especially county levels of governance. Without proper information, citizens will be unable to participate in governance as intended under the 2010 constitutional framework. It is of critical importance that such information be made accessible, taking into account the diversity of the nation including, geographical, social status, literacy levels and disabilities.

In the past decade, freedom of expression and media freedom was threatened in various instances through both laws and practice. The Security Laws Amendment Act (SLAA), for instance sought to amend various Acts in an effort to combat terrorism in the country. In *Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya &10 others* [2015 eKLR] one of the petitioners challenged Section 64 of SLAA, which it termed as vague and overly broad and infringed on various provisions of the Bill of Rights. The court held Section 64 of SLAA which introduced Sections 30A and 30F to the Prevention of Terrorism Act are unconstitutional for violating the freedom of expression and the media guaranteed under Articles 33 and 34 of the Constitution.99

During the 2017 general elections period, the Communications Authority of Kenya (CA) switched off the signals of four privately owned national TV stations over the stations’ decision to air live the Opposition leader Raila Odinga’s ‘Swearing in Ceremony’ at Uhuru

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Park. Despite a court order to reinstate the TV stations, the same was not adhered to immediately. The TV stations were switched back on after 10 days, with no explanation from the Communications Authority of Kenya.

During the COVID-19 Pandemic, the Commission noted the positive aspect of enhancing media freedom by listing media services as essential services and this enhanced media coverage on the pandemic and access to information. However, there were reported cases that threatened media freedom in the course of covering and reporting the COVID-19 pandemic across the country. The immediate cases that came to the fore involved harassment and intimidation of journalists by law enforcement officers; the assault of an NTV journalist in Mombasa; harassment of a WERU TV journalist in Meru, arrest of Citizen TV journalists in Eldoret and harassment of two Standard Media Group journalists in Nakuru. KNCHR issued a terse statement on the harassment of journalists and called to action the need for duty bearers to support media freedom during COVID-19 pandemic coverage and reporting.

There is a thin line between the freedom of expression and the offence of criminal defamation as per Kenyan criminal law. The case of Jacqueline Okuta & another vs Attorney General & 2 others [2017] eKLR brings into sharp focus the constitutionality of the offence of criminal libel as provided for under section 197 of the Penal Code Cap 63. The petition raises fundamental questions such as whether or not criminal defamation is a ground on which a constitutional limitation on the rights of freedom of expression, could be legally imposed. Does defamation law infringe the right of freedom of expression guaranteed under the Constitution or is it one of the reasonable and justifiable limitations justifiable in an open democratic society? The Constitutional court declared the offence of criminal defamation as unconstitutional citing that there is an appropriate and satisfactory alternative civil remedy that is available to combat the mischief of defamation. The offence of criminal defamation constitutes a disproportionate instrument for achieving

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the intended objective of protecting the reputations, rights and freedoms of other persons. Thus, it is absolutely unnecessary to criminalize defamatory statements. Further, the offence of criminal defamation is not reasonably justifiable in a democratic society; hence criminal sanctions on speech ought to be reserved for the most serious cases as envisaged under Article 33 (2) of the Constitution.

On a progressive note, the case of Geoffrey Andare\textsuperscript{102} rekindled hope towards reinforcing the freedom of expression. The petitioner in this case challenged the constitutionality of section 29 of the Kenya Information and Communication Act, Cap 411A on the grounds that it criminalizes publication of certain information in vague and overbroad terms, has a chilling effect on the guarantee to freedom of expression, and creates an offence without creating the mens rea element on the part of the accused person. The court declared section 29 unconstitutional for being couched in overbroad and vague terms that violate or threaten the right to freedom of expression guaranteed under Article 33 of the Constitution.\textsuperscript{103}

7. FREEDOM OF ASSOCIATION; ASSEMBLY, DEMONSTRATION, PICKETING AND PETITION (ARTICLES 36 AND 37)

In the period, there have been several attempts to either suspend operations or de-register non-governmental organizations viewed as being critical of the State for human rights violations on grounds of alleged non-compliance with law, financial impropriety, money laundering and financing of terrorist activities. The State through the NGO Coordination Board has also attempted to de-register the African Centre for Open Governance (AFRICOG). This was followed by a raid on 16 August 2017 by the Kenya Revenue Authority (KRA), accompanied by Kenyan police officers without notice and with a defective search warrant. De-registration attempts were also made on the International Foundation for Electoral Systems (IFES) in December 2016 on account that it has not be

\textsuperscript{102}Geoffrey Andare v Attorney General & 2 others [2016] eKLR

\textsuperscript{103}Geoffrey Andare case available at \url{http://kenyalaw.org/caselaw/cases/view/121033/}.
registered and is therefore carrying out activities in the country illegally without being afforded an opportunity to be heard. IFES has since proved that it is lawfully registered by the Registrar of Companies and has been in operation since 2002.\textsuperscript{104} Moreover, The State has on two occasions attempted to de-register the Kenya Human Rights Commission (for the same reasons) despite a court order declaring the action to be unlawful, null and void.\textsuperscript{105} All these are instances that threaten the freedom of association.\textsuperscript{106}

In March 2013, the NGO Coordination Board rejected to register the National Gay and Lesbian Human Rights Commission (NGLHRC) as a Non Governmental Organization (NGO). NGLHRC challenged the decision of the Board citing Article 36 which provides that very person has the right to freedom of association, which includes the right to form, join or participate in the activities of an association of any kind. The court in its April 2015 ruling declared that the petitioner was entitled to exercise his constitutionally-guaranteed freedom to associate by being able to form an association.\textsuperscript{107} The NGO Board unsuccessfully appealed the decision thereby paving way for the NGO to be formally registered\textsuperscript{108}. The outcome of both cases underscores the milestone achieved in entrenching the freedom provided under Article 36 of the Constitution.

The ascension of the Public Benefit Organizations Act, 2013 in January 2013 was to be followed by a commencement date by notice in the Gazette by the Cabinet Secretary responsible for matters relating to planning and national development the unexplainable delays led to court petitions seeking to have the Government operationalize the Act. Court ruling made in 2016 directed the Cabinet Secretary to gazette within 14 days to

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\item \textsuperscript{104} KNCHR, ‘Press Statement on attacks on the civic space by the defunct NGO Coordination Board delivered on 16\textsuperscript{th} August 2017,’ available at http://www.knchr.org/News-Room/Press-Statements
\item \textsuperscript{105} Kenya Human Rights Commission and Another versus Non-Governmental Organizations Co-ordination Board and Another (2018) eKLR available at http://kenyalaw.org/caselaw/cases/view/147166/
\item \textsuperscript{107} See EG v Non-Governmental Organisations Co-ordination Board & 4 others [2015] eKLR available at http://kenyalaw.org/caselaw/cases/view/108412/ para 148
\item \textsuperscript{108} Majority of Judges (3 out of 5) ruling of Non-Governmental Organizations Co-Ordination Board v EG & 5 others [2019] eKLR available at http://kenyalaw.org/caselaw/cases/view/170057/
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commence the PBO Act.\textsuperscript{109} Before commencement, the PBO portfolio was moved to the Ministry of Interior, a clear way to manoeuvre the court order. In 2017, the High Court ordered the Interior Cabinet Secretary, to publish in the Gazette within the next 30 days, the commencement date of the Public Benefit Organisation (PBO).\textsuperscript{110} There has been noncompliance with these court orders and the Commission in August 2017 called on the responsible Cabinet Secretary to comply with the 2017 court order and operationalize the PBO Act.\textsuperscript{111}

Human rights defenders across board continue to face intimidation, harassment and violence in the course of their work. In a Survey carried out by the Commission on situation of women and other vulnerable human rights defenders in Kenya, the Commission established that human rights defenders especially women remain at ‘high risk of a plethora of threats including arbitrary arrest and detention, physical violence, threats, intimidation and harassment.’\textsuperscript{112} The audit established that women human rights defenders were often and unjustly charged with incitement to violence and disobedience to law in their line of duty. The audit further established that 52% of women human rights defenders interviewed felt that there was insufficient State protection on the activities of human rights defenders. Furthermore, the study established that police officers and chiefs were common perpetrators of human rights at 56% with community members and politicians cited as notable perpetrators standing at 24% and 13% of responses received. Between January 2016 and September 2019, six (6) cases of killings of human rights defenders (HRDs) in their line of duty were recorded by the Defenders Coalition. They include the Mavoko 3 (Willie Kimani, Joseph Muiruri and Josephat Mwenda), Evans

\textsuperscript{109}Trusted Society of Human Rights Alliance v Cabinet Secretary Devolution and Planning & 3 others [2016] eKLR available at http://kenyalaw.org/caselaw/cases/view/128172 para 109 (c)

\textsuperscript{110}Trusted Society of Human Rights Alliance v Cabinet Secretary for Devolution and Planning & 3 others [2017] eKLR available at http://kenyalaw.org/caselaw/cases/view/135653/ Order (c)


Njoroge (Student Activist), Esther Mwikali (land rights activist) and Robert Kirotich (Sengwer Indigenous community).

Article 37 of the Constitution provides that every person has the right, peaceably and unarmed, to assemble, to demonstrate, to picket, and to present petitions to public authorities. In the run up to the fresh Presidential Election in 2017, National Super Alliance (NASA) leaders called on their supporters to demonstrate as a way of demanding for reform at the Independent Electoral and Boundaries Commission (IEBC). In Kisumu for instance, protests were witnessed in Kondele, Manyatta, the Central Business District (CBD) and Nyalanda areas. Out of the ensuing demonstrations, KNCHR confirmed five (5) deaths allegedly resulting from use of excessive force by police during the protests which took place on October 2nd, 5th, 10th, 11th, 12th, 13th and 16th October 2017. One (1) death in Kisumu and four (4) in Siaya County. KNCHR documented cases of gunshot wounds, soft tissue injuries and fractures.\(^{113}\) University students have had their peaceful protests disrupted forcefully by the police, harassing, beating and mistreating them. On 30 April 2019, police used tear gas to disperse protestors who had gathered at Uhuru Park in Nairobi to protest against widespread corruption. A Bill to amend the Public Order Act, 2014 was submitted to the National Assembly but it was widely criticized for imposing undue restrictions on the right to peaceful assembly, and for disproportionately punishing protest organisers. The impugned amendment sought to make organisers of events criminally liable for damages arising from protests.\(^{114}\)

8. **POLITICAL RIGHTS (ARTICLE 38)**

Every citizen has the right to make political choices, which includes the right to form and participate in forming a political party, and to participate in the activities of, or recruit members of, a political party. All adults have the right to be registered as voters or to vote by secret ballot.


Political parties are critical vehicles towards achieving democratic process in Kenya. The 2010 Constitution stipulates expressly, the basic principles that political parties in Kenya must adhere to. They must for instance have a national character and respect and promote human rights and fundamental freedoms in their processes.\textsuperscript{115} Political parties must not encourage any form of violence or intimidation of its supporters or opponents or other person or even engage in bribery or other forms of corruption.\textsuperscript{116} In the two general electoral cycles under the 2010 Constitution, KNCHR has recorded\textsuperscript{117} ill preparedness by political parties. Political party primaries in the run up to the 2013 and 2017 General elections have been marred by controversy, particularly with regard to adherence to basic tenets of human rights and national values and principles of governance including transparency, accountability, participation, rule of law amongst others. The nomination processes have not been open and in line with the law, leading to numerous contests before the political parties disputes tribunals and the Courts. The Commission observed that political party processes flouted many of the electoral laws including bribery and manipulation of voters’ registers, leading to the wrong candidates on the ballot papers, resulting in a compromise on the true will of the people. While security forces tried to quell protests and other disruptions, incidents of violence, bribery and use of public resources in campaigns were recorded. Coupled with the weak internal dispute resolution mechanisms and the tight timeframes for effective resolution of disputes, this has curtailed the effective exercise of political rights safeguarded under Article 38.

The period has seen loss of life related to electoral violence witnessed during the 2017 general elections. The Commission in the context of monitoring elections has documented 101 cases of person who died; 247 cases of injuries and 37 cases of damage

\textsuperscript{115} Article 91 Constitution of Kenya, 2010  
\textsuperscript{116} Article 91 (2)(b)(d) Constitution of Kenya, 2010  
to property in election related violence. Following the announcement of the Presidential results by the IEBC on 11th August 2017, there were gunshots and teargas mostly in; Mathare, Kibera, Dandora, Lucky Summer and Kawangware all within Nairobi City County and Manyatta, Kondele, Nyamasaria in Kisumu County as police tried to disperse demonstrators under the cover of darkness. The Commission documented 37 lives lost in the three-day unrest. The dead included a six 6-month-old baby who was clobbered by armed security agents whilst in Kisumu County.

In Still a Mirage, the Commission continued to monitor the fresh presidential elections following the Supreme Court’s decision to overturn the presidential elections amidst findings of electoral irregularities. Cases of voter bribery, incitement and hate speech were recorded. Accusations and counter accusations were traded between the two main political protagonists who further created deep rifts among communities. Politicians and Wananchi caused incitements to violence further polarising the electorate. The Commission documented instances where the groups of youths disrupted meetings and got involved in running battles with the police during the anti-IEBC demonstrations. KNCHR documented 25 new cases of deaths in the period between 1st September 2017 and 25th October 2017, over 100 injuries treated and discharged at various hospitals in Kisumu and Nairobi City Counties. 11 cases of police injuries were also recorded. The cases were recorded during the anti-IEBC demonstrations. As the Commission has previously observed, any electoral cycle marred with violence negatively affects the full spectrum of human rights enjoyment to include the right to vote and be voted for.

119 Ibid
120 Ibid
121 Ibid p 19.
122 Ibid p 18.
9. FREEDOM OF MOVEMENT AND RESIDENCE (ARTICLE 39)

Freedom of movement and residence is one of the core rights guaranteed under the 2010 Constitution of Kenya. Whereas every person has the right to move freely in Kenya, the right to enter, remain in and reside anywhere in Kenya is limited to Kenyan citizens. Therefore, the question of who a citizen is and by what means one acquires Kenyan citizenship is of fundamental importance. The citizenship provisions under the 2010 Constitution and the laws enacted over this period are very progressive. The 2010 Constitution, for instance, allows dual citizenship, something which was not possible under the old Constitution. In addition, under the repealed Constitution, Kenyan women could not confer citizenship to their children born of foreign nationals or their non-Kenyan spouses on an equal basis as Kenyan men. The 2010 Constitution of Kenya provides that “a person is a citizen by birth if on the day of the person’s birth, whether or not the person is born in Kenya, either the mother or father of the person is a citizen”. The 2011 Kenyan Citizenship and Immigration Act guarantee the same. Moreover, any person who has been married to a Kenyan citizen for at least a period of seven years has the right to acquire Kenyan citizenship by registration.

On the other hand, the question of citizenship has primarily been contentious in the case of Miguna Miguna v Fred Okengo Matiang’i Cabinet Secretary, Ministry of Interior and Coordination of National Government & 7 others, in which the Government declared Miguna Miguna a prohibited immigrant by virtue of him having supposedly lost his Kenyan citizenship when he acquired a Canadian passport. The Government confiscated his Kenyan passport and national identity documents and proceeded to deport him in March 2018. In a December 2018 judgment, the High Court established that Miguna Miguna is a citizen of Kenya and did not lose his citizenship based on his acquisition of a Canadian passport. The High Court gave at least 10 orders to the Government, including

126 Article 6, 7 Kenya Citizenship and Immigration Act, 2011.
128 Miguna Miguna v Fred Okengo Matiang’i Cabinet Secretary, Ministry of Interior and Coordination of National Government & 6 others, 2018. Available at http://kenyalaw.org/caselaw/cases/view/163893/ section 56-75
facilitating Miguna’s return to Kenya, none of which has been obeyed. It remains a deep concern that a Kenyan citizen’s constitutional right to enter Kenya has been completely violated, and almost two years after the High Court ruling, Miguna still resides in Canada.

It is also concerning that despite the constitutional guarantee to every person to freely move within Kenya, the freedom of movement of refugees in Kenya has largely been restricted during this period, compared to the pre-2010 era. Kenya has historically hosted a large refugee population and accorded refugees the right to live and move freely in urban centers. However, following a rise in terrorist attacks over the past ten years, the Government revisited its refugee policy and instituted harsher restrictions on refugee movement. In 2012, the Government announced an encampment policy that required all refugees and asylum seekers in urban centers to relocate to refugee camps. Following the terror attacks in Garissa University in April 2015 the Deputy President of Republic of Kenya, William Ruto, announced the Government’s intention to close Dadaab Refugee Camps within three (3) months which placed 500,000 refugees at risk of being forcibly returned to their countries hence in violation of Kenya’s international obligations. A July 2013 High Court ruling established that this policy was, among others, a violation of the constitutional right of movement and the principle of non-refoulement enshrined in the 2006 Refugees Act. Despite this ruling, the Government again issued another directive citing security and logistical concerns thereby requiring all refugees residing outside the designated camps to return there immediately; and urging Kenyans to report all refugees and illegal immigrants residing outside the camps. Thus in May 2016, by way of Gazette Notice No. 4418 of 2016, the government through the Ministry of Interior and Coordination of National Government stipulated its intention to fast-track reparation of

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129 Miguna Miguna v Fred Okengo Matiang’i Cabinet Secretary, Ministry of Interior and Coordination of National Government & 6 others, 2018. Available at http://kenyalaw.org/caselaw/cases/view/163893/ section 121
132 Press Statement of Cabinet Secretary for Interior and Coordination of National Government on Refugees and National Security Issued on 26th March 2014, available at https://www.hrw.org/sites/default/files/related_material/PRESS%20STATEMENT%20BY%20CABINET%20SECRETARY%20FOR%20INTERIOR%20COORDINATION%20OF%20NATIONAL%20SECURITY%20ISSUED%20ON%2026%20MARCH%202014.pdf
Somali refugees from Kenya and established the National Multi-Agency Refugees Reparation Team with the mandate to manage the process of reparation. These policies were successfully challenged by KNCHR\textsuperscript{133} in Kenya National Commission on Human Rights & Another v. Attorney General & 3 Others, H.C of Kenya at Nairobi Constitutional Petition No. 227 of 2016.\textsuperscript{334} The Government’s efforts to severely curtail the freedom of movement of refugees and forcibly repatriate them culminated in a series of amendments to the 2006 Refugee Act one of which sought to drastically reduce the number of refugees and asylum seekers in the country, through forced repatriation.\textsuperscript{134} The High Court in 2014 established that this provision, which would require the \textit{refoulement} of 400,000 refugees and asylum seekers was “unconstitutional and therefore null and void”.\textsuperscript{135} Following the April 2015 Garissa University terrorist attack, the Government announced that it would close the Dadaab refugee camp immediately and repatriate all refugees. The High Court in 2017 ruled that this Decision was unconstitutional, null and void.\textsuperscript{136} On a positive note, the new Refugees\textsuperscript{137} Bill, 2019 which was introduced at Parliament is progressive and will hopefully lead to better protection of refugee rights in Kenya.

Restriction of movement has also been occasioned by the outbreak of the COVID-19 pandemic. Following the country's first reported case of the disease in March 2020, the Government instituted a number of laws, regulations and directives to curb its spread, as permitted under article 24 of the Constitution and the \textit{Siracusa Principles}. The measures instituted included dawn to dusk curfews and restriction of movement into and out of designated metropolitan areas. The restriction of movement rules prohibited the movement of non-essential service providers during the dusk to dawn hours, and movement of non-essential service providers into or out of the COVID-19 hotspot areas

\begin{itemize}
\item \textsuperscript{133} Kenya National Commission on Human Rights & Another v. Attorney General & 3 Others, H.C of Kenya at Nairobi Constitutional Petition No. 227 of 2016.\textsuperscript{334}
\item \textsuperscript{135} Petition 628, 630 of 2014 & 12 of 2015 (Consolidated), available at http://kenyalaw.org/caselaw/cases/view/106083/ para 427
\item \textsuperscript{137} The Refugees Bill, 2019. Available at http://www.parliament.go.ke/sites/default/files/2020-05/Refugees%20Bill%2C%202019_compressed%20%281%29_0.pdf
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(these were mainly Nairobi, Mombasa, Kilifi and Kwale Counties). Insecurity has also been a prime cause of restriction of movement of persons. This was clearly evident in the two month long dawn to dusk curfew imposed upon residents of Wajir, Mandera, Garissa and Tana River following the April 2015 Garissa University terror attack.

10. PROTECTION OF THE RIGHT TO PROPERTY (ARTICLE 40)

Although the right to acquire or own property is provided by Article 40 of the Constitution, equitable access to land and security of land rights have and continue to face potential violation in the implementation of Kenya’s Constitution and Vision 2030. The Commission noted in its fourth state of human rights report that in the course of implementation of LAPSSET project in Lamu county, Aweer (Boni) community decried lack of public participation and inadequate compensation to deserving dispossessed proprietors. In 2012, residents of Kibera slum were unsatisfied with the compensation by the Kenya Railways Corporation which sought to build a railway line along the railway reserve in the slum area. In 2013, the Maasai community in Narasha, Olkaria region of their ancestral land were dispossessed. Additionally, in its COVID 19 Situational Report No. 1 of 2020, KNCHR took note of increased number of evictions and demolitions of houses especially for the poor people who were either squatters on government land or who have been conned into buying land belonging to the government and issued with fake title deeds. Forceful evictions during the Covid-19 pandemic period occurred in Kariobangi and Ruai where families were left in the cold after demolition of their houses despite the inherent dangers of the pandemic and existence of an interim court order. Forceful demolitions and evictions not only paints a clear picture of how land problem is still persistently evident but also the threat posed to the right to own and acquire property. The resultant effects

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also threaten several other human rights. 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.

The right to property has also been violated mostly during election periods. In its 2016 research report, the National Crime Research Centre found that destruction and/or loss of property as an election offence had a prevalence rate of 30.9% making it one of the major factors leading to negative societal socio-economic and political impact as houses are razed down, vehicles burnt and cash stolen during election conflicts. A case in point was the burning of a vehicle of one of the aspirants by supporters of an opponent in Kakamega County during the 2013 General Elections.\(^{141}\)

During the 2017 general elections, the Commission documented five (5) cases relating to unlawful destruction of private and public property by civilians in various counties after the announcement of the Presidential election results in Garissa, Bondo, Nyalenda, Mathare and Kibra.\(^{142}\) Moreover, during the fresh Presidential election, the Commission monitored and documented areas that saw upscale in the destruction of property and looting. Such areas with high prevalence of property destruction included Nairobi City County, Kakamega County, Vihiga County and Kisumu County. The Commission recorded destruction of property, looting and forceful entry in supermarkets, general shops, Mpesa shops, private homes, private and public vehicles, motor bikes inter alia. Victims of property loss suffered harassment and actual bodily injuries from perpetrators who included security officers and civilians. Although destruction of property was widespread across the country, there were thirty two (32) cases documented by the Commission. In cases where police were the perpetrators, most victims did not report incidences to the police out of fear of retribution.\(^{143}\)

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11. LABOUR RELATIONS (ARTICLE 41)

Article 41 of the Constitution provides for fair labour practices, fair remuneration, reasonable working conditions, and the right to collective bargaining including the right to go on strike.\textsuperscript{144} On their part, employers who include the corporate and other business enterprises have the right to form and organize activities as employers’ organizations.\textsuperscript{145} Five legislations, namely: the Employment Act, the Labour Relations Act, the Labour Institutions Act, the Occupational Safety and Health Act, and the Work Injury Benefits Act provide for aspects envisaged under this Article. While these laws are fairly recent and progressive in terms of human rights protections, there is need to ensure that they are in conformity with the Bill of Rights and Kenya’s obligations under international human rights laws especially the International Labour Organization’s conventions.

Major strikes have been witnessed in the past ten years, for instance teachers went on strike in September 2012, April 2013, January and July 2015 over pay disputes and demand for better learning facilities.\textsuperscript{146} While teachers’ welfare is important and should be looked into by the Government, these strikes not only disrupted learning calendars but also curtail learners’ right to education. The doctors 100 days strike from December 2016 to March 2017 was a result of unimplemented 2013 Collective Bargaining Agreement (CBA) which the government said it did not recognize compounded by the demand for better working conditions.\textsuperscript{147} Nurses and clinical officers went on a 150 and 20 day strike from June to November 2017 and September to October 2017 respectively which resulted

\textsuperscript{144} Article 41(1,2, 4 & 5) Constitution of Kenya, 2010
\textsuperscript{145} Article 41(1,3,4 & 5) Constitution of Kenya, 2010
\textsuperscript{147} Aljazeera, ‘Kenya doctors end strike after deal with government,’ (March 5\textsuperscript{th} 2017), available at https://www.aljazeera.com/news/2017/03/kenya-doctors-strike-deal-government-170314084246054.html
to a high mortality at Kenyatta National Hospital because of its role as a national referral facility and a decline in number of persons seeking medical services in other facilities.\textsuperscript{148}

During the 2015/2016 reporting period, a total of 94 cases were resolved mainly by deploying conciliation and negotiation by KNCHR; majority of them touching on labour issues, specifically withholding of terminal benefits by employers.\textsuperscript{149} Whereas the Commission appreciates the importance of the private business sector to the growth of Kenya’s economy and the general improvement of the lives of citizens, it also recognizes the importance of ensuring that businesses are run within a framework that respects, promotes and protects human rights. Following an increase in the number of complaints on violations of labour rights by private security firms, the Commission in 2017 conducted an audit of 9 private security companies operating in Kisumu County to determine their level of compliance with national and international labour laws. The audit focused on 5 key areas, namely; the employment relationship; equality of opportunity/non-discrimination; workplace policies and complaints handling mechanisms; conditions of employment and membership to trade unions. The audit revealed gaps ranging from minimal to major in the practices of all but two of the companies audited. The gaps in compliance included gross underpayment to late or absolute non-payment of salaries. Other gross failures established include; failure by some companies to allow their employees to go on leave, including maternity leave, whimsical dismissals, and general poor working conditions.

Poor and unsafe working conditions and complaints of human rights violations in salt mining companies in Malindi necessitated the Commission to undertake a public inquiry in 2006. Issues then were that employees lacked protective clothing, injuries, poor pay and harassment among others. In 2017, the Commission conducted a follow up inquiry to evaluate the level of recommendation uptake. The 2017 report highlighted better working conditions and fair labour practices accorded to the employees as opposed to

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what happened previously (2006). Workplace policies were in place; most casual employees had been absorbed into permanent terms and corporate social responsibility and community relations have improved.¹⁵⁰

The Employment and Labour Relations court has been established pursuant to Article 162 (2) of the Constitution through Employment and Labour Relations Court Act of 2011. The Court enjoys same status as the High Court and has unlimited jurisdiction solely on matters that touch on employment and labour relations. Complaints can be lodged by an employee, employer, trade union, cabinet secretary, employer’s organisation, a federation, Registrar of Trade Unions and any other office established by law that can sue or be sued. The court has the power to issue orders such as preservation, compensation, award of damages, prohibition and reinstatement of an employee as well as an order for specific performance.¹⁵¹ One of the Court’s decisions in 2011 was to award an employee on the doctrine of constructive dismissal that was not defined in the Employment Act. In Maria Kagai Ligaga v. Coca Cola East and Central Africa Limited [unreported] the Court advanced the principle of constructive dismissal.¹⁵² The Claimant was granted monetary compensation.¹⁵³ The respondent in this case, Coca Cola East and Central Africa Limited, appealed the decision but the appeal was dismissed by the Court of Appeal in 2015.¹⁵⁴

In terms of wages, the government gazetted minimum wages per sector in 2018 which showed an increase compared to previous years.¹⁵⁵ However, there was no wage

¹⁵²Constructive dismissal occurs where an employee is forced to leave his job against his will, because of his employer’s conduct. Although there is no actual dismissal, the treatment is sufficiently bad, that the employee regards himself as having been unfairly dismissed. The Claimant was transferred from Kenya to Uganda, retransferred to Kenya then to Mozambique, all within a very short notice. She was never allowed to settle in any position or market and was finally repatriated to Kenya and moved from one town to the other at considerable disruption to her family life. She resigned, and the Court found resignation was involuntary and amounted to constructive dismissal.
increase gazetted in 2019. The average monthly basic minimum wages for Nairobi, Mombasa and Kisumu cities were higher than in other county headquarters and in all other towns. Average minimum wage was 7,284 (2015), 7,284 (2016), 8,585 (2017), 9,014 (2018) and 9,014 (2019). 156

12. ENVIRONMENT (ARTICLE 42)

The Government through the Office of the Attorney General and Department of Justice developed a National Action Plan on Business and Human Rights, a comprehensive strategy for protecting against human rights abuses by businesses, whether private or owned by Government. The policy has domesticated the UN Guiding Principles on Business and Human Rights and has focused on five thematic areas namely: land and natural resources; labour rights; revenue transparency; environmental protection; and access to remedy. 157 Having this policy in place is a milestone achievement in guiding how businesses and the environment co-relate symbiotically.

To protect the right to a clean environment guaranteed under Article 42 of the Constitution, Article 70 provides that any person who alleges that this right is being or is likely to be denied or violated, infringed or threatened may apply to the court for redress. On this basis the residents in Owino Uhuru in Changamwe, Mombasa County sought redress for environmental pollution occasioned by lead smelting in the area. 158 In its determination, the Court was satisfied that the Owino Uhuru settlement was affected as there was evidence of soil and water pollution from the experts and report produced in evidence. The court awarded compensation amounting to Kshs. 1.3 Billion and directed that all liable respondents to, within four months clean-up the soil, water and remove any

wastes deposited within the settlement failure to which a fine of Kshs.700 million is payable in default. Compensation on the basis of liability was apportioned as follows:\textsuperscript{159}

- 2nd Respondent (Ministry of Environment water and Natural Resources) -10%
- 3rd Respondent (Ministry of health)- 10%
- 4th Respondent (NEMA) -40%
- 6th Respondent (EPZA) -10%
- 7th Respondent (Metal Refinery EPZ) -25%
- 8th Respondent (Penguin Paper and Book Co.) -5%

However, the Attorney General has filed a notice of appeal against the ruling and the determination of the matter is pending.\textsuperscript{160}

Environmental protection for the benefit of present and future generations contemplated under Article 42 is closely tied with measures to be taken by the State under Articles 69 of the Constitution, particularly Article 69 (1) (b) requiring the State to work to achieve and maintain a tree cover of at least ten per cent of the land area of Kenya. Kenya’s forest cover in 2018 was estimated to be about 7.4% of the total land area, short of the constitutionally recommended minimum cover of 10%. Measures to upscale forest cover have been hindered by wanton illegal forest destruction. To address this problem, the Government declared a moratorium on harvesting of timber on all public and community forests for 90 days with effect from 24 February 2018. The purpose of the moratorium was to allow for reassessment and rationalization of the entire forest sector in the country.\textsuperscript{161} The moratorium has not been lifted. The Kenya National Bureau of Statistics Economic Survey of 2020 show an increase of total area under state forest plantation from 141.6 thousand hectares in 2018 to 147.6 thousand hectares in 2019 and that there was no area clear felled in 2019.\textsuperscript{162}

\textsuperscript{159} Ibid para 171
13. ECONOMIC AND SOCIAL RIGHTS (ARTICLE 43)

The Commission takes cognisance of the Governments’ efforts in respect to the Big Four (4) Agenda that strategically aims to boost manufacturing, universal health coverage, food and nutrition security and supporting affordable housing. The Commission similarly welcomes the prioritisation of the implementation of the “Big Four” initiatives in the Medium Term Plan III (2018-2022).

a. Food

The right to be free from hunger and to have adequate food of acceptable quality is one of the core economic and social rights enshrined under the Constitution.\(^{163}\) Over this period, food production has primarily been affected by extreme phenomena characterised by droughts, famine, heavy rainfall, locust invasions and fall army worms infestations. These events have contributed to fluctuations in the production of agricultural commodities over the years, and thus the right to freedom from hunger.\(^{164}\)

The Commission gladly notes that the State put in place the National Food and Nutritional Security Policy Implementation Framework 2017-2022; the National Nutrition Action plans (2012-2017) and (2018-2022). Despite the government efforts towards ensuring food security, incidences of food poverty persist. Data from the Kenya National Bureau of Statistics ['Basic Report: Kenya Integrated Household and Budget Survey (KIHBS)' (March 2018)] reveal that food poverty stands at 32% translating to 14.5 million Kenyans. Alarmingly, the survey findings show that six counties registered food poverty of more than half of their population which includes Turkana (66.1%); Mandera (61.9%); Samburu (60.1%); Busia (59.5%) and West Pokot (57.3%). On average, 25% of the population suffers from chronic food insecurity and poor nutrition linked to stagnated food production, high food prices, and climate change. In addition, national level data shows

\(^{164}\)For instance, in 2015 42.5 million bags of maize were produced. This number declined to 37.8 in 2016, 35.4 in 2017, 44.6 in 2018, and 39.8 in 2019. Available at https://www.theelephant.info/documents/kenya-national-bureau-of-statistics-economic-survey-2020/ page 123.
29% of children less than five years are stunted while 11.4% of children are severely stunted linked to poor socio-economic conditions and inappropriate feeding practices.

There have been concerns over the acceptability of food sold for consumption. Reports of maize ingested with aflatoxins; milk and meat containing dangerous amounts of chemical compounds (sodium metabisulfite) for preservation amongst others were confirmed in the period. This not only infringes the right to food of acceptable right safeguarded under Article 43 but also consumer rights secured under Article 46 of the Constitution.

b. Health

Since 2010, the health sector has undergone legislative reforms to align it with the requirements of the Constitution leading to enactment of Health Act, 2017; Health Records and Information Managers Act, 2017; Public Health Officers (Training, Registration and Licensing) Act, 2013; Kenya Medical Supplies Authority Act, 2013; and Cancer Prevention and Control Act 2013. The County Government Act, No 17 of 2012 sets out the framework for service delivery at the county level. A research study conducted by KNCHR in 2018 on county laws on the right to health and water reveal that many of the counties’ laws fall short of the human rights parameters necessary to achieve the four core elements on the right to health. Notwithstanding the existing legal framework, gaps abound when it comes to the enjoyment of the right to health.

Three research case studies of county governments conducted by the Commission between the years 2014 and 2018 have revealed gaping gaps in the realisation of the right to health and the right to emergency health care at the county levels.165

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According to the Kenya Integrated Budget and Household Survey 2016 (KIHBS 2015/16), about 73.4% of Kenyans access health services in public health facilities such as government hospitals, health centres and dispensaries. However, distance to health facilities is a major challenge with over 50% of counties reporting average distances that are higher than the national average of 3 kilometres and average time of one hour from the nearest health facility. Financial allocation for the health sector remains low with the country managing to allocate only around 5 to 7% of the budget to health between 2013/14 to 2015/16 which is below the 15% target in the 2001 Abuja Declaration. Worryingly, according to KIHBS 2015/2016, health insurance coverage is only at 19.0% of the population. In its General Comment No. 14, the United Nations Committee on Economic, Social and Cultural Rights defined four core elements of the right to health emphasizing that states should ensure that health goods, services and facilities are available, accessible, affordable, acceptable, and of good quality.

The launch of Universal Health Coverage (UHC) as part of the Big Four (4) Agenda is expected to ensure a healthier nation and realization of the right to highest attainable standard of health. This however is yet to be rolled out to the whole country. There is a grave concerned about the poor state of public health facilities at both National and County levels and the continued detention of bodies and sickly persons for failure to pay medical bills. The doctor-patient ratio is still below par.\(^{166}\) While the introduction of free maternity services in all public hospitals has boosted access to maternal health care, the quality of healthcare is poor in many county health facilities.

Article 43 1(a) provides that every person has the right to the highest attainable standard of health, which includes the right to healthcare services. World Health Organization defines health as a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.\(^{167}\) In this regard, the health in the context of Article 43 (1) includes mental health. On June 1st, 2020 President Uhuru Kenyatta

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\(^{166}\) KNBS Economic Survey 2020 shows the number of registered personnel per 100,000 population rose for all the cadres of registered health personnel. Registered nurses had the highest ratio of 122 per 100,000 population while Nutrition and Dietetics Technicians had the lowest ratio at 2 per 100,000 in 2019. The proportion of medical officers and clinical officers stood at 25 and 46 per 100,000 population, respectively during the same period. Pg 289

\(^{167}\) World Health Organization [https://www.who.int/about/who-we-are/constitution](https://www.who.int/about/who-we-are/constitution) (Accessed on 19\(^{th}\) August 2020)
indicated in his Madaraka Day speech that the country was facing a mental health crisis, and ordered the Ministry of Health to implement programmes and policies to address the problem. In November 2019, a Mental Health Taskforce to address the mental health concerns of Kenyans and help guide the Government on resource allocation for mental health was formed. The Task Force in its many findings: decried the poor state of mental health facilities and dehumanizing conditions that mentally ill patients were subjected to; stigma and discrimination and inaccessible mental health services to most deserving persons and special populations. According to the report, **lack of a Mental Health Action Plan has hindered the operationalization of the Mental Health Policy (2015-2030).** Government expenditure on mental health is 0.01% of the total expenditure forcing service seekers to pay out-of-pocket for treatment due to discriminatory medical insurance that does not cover for mental health care.\(^\text{168}\) The findings resonate with the Commission’s earlier findings in *Silenced Minds (2011)*.\(^\text{169}\)

It is worth noting that the right to highest attainable standard of health and the right to health care services include reproductive health care. On reproductive health rights, a large portion of Kenyan women have unmet family planning needs with only 44.2% of Kenyan women able to access modern contraceptives.\(^\text{170}\) In its *Report of the Public Inquiry into Violations of Sexual and Reproductive Health Rights in Kenya (2012)*,\(^\text{171}\) the Commission noted that funding challenges had resulted in a ‘weak health system thus resulting in inaccessible, unaffordable and poor quality (of healthcare?)’ and called on need to improve financing especially for sexual and reproductive health rights. The Inquiry confirmed that indeed the sexual and reproductive health rights of Kenyans are being violated in terms of unavailability of essential sexual and reproductive health services; difficulties in accessing these services owing to distance or cost; the high charges levied


on the services; poor quality of the available services and the lack of sensitivity to the cultural norms and beliefs of the people in service delivery. The inquiry concluded that the State had not met its obligation to progressive realisation of reproductive health care.

Safe abortion is a reproductive rights element of the right to reproductive health, making it imperative that the implementation of Article 26 (4) must enable the optimal enjoyment of Article 43 (1) (a). The components that make up reproductive health include access to information on reproductive health services including information on safe abortion, freedom to determine the timing, number and spacing of children, access to appropriate contraceptives and access to necessary reproductive health services (which include safe abortion services). Implicit in these components is the aspect of self determination and bodily integrity: the idea that women and men should have control over their sexual and reproductive faculties unhindered.172

In September 2012, Ministry of Medical Services published the Standards and Guidelines for Reducing Morbidity and Mortality from Unsafe Abortion in Kenya173 but in December 2013, the Director of Medical Services withdrew the Standards and Guidelines without explanation or the involvement of the stakeholders who had participated in its development. The Ministry threatened health providers with dire legal and professional consequences if they participated in any abortion training.174 Constitutional and Human Rights Division of the High Court in its June 2019 decision, resulting from a case where in 2018, an adolescent known only as JMM died after suffering complications from an unsafe abortion, quashed the Ministry’s decision to withdraw the Standards and Guidelines and held that abortion is illegal save for exceptions provided under Article

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26(4) of the Constitution.\textsuperscript{175} The Reproductive Healthcare Bill in the Senate caused uproar within and without the House of Parliament and in religious circles. The Bill seeks to realize the right to health including reproductive health by imposing obligations on each level of government to ensure availability of reproductive health care services. As at the time of writing the report, the Senate had suspended the reading of the Bill to allow for more consultations. The Commission has in its submission supported the enactment of the law to address the reproductive health care concerns.

The uptake of modern contraceptives in health facilities for the period 2015 to 2019 shows that Family Planning (FP) injections continued to be the most popular method of contraception with over 2.5 million clients followed by implants insertion at 733 thousand clients in 2019. Permanent family planning methods recorded low uptake with the number of women undergoing sterilization tubal ligation decreasing by 17.0 per cent while male sterilization vasectomy recorded 658 clients. During the period under review, there was a general increase in the uptake of the modern contraceptive methods.\textsuperscript{176} On a positive legislative side, The Reproductive Healthcare Bill, 2019 seeks to provide for the right to reproductive health care; to set the standards of reproductive health and provide for the right to make decisions regarding reproductive health once passed, will in a great way enhance the right to reproductive healthcare. The Bill is due to the Committee of the whole House at the Senate.

Regarding maternal health, births occurring in health facilities increased from 90.1 per cent in 2015 to 96.7 per cent in 2019 due to free maternity programme in public health facilities launched in 2014.\textsuperscript{177} Maternal mortality rate has reduced from 488/100,000 (KDHS 2008/9) to 362/100,000 live births (KDHS 2014). However, disparities persist, ranging from 189/100,000 in Elgeyo-Marakwet to over 1,000/100,000 in the four counties (Mandera, Marsabit, Wajir and Turkana) where many women live beyond the reach of

\textsuperscript{175} See Federation of Women Lawyers (Fida – Kenya) & 3 others v Attorney General & 2 others; East Africa Center for Law & Justice & 6 others (Interested Party) & Women’s Link Worldwide & 2 others (Amicus Curiae) [2019] eKLR available at http://kenyalaw.org/caselaw/cases/view/175490/ para 415
\textsuperscript{176} See KNBS Economic Survey 2020 pg 285
\textsuperscript{177} See KNBS Economic Survey 2020 pg 297
health facilities.¹⁷⁸ This calls for concerted efforts by the two levels of government to lower maternal mortality rates and promote safe motherhood.

The Commission, between March and June 2020, received thirteen (13)¹⁷⁹ complaints on the right to the highest attainable standards of health as it emerged that people are seeking medical services due to the fear that going to hospital would expose them to the dreaded coronavirus (COVID-19) disease. There are those who lost their sources of income and therefore no longer have disposable income to spend on health. Kenyans who have suffered job losses are also unlikely to renew their medical covers if at all they had any.¹⁸⁰

c. Clean water and Sanitation

The United Nations Committee on Economic, Social and Cultural Rights in its General Comment No. 15 on the Right to Water defined the right to water as the right of everyone to sufficient, safe, acceptable and physically accessible and affordable water for personal and domestic use. Although Kenya has set out various sanitation policies such as the Kenya Environmental Sanitation and Hygiene policy 2016-2030 and the Kenya Environmental sanitation strategic framework (KESSF) 2016-2020; scarcity of water, let alone clean and safe water remains a huge challenge posing a risk to realisation of other rights such as the right to health. According to government reports, access to safe drinking water increased from 53.3% in 2013 to 60% in 2017 translating to an additional 4.65 million people accessing clean and safe water. In addition, urban water supply coverage increased from 66.7% in 2013 to 70% in 2017. The proportion of households having access to improved drinking water¹⁸¹ has risen from 58.9% to 72.6% but disparities exist in rural areas and informal settlements and among counties (KIHBS 2015/16). Nairobi


¹⁸¹Improved drinking water is water that is obtained from sources that include piped water, borehole with pump, protected spring, protected well, rain water and bottled water but this does not necessarily mean that the water meets the necessary quality standards.
City had the highest proportion of households accessing drinking water from improved sources at 97.1% followed by Kiambu at 93.2%.

Before dust could properly settle on the promulgated Constitution, the case of *Satrose Ayuma & 11 others* found an early start to interpretation of Article 43 rights. The High Court reiterated the normative elements of the right to water as outlined in General Comment number 14 although it did not provide clear guidance on the human rights obligations of the state in the dispute concerning disconnection of water supply to the poor. Notably, even though several counties have enacted some form of laws on water and sanitation; the county governments have fallen short of putting in place water service delivery laws that comprehensively mainstream human rights standards and principles on water service delivery.

**d. Housing**

Kenyans without land documentation or tenure security have found it hard to own a home. Kenya has an annual housing demand of 250,000 units with an estimated supply of 50,000 new units; this culminates to a housing deficit of about 2 million units. Housing affordability is a key challenge with many people unable to afford to buy or build their own home. Only 2% of the formally constructed houses target lower-income families. Majority of Kenya’s urban population 6.4 Million (56%) live in informal settlements while the country has estimated 25,000 mortgages only. Through the initial Kenya Slum Upgrading Project, 822 housing units were built in Kibera Soweto A and occupancy took place in July 2016. Subsequently, 498 slums in the country have been mapped and National Government will work with County Governments to improve housing conditions. It is on this basis that the government launched the

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182 Satrose Ayuma & 11 others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 others, Petition No 65 of 2010.  
183 KNCHR, ‘Realizing The Right To Health And The Right To Water A human rights assessment of county health and water services laws (unpublished),’ (2019).  
184 Boma Yangu, ‘500,000 Affordable Homes Program-Delivery Framework,’ (June 2019), available at https://bomayangu.go.ke/downloads/Affordable_Housing_Program_Presentation.pdf pp 5  
185 Ibid pg 32
Big 4 Agenda, one being the Affordable Housing Program (AHP) through which 500,000 housing units are to be built within five years (2017-2022).

There has been increased number of forced evictions and destruction of property especially for marginalized urban communities to pave way for mega urban renewal and regeneration programs.\(^\text{186}\) The manner in which these evictions have been carried has flouted national and international law and guidelines governing elections. Scores of women and children have been evicted in the night and left more vulnerable amidst harsh weather conditions. Despite the passing of the Land Laws (Amendment) Act,2016 (No. 28 of 2016) that \textit{inter alia} provided for procedures for effecting evictions from land, the same have largely not been followed.

Implementation of the Affordable Housing Program through mandatory deductions to be paid by both employers and employees run into headwinds as unions for employers and workers challenged the decision in court.\(^\text{187}\) Due to this opposition and court cases, the President on 12\(^{\text{th}}\) December 2019 Jamhuri Day speech directed that the National Treasury and the ministry responsible for Housing to move to Parliament a revision of the legal requirement in respect to the Housing Fund Levy, to make the contribution voluntary, with immediate effect.\(^\text{188}\) The State Department of Housing and Urban Development in a bid to give effect the Article to the right to accessible and adequate housing under the Constitution, developed National Building Maintenance Policy, National Slum Upgrading and Prevention Policy, Leasing and Accommodation Policy; and reviewed the National Housing Policy.\(^\text{189}\)

Forceful demolitions have impacted negatively to the right to accessible and adequate housing that is of reasonable standards of sanitation. The government carried out forceful evictions in Mau in 2018 and 2019 where about 50,000 people were displaced resulting to the elderly, children and women to be exposed to harsh weather conditions in their makeshift camps. In the year 2020, forceful evictions during the COVID-19 pandemic period occurred in Kariobangi and Ruai where a total of 12,000 families were left in the cold after demolition of their houses despite the inherent dangers of the pandemic and existence of an interim court order.

The Preservation of Human Dignity and Enforcement of Economic and Social Rights Bill, 2018 was passed by the Senate in June 2019 and is due to go for Second Reading in the National Assembly. If enacted the law will establish a framework for the preservation of human dignity; for the promotion, monitoring and enforcement of economic and social rights and establish mechanisms to monitor and promote adherence by county governments to Article 43 of the Constitution. This is a laudable and positive move towards realization of the economic and social rights.

e. Education

The Constitution guarantees the right of every person to education. Article 53 further states that it is the right of every child to free and compulsory basic education. Over the period, the Government has fulfilled this positive duty by continuing the Free Primary Education (FPE) programme introduced in 2003, and providing free secondary day education. In 2019, the Government also introduced a new education system, the

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Competency Based Curriculum (CBC) covering pre-primary and primary Grades 1, 2 and 3.\textsuperscript{194} This new system of education is expected to improve the quality of learning in Kenyans schools. Additionally, over this period the difference between primary school completion rates and secondary school transition rates has steadily declined over the years. In 2014, for instance, the reported pupil completion rate was 79.3 percent compared to a secondary school transition rate of 76.1 percent. In 2018, 84.2 percent of pupils completed primary school, and 83.3 percent of them joined secondary school.\textsuperscript{195}

To promote the right to education, the Government has also provided school meals to disadvantaged and vulnerable children and distributed sanitary towels to female students. In 2015, 812,715 disadvantaged children were fed under the Government school feeding programme, while in 2016; 1.3 million girls had access to sanitary towels.\textsuperscript{196}

Even so, there have been various gaps in the education system. In \textit{Leaving No one Behind: Covering the Base(2018)}\textsuperscript{197}, the Commission observed that while the stakeholders in education including the parents, teachers and head teachers were conversant with the aims and policies of free and compulsory basic education, majority did not conceptualize the policy within the wider context of human rights and specifically the rights of the child. There was a general lack of coordination among the education agencies and stakeholders in implementing the strategies for Free Primary Education. Further, that there an urgent need for the government and other stakeholders to take affirmative action and allocate more funds for children with disability, children in Arid and Semi-Arid lands (ASALs) and urban informal settlement schools.

\textsuperscript{197}KNCHR, ‘Leaving no one behind: Covering the Base: Making Universal Primary Education a Reality for Children in Kenya’ (2018).
The right to education for children has been violated following the various insecurity situations witnessed across the country in the last ten years. In Wajir, Mandera and Garissa Counties for instance rising terrorist attacks and general insecurity in the areas including target on non-local teachers prompted massive transfers of teachers in public schools by the Teachers Service Commission. Earlier in year 2020, the heightened situation threatened closure of close to 200 schools in the region.

The online learning in the COVID-19 season brought to fore the steep social economic disparities among learners, to the disadvantage of the poor, the marginalised areas and learners with disabilities.

14. FAMILY (ARTICLE 45)

The 2010 Constitution recognizes that the family is the natural and fundamental unit of society and entitles it to recognition and protection of the State.\(^{198}\) In this regard, it aims to protect the basic foundations of the family, including the institution of marriage. It enshrines the right of every adult to marry based on their free consent, and entitles them to equal rights at the time of the marriage, during marriage and at its dissolution.\(^ {199}\) Over this period, the enactment of the 2014 Marriage Act was a welcome development. The Act lays a framework that, among others, protects young girls from early marriage\(^ {200}\), and that recognizes marriages concluded under any tradition, or system of religious, personal or family law, but only to the extent that such marriages or systems of law are consistent with the Constitution.\(^ {201}\) The establishment of a Matrimonial Causes Court under the Matrimonial Causes Act to facilitate lawsuits for divorce, judicial separation, nullity of marriage, and restitution of conjugal rights, among others, is a welcome development.\(^ {202}\) Furthermore, during this period, there has been progress towards better


\(^{200}\) Section 4 of the Act sets 18 years as the minimum age of marriage.


protection of children’s rights. Children’s constitutional right to parental care and protection and the equal responsibility of their parents towards them has been emphasised and strengthened through Court rulings. Notably in *PKM v ANM*, the High Court ruled that a separated couple has equal responsibility for their children and none has a superior or inferior burden in child support.\(^{203}\)

Positively, the 2001 Children’s Act is currently being amended. One of the proposed amendments authorizes the Cabinet Secretary in charge of implementing the Act to deregister existing charitable children’s institutions or adoption societies or refuse to register new ones that fail to adhere to standards that promote the well-being of children.\(^{204}\) This amendment is indeed crucial at a period where there have been allegations of massive violations of the rights of children housed in children’s homes.\(^{205}\)

**15. FAIR ADMINISTRATIVE ACTION; ACCESS TO JUSTICE (ARTICLES 47, 48)**

Access to justice continues to be improved in the country. The pronouncement by the High Court in April 2019 that actions of the police and government medical facilities to levy fees for issuance of filling of Medical Examination Forms (P3 forms) was in violation of the basic principle of access to justice therefore unlawful and unconstitutional was a progressive step towards realisation of justice for victims of sexual and gender based violence.

Failure to operationalise the National Legal Aid Service (NLAS) Board under the Legal Aid Act has hindered implementation of the Act. Furthermore, delay in operationalising the Small Claims Court has further curtailed the intended accelerated access to justice under the framework.


The Judiciary, in 2016, launched the court annexed mediation, a process conducted under the umbrella of the court with regard to family and commercial disputes. As at May 2019, court annexed mediation had been rolled out in 11 counties- Eldoret, Mombasa, Kisumu, Nakuru, Nyeri, Kisii, Machakos, Garissa, Embu, Nairobi and Kakamega Counties. So far, 3517 matters have been referred to Mediation, 2593 concluded, with 1279 settled successfully at a settlement rate of 50 per cent. About Sh7.2 billion that had been held in litigation has been released through Court Annexed Mediation during the 2018/2029 financial year. The Mediation Accreditation Committee has so far accredited 645 mediators who are currently handling 411 commercial matters. The number of mediators currently stands at 541. During the 2018/2019 financial year, the number of concluded cases through mediation was 1109 matters with 543 settlement agreements.

On March 4, 2016 the Taskforce on Alternative Justice Systems was appointed by the then Chief Justice Hon. Willy Mutunga to look at the various Traditional, Informal and Other Mechanisms Used to Access Justice in Kenya (Alternative Justice Systems). The Taskforce was charged with examining the legal, policy and institutional framework for the furtherance of the endeavor by the Judiciary to exercise its constitutional mandate under Article 159(2) and its plans to develop a policy to promote robust cooperation and harmony between AJS and the Court system and support communication policies and initiatives to mainstream Alternative Justice Systems (AJS) with a view to enhancing access to and expeditious delivery of justice.

In terms of clearing case backlog, the Judiciary continues to reduce the number of cases placed before the various courts. At the beginning of the 2018/2019 financial year, case backlog stood at 372,928 cases. Consequently, diverse case backlog reduction initiatives were instituted to curtail its growth, key among them holding of service weeks, circuit courts and mobile court stations as well as having reduction of case backlog as a

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207 Gazette notice establishing the AJS Taskforce available at http://kenyalaw.org/kenya_gazette/gazette/volume/MTI5MQ--/Vol.CXVIII-No.21

In as much as there is progress in the access to justice front, there are some challenges that have plagued the judiciary; key among them being low budgetary allocation. In a statement by the Chief Justice Hon. David Maraga, he noted the declining budgetary allocation to the Judiciary over the years evidenced as 2017/18 – Kshs.14.652 billion – 0.69 per cent of the National Budget; 2018/19 – Kshs.16.096 billion – 0.66 per cent of the National Budget; and 2019/20 — Kshs.18.857 billion – 0.69 per cent of the National Budget.\footnote{Statement by the Chief Justice Hon. David Maraga on judiciary budgetary cuts available at https://www.judiciary.go.ke/statement-by-chief-justice-david-maraga-on-judiciary-budget-cuts/} Another challenge is upholding judicial independence. In Adrian Kamotho Njenga v Attorney General; Judicial Service Commission \& 2 others (Interested Parties) [2020] eKLR, the Petitioner filed a suit citing the delay by the President to formally appoint 30 Judges to the Court of Appeal as breach of the Constitution particularly on access to justice. The Court held that the President is bound by Article 166 (1) of the Constitution and should therefore appoint the 30 Judges.\footnote{http://kenyalaw.org/caselaw/cases/view/189157/}

\section*{16. RIGHTS OF ARRESTED PERSONS, FAIR HEARING (ARTICLES 49, 50)}

The Constitution stipulates a number of rights for arrested persons.\footnote{Constitution of Kenya, 2010. Article 49} One of these rights is the right of arrested persons to be brought to court as soon as possible, but not later than twenty four hours after being arrested.\footnote{Constitution of Kenya, 2010. Article 49 (1f)} However, this constitutional requirement has not always been followed during this period, and has been raised as a concern by treaty body mechanisms during their review of Kenya. During this period, Kenyan police forces and military have been implicated in cases of enforced disappearances and extrajudicial killings of suspects linked to Al-Shabab, in counter-terrorism efforts that have been criticised by various human rights bodies as violating human rights. A September 2015
On a positive note, the Government has taken progressive measures to promote access to justice. These measures include the enactment of the Legal Aid Policy and the Legal Aid Act (Act No. 6 of 2016) to provide accessible, affordable legal aid to indigent persons. The Act establishes the National Legal Aid Service meant to administer the national legal aid scheme.

17. RIGHTS OF PERSONS DETAINED, HELD IN CUSTODY OR IMPRISONED (ARTICLE 51)

Places of detention continue to face various challenges such as congestion, health and general well-being of the detainees. In an investigation on the state of healthcare for prisoners in Kenya, the Commission noted the challenges that face the prison system:

- Lack of sufficient health infrastructure, lab equipment, poor health facilities within the prisons;
- Lack of adequate medical personnel including resident medical doctors and regular services by a dentist and a psychiatrist;
- Most prisons do not cater for the needs of persons with disabilities and there is lack of assistive equipment for the inmates with physical disabilities.

In Kenya, the Presidential pleasure detention is a form of sentence that is prescribed under section 162 to 167 of the Criminal Procedure Code. The provisions allowing for detention at ‘the President’s pleasure’ of persons who due to disability are found either criminally not responsible or unable to participate in their defence violate fundamental tenets of criminal justice, constitutional rights and the rights of persons with disabilities. Detention at ‘the President’s pleasure’ usually occurs in an environment where abuse

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often flourishes and rehabilitation is rarely possible. In *Hassan Hussein Yusuf v Republic [2016] eKLR*, the High Court held that section 167 of the CPC is discriminatory to people with mental illness for two reasons. First, section 167 prescribes detention of persons with mental illness to be in prison instead of a health facility. Secondly, the period for the detention under section 167 is indeterminate yet any punishment that cannot be determined from the onset is cruel, inhuman and degrading. The court further held that section 167 of the CPC offends Articles 25 and 29 (f) of the Constitution. Article 25 of the Constitution guarantees freedom from torture and cruel, inhuman or degrading treatment or punishment while Article 29(f) guarantees the right to freedom and security of the person, which includes the right not to be treated or punished in a cruel, inhuman or degrading manner respectively.215

=Ends=

Signed on 27th August, 2020

Dr. Bernard Mogesa, PhD, CPM

Secretary to The Commission/Chief Executive Officer

215 Hassan Hussein case available at [http://kenyalaw.org/caselaw/cases/view/121892/](http://kenyalaw.org/caselaw/cases/view/121892/)