



**International Covenant on  
Civil and Political Rights**

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**Human Rights Committee**

**Fourth periodic report submitted by Kenya under article 40  
of the Covenant, due in 2015<sup>\*</sup>, <sup>\*\*</sup>**

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\* The present document is being issued without formal editing.

\*\* The annex to the present report is on file with the Secretariat and is available for consultation. It may also be accessed from the web page of the Human Rights Committee.



## List of abbreviations

AIDS	Acquired Immune Deficiency Syndrome
CAT	Convention against Torture
CEDAW	Convention on the Elimination of all forms of Discrimination against Women
CPRD	Convention on the Rights of Persons with Disabilities
CRC	Convention on the Rights of a Child
ESCR	Economic, Social and Cultural Rights
FGM	Female Genital Mutilation
HIV	Human Immunodeficiency Virus
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICCPR	International Convention on Cultural and Political Rights
IDPs	Internally Displaced Persons
ILO	International Labour Organization
IPPF	Indigenous People Planning Framework
KENSUP	Kenya Slum Upgrading Programme
KNCHR	Kenya National Commission on Human Rights
LGBTI	Lesbians, Gays, Bisexual, Transgender and Intersex
NCIC	National Cohesion and Integration Commission
NCI	National Cohesion and Integration
NGEC	National Gender and Equality Commission
NPA	National Plan of Action
OAU	Organization of African Union
PEV	Post-Election Violence
POMAC	Power of Mercy Advisory Committee
PWD	Persons with Disability

## **I. Introduction**

1. The Government has continued to implement Kenya's commitments under the International Covenant on Civil and Political Rights (Covenant), since the presentation of the 3rd Country Report of Kenya to the Human Rights Committee in 2012. The recommendations of the Committee have informed the formulation of policies, legislation and other strategies that contribute towards improving the enjoyment of human rights at the national level. The Government is therefore pleased to submit to the Committee its 4th periodic Country Report on the Covenant. This Report outlines the progress made towards the fulfilment of the rights recognized under the Covenant since the last presentation. Specific information is provided in reply to the concluding observations by the Human Rights Committee, during its 105th Session-CCPR/CO/105/KEN. The report further discusses factors and challenges faced by the Government in the implementation of some of its human rights goals.

2. The present report has been prepared in accordance with the harmonized General Guidelines of the Human Rights Committee articulated in 06637. To ensure that the report retains fidelity to the guidelines, information already provided to other treaty bodies is not repeated herein. By way of example, matters relating to women are outlined in the 8th Report of Kenya on the Convention on the Elimination of all Forms of Discrimination against Women and matters relating to Torture and other Cruel, Inhuman and Degrading Treatment can be accessed in the 3rd Report of Kenya on the International Covenant on Torture and other Cruel, Inhuman and Degrading Treatment or Punishment.

3. The Office of the Attorney General and Department of Justice coordinated the preparation of this report with the participation of all government ministries, national human rights commissions, civil society organizations and the county governments. The concluding observations made by the Human Rights Committee during the last review have been disseminated.

## **II. Implementation of specific articles and replies to concluding observations**

### **A. Article 1: Self-determination**

4. The Constitution establishes a comprehensive framework for constitutional democracy in Kenya, where all sovereign power belongs to the people. The people of Kenya exercise their sovereignty through free and fair elections of their representatives once every five years. Elections are held under the management of an Independent Electoral Commission created under Article 248 (2) (c) and in accordance with the Elections Act. Kenyans elect leaders to govern them at the national and county levels. The devolved system of Government introduced by the Constitution in 2010 has played a major role in: increasing the peoples' participation in the way they are governed; widening the scope of development with most functions being devolved to the county government; ensuring the equitable sharing of national and local resources; protecting the rights of minorities and marginalized communities; and promoting social and economic development and access to public services throughout Kenya.

5. The Constitution recognizes that indigenous people form part of marginalized communities who must be protected through specific affirmative action designed to ensure that they enjoy their human rights and fundamental freedoms on an equal footing with others. Their rights to land are recognized and protected under the Community Land Act enacted in 2016, which also details the role of county governments in relation to unregistered community land. All dealings with community land can only be conducted with the consent and participation of communities.

6. The Forest Conservation and Management Act protects forests which form the habitat of indigenous people and provides for community participation in forest

management. The Indigenous Peoples Planning Framework (IPPF) is invoked in cases where indigenous peoples are present in, or have collective attachment to any project lands. The Plan is prepared so that the development process fully respects the dignity, human rights, economies, and culture of indigenous peoples.

## **B. Article 2: Non-discrimination and effective remedy**

7. Equality and non-discrimination are some of the important national values and principles of governance under the Constitution that underpin the Kenyan state. All through the Constitution a robust commitment to the principles of equity, equality, inclusiveness, equality, non-discrimination and protection of the marginalized is evident. There have been a number of major improvements to the legal and policy framework which relate to equality and non-discrimination in Kenya since the submission of the 3rd ICCPR report. Affirmative action legislation, policies, budgetary and administrative measures taken to redress any discrimination suffered by individuals and/or groups are outlined as follows.

8. The Community Land Act, 2016, prohibits all forms of discrimination with regard to community land. It enables communities to secure the formal legal recognition of their land rights. The Land Laws (Amendment) Act, 2016 addresses the issue of historical land injustices including the remedies of restitution and compensation which are available upon successful adjudication of claims. To ensure that the exploration and extraction of natural resources does not lead to further socio-economic marginalization or impoverishment for the communities that own or occupy land, the Natural Resources (Benefit Sharing) Bill 2014 is intended to provide a framework for the establishment and enforcement of a system of benefit sharing between resource exploiters, the national and county governments and the local communities.

9. The National Employment Authority Act 2016 provides a legal framework for the State to take affirmative measures to ensure youth and marginalized groups access employment and economic empowerment. The National Cohesion and Integration Act 2009 prohibits discrimination on the grounds of ethnicity, race, colour, religion, nationality or origin in both the private and public spheres of national life. Other policies, budgetary and administrative measures, include the following.

10. An Equalization Fund is established under the Constitution to provide basic services to marginalized areas to the extent necessary to bring the quality of those services to the levels generally enjoyed by citizens in the rest of the country. The fund received Kshs. 6 Billion (Approx. USD 58.2 Million) in 2016/2017, Kshs. 7.7 billion (Approx. USD 74.7 Million) in 2017/2018 and 4.4 Billion (Approx. USD 4.7 Million) the 2018/2019 year.

11. Devolution is promoted, as a strategy for balanced social and economic development. It enhances the participation of the people in making decisions on issues affecting them and ensures equitable distribution of resources. The revenue raised nationally is divided on the basis of 8.45 percent for national government, 15 percent for county government and 0.5 percent for the equalization fund.

12. The National Gender and Equality Commission is in the process of auditing and monitoring affirmative action in the devolved governments on the access to employment, education, health and information by women, persons with disabilities, ethnic and other minorities and marginalized communities. The outcome of the audit will be used to identify areas where there are gaps in service delivery for further redress.

13. The Housing Policy, Sessional Paper No. 3 of 2014. The policy details deliberate measures to address the interests of vulnerable groups such as women, youth, elderly and Persons with disabilities. The Slum Upgrading policy, Sessional paper no. 2 of 2015 also addresses the interests of these groups. This is being actualized through the Kenya Slum Upgrading Programme (KENSUP) and the Kenya Informal Settlements Improvement Project.

14. The Ethnic and Diversity Audit. In order to redress past discrimination, the Constitution calls for ethnic diversity in the public service. The National Cohesion and Integration Act provides that no public establishment shall have more than one third of its

staff from the same ethnic community. In this regard, an Ethnic and Diversity Audit conducted revealed skewed dominance of the public service by Kenya's largest communities. The audit has influenced a more diversified public service at both national and county levels. For instance, the 2016 Universities Audit revealed inclusion of the Orma who were totally excluded in 2012, and also an increase in the number of the Ilchamus who are marginalized communities. County governments have explicitly targeted specific minority communities for recruitment by exemplifying the same in public newspaper recruitment advertisement. The Kenya Police have developed recruitment guidelines to comply with the Constitution 2010 and the NCI Act on inclusion. As a result, the recent police recruitments took particular consideration to ensure inclusion of minorities.

15. The Diversity Policy for the Public Service, 2016, provides strategies for ensuring that the recruitment process for the public service reflects the diverse Kenyan communities. The policy is strictly followed in any recruitment or appointment in the public service. County Governments, have explicitly targeted specific minority communities for recruitment. To empower the devolved units to comply with the existing laws on non-discrimination in employment, the National Government developed a hand book prescribing the minimum standards the devolved units should apply in order to comply with the existing laws. The handbook further contains the best practice and principles which when applied ensure there is inclusion in employment at the county level.

### **Effective remedies**

16. There are various channels through which a person can seek effective remedies for alleged discrimination and denial of constitutional and related legal rights. The Kenya National Commission on Human Rights, the National Gender and Equality Commission and the Commission on Administrative Justice have a constitutional and legal responsibility to investigate complaints on human rights violations and take appropriate action. The National Gender and Equality Commission, particularly, hold the mandate of combating discrimination and promoting equal opportunities based on gender equality, for persons with disability and other vulnerable and marginalised groups. The Commissions frequently engage with the communities to create civic awareness on topical human rights issues and to empower the people to claim their rights.

17. The Courts have jurisdiction, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights In *Mitu-Bell Welfare Society v Attorney General & 2 others* [2013] eKLR, the court found that there is "evident therefore, in the selective demolition of Mitumba village, violation of the right to non-discrimination and equal protection of the law guaranteed under Article 27 (1), (2) and (4) of the Constitution".

18. In *Fredrick Gitau Kimani & another v Attorney General & 2 others* (2012) High Court at Nairobi (Constitutional & Human Rights Division) eKLR. The Court declared that the failure by the respondent to extend the petitioner's retirement age from 55 years to 60 years as required by the Persons with Disability Act, 2003 amounted to a violation of his right not to be discriminated against on grounds of age and disability under Article 27 (4) (5) (6) and (7) of the Constitution and Article 7 of the Universal Declaration of Human Rights. The judge found that there was no procedural fairness when the petitioner's request for extension of his retirement age was not responded to and least of all, acknowledged.

### **Replies to Concluding observation CCPR/CO/105/KEN para. 8**

19. Article 45 (2) (2) of the Constitution envisages marriage between adults of the opposite sex, based on the free consent of the parties. Section 165 of the Penal Code Cap. 63 prohibits indecent acts between male persons. The State restates that it does not sanction or condone discriminations against any persons on the basis of their sexual orientation in terms of access to basic fundamental human rights such as health, education and housing. Laws and policies are being amended to ensure that they fully conform to the constitutional imperative on non-discrimination. Indeed, in *Republic v Kenya National Examinations Council & another Ex-Parte Audrey Mbugua Ithibu*, High Court, JR Case no 147 of 2013, eKLR, Ms. Audrey Mbugua had sued the Kenya National Examination Council (KNEC) for declining to change her names and delete the "male" gender mark from her certificate

despite tabling a gazette notice reflecting her new identity. The High Court of Kenya issued an order of mandamus compelling the Kenya National Examination Council to recall the Applicant's school certificate issued in the name of Ithibu Andrew Mbugua and replace the said certificate with one in the name of Audrey Mbugua Ithibu. The replacement certificate shall be without a gender mark.

20. The National Police Service, National Gender and Equality Commission and a number of Nongovernmental organizations, such as Kenya Human Rights Commission, the Legal Resource Foundation are sensitizing public officers on how to handle matters relating to Lesbian, Gay, Bisexual and Transgender matters.

**Replies to Concluding observation CCPR/CO/105/KEN para. 9**

21. The Government of Kenya delivers services to all in Kenya without discrimination. Stigma and discrimination have been identified as a barrier to HIV/AIDS prevention and uptake of care and treatment services. The socially excluded, poor and vulnerable people who are living with HIV are unlikely to take up services, with a consequent negative impact. Access to justice is embedded in the establishment of the HIV & AIDS Tribunal. The High Court of Kenya and the HIV and AIDS Tribunal have issued decisions that have affirmed the rights of persons living with HIV. The government has implemented these decisions by introducing various initiatives to create awareness and educate the population thus stopping stigma and discrimination, especially in the delivery of services.

22. Some of these initiatives include; The sensitization of health care workers to reduce stigmatizing attitudes in healthcare settings; the development and dissemination of population specific and user friendly information including Braille; Religious organizations have integrated HIV information and encourage service uptake in religious teachings; and the promotion of the acceptance of priority population as part of the community for increased service uptake.

23. Additionally, the government has encouraged persons living positively with HIV/AIDS to campaign against HIV-related stigma and discrimination; educate communities on legal issues, rights and gender, and incorporated the media in facilitating campaigns to reduce stigma and discrimination; reduce gender violence; promote uptake of HIV services and prevention interventions. Sensitization of law and policy makers are conducted on the need to enact laws, regulations and policies that prohibit discrimination and support access to HIV prevention, treatment, and care.

24. The most recent policy on Education Sector Policy on HIV and AIDs 2013, published in 2013, has informed the development of programmes to enhance HIV prevention, care and support for school pupils as well as education personnel (e.g. teachers). It emphasizes strategies that are gender-sensitive because women and girls are disproportionately affected by the epidemic.

25. It is worth noting that since 2008 when the first survey of men who have sex with men (MSM) was conducted, deliberate efforts have been taken to reduce HIV infections among them. A primary objective of the Mombasa male sex worker study was to determine the feasibility and efficacy of interventions to reduce HIV risk. After implementation of the baseline survey, 40 male sex worker peer educators were trained in HIV prevention and basic counselling skills. Additionally, 20 health-care providers from Mombasa-area hospitals and clinics were trained and sensitized to MSM issues including diagnosis of STIs and HIV counselling. Condoms and water-based lubricants were distributed via a drop-in center and by peer educators. Follow up surveys continue to be conducted to ensure that that this vulnerable population is given has the requisite prevention awareness and medical attention.

**Replies to Concluding observation CCPR/CO/105/KEN para. 20**

26. The Government has compensated 19,000 Internally Displaced Persons (IDPs) displaced by the 2007 post-election violence, who were living in 80 camps. Focus is now on the resettlement of integrated IDPs. The body in charge of resettlement of IDPs is the National Consultative Coordination Committee on IDPs (NCCC). KSh6 billion has been set aside for the resettlement of over 90,000 integrated internally displaced persons (IDPs). The

Committee is working with the county administrators to identify the IDPs, ahead of compensation. Some of the integrated IDPs are living in Ol Kalou, Nakuru, Kakamega, Vihiga, Kisii, Migori, Marsabit and Mombasa. The resettlement of IDPs has faced some challenges; the original profiling failed to capture all deserving IDPs, resulting into some people masquerading as IDPs, while others have been registered as IDPs twice. The lack of adequate finances and personnel to deal with internal displacement, over the years, is also a factor in slowing down the resettlement process. The Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act 2012, establishes a rights-based response to internal displacement. The legislation establishes a fund that is channelled towards food, housing, medical supplies and grants for IDPs to help them restart their livelihoods. The National Policy on the Prevention of Internal Displacement, Protection and Assistance to Internally Displaced Persons (IDPs) in Kenya contains provisions that offer further protection.

27. The Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act, came into force on 18th January 2013. The Act provides procedures for the resettlement of IDPs and provides an all-inclusive National Consultative Coordination Committee to steer the resettlement programmes.

#### **Replies to Concluding observation CCPR/CO/105/KEN para. 5**

28. Prior to the enactment of the Constitution in 2010, Kenya followed a dualist system, wherein any ratified human rights treaty had to be incorporated into domestic legislation through an Act of Parliament. However, the passing of the Constitution in 2010 has radically transformed the position of international human rights law in the Kenyan domestic legal system. Articles 2 (5) and 2 (6) state respectively that, “The general rules of international law shall form part of the law of Kenya” and that, “Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution”. The Treaty Making and Ratification Act was enacted in 2012. The Act lays out a detailed procedure for the ratification of treaties and expounds the role Parliament.

29. However under Article 2 (4) of the Constitution, any law, whether national or international, that is inconsistent with the Constitution is null and void to the extent of the inconsistency. On this basis, it is prudent to appreciate that the applicability of international law or regimes still remains within the realm of the test on inconsistency with the Constitution.

30. This position was espoused in the case of *Joseph Njuguna Mwaura & 2 Others vs. Republic* [2–13] eKLR (Court of Appeal), where the court in determining the aspect of abolition of death penalty stated that, “By virtue of Articles 2 (5) and (6) of the Constitution, international treaties and covenants to which Kenya is a party, as well as the rules of international law form part of our law. We wish to state from the outset that while international instruments and the norms of international law do form part and parcel of our law, they do so only in so far as they are not inconsistent with the Constitution. This is provided at Article 2 (4) which states that “Any law, including customary law that is inconsistent with this Constitution is void to the extent of the inconsistency ... .” And as such that the role of the judges was not to engage in wondering and wilderness interpretation of what the law ought to be. Since doing so will be going outside the province of Articles 159 and 259 of the Constitution.

31. Article 2 (6) not only provides for the supremacy of the Constitution, but also incorporates international treaties ratified by Kenya into the Kenyan domestic system as sources of law.

32. It is important to highlight the fact that the Constitution anchors the bill of rights in the numerous regional and international human rights instruments that Kenya is a state party to, including the present Covenant. Indeed, Article 19(3) (b) outlines the fact that the bill of rights does not exclude other human rights and fundamental freedoms, which though not in the bill of rights, are recognized or conferred by law, except to the extent that they are inconsistent with the supreme law.

33. The changed situation in relation to the applicability of international law in Kenya also found affirmation in the case of *David Njoroge Macharia v Republic* [2011] eKLR and

by the Supreme Court of Kenya in the dissenting opinion of Chief Justice Willy Mutunga in the One-Third Gender Representation Advisory Opinion (Advisory Opinion Number 2 of 2012) as follows.

34. “From article 27, and from CEDAW, it is clear that disenfranchisement of the Kenyan women in the political arena is a form of discrimination. CEDAW applies through the operation of Article 2 (6) of the Constitution of Kenya, having been acceded to by Kenya on 9th March 1984. These provisions collectively call for the immediate removal of this discrimination through the empowerment of women representation in political office, with CEDAW calling for stop-gap measures to be put in place to reverse the negative effects on our society through the operation of this systemic discrimination.”

35. Other cases which develop this jurisprudence include the following: in the High Court case of *Re the Matter of Zipporah Wambui Mathara* [2010] eKLR, the court, in discussing Article 11 of the Covenant, held that Article 2 (6) served to incorporate international treaties and conventions that the country has ratified into domestic law as part of the sources of Kenyan law. This school of thought was further affirmed in the High Court case of *Beatrice Wanjiku & Another vs The Attorney-General & Another* [2012] eKLR, where the Court stated as follows:

36. “Before the promulgation of the Constitution, Kenya took a dualist approach to the application of international law. A treaty or international convention which Kenya had ratified would only apply nationally if parliament domesticated the particular treaty or convention by passing the relevant legislation. The Constitution and in particular Articles 2 (5) and 2 (6) gave new colour to the relationship between international law and international instruments and national law.”

37. This direct incorporation of international human rights law into the domestic legal system, by the Kenya Constitution, 2010 dovetails with the prevailing jurisprudence of international treaty bodies such as the Committee on Economic, Social and Cultural Rights (ESCR Committee) which, in General Comment 9, has recommended to member states the immediate and direct application of binding international human rights instruments in the domestic legal systems of states so as to enhance the ability of individuals to seek effective, accessible, affordable and timely enforcement of their rights in domestic courts and tribunals.

38. Numerous Laws and regulations in Kenya have been enacted to mainstream human rights treaties into Kenyan law. To name a few: Persons Deprived of Liberty Act; Victim Protection Act, IDP Act. All other laws in Kenya are under review to ensure compliance of Kenya’s obligations under regional and international treaties.

### C. Article 3: Equality between men and women

**(For more information on Article 3 please refer to Kenya’s 8th Periodic Report on the Convention on the Elimination of all Forms of Discrimination against Women presented to the UN Committee on the Elimination of Discrimination against Women in 2017)**

#### **Replies to Concluding observation CCPR/CO/105/KEN para 6**

39. The Constitution guarantees equality of opportunity by reiterating the principle that “Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres”. Most importantly, it is a constitutional imperative that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender. Through this provision a large number of women have been appointed to various positions both in the executive, judiciary and parliament. These provisions bode well for Kenyan women who, historically, have been disempowered by cultural and societal dynamics.

40. However, the full realization of total de facto equality poses some difficulties. Kenya continues to face challenges with regard to the equality of women and men, particularly in the representation of women in decision-making and leadership positions in

politics and the economy. While women performed better in the 2017 elections, as compared with 2013, the numbers still fall short of the constitutional two-thirds gender requirement. In the National Elections held in August 2017, 23 women were elected to the National Assembly up from the 16 elected in the last elections, 47 women representatives, and 6 nominees by political parties (the total number of women in the National Assembly stands at 76). However, this number is still short by 41 seats to make 117 or one-third of the 349 MPs – 290 elected, 47 woman representatives and 12 nominated members. For the first time since the advent of devolution, 3 women governors and 3 women senators were elected to the respective bodies. The number of women elected members of county assemblies has also increased from 84 to 96 of the total 1450. The data presented in Table 1 (Annexure 1) provides information on the total number of women in Parliament, the Judiciary and Senior Civil Service Positions by March 2018. Table 2 (Annexure 1) presents the number and percentage of women in board of private agencies, number of women chairs to the board of directors, and women directors in the companies listed at Nairobi Securities Exchange. The data further shows the private companies that have met the not more than two thirds gender principle in governance levels. Section 8 of NGEC Act mandates the Commission to promote gender equality and freedom from discrimination in accordance with Article 27 of the Constitution in private and public sectors.

41. Over the past few years there have been three attempts to introduce the Constitution of Kenya (Amendment) Bills in Parliament in order to implement Article 81(b) of the Constitution which requires that not more than two thirds of the members of elective public bodies shall be of the same gender. These attempts were made in 2016, 2017 and most recently 2018. However, on all these occasions Parliament debated the matter but failed to pass the bills. The main argument for the rejection was that the new provisions would result in bloated representation. It would also add to the heavy tax burden. The poor performance of women in Kenya's political arena can be attributed to two major factors – the Kenya's patriarchal culture and electoral system. Kenyan politics requires an enormous outlay of social capital, yet the processes of economic, cultural and political capital accumulation still favour men more than women, irrespective of ethnic, religious and class divides. Government continues with its efforts to implement measures aimed at advancing gender equality and the empowerment of women. Some of these interventions are highlighted as follows:

42. Amendments to the Political Parties Act 2011 contain gender equality safeguards to enhance the participation of women in politics and bridge the gender gap. The Code of Conduct under the Act directs parties to respect and promote gender equity and equality, human rights, and fundamental freedoms, as well as practice tolerance and inclusive political activities.

43. Economic empowerment through better business opportunities, such as the Uwezo Fund and the Women Enterprise Fund. To increase women's access to land ownership and use, through inheritance and through personal acquisition, a number of statutes have been enacted: The Land Act (No. 12 of 2012) and the Land Registration Act (No. 3 of 2012) increase women's access to land ownership and use, through inheritance and through personal acquisition. The Matrimonial Properties Act 2013 guarantees equality for married men and women in dealing with matrimonial property in terms of right to ownership, access, control and disposition of matrimonial property.

44. Development of a guideline on Mainstreaming Principles of Equality and Inclusion in Business for private sectors in Kenya. The guide book is designed to create awareness by the private sector institutions of their constitutional obligations and responsibilities in businesses. The Government through the National Gender and Equality Commission (NGEC) pays attention to selected indicators and dimensions to determine institutional levels of mainstreaming principles of equality and inclusions in business sector such as the National Government Affirmative Action Fund Regulations 2016, The Affirmative Action Social Development Funds Regulations, Protection against Domestic Violence Act, 2013 and Statutory Miscellaneous Amendment to the Procurement Act. General awareness-raising projects have been conducted in schools for target group of teenagers and young adults. The awareness of children and young people is raised in regard to equality issues,

and they are motivated to get to know gender-atypical professions and not to be guided by stereotypical roles when choosing their career.

**Replies to Concluding observation CCPR/CO/105/KEN para. 7**

45. The Marriage Act 2014 recognizes four different marriage types, namely Civil, Christian, Islamic, and Customary marriages. Polygamy is a deeply entrenched cultural practice recognized under both African customary and Islamic law. All registered marriages under the Act have the same legal status. Prior to the enactment of the Marriage Act, customary marriages were not regulated by law, thus rendering them informal and uncertain as their legitimacy could only be confirmed and formally recognized through court judgments and rulings. Women, have lost their property, companionships and other marriage benefits due to evidentiary difficulties involved in proving the existence of a customary marriage before the passing of the Act. There are cases where women married under customary law have been denied the right to inherit the estate of their deceased spouses due to the difficulty of proving the existence of such unions.

46. It is noted that the Marriage Act restricts the legal age of marriage at 18 and parties must freely consent to the union. It is up to adult couples to freely choose, from the very onset, the kind of union they prefer. Those adults who choose voluntarily to contract a monogamous marriage cannot later contract another marriage, unless in the event of divorce or death. Similarly, no one in a polygamous marriage can contract a monogamous marriage. A polygamous marriage can later be converted into a monogamous one, as long as at that time there is only one wife.

47. The Law of Succession Act 2015. The Law of Succession Act was first enacted in 1981 to oversee the administration of the estate of deceased persons. The law was later revised in 2015 to align its contents with the Constitution of Kenya. Through its equality provision, the Constitution, 2010 renounces discrimination against either gender by providing an equal platform to the issues of property ownership and inheritance. The revised legislation now incorporates the rights of woman to inherit property.

48. The Matrimonial Property Act 2013: Parties to a marriage are entitled to equal rights at all times include at the dissolution of the marriage (Article 45 (3), Constitution). Notably, while Section 7 of the Matrimonial Property Act 2013 provides that upon dissolution of a marriage, parties are entitled to a share of the property equal to their contribution whether monetary or non-monetary. Under Section 2 of the Act, contribution is defined to include non-monetary contribution and includes domestic work and management of the matrimonial home, child care, companionship, management of family business or property and farm work. The argument given here is that this definition greatly disadvantages women whose contribution is mainly non-monetary and thus difficult to quantify and prove, leaving them disempowered and disenfranchised economically upon divorce. The courts have since the passing of the Act favoured distribution on the basis of actual contribution.

49. In the case of – Federation of Women Lawyers (FIDA) and Another vs Attorney General (2018) eKLR, (Petition No. 164B 2016) – challenging the constitutionality of Section 7 of the Matrimonial Properties Act in that it offends constitutional provisions. The High Court of Kenya, by its decision delivered on the 14th May 2018 declared that the fact that the Constitution recognizes equal worth and equal importance of parties in a marriage does not guarantee a 50-50 sharing of wealth. The beneficial share of each spouse as the law on the division of matrimonial property stands in Kenya ultimately depends on the parties' proven respective proportions of the financial contributions either direct or indirect towards the acquisition of the property. In exercising judicial discretion, the outcome of the case will highly depend on the facts and evidence presented to court as regard the nature of contribution of either spouse towards the acquisition of matrimonial property. Jurisprudence set herein is that the Courts will evaluate the contributions made towards acquisition of the property and make a just and equitable distribution of the property or properties. The courts have taken the view that:

*“... at the dissolution of the marriage each partner should walk away with what he/she deserves. What one deserves must be arrived at by considering her/his respective contribution whether it be monetary or non-monetary. The bigger the*

*contribution, the bigger the entitlement. Where there is evidence that a non-monetary contribution entitles a spouse to half of the marital property then, the Courts should give it effect. But to hold that Article 45(3) decrees an automatic 50:50 sharing could imperil the marriage institution ...”.*

#### **D. Article 4: State of emergency**

50. The Constitution provides a comprehensive framework to guarantee the effective protection of rights during a state of emergency. The limited and specific derogation of certain rights can be undertaken only to the extent strictly required to restore normalcy and stability. Article 58 of the Bill of Rights provides that a State of Emergency can only be declared in a situation of war, invasion, general insurrection, disorder, natural disaster or other public emergency and only when necessary. Article 58 (6) clarifies that the legislation that is enacted in consequence of a declaration of a State of Emergency, can only limit a right or fundamental freedom in the Bill of Rights, only to the extent that the limitation is strictly required by the emergency, and the legislation is consistent with the Republic’s obligations under international law applicable to a state of emergency. The Supreme Court is bestowed with the power to decide on the validity of any legislation enacted, or other action taken, in consequence of a declaration of a state of emergency. Article 58 (6) empowers Parliament to enact legislation that can limit a right or fundamental freedom in the Bill of Rights, during a declaration of a state of emergency, only to the extent that:

- (a) The limitation is strictly required by the emergency; and
- (b) The legislation is consistent with the Republic’s obligations under international law applicable to a state of emergency.

51. The Constitution in Article 25 clearly outlines the non-derogable rights, which include freedom from torture, freedom from slavery and servitude, right to fair trial and right to habeas corpus order. Article 2 (6) provides that international treaties that Kenya has ratified are part of Kenyan law.

52. Kenya has been and still is a target of terrorism activities. Kenya has suffered significant attacks from the terrorist groups that create fear and undermine the quality of life through several deaths and injuries. The Westgate Mall attack in September 2013 in Nairobi left 67 people dead and more than 175 injured. In April 2015, Al-Shabaab extremists launched an attack on Garissa University leaving 148 people dead and over 80 were injured. In July 2016, six people were killed and more than 20 people injured when terrorists ambushed two public buses travelling from the Mandera town in the north-eastern border region. There have been several attacks on police stations, military camps and in villages where civilians are unarmed. To combat these attacks Government has increased security personnel in these areas to enable quick response as well as deterrence in the regions affected by violent extremism and terrorist attacks. Curfews have also been announced in some areas. However, curfews are normally short lived and used only to contain the insecurities. All human rights are protected and due process followed in brings perpetrators of terrorist attacks to justice.

#### **E. Article 5: Derogation of fundamental human rights**

53. There are no new developments to report under this article.

#### **F. Article 6: Right to life**

##### **Replies to Concluding observation CCPR/CO/105/KEN para. 10**

54. The Constitution of Kenya recognizes the right to life and directs that a person shall not be deprived of life intentionally, except to the extent authorized by this Constitution or other written law. Section 204 of the Penal Code of Kenya imposes a mandatory death penalty for conviction of the crime of murder, and other capital offences.

55. In a landmark ruling dated 14th of December 2017 the Supreme Court in Petition No. 15 of 2015 as consolidated with petition No. 16 of 2015, Francis Kariuki Muruatetu and Wilson Thirumbu Mwangi Vs and Republic of Kenya and 5 Others declared unconstitutional the mandatory nature of Section 204 of the Penal Code, which provides that “any person convicted of murder shall be sentenced to death”. The issue was that the mandatory terms used by Section 204 do not allow the Court to consider the mitigating circumstances of the case. Mitigation is an important facet of a fair trial. The Court stated that:

*“It is during mitigation that the offender’s version of events may be heavy with pathos necessitating the court to consider an aspect that may have been unclear during the trial process ... mitigation might call for pity more than censure or on the converse, impose the death sentence, if mitigation reveals an untold degree of brutality and callousness”.*

56. A Task force appointed by the Attorney General to develop a framework for the implementation of the Court’s ruling, has proposed a comprehensive legal framework to guide the sentence rehearing of all offenders who have been subjected to the death penalty at the time of the Muruatetu decision, all capital offenders whose sentence has been commuted to life imprisonment; and any offenders sentenced to death after the decision but without regard to or compliance with the court’s declaration. The task force has further recommended a guide to death sentencing and formulated parameters of what ought to constitute life imprisonment. It must be noted, however that the order by the Supreme Court does not abolish the death sentence.

57. The Power of Mercy Advisory Committee (POMAC), the Kenya National Commission on Human rights and the Office of the Attorney General and Department of Justice have organized a number of awareness campaigns to sensitize the people on the value of abolishing the death penalty.

58. Kenya has not yet acceded to the Second Optional Protocol to the Covenant.

#### **Replies to Concluding observation CCPR/CO/105/KEN para. 10**

59. Laws on counter terrorism – Kenya has been a target of various terrorist attacks that continue to claim lives of innocent Kenyans and destroy property. In a bid to fight terrorism and halt the havoc it wreaks, the Prevention of Terrorism Act was enacted in 2012. The Act contains a comprehensive definition of acts of terrorism, which include, but not limited to – acts that endanger the life of a person, results in serious damage to property, involves the use of firearms, creates a serious risk to health or safety of the public. These acts must be carried out with the aim of:

(a) Intimidating or causing fear amongst members of the public or a section of the public;

(b) Intimidating or compelling the Government or international organization to do, or refrain from any act; or

(c) Destabilizing the religious, political, Constitutional, economic or social institutions of a country, or an international organization.

60. It must be noted that an act which disrupts any services and is committed in pursuance of a protest, demonstration or stoppage of work is not deemed be a terrorist act within the meaning of this definition so long as the act is not intended to result in any harm. The law contains safeguards to protect the rights of persons arrested who cannot be held for more than twenty-four hours after their arrest unless the suspect is produced before a Court and the Court has ordered that the suspect be remanded in custody.

61. The Security Laws (Amendment) Act was enacted in 2014 in the wake of successive terrorist attacks on civilian targets and mounting public pressure to curb those attacks. In 2016, certain sections of the Act were declared unconstitutional on the basis that they violated freedom of expression and the media, the right of an accused person, and the principle of non-refoulement as recognized under the 1951 United Nations Convention on

the Status of Refugees. The Act is under review to balance between the imperatives of security and those of civil liberties in the age of terrorism.

62. Refugee Bill – Parliament passed the Refugee Bill in 2017 and referred to the President for assent. The bill seeks to give effect to the Convention Relating to the Status of Refugees, the Protocol Relating to the Status of Refugees and the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa. Section 15 prohibits refoulement of asylum seekers, refugees, their families and any other persons. The proposed law allows a person who has been granted refugee status and is in possession of valid identity card to engage in gainful or wage-earning employment. It also provides for refugees residing in designated camps to have free access to land for farming but without the right to sell, lease or alienate the land. The President referred the bill back to Parliament for further review and public participation. The lawmakers are studying the bill once again to address the reasons cited for referral before sending it back to the President.

#### **Replies to Concluding observation CCPR/CO/105/KEN para. 11**

63. The Government of Kenya recognizes its legal obligation under various treaties to respect, fulfil and protect the right to life, right to security and freedom from torture and other cruel, inhuman, and degrading treatment or punishment. This protection finds full expression in the Constitution of Kenya.

64. The Constitution particularly safeguards the freedom and security of a person, and protects the right to life. Law enforcement officers suspected of committing extrajudicial killings are investigated and if found culpable brought before a civil competent and impartial Court and penal sanctions applied when found guilty. With regard to Messrs. Oscar Kamau King'ara and John Paul Oulu, investigations stalled due to lack of evidence since the scene had been heavily tainted due to demonstrations which broke out soon after by university students. The file will be reopened when new evidence comes to light.

65. The Constitution demands the highest standards of professionalism, transparency, accountability and discipline amongst police officers. It also requires compliance with constitutional standards of human rights and fundamental freedoms to foster and promote relationships with the broader society. The National Police Service Standing Orders were launched in 2017 to guide officers serve Kenyans according to the new constitutional dispensation. The Orders set standards for professional police conduct. The standing orders guide police officers on the proper use of force and firearms and non-deadly force. A police officer shall always attempt to use non-violent means first and force may only be employed when non-violent means are ineffective or without any promise of achieving the intended result. It is noteworthy that the police now increasingly resort to using teargas when the situation merits. Where deadly force is not authorized, officers may use only that level of force that is objectively reasonable to bring an incident under control. On the restrictions on the use of firearms, the Orders are clear that firearms may only be used when less extreme means are inadequate and for saving or protecting the life of the officer or other person; in self-defense or in defense of other person against imminent threat of life or serious injury. A police officer shall make every effort to avoid the use of firearms, especially against children.

66. All law enforcement officers are trained on the respect of human rights that enable fair, just and humane treatment of the public, which is critical in policing, especially in regard to duties involving arrest, detention, search, seizure of property, surveillance, use of force and firearms. Serving police officers are required to undertake periodic review courses on the use of firearms. All police officers must undergo a vetting process against set criteria on professionalism, integrity, track record of performance and psychological fitness.

#### **Replies to concluding observation CCPR/CO/105/KEN para. 13**

67. In 2008, The Director of Public Prosecutor established a Multi-Agency Taskforce to undertake a countrywide audit of all the local post-election violence (P.E.V.) cases under investigation and pending before court with a view to recommending ways and means of ensuring their fair and speedy determination. A number of cases have been prosecuted and

convictions passed by Kenyan courts on various offences including rape. However, the task force faced some challenges in recommending some of the cases for prosecution due to lack of sufficient evidence to sustain convictions. The factors identified by the Task force as contributing to the dearth in evidence are summarized as follows:

68. While complainants identified their attackers as belonging to certain communities because of language, they could not identify any particular individual. Some complainants refused to identify their neighbours as their attackers since they (the complainants) had already been resettled on their original farms. Other complainants who had received compensation from the government, had left the areas where clashes occurred, and could not be traced to testify. The files remain open.

## **G. Article 7: Protection from torture, inhuman, cruel and other degrading treatment or punishment**

**(For more information on Article 7 please refer to Kenya's 3rd Periodic Report on the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, submitted to the UN Committee against Torture in 2018)**

### **Replies to Concluding observation CCPR/CO/105/KEN para 16**

69. Article 29 of the Constitution provides that every person has the right not to be subjected to torture in any manner whether physical or psychological.

70. Measures taken to reduce overcrowding in detention centers and prisons include: increasing the use of community services especially for petty offences; increasing legal aid and assistance by making use of paralegals to provide advice to defendants; holding mobile courts inside prisons to reduce case workload; engaging court users Committees so that cases are reviewed regularly and brought to a speedy conclusion; awarding remission of sentences as provided by the law; facilitating the Power of Mercy Committee in reviewing cases for executive consideration of possible release and the use of the Bond and bail policy. Government is in the process of introducing parole as a method of decongesting prisons and increasing the chances of rehabilitation of offenders within the community while still maintaining public safety.

71. Allegations of torture and ill-treatment are effectively investigated and that alleged perpetrators are prosecuted and, if convicted, punished with appropriate sanctions, and that the victims are adequately compensated.

72. Torture in Article 25 is classified as a non-derogable right. The National Police Service Act No. 11A of 2011 prohibits police officers from subjecting any person to torture, cruel, inhuman or degrading treatment (Section 95). A police officer found guilty of subjecting another to torture is liable to serve a sentence of up to 25 years in prison. Section 270 of the Kenya Defence Forces Act No. 25 of 2012 also prohibits military personnel from engaging in torture with the liability to a fine of up to 10 million or a prison sentence of up to 25 years for torture. The clear legal prohibition of torture on security agencies is part of the reform agenda and meeting the obligations of the Constitution. The Victims Protections Act covers compensation for victims of crime in Kenya. The Act establishes a Victim Protection Fund where a court may award compensation, which may include financial compensation for expenses incurred as a result of the loss or injury resulting from the offence complained of which shall be charged from the Fund. As such for there to be reparation for victims, the reparation must come from a court of law and hence from a successful prosecution.

73. In this connection, the State party should ensure that law enforcement personnel continue to receive training on torture and ill-treatment by integrating the 1999 Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol) in all training programmes for law enforcement officials. The Government has also taken measures to eliminate torture and ill-treatment such as increasing the training period of new recruits to the respective security agencies and incorporating within the curriculum training on human rights and on the

responsibility not to subject any person to torture or ill-treatment. The current dispensation in the security agencies promotes the respect for and upholding human rights of civilians. Interrogation techniques that do not involve use of unwarranted force or cruelty are also being taught as part of the skills training. At the same time, criminal prosecutions as well as administrative and disciplinary actions have been taken against security officers who are found to have participated in subjecting persons to Torture.

74. Enactment of the Prevention of Torture Act: The Prevention of *Torture Act* was enacted in 2017 and incorporates a definition of torture that resonate with the International Convention against Torture and Other Cruel, Degrading and Inhuman Treatment or Punishment. Other measures taken.

75. Humane treatment of persons deprived of liberty. A Person Deprived of Liberty under the law in Kenya enjoys all human rights and fundamental freedoms in the Bill of Rights, except insofar as the rights and freedoms are inconsistent with the incarceration and deprivation of liberty. The Persons Deprived of Liberty Act enacted in 2014 provides for the humane treatment of persons detained, held in custody or imprisoned and upholds their inherent human dignity. The legislation affirms the rights of persons in police or prison custody and the duties of those who are in charge of such persons. It further provides hefty penalties for those who subject a person deprived of liberty to cruel, inhuman or degrading treatment.

76. Measures to ensure safety of those in custody. To ensure the safety of those in custody, the prison authorities take steps to categorize offenders so that dangerous criminals are not placed in the same cells with petty offenders. Heavy investments have been made in surveillance equipment to ensure that those in custody do not walk into the cells with any concealed weapon that might endanger the lives of other cellmates. Moreover, the prison authorities have undergone continuous training on conducting search before the inmates are locked in their cells.

77. Kenya Prisons Service has medical health workers who have been posted to all prisons in the country to provide health services in prisons. Health workers working in prisons get regular training and capacity building on current updates in health care. Procurement of medical drugs and medical supplies for all the inmates is undertaken on time. The Kenya Prisons Service work very closely with all County Government with a view of strengthening support to Prisons health facilities in terms of commodity supplies, staffing and supervision.

78. Number of children accompanying their mothers – currently there are 340 children accompanying their mothers in Prisons. Mothers are allowed to stay with their children in Prisons up to the age of four (4) years, due basically to the difficulty in accessing institutions or personnel to take care of the children. Measures have been put in place to have special facilities for children accompanying their mothers to prison including working with stakeholders to provide adequate facilities for education, recreation, lactation, and accommodation for the children and their mothers. Upon the child attaining four years, arrangements are made for the child is to be cared for by a relative or moved to children homes. Courts endeavour as much as possible to issue non-custodial sentences to female convicts of the mentioned category.

#### **Replies to Concluding observation CCPR/CO/105/KEN para. 12**

79. An expanded community policing programme has been introduced in both Dadaab and Kakuma refugee camps. Additional policy units have been deployed to enhance security at the camps. It is noted that any allegations of crime by law enforcement officers is promptly investigated and where found liable prosecuted. In Kenya an applicant seeking compensation must use the civil litigation process.

#### **Replies to Concluding observation CCPR/CO/105/KEN para. 15**

80. The National Gender and Equality Commission in collaboration with key partners and stakeholders facilitated the development of a national multi-sectoral monitoring and evaluation framework on prevention and response to sexual and gender based violence in Kenya. The framework provides a centralized mechanism for monitoring progress towards

prevention and response management. It aids in facilitating the availability of credible and reliable data to inform policy development and streamline submission of data for routine as well as periodic reporting for stakeholder's consumption and international reporting. Other interventions include the development of: The National Government Affirmative Action Fund Regulations, 2016; The County Government Policy on Sexual and Gender Based Violence 2017, which elaborates a comprehensive framework to progressively eliminate sexual and gender-based violence through the development of a preventive, protective, supportive and transformative environment; and National Guidelines on the Management of Sexual Violence 2014, a guiding policy framework on procedures and services for management of survivors of sexual violence and explicitly recognizes sexual violence as a serious human rights and health issue which calls for imperative attention by all concerned. The Guideline provide medical practitioners with information on steps to be taken when treating a survivor of sexual violence, preservation of evidence for court use, issues of psycho-social support and other ethical issues related to the management of health-related problems of sexual violence.

81. The Training Manual on Sexual and Gender based Violence for Prosecutors is useful to investigators, medical practitioners, and civil society organizations among other stakeholders. The Manual is an important resource that Prosecutors refer to when preparing for Court Cases. It has also expansively specified the ingredients of the offences under the Sexual Offences Act, 2006. The manual explains the process of reporting a Sexual Offence, process of investigation with particular emphasis to critical areas of investigations that should be given special attention such as recording of statements, how to handle a scene of crime, medical evidence, identification of offenders, expert witnesses and challenges relating to the same. The user is also informed on the arrest and Pretrial procedure with emphasis being laid on the rights of the Accused as contained in our Constitution.

82. Sexual Offences Act (Amendment): Several amendment proposed to strengthen the Sexual Offences Act, include: provisions relating to the definition of sexual offences, prevention and the protection of all person from harm from unlawful sexual acts, and provides for minimum sentence for offences; and the need to prohibit different types of sexual violence committed against men, women and children, including attempted rape, rape, sexual assault, indecent acts, defilement, gang rapes, sexual harassment, child pornography, child prostitution, child sex tourism, exploitation of prostitution, incest, deliberate transmission of HIV including other life threatening sexually transmitted diseases, cultural and religious offences.

## **H. Article 8: Freedom from slavery and forced labour**

### **Replies to Concluding observation CCPR/CO/105/KEN para. 17**

83. The Counter Trafficking in Person's Advisory Committee established under Section 19 of the Counter-Trafficking in Persons Act 2010 was operationalized in 2014. Members of the Committee are nominated from Government Organizations and civil societies. The Advisory Committee implements its mandate in line with National Plan of Action (NPA) for Combating Human Trafficking 2013–2017. One of the activities carried out by the Committee is capacity building and training activities for prosecutors, immigration and police officers. Secondly, the Committee raises awareness of the public, hoteliers, tour operators and air and border control officers on issues surrounding human trafficking, including the evils of child prostitution and child sex tourism. All hoteliers and other actors in the tourist sector have been encouraged to sign the Code of Conduct against Child prostitution. The National Steering Committee, established by the National Gender and Equality Commission, also addresses issues on human trafficking for purposes of sexual exploitation and labour (particularly among children and women) through meaningful engagement with different stakeholders at both national and county levels.

84. The Committee has made significant progress in the identification of victims and prosecution of traffickers. Statistics show that so far 47 victims of trafficking have been identified, out of 30 traffickers prosecuted, seven have been convicted.

85. Community-based structures are in place at the border towns to counter trafficking in the region through public awareness campaigns and monitoring of the human movement along and across the borders. Government officers are being trained to use all the legal tools at their disposal to facilitate effective extradition for prosecution of traffickers. Kenya also has a Multi-Agency Committee facilitating the voluntary rescue of victims and humane repatriation, rehabilitation and reintegration into their families, or offered alternatives if unable to return to their home communities.

## **I. Article 9: Liberty and security of the person**

### **Replies to Concluding observation CCPR/CO/105/KEN para. 18**

86. Wide-ranging reforms have been undertaken to ensure that the police service is efficient, effective and professional.

87. Police reforms have been a major agenda in Kenya for some years now. The Revised Police Reform Program Document 2015–2018 is a continuation of these efforts. Through this strategic document, the policy and institutional frameworks of police institutions have been strengthened and capacities for accountability enhanced through increased compliance to the Public Officers Ethics Act 2003 and the Leadership and Integrity Act 2012, among police officers. Further, the capacity for strategic police human resource management and police professionalism have been built with a view to reengineer police operational preparedness, logistical capability, tooling and kitting of police officers. Motivation of police officers has been mainstreamed through development and implementation of innovative and creative strategies for police welfare and sustainable motivation. In September 2018, radical changes were made in the police force. The changes deal with command, uniform, housing and training in the Administration Police (AP), Kenya Police and the Directorate of Criminal Investigations (DCI). The changes include integration of functions, rebranding, renaming and scrapping of some positions.

88. To promote effectiveness and efficiency in the administration of justice and promote judicial performance, section 12 of the High Court (Organization and Administration Act) 2015 requires the Chief Justice to facilitate reasonable and equitable access of the services of the Court and establish at least one station of the Court in every county. Towards this end, the Chief Justice embarked on the decentralization of high courts to all 47 counties. By December 2017, 39 High Courts have been established in 38 counties meaning, only 9 counties still remain without a High Court Station. Plans are also ongoing to establish at least one Magistrates Court in each of the 290 sub-counties. With regard to the 24-hour rule – In Criminal Division, Misc. Criminal Application No. 304 of 2016, Michael Rotich vs Republic of Kenya, the High Court ruled it illegal for police to detain suspects for more than 24 hours on the basis that they are conducting investigations. All accused persons had a right to have their cases determined expeditiously. In the criminal application the Applicant was deported from Rio de Janeiro on allegation that he had been involved in subverting the doping procedure of athletes. On arrival in Kenya the Applicant was arrested by the police and brought before the court within the 24-hour rule without been informed of reasons for his arrest, neither were any charges preferred against him. The prosecution, concern that the applicant may interfere with witnesses due to his status, sought the order of detention of the Applicant before he is formally charged with a criminal offence. The court ruled that it was unlawful for the police to seek to have a person who has been arrested to continue to remain in its custody without a formal charge being laid in court. “A person’s right to liberty should be respected at all times unless there are legal reasons for such person to be deprived of his liberty. The police should only arrest a person when they have prima facie evidence that an offence has been disclosed which can result in such person being charged with a disclosed offence or a holding charge of the likely offence being presented in court.”

89. Since the presentation of the last ICCPR report several pieces of legislation and policies have been developed to protect the rights of arrested persons. The courts have decided several matters concerning the rights of arrested persons.

90. The Person Deprived of Liberty Act 2014 affirms the fundamental rights and freedoms of persons in police or prison custody. All persons deprived of liberty have the opportunity to communicate with any persons of his/her choice including an advocate. Persons in custody who feel their rights have been denied or violated may lodge complaints with the officer in charge of the facility, or the relevant Cabinet Secretary. Recourse to the Commission on Administrative Justice and the Kenya National Commission on Human Rights is available.

91. An arrested person has a right to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released. The discretion to grant or deny bail or bond rests with the court. The Court must consider whether there are any compelling reasons not to liberate the person pending trial. A basis here for rejection of bail would be the likelihood of the accused person absconding and the security of witnesses. In 2015 a Bail and Bond Task Force established in 2015 developed the Bail and Bond Policy Guidelines that now provide a guiding framework for law enforcement, judicial and police officers on implementing the right to bail and bond while protecting the integrity of judicial processes. The Guidelines emphasize and elaborate on the right to be released on bail or bond except where there are compelling reasons to deny bail or bond, which reasons must be stated.

92. In *Aboud Rogo & Another vs. Republic* [2012] eKLR the two were indicted for the crime of participating in a structured criminal action, contrary to Section 3(3) as read with Section 4 (1) of the Prevention of Organised Crimes Act, 2010. They were alleged to be members of the unlawful Al-shabaab group. They were arrested on 21st December 2010. Relying on Article 49 of the Constitution, the Judge granted bail and pointed out that there was no offence that was not bailable and that there were no compelling reasons to deny the bail and ruled that each applicant will sign a Bond for KShs. 3,000,000/- or provide two sureties for KShs. 3,000,000/- each. Article 49 provides that an arrested person has the right to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.

93. In addition an application for a writ of habeas corpus to the courts is available as recourse for unlawful detention or imprisonment. The writ of habeas corpus is a non-derogable right entrenched in the Constitution, 2010 vide Article 25 (d). Again, the Constitution provides under Article 51 (2) that, "A person who is detained or held in custody is entitled to petition for an order of Habeas Corpus."

94. In the case of *Masoud Salim Hemed & Another v. Director of Public Prosecution & 3 Others* [2014] eKLR, the subject was arrested by Police on 2nd February, 2014 as a result of a raid by the police on an alleged jihadist convention held at Masjid Musa Mosque. Incidentally, the subject was not produced in court within 24 hour limits after arrest as articulated in the Constitution. In fact, no Occurrence Book entry had been made concerning the subject within the Police Stations in the region. Subsequent searches at the mortuaries bore no fruit. The court granted the applicant an order of habeas corpus for the production of the person of the proceeding on Monday the 17th February, 2014 at 10:00 am. This failed to materialize as the Police insisted that the subject was not in their physical custody since he had escape during the period of arrest. Finally, the court in the petition made orders inter alia that as regard section 387 of the Criminal Procedure Code which contemplate contemporaneous investigations by the police in addition to the inquiry by the Magistrate's Court, that the Criminal Investigations Directorate of the Police to further investigate the circumstances surrounding the disappearance and/or death of the subject of these habeas corpus proceedings.

95. In the case of *Law Society of Kenya & 2 others v. Attorney General & 2 others* [2016] eKLR; The Petitioners principally sought an order of Habeas corpus directed at the Respondents. At the hearing of the application, court was not able to conclude that the 2nd and 3rd Petitioners were arrested and detained by the Administrative Police officers so as to justify an order of habeas corpus against the 3rd Respondent. In deed the court made a considered view that the matter should proceed to full hearing of the petition in order to make a final decision as to the question whether the 3rd Respondent's officers arrested and illegally detained the 2nd and 3rd petitioners to warrant an order for Habeas corpus. And, the court made an order to that effect.

96. The Victim Protection Act was enacted in 2014 to provide for the protection, rights and welfare of victims of offences and abuse of power. The Act further sets up a Victim Compensation Fund to provide for reparations and compensations to victim. “Victim” means any natural person who suffers injury, loss or damage as a consequence of an offence. The Prevention of Torture Act enacted in 2017 provides that the expenses incurred for the treatment or professional counselling of a victim granted shall be charged on the Victim Protection Trust Fund established under section 27 of the Victim Protection Act, 2014.

**J. Article 11: No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation**

97. In Kenya, the Committal to Civil Jail mechanism is still applicable especially where parties are unable to fulfil part of their bargains in a contractual engagement. The Civil Procedure Act governs the procedure within which the committal regime is undertaken. There have been concerns that this provision violates the right of a person to freedom and security of a person, and the right not to be arbitrary arrested. However, various courts have interpreted this provision to mean that a person cannot be detained merely on the fact that he/she is unable to fulfil a contractual obligation. There must be other elements of criminality other than a simple inability to perform the contractual obligation. Other elements include negligence or the person to pay, is about to abscond or is intent on obstructing or delaying execution of the decree.

98. In *Beatrice Wanjiku & Another vs. the Attorney General & another* (Petition No. 190 of 2011); (2012).

99. ECLR, the Petitioner therein sought a declaration that civil jail for debtors, violated the rights and fundamental freedoms in the Constitution and human rights conventions. In the judgment, the court stated that the word “merely” used in Article 11 of the ICCPR connotes that one cannot be imprisoned for the sole reason of the inability to fulfil a contractual obligation. That additional reason must exist thereof for one to be imprisoned. However, the court declared that Order 22 section 7 of the Civil Procedure Act, unnecessary infringed on the rights of a judgment-debtor hence unconstitutional, null and void. The Order empowers the court to issue a warrant of arrest upon an oral application by the judgment creditor when passing the decree if the judgment debtor is within the court precincts. This provision, the court concluded, does not entitle the judgment debtor to sufficient notice nor opportunity to pay the debt even where he has the means to do so.

**K. Article 12: Right to liberty of movement and freedom to choose residence**

100. Article 39 of the Bill of rights provides that every person in Kenya has the right to move freely in the country and to leave Kenya. Citizens are granted the right to enter remain in and reside anywhere in Kenya. All visitors to Kenya who are not citizens must apply for visas from the Immigration Office. There is no impediment for foreigners who have obtained all necessary documentation to be in the country, to move and reside anywhere in Kenya. All areas are accessible except those designated as security zones, State houses across the country and private land. State and public officers require clearance from the Director of Immigration or the Head of Public Service to leave the country. However, restrictions to depart the country, even for citizens, may be made or imposed by the courts.

101. In the event where a person feels that his/her rights have been infringed, they have the right to institute court proceedings claiming that a right or fundamental freedom has been denied, violated or infringed or threatened.

## **L. Article 13: Expulsion of an alien lawfully in Kenya**

102. The Kenya Citizenship and Immigration Act, Act No 11 of 2011 is the guiding law in respect of foreign nationals. It repealed the previous statutes, Kenya Citizenship Act (Cap. 170), the Immigration Act (Cap. 172), and the Aliens Restriction Act (Cap. 173). In Kenya the term aliens includes foreign nationals. A foreign national is defined in Part 1 of the newly enacted Kenya Citizenship and Immigration Act 2011 as any person who is not a citizen of Kenya.

103. The registration of foreign nationals is governed by the Kenya Citizenship and Immigration Act, 2011, part VII, section 56. The law requires that all foreigners residing in Kenya for a period exceeding 90 days must be registered. Such persons are provided with a foreign national certificate/alien card upon application.

104. When a state of war exists between Kenya and a certain country, the Cabinet Secretary for Interior and Coordination of National Government and the National Security Council have powers to impose restrictions and conditions on foreign nationals and make provisions for: prohibiting foreign nationals from landing in or otherwise entering Kenya; prohibiting foreign nationals from embarking in or otherwise leaving Kenya; requiring foreign nationals to reside and remain within certain places within Kenya; prohibiting foreign nationals from residing or remaining in any areas specified in the order; imposing penalties on persons who aid or abet any contravention of the order, and any other matters which appear necessary or expedient with relating to the security of the country.

105. Persons aggrieved by any of the aforesaid orders may apply to the High Court for a review of the decision. Additionally, an appeal against the decisions of the Cabinet Secretary or of the Service under this Act may be made to the High Court.

106. The Constitution of Kenya also provides that justice shall be done to all, irrespective of status. Article 22 and 23 of the Constitution provide safeguards for an individual faced with any challenge as regards enforcement or protection of the fundamental rights and/or freedoms as per. Any aggrieved person has a right to institute proceedings in a court of competent jurisdiction to hear and determine the case.

107. Under section 11 (1) of the Persons Deprived of Liberty Act all aliens deprived of liberty, must be promptly informed, and in any case before they make any statement to the competent authorities, of their right to consular or diplomatic assistance, and to request that consular or diplomatic authorities be notified of their deprivation of liberty forthwith. Where consular assistance is not available, the alien will be entitled to legal aid and assistance in accordance with any written law.

## **M. Article 14: Right to a fair trial and equality before the courts**

### **Replies to Concluding observation CCPR/CO/ 105/KEN para. 19**

108. The right to a fair trial is an absolute right under the Constitution. Indeed, Article 50(4) states that “evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice”. In analyzing the applicability and/or realization of the right to fair trial in Kenya, the case of Robert Muli Matolo vs. Republic [2015] eKLR provides a clear view of how the court applied Article 50 (4) of the Constitution of Kenya. The bone of contention was that the introduction by the prosecution of witness statements and exhibits that had not been supplied to the accused was against the appellant’s constitutional right to a fair trial as envisaged under Constitution. The Judge ruled that the court must broadly address its mind to what would hinder effective administration of justice and as such each case must be considered on its own merits and circumstances.

109. Similarly, in the case of Joseph Ndungu Kagari vs. Republic [2016] eKLR (Criminal Appeal) it was established that the appellant was put on defence on a count he was not charged with nor entered a plea. On the other hand, the accused persons were unrepresented. In its determination, the appellate court found that the appellant and his co-accused were

not afforded a fair trial and that the entire proceedings were a sham and gross violation of constitutional provisions safeguarding a fair trial and the proceeding also violated the provisions of the Criminal Procedure Code. The appeal was upheld by the court.

110. An accused person's right to counsel is found under article 50 of the Constitution which provides that all accused persons have the right to choose, and be represented by, an advocate, and to be informed of this right promptly. It is a constitutional obligation of the State to assign an advocate to the accused person if substantial injustice would otherwise result. The accused person must be informed of this right promptly.

111. Legal assistance is a key element towards promoting access to justice for all persons. However, legal fees charged by lawyers remain prohibitive for many and impede access to justice. One measure taken by the state is the establishment of the Legal Aid Scheme under the Legal Aid Act No. 2 of 2016, which provides a framework through which free legal aid is made available to all indigent persons. The Legal Aid Act provides the legal authority for disbursement of government funds towards meeting the requirements of setting up a legal aid scheme. The Scheme is run by a Legal Aid Board.

112. The National Legal Aid Act was enacted in 2016 to provide a framework through which legal aid is made available as a national measure to improve access to justice by providing affordable, accessible, sustainable, credible and accountable legal aid services to indigent persons in Kenya and in accordance with the Constitution. The Act establishes the National Legal Aid Board, mandated to provide free legal assistance, which includes legal representation to the indigent. It also promotes legal awareness, supports community legal services by funding justice advisory centers, education and research initiatives that improve access to justice while also promoting alternative dispute resolution mechanisms that enhance access to justice according to the Constitutional tenets.

113. Equality before the Courts – The due administration of justice is continuous processes that strive to achieve the overriding interests to maintain public confidence, enforcing the rule of law and to actualize the true sense of justice. As a result, efforts on wide-ranging reforms have been undertaken in the judiciary in order to ensure access to justice and remove any inequalities in the justice system. The Judiciary has put in place an elaborate policy, legal and administrative framework, and implemented diverse strategic initiatives to ensure that persons are not denied their right to claim justice.

114. Some of the stated measures anchored under the Judiciary Transformation Framework 2016/2017, include a substantial increase in the number of judges, building of additional courts; introduction of mobile courts; reduction of judicial services costs; establishment of an effective public information system on courts' jurisdiction fees, calendar and a litigant's charter. Other measures taken include: the establishment of the Office of Court Counsel in each court to assist litigants representing themselves on court procedures; simplified court procedures; and establishment of customer care desks at every court station. The Judiciary has also set up special courts for children and other vulnerable groups. Plans are at an advanced stage to set up Small Claims Courts and Courts of Petty Offenders. Massive investment in growing technological, organizational, institutional and human resource capabilities have raised efficiency in the Judiciary.

115. Most revolutionary, the Judiciary has been promoting Alternative Dispute Resolution (ADR) mechanisms with an aim of enhancing access to justice in line with the provisions of Article 159 of the Constitution. During the period under review, 88 mediators were accredited to undertake the Court Annexed Mediation (CAM) process. A total of 1,497 case files were screened with 463 matters being referred for mediation. Of the 463 matters, 156 cases were concluded with a total monetary value of Kshs. 615,594,226. On average it took 69 days to finalize a case through CAM. This demonstrates that there is speedy resolution of cases through mediation as compared to cases that undergo the normal court process.

116. Further, a Taskforce on Informal Justice Systems was established within the Judiciary and gazetted in 2016 to look into traditional, informal and other mechanisms for delivery of justice in order to align informal justice systems with the precepts of the Constitution and to promote access to justice.

**N. Article 15: Conviction on existing criminal offences**

117. The Constitution affirms this right in Article 50 (n) and carries on the practice that has been part of Kenyan law. Kenyan police who charge arrested persons of crimes must cite the specific crimes that are listed in the Penal Code or in other legislation that specifies an offence. Courts are bound to hear criminal cases and convict or acquit accused persons based on existing criminal law. This is the practice in the country.

**O. Article 16: Right to recognition everywhere as a person before the law**

118. Recognition of a person everywhere before the law is a key element in the realization of a host of rights that enable a person to live in dignity that befits a human being. In Kenya, birth registration is the first key step to be recognized as a person before the law. Once registered a person is able to enjoy many other rights such as: work, vote, and education, own property, among others. Kenya Citizenship and Immigration Act 2011 details the registration procedures in Kenya. It allows for the recognition of foundlings, stateless people and migrants and spells out the criteria for registration. With the promulgation of the Constitution in 2010, Kenya gave provision for timelines to reduce statelessness within 5 years. This process has been arduous due mainly to the lack of appropriate documentation. However, eligible Makonde stateless persons living in Kwale were recently granted citizenship in conformity with the law.

**P. Articles 17: Freedom from arbitrary or unlawful interference with privacy, home and family**

119. The Constitution enunciates the right to privacy of all persons. This includes the right not to have a person, home or property searched; their possessions seized; their information relating to their family or private affairs unnecessarily required or revealed; or the privacy of their communications infringed. Therefore, it is imperative upon all persons including the National Police Service personnel to respect, uphold and enforce the constitutional provision as envisaged. The new constitutional dispensation calls for procedural engagement through the court process for one to qualify in obtaining a lawful court order that will allow for a search warrant to be issued. On this basis, each case of infringement of the right to privacy is heard and determined based on each individual circumstance. The right to privacy in Kenya is protected through a number of legislative, judicial and policy frameworks.

120. In the case of *Standard Newspaper Ltd & another vs. Attorney General & 4 others* [2013] eKLR the Police raided the Standard Newspaper media house and seized their equipment and publications. The raid raised the issue whether the search and confiscation of the communication equipment or publication was in violation of the Petitioner's fundamental rights. The court held that the acts of the respondents (police) were unlawful and violated the petitioner's rights through the respondent's action of arbitrary search and seizure.

121. In the case of *Winfred Gisebe Gisebe & 2 others vs. County Government of Kisii & 2 others* [2017] eKLR the petition concerned claims of arbitrary search, whimsical arrest and detention of peaceful citizens and destruction of property by police officers. The court found that the respondents acted with impunity and violated Article 31 of the Constitution. The court hence declared that the petitioner's right to privacy protected under Article 31 (a) and (b) of the Constitution were violated by the respondents' arbitrary invasion and search of their home.

122. In compliance with the legitimate expectation, Section 51 of the National Police Service Act highlights the fact that a police officer shall obey and execute all lawful orders and warrants lawfully issued. On the other hand and subject to the Constitution, Section 57 of the said Act provides where a police officer has reasonable cause to believe that anything necessary to the investigation of an alleged offence is in any premises and that the delay caused by obtaining a warrant to enter and search those premises would likely to imperil the

success of investigation, the police officer may demand that the person residing in or in charge of such premises allow him free entry thereto and afford him all reasonable facilities for a search of the premises. However, the police officer may enter such premises without warrant and conduct the search if after notification of his authority and purpose, entry cannot without unreasonable delay be so obtained.

123. Above all, in case of arrest, search and seizure the Constitution forms the basis upon which any action occasioned by the Police officers are measured against and in case of any breach thereof, they would be liable to pay damages for infringement of other people's fundamental rights and freedom.

124. The Kenya's Data Protection Bill 2017 was developed to guarantee the right of every person not to have their personal information unnecessarily required or revealed and the right not to have the privacy of their communications infringed. The bill once enacted will restrict the transmission of personal data and appropriation of the same. It would also regulate the collection, retrieval, processing, storing, use and disclosure of personal data.

125. In *C.O.M. v Standard Group Limited & another* [2013] eKLR, the respondent published an article in the local dailies revealing the HIV status of the petitioner without his consent. The court found that the respondent was in violation of the petitioner's right to privacy as outlined in the constitution and against section 22 of the HIV and Aids Prevention and Control Act, which prohibits any person from disclosing any information concerning the HIV status of a person without his/her written consent.

126. The Victim Protection Act 2014 highlights the right of a victim of crime to privacy from the media, whether print, electronic or other; and from unreasonable intrusion from health professionals; or confidentiality of their communication with victim support service providers. Law enforcement agency investigating the crime must ensure that the victim information is kept confidential except to the extent required – by law or to ensure the safety and security of any person.

#### **Replies to Concluding observation CCPR/CO/ 105/KEN paras. 21 and 24**

127. Kenya has a comprehensive legal framework for protection of communities affected by the various development projects undertaken by the State. Constitutional provisions outline the fact that the state shall not deprive a person of property or any interest in, or right over, property of any description unless the deprivation results from an acquisition of land or for a public purpose or in the public interest. It requires prompt and just compensation and the affected person has access to court of law in case there is a dispute. The Land Act, 2012, Sections 107 to 143 ensures that all the persons are properly informed, consulted and that they give informed consents. Public participation is conducted on issues of re-location, funding, compensation of land and property and resettlement of the displaced persons. The procedure set by domestic law ensures that the acquisition of the land and the displacement of the people is done in accordance with international standards. The Community Land Act 2016 further provides for the recognition, protection and registration of community land rights; management and administration of community land; and the role of county governments in relation to unregistered community.

128. The Indigenous Peoples Planning Framework (IPPF), is invoked in cases where indigenous peoples are present in, or have collective attachment to any project lands, an Indigenous Peoples Plan (IPP) is prepared so that the development process fully respects the dignity, human rights, economies, and culture of indigenous peoples. To achieve this, the IPPF provides guidelines for, among other things, a social assessment of indigenous communities; free, prior and informed consultations leading to broad community support; and the preparation of Action Plans to:

- (a) Avoid potentially adverse effects on the indigenous peoples' communities; or
- (b) When avoidance is not feasible, to minimize, mitigate, or compensate for such effects; and
- (c) Ensure that the indigenous peoples receive social and economic benefits that are culturally appropriate, and gender as well as inter-generationally inclusive.

129. Regarding the Ogiek community, a taskforce has been established by the government on the implementation of the African Court on Human and Peoples' Rights judgment on the indigenous Ogiek people. The Taskforce is charged with the responsibility of studying the ruling, other judgments issued by the local courts in relation to the Ogieks occupation of the Mau Forest, with a view to identifying all land related laws and policies to see how they address the plight of the Ogieks of the MAU; establishing both the registration and ground status of the claimed land; recommending measures to provide redress to the Ogiek's claim, which may include restitution to their original land or compensation with alternative land; and preparing a report to be submitted to the African Court on Human and Peoples' Rights in Arusha. The Task force is expected to examine the effect of the Judgment on other similar cases in other areas in the country.

**Q. Article 18: Freedom of thought, conscience, and religion**

130. Kenya has a large number of well-established churches, which practice freely all over the country. The wave of Protestants and/or Pentecostal fellowships has seen many other churches ballooning to more than 4,000 registered churches in Kenya. Kenya also has a large population of Muslims and Hindus.

131. The Constitution of Kenya guarantees the right of religion and/or beliefs. With a mixed populace, the drafters of the Constitution in their wisdom proclaimed under Article 8 that there is no state religion. Additionally, Article 32 of the Constitution 2010 acknowledges that every person has the right to freedom of conscience, religion, thought, belief and opinion. All churches are registered as societies by the Registrar of Societies.

132. In 2015, the Attorney General drafted a proposed amendment to the Societies Act to streamline the processes pertaining to the registration of religious organizations in Kenya. However, some faith based organizations objected to certain provisions, which they opined would lead to over-regulation by the government. Key among these were provisions touched on leadership and integrity, as well accountability on resources entrusted to religious organizations by congregants. The impasse on these provisions led to the issuance of a moratorium stopping the registration of churches and societies.

133. The moratorium was not in any way intended to limit the freedom of association, freedom of conscience, religion, as guaranteed in the Constitution of Kenya or the Covenant. There was that officials of several religious institutions and societies were orchestrating unconscionable activities that left their congregants at a disadvantage. Such instances included the infamous 'panda mbegu' saga. The saga involved a pastor pressing his audience to send him cash, which he calls "seed money", so that they can receive prayers, miracles and healing. Intense public outcry followed this exploitation and the State saw it necessary to formulate measures to curb such activities.

134. The Office of the Attorney General and Department of Justice has been holding various consultations with religious organizations to deliberate on the existing operations of the faith based institutions with a view to encouraging the religious bodies to agree on a more streamlined and regulated system of operations. So far the intended amendment has stalled due to the pending case in court.

135. Nonetheless, regulation premised on the Societies Act do exists but the execution must be tightened. For instance, section 30 of the Societies Act does require that religious organizations submit audited reports and so every registered society is required to furnish the Registrar of Societies on an annual basis, on or before the prescribed date, such returns, accounts and other documents as prescribed thereof. It is in fact an offence to fail to comply with the said section of the Act. In essence what is prudent is the controlling of rogue priests and/or individual taking advantage of the religious teachings to exploit their followers and enrich themselves at the behest of impoverishing the congregants.

## **R. Article 19 and 20 everyone shall have the right to hold opinions without interference**

136. The right to freedom of opinion and expression are well articulated under our constitution. The freedom of the media is guaranteed in Article 34 of the Constitution with the State prohibited from exercising undue control of the media. The sanctity and significance of freedom of speech and expression in a democratic space is unquestionable. In a progressive society only freedom to opinion and expression grants transformation in imparting and sharing ideas that attract dissenting discourse for the sustainable course and/or development of humanity. It is therefore important to safeguard these rights and just in any case it will be prudent to establish the actual threat that is being limited within the constitutional bounds, such as propaganda for war, since the same is not permissible.

137. The Access to Information Act was passed in 2015. The Act affirms the legally enforceable right of every citizen to access information held by government and its agencies. This enables citizens to access information freely and thus be in a position to hold government accountable leading to the promotion of good governance.

138. The Kenyan courts have strengthened efforts to create more space for free expression in Kenya by annulling section 194 of the Penal Code that provides for the offence of criminal defamation. The decision made by the High Court in the case of Jacqueline Okuta & Anor vs. AG & Others [2017] eKLR is significant in safeguarding the fundamental rights of Kenyans. The Court concluded that imprisonment as a sanction was not “reasonably justifiable in a democratic society” and that the availability of civil remedies afforded sufficient redress for injury to one’s reputation. The DPP has since withdrawn all cases of criminal libel following the High Court declaration that the law was unconstitutional.

139. Another case that reinforces the right to freedom of expression is Geoffrey Andare vs. Attorney General & 2 others [2016] eKLR where the petitioner was charged with a publication offence through social media (Facebook) under section 29 of the Kenya Information and Communication Act, Cap 411A. The court held that the section was unconstitutional for being couched in overbroad and vague terms that violates or threatens the right to freedom of expression as guaranteed under Article 33 of the Constitution.

140. While the freedom of opinion and expression is fundamental in any democratic society, government at all times has the responsibility of promoting national cohesion and harmony, protecting individuals from hate speech and disparaging speech as well as promoting national security. The rise of alternative, and largely unregulated, news channels such as social media has also posed new challenges for responsible journalism and created loopholes for inciting reporting. Challenges with regard to hate speech on social media, and false news are rampant.

## **S. Article 20: Prohibition of propaganda relating to war or racial, national or religious hatred**

141. Article 33 guarantees freedom of expression in so far as the exercise of such freedom does not amount to propaganda for war, incitement to violence, hate speech, advocacy of hatred that or incitement to cause harm. The freedom of expression will be limited where they promote discrimination against individuals or groups on the basis of race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

142. The National Cohesion and Integration Commission is set up under the National Cohesion and Integration Act of 2008 to promote cohesion and integration of Kenya as well as to identify and redress unacceptable forms of public expression, prohibiting the use of hate speech or language that would stir up or incite ethnic hatred. The Commission’s responsibility is to foster and facilitate good relations, harmonious and peaceful coexistence between persons of different ethnic communities in Kenya and to deal with hate speech which is threatening, abusive or insulting expression that employs the use of threatening,

abusive or insulting words or behaviour to commits an offence with the intention of or resulting in stirring up ethnic hatred.

143. With the increased use of internet facilities and social media platforms, the Government faces the challenge of monitoring, deterring and redressing hate speech that is sometimes anonymous as well as difficult to keep track of. There remains often a fine line between free expression including criticism and negative commentary on the one hand and negative, inciting remarks that amount to hate speech on the other hand. These are challenges that are also faced globally with the widespread use of social media that has been used to perpetuate hate, including the promotion of terrorist ideologies.

## **T. Article 21: Right to peaceful assembly**

144. The Constitution of Kenya guarantees the rights to assemble, demonstrate, picket and present petitions to public authorities peaceably and unarmed in Article 37. The Public Order Act (Revised Edition 2014 [2012]), balances the freedom of assembly with the duty to maintain public order. Any group intending to hold a public meeting or assembly is expected to notify the regulating officer a minimum of three days before the event. Organizers of public assemblies or their authorized agents are expected to be present throughout the public gathering and to assist the police in maintenance of public order.

145. The Government supports and upholds the rights of individuals, human rights defenders and groups to assemble freely, to picket, demonstrate and present petitions. This is a normal part of engagement particularly at the political level and civil society levels. In Kenya, political parties, members of parliament, civil society, and the academia engage in robust lively public debate on various matters of topical interest. However, demonstrations have sometimes degenerated into riots and criminal activities including looting of private property, robbing passers-by who are not part of the gatherings and in some instances physically harming innocent passers-by.

146. Various groups have enjoyed right to peaceful assembly within the country. Some of them include the Teachers and Doctors union groups. The teachers have collectively gone on strike where they held several peaceful assemblies on various parts of the country to ensure that the Recognition Agreement of 1968 between the Union and TSC was honoured in a freshly new negotiated Collective Bargaining Agreement. The government and the teachers' union reached an agreement that would see the aforementioned recognition agreement honoured and also provide for career progression of teachers among other agreements reached.

147. Similarly, Kenyan doctors have also recently gone on a nationwide strike where they suspended medical services in all public hospitals save for emergency situations. The doctors held several peaceful assemblies in various cities and towns within the country. The strike went on for ninety-five days (95) as the union officials engaged the Ministry of Health officials and other relevant government officials in implementing the collective bargaining agreement that their union had with the government. The strike had been occasioned by failure of the government to honour the collective bargaining agreement. The union officials managed to reach a resolve which would ensure that the national government honours the collective bargaining agreement. The county governments would also play a key role in ensuring that the collective bargaining agreement is fully implemented in terms of paying the doctors and improving the working conditions in the county hospitals among other agreements reached.

148. The Government continues to monitor and facilitate the freedom of assembly with fairness and to incorporate the interpretation and elucidation of the law provided by the courts in finding a balance between freedom of assembly and protection of the right to safety and security.

## **U. Article 22: freedom of association and the right to form and join trade unions**

149. The Constitution recognizes and protects the freedom of association of every person and the right to form join or participate in the activities of an association of any kind. Additionally, every person has the right to fair labour practices and the right to form, join or participate in the activities and programmes of a trade union. These provisions of the Constitution seek to guarantee and further protect the rights enshrined in article 22 of the ICCPR.

150. Freedom of association is fundamental right in any democracy. Freedom of association, as envisioned by the constitution, entails the voluntary joining of an individual to an association of his/her choice. Freedom of association entails that any legislation that requires registration of an association of any kind shall provide that; such registration may not be withheld or withdrawn unreasonably and there shall be a right to have a fair hearing before a registration is cancelled.

151. In Kenya, officers in the National Police Service and the Kenya Defence Forces Act are barred from joining and participating in the activities of a trade union and going on strike by their respective legislation. These two instances are the only limitations to the right to form and join trade unions and the freedom of association within the current Kenyan legal dispensation. Such limitation is sanctioned under the Constitution in Article 24(5).

152. Kenya upholds the rights of trade unions to go on strike in order to pursue their collective interests. As a member of the International Labour Organization (ILO), Kenya's amended labour laws to comply with the ILO conventions and the Constitution of Kenya. The Employment Act (Revised Edition 2012 [2007]), the Work Injury Benefits Act (Revised Edition 2012 [2007]), and the Occupational Safety and Health Act (Revised Edition 2012 [2007]) have been revised to bring them in conformity with the Constitution and to ensure they uphold labour rights of individuals.

153. Further in a bid to promote the enjoyment of freedom of association, the Societies Act, provides for the registration of societies in Kenya. This Act establishes the Office of the Registrar of Societies where applications for registration of societies or associations are lodged and considered. Society is given a broad definition within the Act. That is, a society includes any club, company, partnership or other association of ten or more persons, whatever its nature or object, established in Kenya or having its headquarters or chief place of business in Kenya, and any branch of a society.

154. There is also a Labour Relations Act which provides for the establishment and registration of Trade Unions and Employers' Organizations. The legislation lays out the procedure for the registration of trade unions and employers' organizations. The act also provides a framework of how operations of a trade union and employers' organization are to be conducted.

## **V. Article 23: Protection for the family and the institution of marriage**

155. Kenya continues to make positive strides in taking legislative, policy, administrative and other measures aimed at protecting the family as the natural and basic unit of society. The Constitution protects the rights of adult persons of opposite sexes to found a family based on free consent of the parties. In addition, the supreme law protects equal rights in entering into a marriage, during the marriage and upon dissolution of the marriage.

156. The Marriage Act No. 4 of 2014 consolidates all laws related to marriage and divorce. It provides for registration of all forms of legitimate marriages including civil marriages, customary marriages and religious marriages. The formal recognition of customary marriages is an important development in a country where many women who marry under the traditional system lose rights related to marriage and divorce as there was no formal registration of customary marriages.

157. The Law prohibits marriage to a minor and has criminalized such conduct. However, the practice still continues particularly in rural areas. The Government continues to promote education and awareness in order to combat the practice while also imposing legal penalties on parents, chiefs and elders found guilty of the practice.

158. The Matrimonial Property Act, No 49 of 2013 sets out the rights and responsibilities of spouses in relation to matrimonial property. It provides for co-ownership of matrimonial property based on individual contributions to acquisition of the property where “contribution” is defined in terms of non-monetary and monetary contributions. This is an important provision as it curtails the disenfranchisement of many women within the marriage setting who contribute through maintenance and management of the family home and do not make financial contributions and yet can easily lose their title to the property where it is registered in the husband’s name.

159. The Protection against Domestic Violence Act No. 2 of 2015 protects all individuals in the family unit against abuse in the domestic setting including sexual, physical and psychological abuse. The Act further identifies members of the family to include current and former spouses of a person, persons living within the same domestic household, children of the person and other family members of the person.

## **W. Article 24 protection of the child**

**(For more information on Article 24 please refer to Kenya’s 3rd–5th Combined Periodic Report on the Convention on the Rights of the Child, presented to the UN Committee of the Rights of the Child in 2016)**

### **Replies to Concluding observation CCPR/CO/105/KEN para. 22**

160. Section 14 (2) of the Penal Code provides that anyone under the age of twelve years is not criminally liable for acts and omissions. However, the presumption is rebuttable and should the prosecution prove that the person at the time of doing the act or omission they had capacity to know of the consequences, then such persons shall be held liable. Global human rights trends have moved towards setting the minimum age from 8 to 12 or more. Kenya continues to review its laws to ensure that they resonant seamlessly with internationally accepted human rights standards and constitutional principles. The Penal Code and other relevant laws are under review. Indeed, the Children’s Act is undergoing a comprehensive overhaul and the issue of the minimum age of criminal responsibility is under intense discussions by the stakeholders. The National Council on the Administration of Justice (NCAJ) Taskforce on Children Matters was gazetted on 10th December 2015. The Taskforce was established to address emerging challenges facing children in the justice sector and in line with the provisions of the Constitution, sections 5 and 34 of the Judicial Service Act and section 22 (3) of the Children Act.

161. Reform in correctional institutions has seen the separation of juvenile offenders awaiting trial in prisons, from other adult convicts. All offenders between ages 15–18 years are kept separate from adults at Borstal Institutions. Borstal institutions can be found in the coastal region – Shimo la Tewa Borstal, western region – Shikusa Borstal and Kamiti Youth Corrective Centre in Nairobi. These are for the time being the only facilities catering for boys serving a custodial order. Children from other stations end up being held far away from their homes. The Judicial Sentencing Guidelines of 2016 emphasize that custodial orders should only be imposed as a matter of last resort when dealing with children, consequently committal of juveniles to rehabilitation schools or borstal Institutions is reserved for cases in which non-custodial measures have failed.

### **Replies to Concluding observation CCPR/CO/105/KEN para. 23**

162. The registration of births has increased in the last few years. However, the lack of awareness about the importance of birth registration, and the poor access to registration facilities are some contributing factors that hinder the full registration of births. Government has collaborated with various national and international partners to raise awareness about birth registration in remote parts of Kenya. Since mobile phone use in

Kenya is extremely widespread in all parts of the country, the Government is formulating strategies to use the device as a media in the registration of births.

163. Regarding the Nubian children, the government established a Committee to vet and register genuine Nubians in Kenya. The Government of Kenya has experienced challenges in this area when Nubians from Uganda and recent Sudanese immigrants claim to be the original Nubians who were settled in Kenya by the British Government. The Kenya Government has in place a transparent vetting process which vets Applicants who seek identity cards. The vetting committees are composed of representatives from the District Officer, Registrar of Persons, Immigration department, Civil Registration Department, National Security Intelligence Service, Criminal Investigation Department, Chiefs, Assistant Chiefs and most of all the elders from the Nubian community. These elders are involved since they are presumed to know the Nubians who were born in Kenya and those who weren't and hence are better placed to advise those who are qualified. A large number of Nubians have undergone the vetting process and have been granted national identity cards. An identification card is proof of citizenship. Citizenship then opens the door for the Nubians and their children to access all basic rights on an equal footing with other Kenyans.

## **X. Article 25: Access to the political system and public services**

164. The right of citizens to take part in the political process of the country is a fundamental pillar of Kenya's constitutional democracy. Every citizen is free to form, or participate in forming, a political party; to participate in the activities of, or recruit members for, a political party; or to campaign for a political party or cause. Most importantly every citizen has the right to take part in free, fair and regular elections based on universal suffrage. The Government of Kenya, in giving effect to constitutional provisions, has instituted various overarching reform measures with a view to promoting political democracy in Kenya. These measures have seen the mandatory inclusion of women, youth, marginalized groups, person with disabilities in the country's political processes, institutionalization of political parties; compulsory public participation in the legislative processes, opportunity to petition presidential results before the President-elect is sworn in, allowing independent candidates to contest elections, freedom of media and access to information; a strengthened electoral justice and increased compliance with the electoral framework. All these efforts culminated in the delivery of more efficient, transparent and peaceful elections. Other measures taken include.

165. Election financing: Election Campaign Financing Act, was enacted in 2013. The legislation limits the contributions one can make to any candidate's campaign. This serves the key public interest in deterring corruption of candidates, and ensures that the will of the people is respected.

166. Registration of prisoners: The IEBC is mandated by the Constitution to register all eligible Kenyans as voters, prepare, maintain and revise the register of voters. In the High Court Petition No. 574 of 2012, Kituo Cha Sheria and Independent Electoral and Boundaries Commission, the court declared that all prisoners who are eligible have a right to vote under Article 38 (3) (a) and (b) of the Constitution.

167. Kenyans in the diaspora: The Supreme Court of Kenya, in Petition No. 25 of 2014, Independent Electoral And Boundaries Commission (IEBC) Vs New Vision Kenya and Others affirmed the right of eligible Kenyans living in the diaspora to vote and ordered the progressive registration of Kenyans living abroad to enable them take part in local elections. IEBC conducted the registration of diaspora voters, in four countries: Tanzania, Uganda, Rwanda, Burundi and South Africa. Due to logistical reasons it was not possible to register all Kenyans on other parts of the world.

168. Public service – The Constitution recognizes and promotes equal access to public services. The devolved system of government has brought greater efficiency in service delivery to the people, enhanced the participation of the people in issues that involve them, ensures the equitable distribution of resources and services, recognizes diversity, and protects minorities and marginalised communities.

169. Huduma Kenya Programme is a Kenya Vision 2030 flagship project launched by H.E Uhuru Kenyatta, President of the Republic of Kenya, on 7th November, 2013. The objective of the Huduma Kenya Programme is to enhance access and efficient delivery of Government Services to all Kenyans from a One Stop Shop citizen service centers. This means that persons can obtain birth certificates, national identity cards, passports, registration of business names, and applications for marriage certificates, drivers' licences, police abstracts and many other services in one place.

## **Y. Article 26: Equality before the law**

170. Equality and freedom from discrimination are important national values and rights that must underpin all public policies and legislation in Kenya. Indeed, every person is equal before the law and has the right to equal protection and equal benefit of the law. However, there are still some policies, statutes and regulations, particularly those formulated prior to 2010, which fail to guarantee to all persons equal and effective protection against discrimination on any ground. The Kenya Law Reform Commission has been reviewing all the laws and policies with a view, inter alia to address any pre-existing lack of legal protection from discrimination.

171. The courts have been active in declaring unconstitutional any law, policy or regulation that is considered unconstitutional discriminatory. In 2014 the High Court – Petition no. 484/2014, L.N.W vs The Hon. Attorney General and others, declared Section 12 of the Births and Deaths Registration Act unconstitutional because it was discriminatory against children born outside marriage. The issues in the matter revolved around the registration of births and the whether the name of the biological father should be inserted in the birth certificate of the child. The petition challenges section 12 of the Births and Deaths Registration Act, which prohibited a mother from including the biological father's name on a birth certificate without the man's consent. The Court declared that every child has a right to have the name of his or her father on the birth certificate. The consent of the father is not required as has been the case.

172. For a long time in Kenya, the rights of the intersex persons were not recognized either in law or in fact. A host of legal and social issues arose, such as the two gender mark in official documentation, and living arrangements of prisoners. There is a lot of stigma surrounding intersex persons. Traditional perceptions on intersexuality are however now changing. The Persons Deprived of Liberty Act of 2014 recognizes intersex persons and provides for their humane and dignified treatment while in custody. All intersex people in custody can now choose the sex of the person by whom they should be searched. The Act also directs that intersex persons must be held separate from other persons.

173. The Kenyan courts have also sought to recognize and protect the rights of intersex children. In the judgment delivered on 5th December 2015 in Petition No.266 of 2013, Baby A Vs Attorney General and others – the judge declared that it is the duty of the Government to protect the rights of intersex babies and persons by providing a legal framework to address issues relating to them, including registration under the Registration of Births and Deaths Act, medical examination and tests, and corrective surgeries. The Court directed the Government to work towards an appropriate legal framework governing issues related to intersex children based on internationally acceptable guidelines. The Attorney General has gazetted a taskforce made up of various organizations to work on a comprehensive framework to address the challenges faced by intersex persons. The State has a draft policy to address the plight and challenges faced by intersex persons in Kenya.

174. In High Court – Judicial Review case no. 147 of 2013 – Republic Vs. Kenya National Examination Council and Another, the court directed the Kenya National Examination Council to effect a change of name and gender mark on school leaving certificates belonging to the applicant diagnosed with gender identity disorder. The applicant was born with the physical characteristics of a male child, but has always been inclined towards the female gender.

**Z. Article 27: Right of minorities to culture, religion and language**

175. The Kenyan constitution prohibits all forms of discrimination on any ground, including ethnicity, religion, belief and culture. Indeed, non-discrimination and protection of the marginalized is emphasized as a central national value and principle of governance which must permeate all spheres of the development agenda. All persons, including marginalized communities, enjoy the freedom of expression, thought, conscience and belief.

176. Culture is the foundation of the Kenyan nation and the cumulative civilization of its people. In recognition of this, the state has promoted all forms of national and cultural expression through literature, the arts, traditional celebrations, science, communication, information, mass media, publications, libraries and other cultural heritage and protects cultural intellectual property rights. For example, the State has promoted the use of vernacular or local languages in teaching in early child development and education centres (ECD&E). Community cultural centres have been constructed to provide full and sustained support for the development of the diverse cultural expressions in the country. Community Cultural Festivals are held annually in various regions of the country in partnership with local communities including the marginalised and people with disabilities. These programmes act as avenues for promoting and preserving the rich cultural heritage as well as facilitating participants in enjoying their cultural life and building national cohesion and integration.

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