



**International Convention on
the Elimination of All Forms
of Racial Discrimination**

Distr.: General
13 January 2011

Original: English

Committee on the Elimination of Racial Discrimination

**Reports submitted by States parties under article
9 of the Convention**

Initial to fourth periodic reports of State parties due in 2008*

Kenya**

[27 October 2010]

* This document contains the initial, second, third and fourth periodic reports of Kenya, due on 13 October 2002, 2004, 2006 and 2008 respectively, submitted in one document.

** In accordance with the information transmitted to States parties regarding the processing of their reports, the present document was not edited before being sent to the United Nations translation services.

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List of abbreviations

KNCHR	Kenya National Commission on Human Rights
IDPs	Internally displaced persons
GJLOS	Governance Justice Law and Order Sector
NHSSP	National Health Sector Strategic Plan
GOK	Government of Kenya
GER	Gross enrolment rate
KACC	Kenya Anti Corruption Commission
NCC	National Children Council
NCPD	National Council on Persons with Disabilities
KLRC	Kenya Law Reform Commission
EPZ	Export Processing Zones
ECK	Electoral Commission of Kenya
NGO	Non-governmental Organization
KNCGD	Kenya National Commission on Gender and Development
OAU	Organization of African Union
AU	African Union
ASAL	Arid and Semi Arid Lands
ACHPR	African Charter on Human and Peoples Rights
CAP	Chapter
CDF	Constituency Development Fund

I. General introduction and country information

1. The Government of the Republic of Kenya has the honour and pleasure to submit to the Committee on the Elimination of Racial Discrimination, in conformity with article 9 of the International Convention on the Elimination of All Forms of Racial Discrimination, a combined report of its first to third reports, covering the period 2002–June, 2010.
2. Kenya has not submitted a state report since it became a party to the Convention on 13 September, 2001. The reasons for this state of affairs are manifold, and include political, social, and economic problems obtaining for most of the country's post-independence history. In recent years, and particularly with the ascension to power in 2002 of a new government, Kenya has increased its capacity to undertake State reporting and other human rights related activities. It is in this light that this report has been prepared.
3. This report has been prepared with reference to the Committee 's guidelines on the form and content of reports under the Convention and is a result of wide consultations within the Government the Kenya, the Kenya National Commission on Human Rights (KNCHR), other national institutions, non-governmental organizations, the Committee against Racial Discrimination, civil society organizations and other stakeholders who play an important role in the promotion, protection and fulfilment of the human rights under the Convention to ensure that the report is representative of the de facto situation prevailing in the country at the time of reporting.
4. This report discusses in a candid manner the legislative, judicial, administrative and other measures that the Government has taken to comply with the Convention as well as the difficulties and the shortfalls observed in giving effect to the provisions of the Convention. It also highlights the strategies currently in place or underway to address any existing gaps.

A. Land and people

5. Kenya is an East African country that lies astride the Equator covering a total area of 582, 650 km² of which 560,250 km² constitutes dry land while water takes the rest of about 13,400 km². Approximately 80 per cent of the land area is arid or semi-arid, and only 20 per cent is arable.
6. The total population of Kenya is estimated at 39,002,772 (2009 estimates) people, 75 per cent–80 per cent of whom live in the rural areas. The population distribution varies from 230 persons per km² in high potential areas to 3 persons per km² in arid areas. Only about 20 per cent consists of high to medium potential agricultural land, and supports 80 per cent of the population. The remaining 20 per cent of the population lives in the 80 per cent of the land, which is arid and semi-arid.
7. The country's population is characterised by high infant mortality rates (54.7 deaths/1000 live births), low and declining life expectancy (between 47and 55 years), and total fertility rate (4.56), all 2009 estimates. Kenya is also faced with a high dependency burden, with over 42 per cent of the population below 15 years.
8. Kenya is a multi-racial, multi-ethnic, multi-cultural and multi-religious society. The national language is Kiswahili while the official language is English, though numerous other local languages are spoken. People of African descent constitute about 90 per cent of the population; divided into 42 main ethnic groups. These groups belong to three linguistic families: Bantu, Cushitic, and Nilotic. The main groups comprise of: Bantus-the Kikuyu (22 per cent), Luhya (14 per cent), Kamba (11 per cent), Meru (6 per cent), Embu (1.20 per cent), Kisii (6 per cent), the Mijikenda (4.7 per cent), Taita (0.95 per cent), Pokomo (0.27

per cent), Banjuni (0.20 per cent), Boni-Sanye (0.05 per cent), Taveta (0.07 per cent); Kuria (0.52 per cent), Mbeere (0.47 per cent); Nilotes-Luo (13 per cent), Kalenjin (12 per cent), Turkana (1.32 per cent), Teso (0.83 per cent), Samburu (0.50 per cent), Basuba (0.50 per cent) and the Maasai (1.8 per cent); and the Cushites-Somali (0.21 per cent), Oromo (0.21 per cent), Rendile (0.12 per cent), Boran (0.37 per cent) and Gabra (0.17 per cent). It should be noted that these major groups are further grouped into many smaller subtribes.

9. Ethnicity in Kenya is highly politicised, resulting in insecurity, ethnic conflicts and exclusion, marginalization and governance problems. There is discernible tendency for people of African descent to be identified in terms of their ethnicity and not their citizenship. This becomes more pronounced every five years during national elections when voting along ethnic lines is largely exhibited. The public images of the political leaders are closely associated with their ethnic backgrounds and not the soundness of their policies. Kenya has significant racial minorities, namely: Kenyan Asians (0.27 per cent), Kenyan Arabs (0.16 per cent), Indians (0.14 per cent), and Kenyan Europeans (0.15 per cent). Due to their racial origin, colour, wealth and lifestyles, these minorities may be targets of xenophobic behaviour.

10. The major religious orientations include Christianity (78 per cent), Islam (10 per cent), African Traditional Religions (10 per cent), Hinduism and Sikhism (1 per cent). Religion is increasingly perceived by some minorities in Kenya as a major factor in the determination of citizenship and the acquisition of citizenship entitlements. For example, some adherents of the Islamic faith argue that Kenya is governed as a Christian country. Those who adhere to the African traditional beliefs often complain that rights given under the English system of laws take precedence over those obtainable under customary laws which are intertwined with traditional religious convictions.

11. Poverty remains a major impediment to both the fulfilment of basic needs and the realization of the full potential of many Kenyans, particularly women and children. The population in absolute poverty is estimated at 45.9 per cent (2009) mainly due to the expected negative impact of the post-election violence witnessed in the country at the beginning of 2008 and the global crisis.

12. Kenya's economy has been characterised by stagnation in economic growth in the last two decades. Between 1997 and 2002, the economy grew by an annual average rate of only 1.5 per cent, below the population growth estimated at 2.5 per cent per annum, thus leading to a decline in per capita incomes. Currently, approximately 56 per cent of Kenyans live below the international poverty line of less than \$1 per day. The economy however has been registering some modest improvement in some sectors. In 2005, economic growth rate was 5.8 per cent, and this rate grew to 6.7 per cent by the end of May, 2007. The post-election violence, 2008, has been a major setback to this growth.

13. Kenya has faced numerous challenges in the efforts of fulfilling her reporting obligations under the various international human rights instruments including the present Convention. Some of these include poor political and economic governance characterised by corruption and inequitable allocation/misallocation of resources. This situation has been exacerbated by exogenous factors in the recent past, including droughts and a deteriorating external environment. In 2000 and 2004, Kenya suffered severe droughts and famine that hampered the performance of the productive sectors, especially agriculture and manufacturing. Due to the decline in food production, budgetary resources were diverted to famine relief, thus interrupting the development momentum. Another external factor which affects the country, like other developing countries, is the deteriorating terms of trade, especially the falling of international prices of primary exports. Coupled with these are the concerns created by HIV/AIDS, diseases like malaria and poor infrastructure.

B. General political structure

14. Kenya gained independence in 1963 and has, in the last two decades, evolved into a multi-party electoral democracy. After years under a single-party state system, the Constitution of Kenya (“the Constitution”) was amended in 1991 and the first multi-party elections were held in 1992. The change to a multi-party system was a political transition, which involved fundamental constitutional re-engineering aimed at transforming the state apparatus from instruments of repression and exploitation to agents of African development and self-actualization. Before then, the Kenya African National Union (KANU) had not only won the independence elections in 1964 but also managed to retain power for 39 years through 8 general elections. Only in 2002 did KANU lose the general elections for the first time to the National Rainbow Coalition (NARC), a grouping of 14 political parties.

15. Despite the political crisis witnessed after the general elections held in December 2007, there is renewed hope that with good governance, improved relationships with bilateral and multi-lateral donors and targeted social and economic interventions, the chances of progressive realization of human rights in general, will improve.

16. There are three arms of the Government: the Legislature, Executive, and Judiciary. Chapter III of the Constitution establishes the Parliament. Section 30 provides that the legislative power of the Republic shall vest in the Parliament of Kenya, which shall consist of the President and the National Assembly. The National Assembly consists of 210 members, elected in constituencies spread throughout the 8 provinces, 12 nominated members and ex officio members (Speaker and the Attorney General). The Presiding Officer in Parliament is the Speaker, who is elected by the members.

17. The President heads the Executive arm of the Government. The Executive acts through a Cabinet which, at the time of writing this report, consists of the President, Vice President, Prime Minister, two Deputy Prime Ministers, and other Ministers. The function of the Cabinet is to aid and advise the President in the governance of the country.

18. As a check against excesses of Government, section 17 (3) of the Constitution provides that the Cabinet shall be collectively responsible to Parliament for all things done by or under the authority of the President or the Vice President or any other minister in the execution of his/her office.

C. General legal framework within which human rights are protected

19. Chapter V of the Kenya Constitution provides for the fundamental rights and freedoms of all persons in Kenya. Section 70 of the Constitution provides “Whereas every person in Kenya is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, tribe, place of origin or residence or other local connection, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest ...,” The importance of this provision lies in the fact that it does not discriminate against foreigners but affords protection of the rights and freedoms of “every person in Kenya” without exception. The principle of non-discrimination was re-affirmed in the case of *Madhwa and others v. City Council of Nairobi*¹ where the court held that the Constitution provided for the rights of the individual as a human being without reference to any matter of nationality, citizenship or domicile. Further the Constitution entitles any such human being to seek redress from Kenyan courts without restrictions as any other Kenyan would.

¹ [1968] EA 406.

20. Chapter IV of the Constitution establishes the Judiciary. Section 60 thereof provides for the High Court as a superior court of record and with unlimited original jurisdiction in civil and criminal matters. Section 64 provides for the Court of Appeal. This is the highest court in the country. It only hears matters on appeal from the High Court and has no original jurisdiction to hear any matter.

21. The Judiciary is headed by the Chief Justice, and consists of Judges of the Court of Appeal and High Court, as well as magistrates courts, which are subordinate courts to the High Court established by Parliament in accordance with the Constitution. These are the courts martial, magistrates' courts and tribunals. Such courts only have such jurisdiction and powers as law may confer on them.

22. The High Court also has inherent jurisdiction to hear cases of violations of fundamental rights. Thus, a complaint touching on the rights in the Convention against Racial Discrimination would be dealt with as a violation of fundamental rights, and would be heard by the High Court. If any person alleges that any of their fundamental rights have been, are being or are likely to be contravened in relation to them, then that person may apply to the High Court for redress. The High Court hears and determines such an application, and issues appropriate orders in accordance with section 84 of the Constitution.

D. Legislative authority

23. The Parliament of Kenya is vested with the power to enact legislation. In the field of human rights, Parliament has established the following institutions:

- (a) The Kenya National Commission on Human Rights (KNCHR);
- (b) The Kenya National Commission on Gender and Development (KNCGD);
- (c) The Kenya Anti-Corruption Commission (KACC);
- (d) National Council for Children Services (NCCS);
- (e) National Council on Persons with Disabilities (NCPD);
- (f) The Kenya Law Reform Commission (KLRC).

24. International treaties are not considered as part of the law of Kenya and cannot be directly applied by the courts, tribunals or administrative authorities in the absence of domestic legislation on the same. The practice is that after ratification, legal and administrative measures are taken to support such instruments. In addition, courts are progressively interpreting the laws of Kenya, in their judicial pronouncements, so that they do not conflict with human rights instruments that Kenya is a party to. This is set to change once the new constitution is adopted.

25. Kenya has ratified the following international human rights instruments:

- (a) The International Covenant on Civil and Political Rights;
- (b) The International Covenant on Economic, Social and Cultural Rights;
- (c) The International Convention on the Elimination of All Forms of Racial Discrimination;
- (d) The Convention on the Elimination of All Forms of Discrimination against Women;
- (e) The Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment;
- (f) The Convention on the Rights of the Child;

- (g) Convention on the Rights of Persons with Disabilities;
- (h) The Convention on the Non-applicability of Statutory Limitation to War Crimes and Crimes Against Humanity;
- (i) The International Convention against Corruption;
- (j) The Convention Relating to the Status of Refugees;
- (k) The Optional Protocol to Convention on the Rights of the Child on the sale of children, child prostitution and child pornography;
- (l) The Rome Statute of the International Criminal Court;
- (m) Forty-nine ILO Conventions, with 43 of them in force.

26. At the regional level, Kenya has ratified the following key human rights Instruments:

- (a) The African Charter on Human and Peoples' Rights;
- (b) The African Charter on the Rights and Welfare of the Child;
- (c) The OAU Convention Governing Specific Aspects of Refugee Problems in Africa;
- (d) The OAU Convention Against Corruption;
- (e) The Protocol to the African Charter on Human and Peoples Rights on the Establishment of an African Court on Human and Peoples Rights.

E. The extent to which human rights treaties have been domesticated

27. Kenya is a dualist State requiring domestication of international instruments in the national arena through legislation by Parliament. In this regard, the United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child and recently the Convention relating to the Status of Refugees and the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa have been fully domesticated by the promulgation of the Children's Act (Chapter 586 of the Laws of Kenya) and the Refugees Act (No. 13 of 2006) respectively. The provisions of these laws are closely modelled on those of the international and regional instruments, with necessary exceptions as necessitated by the circumstances of Kenya. The country has also fully domesticated the four Geneva Conventions through The Geneva Conventions Act (Chapter 198 of the Laws of Kenya).

28. Further, in order to domesticate the Rome Statute of the International Criminal Court and enable Kenya comply with its obligations thereto; Parliament passed the International Crimes Act, 2008. Many other international instruments are given effect in different laws. While some instruments are given effect by a single law, others may be given effect through more than one law. For example, the Convention on the Elimination of All Forms of Discriminations against Women and the International Convention on the Elimination of All Forms of Racial Discrimination have substantially been domesticated through different legislations. The National Cohesion and Integration Act, 2008, is an Act of Parliament to encourage national cohesion and integration by outlawing discrimination on ethnic grounds; to provide for the establishment, powers and functions of the National Cohesion and Integration Commission, and for connected purposes. Ethnic grounds in the Act mean any of the following grounds, namely colour, race, religion, nationality or ethnic or national origins.

29. The courts are also increasingly making judgements which are consistent with international instruments which Kenya is a party to. For example, *Fuad Dumila v. Republic*² addressed the issue of corroboration in sexual offences. The practice that has been invariably followed by the Kenyan courts, despite the absence of an express legal provision, was to require corroboration in all cases where women and girls were complainants in sexual offences, and the basis for this proposition was supposedly on the fact that; "... experience had shown that girls and women sometimes tell an entirely false story which is very easy to fabricate, but extremely difficult to refute". Here, the Court of Appeal upheld a decision by a lower court declaring this requirement unconstitutional and against the tenets of Section 82 of the Constitution of Kenya – the principal constitutional provision against discrimination in Kenya.

30. In the case of *Daniel Musili Nyeki v. Kenya Wildlife Services*,³ the plaintiff's claim was based on the assertion inter alia that the defendant had violated his constitutional rights by treating him in a racially discriminatory manner. The plaintiff claimed that he was paid well below the required salary scale of his position as opposed to the other officials of different races that were in the same rank as his. Here the court ordered the defendant to calculate and pay the due emoluments to avert the discriminatory treatment occasioned to the plaintiff.

II. General legal framework under which racial discrimination is prohibited in Kenya in accordance with the provisions of the Convention

Article 1

31. Although Kenya is a multi-racial, multi-ethnic, multi-cultural and multi-religious society, and historically cultural communities have lived in harmony and mutual respect, there is a recent trend in which cultural identity has been politicized, thus creating serious inter-ethnic conflicts in many parts of the country. Such conflicts have been fuelled, inter alia, by historical differentiations arising from the divide-and-rule tactics pursued by the country's former colonial authorities. For example, the differing colonial and post-colonial access to modernization through education and employment has been used to polarise communities against one another. This has led to certain attitudes, perceptions and prejudices across Kenya's cultural landscape and some very strong feelings of marginalization by a number of communities. Indeed, the political establishment has since independence constantly proclaimed negative ethnicity or tribalism as a threat to national unity. Further, taking citizenship as the principal unit of state organization, it does not explicitly recognize ethnic groups as a locus of political expression and social life.

32. Data on ethnicity has always been collected during national population censuses but is not available in a disaggregated manner. It was found desirable to include ethnic background in the census that was carried out in August 2009 as there is consensus that Kenyans ought to celebrate diversity, and the fact of different ethnic backgrounds should not be suppressed in national activities like the census. However, there was considerable resistance to people stating their ethnic backgrounds. The Government made it optional to either state one's ethnic background or not as Citizenship remains the most important criteria which provides for the direct relationship between a person and the state. The basic

² Criminal Appeal No. 395 of 2002 eKLR.

³ Civil case No. 1278 of 1996.

principle of this is the formal equality of all citizens, as individuals, not as members of communities. This concept has thus emphasised individualism and the importance of national unity at the expense of cultural diversity and communal rights because, for a long time, indigenous cultures were seen as an impediment to forging national unity and nation building. As a result, no specific provisions are made either in the Constitution or in other laws on customary rights on the basis of ethnic, linguistic or cultural orientation. Consequently, there is no common, rallying and distinctive national cultural identity. Wearing “cultural” dress in official settings such as in the National Assembly is discouraged.

33. Nonetheless, as part of the reform measures, the Government of Kenya is cognizant of the fact that affirmation of people’s experiences, values and beliefs is as much a part of building a rich and pluralistic national democratic governance system as is nourishing the cultural manifestation of Kenya’s own identity as a nation state.

34. Therefore, the Government has been educating the public, through the public media, on the need to collect information on tribe/ethnicity due to its statistical and cultural value. The value lies not so much in the numbers but the label/attribute. Ethnic origin data paints a picture of Kenya’s cultural diversity and provides insight into the changing in-migration patterns and increasing diversity.

35. The Government, community groups, ethnic and cultural organizations, school boards, hospitals and researchers use ethnicity data to assess the social-economic characteristics of people of differing backgrounds. It is for this reason that one of the objectives of the Constitution of Kenya Review Act⁴ is to ensure respect for ethnic and regional diversity and for communal rights, including the right of communities to organize and participate in cultural functions and expression of their identities.

36. The Government of Kenya largely treats all foreigners equally including refugees and asylum-seekers of different nationalities due to this principle of non-discrimination on racial grounds. To this end, Kenya has enacted the Refugees Act of Kenya 2006⁴, governing aspects of refugee law. This Act prohibits discrimination of any refugee and/or asylum-seeker by making provisions which are to be enjoyed by refugees and asylum-seekers on equal footing. In ensuring that refugees in Kenya are accorded adequate enjoyment of human rights, the Government has seen to the provision of the following services to the refugees without any discrimination:

(a) Right to public health, medical care, social security and social services whereby all refugees living in the camps are provided with health facilities at no cost. There are health centres which are accessible to them. They have basic amenities, such as antiretroviral medicines (ARVs), which are provided free of charge. In addition to this there is specific attention to pregnant women who are provided with ante natal care and are given mosquito nets;

(b) The right to equal education and training. Refugees in Kenya can also access free primary education provided by the Government;

(c) The right to equal participation in cultural activities. Refugees are able to freely participate in their cultural activities where the Government has, through the World Refugee Day celebrations, organised by the Department of Refugee Affairs, refugees are encouraged to showcase their cultural activities;

(d) The right to access places of service. Refugees and asylum-seekers, in accordance with the International Convention on the Elimination of All Forms of Racial

⁴ Chapter 3A of the Laws of Kenya.

Discrimination, have free access to places of service and can obtain any service for the required fee. The Government has also provided mobile courts in the Kakuma and Dadaab refugee camps, held on a monthly basis but the refugees living in urban areas have access to the courts just like the Kenyans;

(e) Right to human rights education. The Kenya Government encourages the teaching of refugee rights and human rights to not only the refugees but also to surrounding communities. The Government has also been co-operative in the development of a curriculum on training of officers such as Immigration officers and police officers on refugee laws and rights while, the provincial administration has been instrumental in maintaining peaceful co-existence between refugees and host communities.

37. The Government recognizes the plight of the marginalized communities within its population who mainly comprise of pastoralists and hunter gatherers. These communities occupy the Arid and Semi Arid Lands (ASALs) of the country and through the ASALs Policy⁵ that is currently at its advanced stages of development, the development targeting these communities will not only be participatory but also sustainable. The ASALs Policy will seek to among others, ensure that the resources in the ASALs are harnessed not only for these communities to sustain themselves but also to contribute to national economic development. The policy document, prepared through a participatory and consultative process with relevant stakeholders, provides a vision and a practical framework for achieving multiple developmental objectives in the ASALs. It provides a vital link between public policy and the socio-economic needs of ASAL communities. This new vision of hope and prosperity recognizes that the interdependence between ASAL and non-ASAL socio-economic systems is the main driver for sustainable development. To ensure that these measures are realized, the Government has created a Ministry for the Development of the Northern Region, to spearhead efforts to improve development programming for the region.

Article 2

Measures taken to give effect to the undertaking to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity

38. The Kenya Constitution in section 82 prohibits discriminatory treatment either by law or in practice and provides, “the expression “discriminatory” means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, place of origin or residence or other local connection, political opinions, colour, creed or sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description”.⁶

39. The Constitution however recognizes cases where there is disparate treatment which should not be construed to be discrimination as envisaged under section 82. This includes:

(a) Any law in so far as that law makes provision with respect to persons who are not citizens of Kenya;

⁵ The National Policy for the Sustainable Management of Arid and Semi Arid Lands of Kenya.

⁶ Refer to annex 1 for the provisions under Section 82 of the Kenyan Constitution and other legal provisions mentioned in the report.

(b) Where persons are subject to a disability or restriction or are accorded a privilege or advantage which, having regard to its nature and to special circumstances pertaining to those persons or to persons of any other such description is reasonably justifiable in a Democratic society.

40. The courts have also been reluctant to make findings on discrimination where the State is able to prove that some disparate treatment is necessary for the sake of law and order. In the case of *Hersi Hassan Gutale & Another v. Principal Registrar of Persons & Another*,⁷ an application pursuant to the provisions of Section 84 of the Constitution of Kenya in respect of the constitutionality of Gazette Notice No. 5320 dated 7 November 1989 issued by the Principal Registrar of Persons and published in the Kenya Gazette. The Notice was to the effect that ‘... all persons of the Somali ethnic community in Kenya who are aged between eighteen (18) years and above to attend before registration officers at the centres specified ... and furnish such documentary or other evidence of the truth of their registration ...’. The court recognized the need to differentiate and hence classify Somalis of Kenyan origin as against those of other neighbouring regions – a right that even this Convention in its article 1 bestows upon a State party. The court in this case further goes to note the fact that vetting for purposes of the issuance of new generation identity cards in Kenya, is known to have commenced sometime in 1988 and it is an established fact that special border districts vetting committees are in place (to-date) in respect of all border districts. This vetting process was thus an on-going process country-wide. The vetting process is in operation by virtue of bordering other jurisdictions (countries) including Busia, Namanga and Malaba, which are inhabited by other ethnic communities beside the Somali.

41. Public authorities and institutions are expressly prohibited from treating any person in a discriminatory manner under Section 82 (2) of the Constitution. This provision is further strengthened by Section 16 of the Public Officers Ethics Act, No. 4 of 2003 which calls upon public officers to carry out their duties without any favouritism or nepotism. The Act seeks to improve service delivery to the public. Section 77 of the Kenyan Penal Code also expressly prohibits any attempts to do any act with a subversive intention, and the meaning of the term ‘subversive’ here is taken to mean inter alia, acts intended or calculated to promote feelings of hatred or enmity between different races or communities in Kenya.

42. These provisions have recently been strengthened by a number of laws. The most recent is the National Cohesion and Integration Act (No. 12) of 2008 which outlaws discrimination on ethnic grounds. Ethnic grounds is defined in the Act to mean any of the following grounds, namely colour, race, religion, nationality or ethnic or national origins. Specifically, the Act provides that; all public entities must seek representation of diversity in the employment of their staff that shall not comprise more than a third from one tribe. It is illegal for an employer to discriminate in the way he employs or offers terms of employment or dismisses staff or to discriminate in membership of organizations or discriminate the services or benefits a person can access as a member on ethnic grounds. Public resources shall be distributed equitably as far as is practicable geographically taking into account the diversity, population and poverty index. It is illegal for a public officer to distribute resources in an ethnically inequitable manner and it is also illegal for a person to discriminate against another in terms of leasing, sale, disposal or management of public property wholly meant for the public.

43. The Persons with Disabilities Act also forbids discrimination by employers and other people based on “any ethnic, communal, cultural or religious custom or practice”. By

⁷ Miscellaneous Civil Application No. 774 of 2003.

outlawing conflicts of interest (s. 42) and abuse of office (s. 46), the Anti-corruption and Economic Crimes Act (No. 3) of 2003 also further reinforces measures against discrimination.

44. The Proposed New Constitution, reflects the desire by the Government and Kenyans to prohibit discrimination including addressing the problem of marginalization. Discrimination is given a very wide meaning where “The state shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth” . This provision goes further to make provisions for affirmative action programmes and policies designed to benefit individuals or groups who are disadvantaged, whether or not as a result of past discrimination. This is one of the issues which is not contentious and will definitely find itself in a new Constitution when Kenya does put one in place. Moreover, it is an accepted principle by all that the Constitutional reform that the country is undertaking now is also geared towards the reassessment of the relationship between the central government and the different regions thus availing an opportunity to redefine identity and cultural belonging in Kenya.

45. The provisions relating to Kenyan citizenship are found in Chapter VI of the Constitution and the Kenya Citizenship Act, Cap. 170, of the laws of Kenya. They outline the four ways through which a person may acquire Kenyan citizenship which is, either by birth, descent, registration or naturalization. The latter three methods generally apply to persons born outside Kenya. The registration process requires proof of age, usually shown by a birth certificate, and proof of citizenship. This second requirement has been criticized as creating the most obstacles for certain minorities like the Somalis, Nubians and the Coastal Arabs. Typically, individuals obtaining citizenship by birth only need to demonstrate one parent is a Kenyan citizen, usually by presenting a parent’s national ID. However, for Nubians, Kenyan Somalis, and coastal Arabs, the standard is higher and has been perceived to be more arbitrary in practice. Registration officials have broad discretion under Section 8 of the Registration of Persons Act, which allows officers to require an applicant to produce additional evidence “as it is within the power of that person to furnish”. Under Section 5, the Principal Registrar of Persons may demand proof of “other particulars as may be prescribed”.

46. In addition, Kenyan citizenship law does not fully protect women, children, and refugees. Women cannot pass nationality to their children. Children of unknown origin or who might otherwise be stateless, including some orphans and street children, are not automatically granted Kenyan nationality. Refugees cannot naturalize, increasing the risk of statelessness over time.

47. There is evidence that registration procedures which have been viewed as discriminative in the past are being redressed. In March 2003, the Nubian Community in Kenya filed a Constitutional Application⁸ in the High Court against the Government and in 2006; the Community took up the matter with the African Commission on Human and Peoples Rights (ACHPR) at The Gambia.⁹ Both cases are still pending but Nubian leaders attribute recent administrative changes to these efforts. Nubians must still submit to vetting committees, but obtaining the Kenyan national identity card has become much easier. National institutions are taking steps to streamline the registration process, construing national identification as a right rather than a privilege. The National Registration Bureau issued a nationwide directive in 2006 to desist requests for grandparents’ documentation,

⁸ Miscellaneous Application No. 256 of 2003, *Yunis Ali Ibrahim & Others v. The Attorney General & Others*.

⁹ African Commission on Human and Peoples Rights Communication No. 317 of 2006.

though it is suggested that the directive has been implemented in an ad hoc manner. In 2007, the Kenya National Human Rights Commission published an in-depth report on national identity card issuance, with recommendations for legal and administrative changes. The process of developing a centralized database of birth registration information is at an advanced stage and this will help in limiting the practice of discriminatory identification procedures on acquisition of the age of majority.

48. Kenya's personal law and specifically the laws on marriage and divorce make provision for various races in terms of the law relating to the English, Asians, the Muslims and the Africans. During the colonial period, the Courts handled the Europeans and Asian matters at the High Court level, the Muslim matters were handled in the Kadhis court and the Africans sought redress at the African Courts. In the case of *Re Maangi*,¹⁰ an African widow whose husband was a public officer was denied access to the High Court because she was an African. The Court ruled that this was discriminatory against her. She was given access to the High Court to deal with her husband's estate. The African Courts were subsequently done away with. The Marriage Bill, 2009 is expected to deal with discrimination in property ownership within all marriages.

49. Currently, all cases of a civil nature are filed and handled at the magistrates' courts level or, if beyond the magistrates' jurisdiction, the High Court. Outside the court system, the elders' courts for Africans function parallel to the formal court system. Some sects of the Islamic faithful also hold their own courts on personal matters. This also applies to those who profess the Hindu faith. They only approach the court as a last resort. In some rural settings, communities have their own means of settling disputes, for example through a council of respected elders.

50. Attempts have been made to have a uniform law on personal matters relating to marriage and succession. The first President of Kenya set up two Commissions, one on the Law of Succession and another on the Marriage Laws. The Commissions came up with their recommendations, but it was only in 1981, 10 years later, that the Law of Succession Act was passed. The Marriage Bill is still to be passed after 40 years. It is in this regard that the Government, through the Ministry of Justice, National Cohesion and Constitutional Affairs and the Kenya Law Reform Commission, has commenced a review process that will lead to the harmonisation of the marriage and divorce laws. This process has since yielded the Marriage Bill, the Matrimonial Property Bill, the Equal Opportunities Bill, and the Domestic Violence (Family Protection) Bill.

51. With regard to labour issues, as a matter of principle, the laws of Kenya allow any person to work anywhere in Kenya without discrimination with one major challenge. Following the 2008 post election violence, over 800,000 Kenyans were displaced from their homes. This makes it difficult for them to work anywhere. Kenya has opened up its doors to foreign investors, an opportunity which is well received. The Government however is aware that there are race-based challenges relating to Export Processing Zones (EPZs) and other businesses. This manifestation of discrimination relates to segregation in instances where persons of a certain race, although in the unionisable cadre, are restricted from joining trade unions. The elements of discord in these spectra are rooted in the Industrial Relations Charter of 1980 and specifically, Appendix "C", which restrains parties to this agreement from allowing their members to join or form unions, contrary to Section 08 of the Constitution, which states that 'Except with his own consent, no person shall be hindered in the enjoyment of his freedom of assembly and association, that is to say, his right to assemble freely and associate with other persons and in particular to form or belong to trade unions or other associations for the protection of his interests'.

¹⁰ (1968) EALR.

52. Further, most senior officials in the EPZs and other multinational companies are foreigners and in terms of emoluments, there are wide differences between local employees and the foreigners. For example, the Asian community does not employ Africans in the high ranking jobs. In attempts to address some of these shortcomings, the Government has enacted the following:

- (a) The Employment Act, 2007: to declare and define the fundamental rights of employees;
- (b) The Labour Institutions Act, 2007; to consolidate all the laws relating to trade unions and trade disputes and to promote the freedom of association;
- (c) The Work Injury Benefits Act, 2007; and
- (d) The Occupational Safety and Health Act, 2007. Application of the Occupational Safety and Health regulations are now applicable to all workplaces including the EPZs. The provisions are geared towards protection of the employee at the work place.

53. To enhance equitable distribution of development, the Constituencies Development Fund Act (No. 10) of 2003 was enacted. It is one of the recent pieces of legislations which have been used to promote development at the constituency level. The allocation of funds to the constituency is based on an objective criterion of the poverty index. Section 3 of the Act states that the purpose of the Act is to set apart a portion of the annual national budget for purposes of development and in particular, to fight poverty at the constituency level.

54. Sections 4 and 19 of this Act spell out the budget ceiling for each Constituency, which shall be three quarters of a set percentage of all the Government ordinary revenue collected in every financial year divided equally amongst all the Constituencies and a further amount equal to a quarter the set, percentage of the annual ordinary revenue, divided by the national poverty index and multiplied by the Constituency Poverty Index. This is an initiative also geared towards ensuring the devolution of resources to correct instances of marginalization of some of the areas in the country that have lagged behind in development due to historical injustices. Measures to strengthen the fund management to ensure sustainable benefits are constantly under review and implemented.

55. The Land question in Kenya remains one of the most emotive issues which usually flare up ethnic animosities. Kenya has not had a clearly defined National Land Policy since independence. This, together with the existence of many land laws, some of which are incompatible, has resulted in a complex land management and administration system in fragmentation, breakdown in land administration, disparities in land ownership and poverty. This has led to environmental, social, economic and political problems including deterioration of land quality, squatting and landlessness, disinheritance of some groups and individuals, urban squalor, under-utilization and abandonment of agricultural land, tenure insecurity and conflict.

56. To address these problems, the Government embarked on the formulation of a National Land Policy through a widely consultative process with the aim of producing a policy whose vision is "To guide the country towards efficient, sustainable and equitable use of land for prosperity and posterity". A wide range of stakeholders from the public, private and civil society sectors contributed towards the policy formulation through thematic groups-based discussions, regional workshops and written submissions.

57. Past initiatives such as the Presidential Commission of Inquiry into the Land Law Systems of Kenya, the Constitution of Kenya Review Commission and the Presidential Commission of Inquiry into the Illegal/Irregular Allocation of Public Land have largely informed the land policy formulation process. This Policy was approved by Cabinet on 25 June, 2009. The policy will among other things; seek to deal with historical land injustices, inequitable distribution of land and non-recognition of community-based land interests in

favour of Pastoralists and other marginalized communities. The Policy seeks to introduce far-reaching reforms, paving way for the permanent resolution of Kenya's perennial land problems. The adoption of the policy was a crucial aspect towards the realisation of Agenda Four of the National Accord, which spells out various measures to correct and punish historical injustices to avoid a recurrence of the violence that rocked the country in 2008.

58. The Government of Kenya has also developed a National policy and Action Plan on Human Rights. The process was highly participatory with public regional hearings to allow for contributions by as many stakeholders as possible. The formulation process had on board both State and non-State actors with all the Government Ministries represented in the National Steering Committee to ensure that human rights are mainstreamed across the different sectors.

59. It is anticipated that once the policy framework is adopted, issues of discrimination will be dealt with to a large extent. The mobilization exercise to facilitate the collection and collation of views from the citizenry, which formed the basis of the human rights policy document, took an activist model in approach. This meant sensitizing the citizens on their rights to ensure that their contributions to the policy were well informed. The Government has also been able to identify human rights problems that require urgent responses. For example, the Government has so far convened peace meetings through the Provincial Administration and community members to address ethnic based conflicts and seek solutions to the root causes of these conflicts.

Court decisions against different types of discrimination

60. Some of the judicial positions held by the Kenyan Courts against discrimination are demonstrated by the following decisions.¹¹ In the case of *Rangal Lemeiguran & Others v. Attorney-General & Others*,¹² an application was brought on 12 March, 2004 by the Il Chamus Community under the provisions of Section 84 (1), 1 and 1A and Section 33 of the Constitution of Kenya. The Application was brought against the Attorney-General (on behalf of the Government of Kenya as its principal legal adviser), and the Electoral Commission of Kenya (as the body charged with the creation and distribution of constituencies under the Constitution). The Il Chamus Community prayed, inter alia, for a declaration that the statistical chance of an Il Chamus candidate being successful as a member of Parliament in the present Baringo Central Constituency is in practice so minimal as to effectively prevent any such membership of Parliament by such candidate for the foreseeable future, (as this has not happened in the past forty years). As a consequence thereof, they claimed that the entitlement of the Il Chamus community to the fundamental rights of freedom of expression, and freedom of conscience protected under Section 70 of the Constitution of Kenya had been contravened.

61. The Il Chamus sought a further prayer that the present Baringo Central Constituency be divided by the next Boundary Commission into two separate constituencies so as to prevent the present electoral marginalization of the Il Chamus. They further prayed for a declaration that a person from the Il Chamus community ought to be appointed as a Nominated Member of the National Assembly to represent the special interest of the Il Chamus community.

62. The Court held that minorities such as the Il Chamus have the right to influence the formulation and implementation of public policy, and to be represented by people belonging to the same social cultural and economic context as them. For a political system

¹¹ Refer to table 1 in annex two of the report for case summaries.

¹² Miscellaneous Application No. 305 of 2004 eKLR.

to be truly democratic, it has to allow minorities a voice of their own, to articulate their distinct concerns and seek redress and thereby lay a sure base for deliberative democracy. Only then would a Nation such as ours, truly claim to be a rainbow democracy.

63. The Court found that the ECK had not demonstrated clarity of thought as regards its role. On the other hand, the II Chamus were able to demonstrate that in the history of nominations under s 33, it is only the blind that had been represented, in one of the terms of Parliament. The Court also noted that ,with no doubt each age will have its fair share of minorities and special interest groups , but in our time they include the blind, the deaf, the physically challenged and the youth in addition to the groups identified earlier. The ECK therefore had a responsibility of identifying all the categories and to ensure that the lists reached the political parties and other organs with the power to appoint under s 33. In the Court's view, the current position of letting the parties nominate a candidate of their choice who does not satisfy the constitutional criterion is challengeable and patently unconstitutional.

64. The Government has also taken legislative and administrative measures to curb discrimination. These include; the establishment of The Kenya National Commission on Human Rights (KNCHR) by an Act of Parliament¹³ to spearhead the Government's efforts in the promotion and protection of human rights. The creation of the Commission is reflection of the Government's desire towards a greater realization of human rights. The main roles of the Commission are to act as a watch-dog over the Government in the area of human rights and to see to the realization of Kenya as a human rights State. The Commission has been at the forefront in addressing subtle cases on discrimination reported to it through its human rights complaints unit.¹⁴ The Commission has quasi-judicial powers to hear and determine complaints of, among others, discrimination.

65. The Commission is largely used by poor petitioners for its free and non-bureaucratic nature of procedures and interventions. Examples of cases that the national Commission has handled include: *Pangani Girls' School Parents v. the School Headmistress*¹⁵ filed in March, 2007. This complaint was based on allegations that Muslim students were being compelled to seek permission from the headmistress to exercise their freedom of worship. Being a government school, the parents contended that, the school ought to be tolerant to all religions equally and that it should not have an official religion. The commission, while appreciating that the freedom Worship of each and every citizen must be guaranteed as provided for under the Constitution compelled the Ministry of Education to intervene and resolve the matter.

66. The Complaint against the head teacher of St. Monica's Girls School,¹⁶ was based on the alleged discrimination of three St. Monica's Girls School students on the basis of their seventh day Adventist (SDA) religion. The said students were expelled from the school for allegedly refusing to sit exams on a Saturday (doing so would have amounted to breaking their Sabbath, contrary to the SDA faith).Again, the complainant contended that being a public school, the religious rights of the girls ought to have been respected as the school should be tolerant to all religions. The school had a choice of fixing the exams dates on weekdays or on Sundays, for the sake of the SDA students whose religion did not allow its followers to work on Saturdays. In admitting the complaint, the commission cited the

¹³ The Kenya National Commission on Human Rights Act, 2002.

¹⁴ Refer to table 2 in annex two of the report for the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)- related complaints made to the KNCHR's Complaints and Redress Department.

¹⁵ KNCHR/PET/GEN/VOL.XXII.

¹⁶ KNCHR/2006/1048.

provisions of among others, Article 5 (d) (vii) of the International Convention on the Elimination of All Forms of Racial Discrimination, which guarantees the freedom of worship and religion. In addition, the commission also relied on Section 78 of the Constitution, which guaranteed the freedom of worship. The Commission conducted investigations into this issue and having received little cooperation from the school administration, forwarded their investigation report to the Ministry of Education for directions and at the same time, the matter was placed before the Complaints hearing panel of the Commission for determination of remedies including compensation if any.

67. In another complaint in which the petitioner cited an allegedly discriminatory advertisement in the daily Nation newspaper of 30 December 2005,¹⁷ the complainant cited that a classified advert appearing on page 42 of the Daily Nation newspaper was discriminatory on racial grounds. The advert read in part: DATSUN 1200 p/up local; KAL Asian accident-free 320,000 Which, in the complainant's view, the reference to 'Asian' in the advert was intended to encourage potential buyers to assume that the better quality of the car in question was assured because it was owned by an Asian (as opposed to it being owned by an African). In its report, the Commission noted the fact that Section 82 (3) of the Constitution of Kenya defines 'discrimination' as affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, place of origin or residence or other local connexion, political opinions, colour creed or sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.

68. According to the commission report, a careful reading of Section 82 (3) shows that it seeks to prohibit discriminatory treatment through disabilities, restrictions, privileges or advantages. It does not purport to prohibit the expression of discriminatory ideas or opinions. This has been made clear by the Kenyan courts in a number of decisions including *Ng'ang'a v. Republic*¹⁸ where it was held that the meaning of 'discriminatory' in section 82 of the Constitution is not the same as its natural or ordinary use. It is limited to what the Judge referred to as a 'special restrictive manner' to the unequal treatment situations set out in sub-section 3.¹⁹ The Commission further noted that the restriction of the term 'discrimination' to treatment rather than a wider expression is found in many jurisdictions. Black's law Dictionary²⁰ defines discrimination as 'a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured'. Further, the commission noted the definition of discrimination as contained in the International Convention on the Elimination of All Forms of Racial Discrimination that discrimination is established in acts of distinguishing, excluding, restricting or preferring and not merely in identifying oneself on the basis of race.

69. The Commission referred to an earlier ruling it made on discriminatory advertising for housing highlighted in the commission's report for 2004/2005. The Advertisement placed by Villa Care Ltd in the East Africa Standard newspaper read: "Westlands, I bed-roomed flat, self-contained, Asians only, 18,000" where the commission pointed out the discriminatory nature of the advert as advertising a property as only being available for rent by Asians.

¹⁷ KNCHR/2006/1021.

¹⁸ (1985) KLR 451.

¹⁹ Ibid. at 456.

²⁰ Black's Law Dictionary 7th Edition Edited by Byran Garner & Henry Black Penguin Books New York 2006.

70. The real Estate Agents, Villa Care, duly apologized and withdrew the advertisement. Unlike in the Villa Care advertisement, the Commission noted that the present advert did not seek to place restrictions or burdens; or privileges or advantages to a particular group of potential buyers. The advertiser merely sought to take advantage of a prejudice that might exist in a society that allegedly assumes, rightly or wrongfully, that Asians are better at maintaining their vehicles than other races. The petitioner invited the Commission to take action against what to him amounted to an indirect expression of a racial prejudice rather than an overt case of racial discrimination. The Commission noted however that, the mere expression of a prejudicial opinion is not tantamount to discrimination. All over the world, advertisers use phrases such as ‘lady owner’ and ‘ex-pat owned’ to exploit the prejudices held by those societies about how women and expatriates maintain their cars. They may be unfortunate but it is not unlawful discrimination.

71. The Commission however made it clear that it was not holding the opinion that, nothing should be done about offensive racial stereotyping in the media, whether in editorial content or in advertisements. Media organizations have a moral and social obligation to make a positive contribution to the fight against racism tribalism, sexism and other forms of intolerance. The commission strongly recommended that by way of self-regulation, clause 13 of the Media Council Code of Conduct should be applied as much to advertisements as to editorial content. The Clause provides that, ‘in general, the media should avoid prejudicial or pejorative reference to a person’s race, tribe, Clan, Religion, sex or handicap. These details should be avoided unless they are crucial to the story. In its recommendation to Nation Media Group (NMG), the Commission stated that the NMG should encourage its stakeholders, including advertisers, to avoid references that tend to stereotype certain groups of people. In particular, the NMG should consider applying Clause 13 of the Media Council Code of Conduct to the advertisements that they carry.

72. The Government has also set up the National Commission on Gender and Development to also fight gender based discrimination. This commission was established to coordinate, implement and facilitate gender mainstreaming in national development and to advise government on all aspects thereof. Through the commission, the government has developed the National Gender and Development Policy out of recognition that development policies so far passed do not affect all Kenyans uniformly and that differences invariably arise on the basis of age, cultural practices and beliefs among others.

73. The Government has also put in place legislation against discriminatory practices in different sectors of the economy. Some of the Legislative initiatives include:

(a) The Non-governmental Organizations Co-ordination Act (No. 19) of 1990 under which the NGO Co-ordination Board in collaboration with the National Intelligence Services (NSIS) ensures that the registration and the conduct of Non-Governmental organizations is not driven by ethnic bias and does not perpetrate ethnic stratifications in the country;

(b) The Societies Act (Cap. 108), which governs the registration of societies which previously included political parties, sets out the criteria of registration of such societies. It prohibits the registration of ethnically based parties. Here the Government seeks to eliminate politically instigated hate propaganda and speech. This arises from the fact that due to ethnic diversity in Kenya, political bargaining tends to take the ethnic angle flavoured by hate language. This often leads to the discrimination and further marginalization of minority groups without the political muscle owing to their numbers and other disadvantages;

(c) The Penal Code (Cap. 63) prohibits illegal assemblies, proscribed groups – vigilantes, administering or taking of illegal oaths as one way through which ethnic based groups could be held accountable;

(d) The Political Parties Act (No. 10) of 2007 in s. 14 prohibits ethnic or religious parties;

(e) The KNCHR has also recently drafted legislation against hate speech that is tailored to generate ethnic, racial, etc hatred against a section(s) of Kenyan society.

74. In addition to the above, special and concrete measures have been taken in the social, economic, cultural and other fields to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms, in accordance with article 2 paragraph 2 of the Convention. These include:

(a) The Arid and Semi-arid Lands (ASALs) Policy whose development is under the Arid Lands Resources Management Programme (ALRMP),²¹ focuses on the revitalization of the Arid and Semi-arid Lands (ASALs) of Kenya. ASALs in Kenya constitute about 80 per cent of the country's land mass; host about 10 million people and approximately 70 per cent of the national livestock herd. The document signifies government commitment to the development of ASALs taking cognisance of the fact that Kenya will not achieve sustained growth in her national economy as long as the ASALs and their enormous resources are not factored into effective national planning and development. The policy document has been developed through a participatory consultative process that marks a major departure from similar past endeavours aimed at improving ASALs. It outlines priorities and measures necessary to bring about sustainable development in the ASALs that have in the past been associated only with poverty and need. It underscores the importance of the ASALs to the rest of Kenya's economy and identifies areas where the ASALs contribute significantly to the country's development;

(b) Devolved Funds are a Government initiative, which aims at unifying development and access to national resources in all the regions. The devolved funds include the Constituency Development Fund (CDF), the Local Authority Transfer Fund (LATF), Road Maintenance Fuel Levy Fund (RMLF), Constituency Bursary Fund (CBF) and The Free Primary Education (FPE). The allocation of these funds is based on, among other factors, the poverty indices per constituency. Recently, the Youth Enterprise Development Fund, the Women's Enterprise Development Fund and the Disability Fund have also been added to direct resources towards these hitherto marginalized groups;

(c) The Government has also established the Ministry of Northern Kenya and other Arid Lands since 2008. The ministry now leads efforts of co-ordinating development activities in North-Eastern Kenya and other ASALs.

Article 3

Measures taken to condemn racial segregation and apartheid

75. There has never been any form of apartheid in Kenya. With regard to racial segregation, during the colonial period, there was de jure segregation in terms of development, land use and housing. There were also some economic activities that the Africans could not engage in like growing coffee. For purposes of segregation, the Africans were referred to as the Natives and were confined to certain rural areas that were specifically reserved for the Africans and were referred to as the "African Native Reserves" while the whites were in the "White Highlands".

²¹ The ALRMP is a special department under the Ministry of Special Programmes in the Office of the President.

76. In the capital city of Nairobi, there were areas specifically designated for the various racial groups. For example, Karen, Milimani and Kilimani areas were reserved for the whites, Parklands and Westlands were reserved for the Asians while Black Africans were confined to the Eastlands area, which due to its flat topography, has poor drainage and therefore attracts a lot of mosquitoes. The Africans were also required to identify themselves using an Identification Card known as the “Kipande” wherever they went. This ensured that the racial stratification was maintained.

77. The Kenya National Commission is carrying out an investigation into how this stratification continues to influence practice where certain pre-requisites are placed on individuals seeking residence in certain areas, especially where such adverts are published in the local daily newspapers. An example is where landlords demand that their would-be tenants, must be vegetarian or Muslim. This specifically qualifies persons of Asian descent and disqualifies majority of the Black Kenyans.

78. In the past, there have been expressed aversions in certain communities with regard to inter marriages. This is mainly due to clashes in cultural norms, beliefs and practices. This is demonstrated by the landmark ruling in the *S.M. Otiemo Case*.²² Over the years, increasingly, there have been inter-ethnic and inter racial marriages in Kenya. These gains may be reversed by the post-election’s violence witnessed after the December 2007 elections. To mitigate this, the Government has created a fully fledged Department, under the Ministry of Justice, National Cohesion and Constitutional Affairs to foster national cohesion and integration. A new law, the National Cohesion and Integration Act, has been conceived to, amongst others, “encourage national cohesion and integration by outlawing discrimination on ethnic grounds”.

79. In the tourism sector, there is a tendency to offer preferential treatment to foreigners at the expense of the locals but, there has been an awakening on the need to promote local tourism as this is sustainable, in the face of all the travel advisories that foreign countries issue against Kenya whenever it experiences any disturbance, even if the treat is external.

Interventions

80. After independence, Kenya remained substantially racially segregated until the Government begun to put in place policies that sought to reverse racial discrimination e.g. policies that ensured equitable access to land by all Kenyans etc. Section 82 of the Constitution of Kenya prohibits discrimination on the basis of among other issues, residence and all Kenyan citizens have a right to live freely in any part of the country without restriction. The Government of Kenya also encourages all Kenyans to settle in any part of the country without fear. The Constitution sanctifies ownership of private property wherever that property is situated irrespective of who owns it.

81. There have been established various commissions to look into the issues of ethnic based clashes/conflicts in Kenya including the Commission of Inquiry into Tribal Clashes (Akiwumi Commission , 1998), the Ndung’u Commission of 2003, to look into inequitable land ownership and/or acquisitions in the country including Illegal/Irregular Allocation of Public Land and the Presidential Commission on the Land Law Systems in Kenya (The Njonjo Commission of 1999). One of the main recommendations of the Njonjo Commission was the need for an elaborate and comprehensive land policy for Kenya, a process that has since been undertaken.

82. On 9 of February, 2006, the Ministry of Justice was also tasked with the responsibility of coordinating the implementation of the Ndung’u Report. The Ndung’u

²² Civil case No. 4873 of 1986 (1987) KLR, p. 371.

Commission had been established in 2003 as a transitional justice mechanism to look into the irregular and illegal allocations of public land since Kenya's independence in 1963. The land in issue includes urban, land belonging to state corporations and Ministries, settlement schemes and community trust lands, forests, game reserves, national parks, riparian river reserves and protected areas.

Article 4

Measures to condemn all propaganda and all organizations based on ideas or theories of superiority of one race or group or that promote racial hatred and discrimination in any form

Administrative measures

83. Kenya has experienced a number of ethnically instigated clashes during the general elections. This is mainly attributed to the colonial legacy, which is essentially historical but with ramifications in the post independence era. The indirect rule administered by the British colonialists later turned out to be the 'divide and rule' strategy which polarized the various ethnic groups in Kenya. This in turn contributed to the subsequent incompatibility of these ethnic groups to build one nation-state. The early political parties in Kenya that championed the nationalist struggle against colonial establishments were bore the marks of distinct ethnic unions. The Kikuyu had the Kikuyu Central Association (KCA), the Akamba, the Ukambani Members Association (UMA), the Luhya the Luhya, Union (LU), the Luo, the Young Kavirondo Association (YKA), the Kalenjin ,the Kalenjin Political Alliance (KPA), the Coastal peoples, the Mwambao Union Front (MUF) and the Taita had the Taita Hills Association (THA).

84. Land is yet another source of ethnic conflicts in Kenya, both in the long term and in the short term. As a result of the massive land alienation activities in the early period of colonialism, many of the hitherto cultivating populations were pushed into the non-productive native reserves that were not conducive for arable farming. The displaced populations lived as farm laborers, casual workers, tenants as well as squatters. The process of land alienation was also extended to the pastoral ethnic groups like the Maasai, Samburu, Nandi, Pokot and other Kalenjin speaking communities. Like their agricultural counterparts, the pastoralists were pushed to the less conducive reserves. During the period of nationalism and decolonization, land grievances were central to all ethnic groups that actively participated in the struggle for independence. In fact the land question is one of the main factors for the Mau Mau rebellion of 1952 to 1956 in Kenya and the subsequent declaration of the state of emergence by the British. On the eve of independence, a formula of handing over land to the indigenous ethnic groups in Kenya was worked out. A special grant was established aimed at facilitating the re-distribution of land, particularly in the former white highlands. Peoples' expectations during the struggle for independence was that, the land would be freely distributed to the people since it had in the first place, been forcefully taken away from them.

85. However, this did not happen as the British advanced a loan to Kenya to facilitate this purchase. This made the land very expensive for the common man. This is the critical point at which the subsequent land-tenure became a factor of ethnicity and hence intensifying ethnic animosity.

86. The land commissions discussed above were geared towards addressing the historical land injustices and ensure equitable distribution of land resources in Kenya. Towards this end, the Kenya Economic Recovery Strategy for Wealth and Employment Creation (ERS) 2003–2007 committed the Government to develop a clear time bound action plan for implementing recommendations of the Njonjo Commission. There have also

been a number of initiatives to resettle the landless and the squatters including the creation of settlement schemes and allocation of Government land.

87. The Government has also conducted training for law enforcement officials on solving land disputes; created social awareness on human rights through the National Human Rights Policy and Action Plan development process; and the implementation of the Rapid Results Initiative, together with performance contracting for senior civil servants to facilitate implementation of government action.

Legislative measures

88. To address these injustices that have led to skewed distribution of land based on racial grounds; the Government has put in place a number of interventions including a comprehensive National Land Policy which has been approved by cabinet and awaits deliberation and adoption by parliament.

89. There exists a Code of Conduct for the media in which the media is compelled to avoid prejudicial or pejorative reference to a person's race, tribe, clan, religion, sex or handicap unless these details are crucial to a story. The enforcement of the Code of Conduct has however proved to be a challenge. The Government has enacted the Media Act which will among other things demand for the enforcement of the Code of Conduct. The Government is also pushing for the enactment of the Freedom of Information Bill which will regulate the content of information distributed to the public to curb cases of incitement and hate speech.

90. The Government has also drafted the Equal Opportunities Bill whose object will among others be to "Promote Equality of Opportunity and to counteract direct and indirect discrimination on the grounds of gender, race, ethnicity, religion, disability or any other of the prohibited grounds". This Bill is awaiting enactment.

91. The Government has set up devolved funds to ensure equitable distribution of funds such as the Constituency Development Fund, the Constituency Bursary Fund, and the Local Authority Transfer Funds among others. These funds seek to enhance equitable development at the grassroots level.

92. Section 77 of the Kenyan Penal Code on the other hand, expressly prohibits any attempts to do any act with a subversive intention, and the meaning of the term 'subversive' here is taken to mean, inter-alia, acts intended or calculated to promote feelings of hatred or enmity between different races or communities in Kenya.

93. The Children Act too, prohibits discrimination on among other grounds, race and prescribes a punishment of imprisonment of one year or in default the sum of Ksh. 20,000/- (US\$ 300).

Article 5

Article 5 (a)

Access to justice

Constitutional guarantees

94. Section 77 of the Constitution provides for fair hearing to be afforded to all persons before a court of law. Where a person is charged with a criminal offence, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court. The section speaks of 'person' and therefore does not discriminate against colour, nationality descent or ethnic origins. Everyone is entitled to a

fair trial in criminal matters. In addition, Section 82 (1) of the Constitution provides that no law shall be made that is discriminatory of itself or in its effect. It outlaws discrimination on grounds of race, tribe, place of origin or residence or other local connexion, political opinions, colour, creed or sex. Further Section 82 (2) provides that no person shall be treated in a discriminatory manner by a person acting by virtue of any written law or in the performance of the functions of a public office or a public authority. Moreover, section 84 of the Constitution provides for constitutional redress in the event of discrimination on the grounds of race. A petition is made to the high court under the Enforcement of Fundamental Rights Practice and Rules.

95. The Constitution provides that only the High Court has the mechanisms to address violation of discrimination on the basis of race. However, the distribution of the High Court in Kenya does not sufficiently provide access to justice by a majority of vulnerable or minority communities, especially in the ASAL areas. In order to militate against this anomaly, there has been an initiative geared towards the establishment of small claims courts as well as a comprehensive legal aid and education policy.

96. However, there still exists lack of effective awareness of the human rights by the ordinary citizen who may not effectively utilize the availability of remedies available for addressing the violation of the right to non-discrimination against ethnic or national origin to effectively utilize Section 84 of the Constitution. The ongoing National Policy and Action Plan development process has been an effective tool through which awareness creation has been effected where Kenyans are sensitised on their rights to enable them participate in the process from an informed position.

97. For child offenders, the Children Act provides that where the child is unable to obtain legal assistance, he/she be provided assistance by government in the preparation and presentation of their case.

98. The Government of Kenya has taken a number of initiatives and laid emphasis on the need for an active and widespread legal aid system that enables law and justice to reach the people, rather than requiring people to reach out to the law. Lack of access to justice is, in and of itself, a form of discrimination to the extent that it denies people the equal protection of the law. However, the implementation of the National Legal Aid (And Awareness) Scheme, now underway after a successful pilot, is expected to progressively ameliorate this problem for indigent Kenyans.

Legislative interventions

99. The Government has, through the Ministry of Justice, National Cohesion and Constitutional Affairs, identified access to justice as a major challenge in the country. It is therefore working towards making justice accessible to the people through increasing availability of legal services by recognition of community justice systems, establishment of small claims courts, support for small business legal advice centres, support for mediation initiatives and the development of a well-structured National Legal Aid (And Awareness) Scheme that would cover legal advice, awareness and representation, focusing on the people and cases where it is most needed. This is being undertaken under the auspices of the Governance, Justice, Law and Order Sector (GJLOS) Reform Programme with the involvement of all stakeholders to ensure that legal education and aid becomes a reality in Kenya. There has been a shift in state policy, which among other things, emphasizes access to justice as a basic right and the provision of affordable, accessible, efficient, convenient and fair dispute resolution mechanisms as critical for poverty reduction and sustainable economic development.

100. Since 2001, there have been policy pronouncements recognizing the importance of Legal Aid and Awareness as part of the process of development in Kenya. The Poverty

Reduction Strategy Paper for 2001–2004 noted that “communities and the poor cited lack of access to socially responsive and affordable legal and judicial services as critical issues that need to be addressed by the Government in the fight against poverty. It is the poor who suffer most from the effects of weak, unaccountable and insensitive legal and judicial systems”.

101. The country has acknowledged that delivery and access to adequate and quality legal services is an insurance against abuse of human rights, especially for the disadvantaged groups in society. It concludes that: “Efficient and easy access to timely, efficient and affordable legal and judicial services encourages the culture of law-abiding citizenry which is a prerequisite for social, political and economic development ... Administration of justice is critical in alleviating poverty as it creates an enabling environment for investment”.

102. The importance of reliable and accessible dispensation of justice to a well-functioning society was reiterated in the Investment Programme for the Economic Recovery Strategy for Wealth and Employment Creation, 2003–2007, commonly known as the ERS. The paper affirmed that “a sound system that is speedy, accessible and affordable to the poor, fair and not corrupt promotes and sustains economic development.”

103. Besides these two important policy documents, the Governance, Justice, Law and Order Sector (GJLOS) Reform Programme’s Medium Term Strategy, 2005/06 to 2008/09 recognized the challenges that face access to justice, especially for the poor, and proposes as a key result area ‘improved access to justice’ which involves providing the poor, marginalized and vulnerable with improved access to justice that is affordable, speedy, relevant and effective in relation to both the state and non-state justice systems. The GJLOS programme aims at reforming the entire legal and justice sector with a view to establishing an effective, fair and efficient governance and administration of justice that will respect, promote and protect human rights.

104. The general import of these policy pronouncements is that the Government does not consider access to justice, especially for the poor, marginalized and vulnerable, as an act of charity or a form of philanthropy, but as a process that underpins development in general and poverty reduction in particular. Thus, establishment of a legal education and aid scheme is considered an integral part of access to justice in particular, and development planning and implementation in general.

105. The Government, through the Ministry of Justice and Constitutional Affairs, has established a National Legal Aid (and Awareness) Steering Committee whose objectives include the establishment of a framework for a nationwide Legal Aid (and Awareness) Programme and to offer policy direction to the National Legal Aid (and Awareness) programme in Kenya. The National Legal Aid (And Awareness) Scheme was launched in 2007 is expected to bring justice closer to Kenyan citizens and transform the face of justice in the country. This Scheme will bolster other Government efforts aimed at ensuring that the citizens’ rights are protected and shall have far-reaching benefits for all, especially the poor and most vulnerable in our society.

106. In addition, in June 2007, the country established a Public Complaints Standing Committee whose functions shall among others be to act as the precursor to the creation of an Ombudsman.

107. There is also, established within the Kenya National Commission on Human Rights, a Complaints and Investigations department which is charged with the task of investigating complaints of human rights violations. Upon completion of investigation and if found valid, the matter(s) is referred to a tribunal within the commission for determination and whose findings are certified by the High Court. (Refer to article 2 for some of the Convention on the Elimination of All Forms of Racial Discrimination (CERD)-related complaints addressed by the KNCHR). The KNCHR is also decentralising its operations through the

establishment of its branches in various parts of the country. There are two branches of the commission established at the grassroots level.²³ The notable aspect of the two offices is the fact that they are located in some of the most marginalized areas occupied by pastoralist communities.

108. The efforts of KNCHR are now being augmented by the Public Complaints Standing Committee, to which public complaints of maladministration (including discrimination in service delivery can be directed). Human rights NGOs also play a supporting role in the provision of legal aid and other services to improve access to justice.

Judicial measures

109. Even though the legislation does not effectively provide group based adjudication of claims, there have been positive judicial decisions which have the effect of recognizing group rights and prohibiting discrimination based on ethnic origin. A case in point is the IL Chamus case cited earlier in this report.

Article 5 (b)

On the right to security of person and protection by the State against violence inflicted by government officials, individuals, groups or institutions

Constitutional guarantees

110. Section 71 guarantees the right to life except in execution of a sentence of a court. However, there are some exceptions to this rule. Section 71 (2) provides an exception if a person dies as the result of the use of force to an extent as is reasonably justifiable in the circumstances of the case:

- (a) For the defence of any person from violence or for the defence of property;
- (b) In order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
- (c) For the purpose of suppressing a riot, insurrection or mutiny; or
- (d) In order to prevent the commission by that person of a criminal offence, or if he dies as the result of a lawful act of war.

111. Section 74 of the Kenyan Constitution prohibits torture and any other degrading treatment. The Constitutional provision has been duly operationalized by the Statute Law (Criminal Amendment) Act 2003 which amended all the existing laws which hitherto allowed corporal punishment and makes inadmissible any confessions made before police officers or in police stations. In 2007 under the Statute Law (Miscellaneous Amendment) Act 2007, this position was reversed to allow for confessions made to a police officer of the rank of inspector and above to be admissible in court.

112. The Government of Kenya is also party to the International Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment is in the process of developing legislation to domesticate the Convention.

113. During the reporting period, as discussed elsewhere in this report, the country has had a lot of challenges dealing with organized crime and ethnically motivated clashes that may largely be attributed to scarcity of resources and not about ethnic backgrounds *per se*.

²³ One office has been established in Kitale and another in Wajir.

These have had negative impact on the security of individuals. A bill to outlaw organized criminal activities is already at an advanced stage while on-going reforms in the law enforcement system will largely address most of the security challenges that Kenya has experienced in the recent past.

Other legislations and administrative measures

114. The Police Department, established under the Police Act, has authority and power to provide security services to all citizens equally. Several initiatives have been put in place by KNCHR to train the police on basic human rights procedures when handling suspects.

115. The Government has established an independent Civilian Oversight Board with members drawn from civil society organizations, government and private sector to strengthen the public complaints mechanism against law enforcement officers. The Government has also established extra police stations, posts and patrol bases in areas prone to violence and in particular areas from which IDPs were evicted to enhance their protection.

116. The Kenya Prisons Service (KPS) has also been working closely with Kenya National Commission on Human Rights (KNCHR), Institute for Education in Democracy (IED) and the Legal Resources Foundation (LRF), among others, in educating prison officers on the need to implement and observe the Standard Minimum Rules as set in the international legal instruments on the treatment of offenders.

117. The Government is sensitive to gender dimensions of torture especially the increased vulnerability to women and children to certain practices which fall within the definition of torture. The law prohibits and criminalises Female Genital Mutilation (FGM) and early forced marriages. These are enshrined in the Children Act and under the Sexual Offences Act. The Ministry of Gender, Children and Social Development coordinates inter-ministerial committee on FGM that spearheads the implementation of the National Action Plan for the eradication of FGM.

Article 5 (c) Political rights

Right to participate in elections

118. Section 32 (2) of the Constitution of Kenya provides for the right to vote. Every person registered in a constituency as a voter has a right to vote subject to few limited exceptions which do not have an effect of perpetuating racial discrimination. The section states, in part, that ‘... every person who is registered in a constituency as a voter in elections of elected members shall, unless he is detained in lawful custody, or is disqualified by law from voting in those elections on the ground of his having been convicted of an offence connected with elections or on the ground of his having been reported guilty of such an offence by the court trying an election petition, be entitled so to vote in that constituency in accordance with the law ...’.

119. Section 33 of the Constitution provides for nomination by political parties of 12 members of parliament appointed by the President of the Republic in accordance with the proportion of seats garnered by each party in the parliamentary elections. The Constitution does not however define special interests. However, the Constitutional Court through the *II Chamus* case has attempted to define Special interests as interests which the normal electioneering process has failed to capture and represent. Thus a constituency which is otherwise well represented by a representative and has a distinguishable minority who cannot on their own make any difference to the outcome of the election has been judiciary

recognized as a special interest group for purposes of this section. However the law does not dictate to political parties on whom they should nominate to Parliament.

120. The Elections Act, Cap. 7 is an enabling legislation which provides further guidelines on electioneering process. It provides for a process of continuous registration of voters with exception of the period of elections and further reinforces the need for registration as voters on the age of majority.

121. The Election Regulations under Cap. 7, enables the ECK to facilitate pastoralist areas in registration and voting for pastoralist communities. This includes the establishment of mobile registration and polling stations by the Government in order to address the problem of marginalization and address the question of mobility of the Pastoralist communities due to the nature of their livelihoods.

122. Further, the 3rd schedule to the Act provides for the Election Code of Conduct which binds the Government, all political parties, candidates to promote conditions conducive to free and fair elections and a climate of tolerance in which political activity may take place without fear, coercion, intimidation and reprisal. The Electoral Commission also has in place public inquiry mechanisms during the review of Constituency Boundaries that has the effect of collection and collation of views of all persons including minority communities and marginalized groups.

Participation in public service and affairs at all levels

Employment in government and public service

123. There are various Commissions which have been constitutionally created and specifically charged with the task of ensuring adequate and effective participation of the public in government and ensure participation in the conduct of public affairs. They include Public service Commission, Parliamentary Service Commission, Teachers Service Commission, Judicial Service Commission, Electoral Commission of Kenya and the recruitment arms of the Kenya Police and Armed Forces. These are guided by policies that are geared towards ensuring participation by people from all the regions in Kenya. There are also policies aimed at the inclusion of women, at least 30 per cent and at least 5 per cent of persons with disabilities of all recruited at any given time. To reinforce these policies, the Government seeks to have all Government Ministries and state Agencies input gender and disability mainstreaming in their performance contracts.

Participation in decision making in public affairs

124. Although there is no specific provision in the Constitution enabling the Government to directly consult the public in decision making and policy decisions, except through their elected leaders both in Parliament and in the Local Authorities, the Government has initiated measures to ensure full participation and consultation of the members of the public in making decisions that affects them. Increasingly there is a participatory approach to the formulation of National policies. Examples of these are; the formulation of the National Land Policy, the drafting of a new Constitution for Kenya which has largely been people driven and the on-going National Policy and Action Plan on Human Rights development process. The proposed Constitution provides for the national values and principles of governance which should bind all State organs, State officers, public officers and all persons whenever any of them applies or interprets the Constitution; enacts, applies or interprets any law; or makes or implements public policy decisions. These include patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people.

Equal access to public service

125. In places where the Government has established public services, there are equal guarantees of access to public service irrespective of race, national or ethnic groups. Section 107 of the Constitution establishes the Public service Commission which is tasked with the appointment of persons to hold or act in offices in the public service and in the service of local authorities (including the power to confirm appointments), the power to exercise disciplinary control over persons holding or acting in those offices and the power to remove those persons from office.

Article 5 (d)
Other civil rights

Article 5 (d) (i) and (ii)
The right to freedom of movement and residence within the border of the State and the right to leave any country, including one's own and to return to ones country

Legislative measures

126. Section 81 of the Constitution of Kenya guarantees the right to freedom of movement which is the main concern of the Police and Provincial Administration. They provide security and enforce freedom of movement within Kenya. Freedom of movement within the country, foreign travel, emigration, and repatriation is generally respected in Kenya. There are however objective and reasonable restrictions in the Constitution based on public safety, public order, Public morality and defence. For example; Cap. 57 – Preservation of Public Security Act in its Section 4 provides that regulations for the preservation of public security may make provision for:

- (a) The registration, restriction of movement (into, out of or within Kenya), and compulsory movement of persons, including the imposition of curfews; and
- (b) The control of aliens, including the removal of diplomatic privileges.

127. The Alien Restrictions Act – Cap. 173 Section 3 provides that the Minister may, at any time when a state of war exists between Kenya and any foreign power or when it appears that an occasion of imminent danger or great emergency has arisen, by order impose from time to time restrictions on aliens and provision may be made by the order inter alia ;requiring aliens to reside and remain within certain places or districts; and for prohibiting aliens from residing or remaining in any areas specified in the order.

Administrative measures

128. Landless squatters are being resettled and given title deeds so as to enable them to settle down in places of their choice. When the new Government came to power in 2002, it recognized landlessness as one of the root causes of poverty and inequality. Its campaign Manifesto stated:

“Land is one of the most contentious issues in Kenya today and has been so since colonial days. Land is of particular interest to Kenyans because of a number of factors, including the fact that 80 per cent of Kenyans are rural peasants who eke their livelihood out of land. For such people land is life and any threat to their land resources causes fear and panic. Indeed our struggle for national independence revolved around the land issue.”

129. The new Government recognized the need to repossess the land still owned by white settlers so as to resettle the landless. In the Proposed New Constitution, which was one of the promises made to Kenyans, it stated that no foreigner would be allowed to lease land for a period exceeding ninety nine years. Any land with a lease greater than ninety nine years would revert back to the State. Though the draft was rejected, this clause was not contentious, meaning that the Government and the people were in agreement that the land was rightfully theirs (Kenya Gazette Supplement, 2005). This is critical because in Kenya, the land problem has at times taken an ugly ethnic turn in which thousands have been killed and thousands displaced from their homes. The desire for agricultural products and valuable minerals has also led to landlessness and environmental degradation. It is expected that the National Land Policy, will provide for ownership and equal distribution of land to all in addition to proper utilization.

Other measures

130. The Government of Kenya and national political leaders have been campaigning against tribalism and encouraging people to tolerate each other, live and work anywhere in Kenya in harmony. This has achieved different dimensions especially after the unprecedented violence which the country witnessed after the December 2007 general elections. At least 1,200 people died and up to 350,000 were displaced when violence erupted in parts of the country, mostly in Rift Valley and Nyanza provinces, following the announcement of the outcome of presidential elections held on 27 December. One of the principles relating to the return of internally displaced persons (IDPs), which is being used, states:

“Competent authorities have the primary duty and responsibility to establish conditions, as well as provide the means, which allow internally displaced persons to return voluntarily, in safety and with dignity, to their homes or places of habitual residence, or to resettle voluntarily in another part of the country resettled internally displaced persons.”

131. The principle notes that IDPs who have returned to their homes or who have resettled in another part of the country shall not be discriminated against as a result of their having been displaced. Following this principle, the Government is making efforts to resettle IDPs resulting out of the 2008 post-elections violence by ensuring their safe return, providing some financial assistance and conducting a range of reconciliation initiatives in the affected areas.

Article 5 (d) (iii) The right to nationality

Legislative measures

132. Kenyan citizenship is mainly determined by *jus sanguinis* (based on parentage) but the law also provides for citizenship of certain category of persons who were in Kenya at the time of independence due to historical reasons. Chapter 6, Section 87–97 of the Kenya Constitution provide for the right to nationality. The Registration of Persons Act (Cap. 107) also makes provisions for the registration of persons and for the issue of identity cards. (Ref. article 2 on citizenship and the Nubian case).

133. By Kenyan law, only men can confer citizenship to their children while women cannot. This is set to change with the adoption of the new Constitution which recognizes that a person is a citizen by birth if on the day of the person’s birth, whether or not the person is born in Kenya, either the mother or father of the person is a Kenyan citizen.

Administrative measures

134. The Government has taken deliberate steps through the GJLOS reform programme to expedite the processing and issuance of identity cards, passports, and birth certificates. Birth certificates are critical to the issuance of either the identity card or the passport. The two documents are critical to the conduct of a citizen's affairs and the exercise of many civil and political rights.

Article 5 (d) (iv)**The right to marriage and choice of spouse****Legislative measures**

135. There is no specific provision in the Constitution on the freedom to marry or choose a spouse. However, all the laws on marriage in Kenya explicitly provide for consensual unions. There is freedom to choose whether to marry or not to. This is provided for under:

- (a) Marriage Act (Cap. 150);
- (b) African Marriage and Divorce Act (Cap. 151);
- (c) Matrimonial Causes Act (Cap. 152);
- (d) Mohamedan Marriage Divorce and Succession Act (Cap. 156);
- (e) Hindu Marriage and Divorce Act (Cap. 157).

136. There is also provision for individuals to marry under their own customary laws and the courts of law have upheld this principle of consensual unions. Under these laws, the right to choose a spouse is not explicit but is implied and stringently enforced by the courts as evidenced by various judicial decisions. Due to the different requirements under the different laws, there are currently two Marriage Bills Pending before parliament aimed at consolidating the law relating to marriage (refer to article 2).

Article 5 (d) (v) and (vi)**Right to own property and right to inherit**

137. The Constitution in Section 75 gives protection against deprivation of property and several other statutes provide a legal regime for registration and transfer of property as well as inheritance. These include:

- (a) Registered Land Act (Cap. 300);
- (b) Registration of Titles Act (Cap. 281);
- (c) Indian Transfer of Property Act, 1882;
- (d) Law of Succession Act (Cap. 160);
- (e) Government Lands Act (Cap. 280);
- (f) Public Trustee Act (Cap. 168).

138. The Government, through the National Land Policy, is seeking to consolidate land laws in Kenya to ensure security of the citizens' property rights – in addition to recognizing communal rights to land.

Judicial and administrative measures

139. Courts have routinely enforced people's rights to own and inherit by determining property issues. There are specific High Court divisions to deal with land and succession/probate cases. On the other hand, the Land Adjudication Boards ensure the equitable administration and/or allocation of land. The need for the expeditious issuance of title deeds is one of the main features of the National Land Policy to ensure secure land ownership by all Kenyans without any discrimination.

140. Land ownership, access and use occupy a central place in public policy and political discourse in Kenya including the constitutional review process. This is because land has been the crux of cultural, economic and socio-political change. In fact, Kenya's political, economic, social and cultural history since the Arabs arrived at the Coast; and European settlers later in the 19th century, has been largely dominated and influenced by questions of access to, and control over land.

141. Following years of systematic imposition of western land tenure and management systems, a large segment of the population continues to have difficulties not only in adapting to the modern agrarian economy but also in coping with the increasingly fragile and marginal environment, land degradation, low agricultural output and intensifying conflicts over access to and control of land and pervasive poverty. This situation has generated an increasing Government interest in land tenure and land use issues and the Government has continued to invest heavily in land reform schemes. This initiative is evidenced by the various Presidential land commissions, the National Land Policy formulation process and the constitutional review process established to address the land problem.

Article 5 (d) (vii), (viii) and (ix)**Right to freedom of thought, conscience and religion; the right to freedom of opinion and expression and the right to freedom peaceful assembly and association****Legislative measures**

142. Sections 78–80 of the Constitution provides for the freedoms of thought, conscience, and religion, and opinion, freedom of expression, peaceful assembly and association. This is further given effect under different Acts of Parliament namely:

(a) The Societies Act (Cap. 108) Churches and religious associations are registered without any form of discrimination;

(b) The Penal Code (Cap. 63) in s. 134 protects the various religions from insult to religion and s. 135 provides for lawfully assembly and worship without disturbance; and

(c) Section 26 of Education Act (Cap. 211) makes provides for religious education in public schools.

Judicial and administrative measures

143. The police are mandated to provide security provided for any assembly/meeting where due notice has been given. Courts adjudicate on disputes among religious groups where necessary.

Article 5 (e)
Economic, social and cultural rights

Article 5 (e) (i) and (ii)
The right to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, and to just and favourable remuneration and the right to form trade unions

Legislative measures

144. Sections 73 (i) and (ii), 75 and 81 of the Constitution provide for the protection from slavery, forced labour, deprivation of property and freedom of movement all of which are relevant to the right to work. Freedom of movement guarantees the right to work in any part of the Country. Under the Constitution, no person is to be held in slavery or servitude, and the country ratified Conventions No. 29 (1930) concerning Forced or Compulsory Labour and No. 105 (1957 concerning the Abolition of Forced Labour on 13 January 1964. The Government has since taken measures aimed at ensuring that the national law and practice are in conformity with these Conventions. In this connection, sections of the Chiefs Authority Act that gave Chiefs the authority to impose forced labour in villages (ostensibly for purposes of undertaking communal projects like the maintenance of rural access roads) were repealed in 1997.

145. The Government is committed to reforming certain provisions of the Penal Code (Chapter 63 Laws of Kenya) which require that a person under imprisonment may be under an obligation to perform work imposed as a punishment. Also set for review are the Merchant Shipping Act (Chapter 389 of the Laws of Kenya) 1967 and the Trade Disputes Act (Chapter 234 of the Laws of Kenya) both which prohibit participation in strikes for certain categories of workers. The Government has also put in place legislation and measures to declare and define the fundamental rights of employees and has consolidated all the laws relating to trade unions and trade disputes to promote the freedom of association. These include:

- (a) The Employment Act 2007; to declare and define the fundamental rights of employees;
- (b) The Labour relations Act 2007; to consolidate all the laws relating to trade unions and trade disputes and to promote the freedom of association;
- (c) The Work Injury Benefits Act 2007;
- (d) The Occupational Safety and Health Act, 2007.

146. These laws also prohibit forced labour in line with Convention 105, with the exception of the categories of work exempted from the provisions of the Convention (such as work or service of a military nature, normal civil obligations etc.).

147. Career and vocational guidance are provided in schools and universities. To supplement the role of Universities in absorbing school leavers, the Government has also established village polytechnics, national polytechnics and middle-level tertiary institutions specializing in science and technology. However, funding these institutions remains a major challenge due to fiscal constraints and the donor-imposed adjustments of cutting on public expenditure in public education. The Directorate of Industrial Training is also engaged in the promotion of technical skills in all sectors. Technical and vocational training programmes are also provided by the National Youth Service (NYS), borstal institutions, vocational rehabilitation centres for persons with disabilities and youth correction centres in

prisons. Vocational training in Kenya is provided for under the Industrial Training Act (Chap. 237 of the Laws of Kenya) and supported by industrial levies collected by the Government.

148. Major challenges relating to the attainment of the objective of full, productive and freely chosen employment include the inability of the economy to support high levels of employment as well as the heavy investment required to adapt the education system to the changing needs of the economy. To address these challenges, the Economic Recovery Strategy for wealth and employment creation (2003–2007) has been adopted as a blueprint for setting the economy on a recovery path. Furthermore, the Government has adopted Sessional Paper on Education (see part of the report on the right to education), the main thrust of which is to realign our education system to market needs in a changing national and international social, economic and cultural landscape.

149. Achieving gender parity especially in the senior positions of both the public and private sector remains a significant challenge. For instance, out of 42 Permanent Secretaries currently serving in the Government only 6 are women. The establishment of the National Commission on Gender and Development, and the elevation of the Women's Bureau to a Department within the Ministry of Gender, Sports, Culture and Social Services are expected to go a long way in correcting gender imbalances in the Country. At the policy level, Sessional Paper Number 5 of 2005 on Gender Equality and Development provides for the establishment of gender divisions in the public service. Enactment of the Disabilities Act, the HIV (Control and Management) Act and the Equality Bill (under discussion), is meant to legislate against discrimination. Under the Children's Act, 2001 discrimination in the education of the girls and boys is penalized and this has a positive impact on the employment prospects for girls later in life. In addressing matters concerning the youth, there is a Draft Kenya National Youth Policy which highly addresses issues of the youth and employment. Also, Youth Councils have been established and decentralized throughout the country.

Judicial measures and administrative measures

150. The Industrial Court deals with labour disputes. In addition, the ordinary courts also have jurisdiction to handle civil and criminal issues arising out of labour and employment situations. The Industrial Relations Charter provides for amicable settlement of industrial disputes. Tripartite Committees (Employers, employees and Government) are usually convened to resolve labour disputes. The Central Organization of Trade Unions (COTU) and the federation of Kenyan Employers (FKE) are usually represented in most Parastatals' Boards. The Minimum wages for workers are reviewed regularly depending on the rise of the cost of living indices and productivity improvement within the constraints of a developing and sometimes stagnant economy.

Article 5 (e) (iii) The right to housing

Legislative measures

151. Many Kenyans still face a lot of challenges in securing adequate housing as is evidenced by the many informal settlements dotting many of our urban centres. To ensure the right to housing, the Government has:

(a) Created a specific ministry for housing to ensure better implementation of programmes;

- (b) Has developed a National Housing Policy for Kenya and passed a Sessional paper for the same leading to the development of a National Housing Bill;
- (c) Has been upgrading informal settlements under the Kenya Slum Upgrading Programme (KENSUP); and
- (d) Has been constructing Houses for purchase by civil servants.

152. Section 9 the Employment Act, compels every employer to, at his own expense, provide reasonable housing accommodation for each of his employees either at or near the place of employment, or shall pay to the employee such sufficient sum, as rent, in addition to his wages or salary, as will enable the employee to obtain reasonable accommodation. House allowance is provided for all civil servants as a matter of policy, while practice in the private sector varies.

Judicial measures and administrative measures

153. The Rent Restriction Tribunal²⁴ and the Business Premises Rent Tribunal²⁵ are established by Acts of Parliament for the determination of rent related disputes as long as the premises in question fall under the category determined in the corresponding Acts as controlled tenancies. These are premises with low rentals which cater for low income earners whom the Government would wish to protect from undue harassment by land lords or unreasonable increases in rent. In addition the following administrative measures have been put in place:

- (a) The facilitation of affordable, decent and adequate housing to all socio-economic Groups through the Housing Policy Sessional Paper No. 3 of 2004 provides for the need to facilitate availability of shelter for vulnerable groups;
- (b) Appropriate Building Technologies (ABT) and Material that reduce construction cost by 50 per cent have been introduced;
- (c) Introduction of tax deductible mortgage schemes to encourage individuals to own homes; and
- (d) Housing incentives for investors like tax waivers and other incentives for investors investing in low cost housing have been introduced.

Article 5 (e) (iv)

The right to public health, medical care, social security and social services

Legislative measures

154. The Government of Kenya, through the Ministry of health has continually invigorated its Health Policy Framework (KHPF) through the second National Health Sector Strategic Plan (NHSSP II). The current NHSSP is formulated with the aim of reversing the downward trends in health indicators observed during the implementation of the first strategic plan (NHSSP I, 1999–2004), applying the lessons learnt and searching for innovative solutions. The health goals formulated in the KHPF underlined the need to pursue the principles of primary health care in improving the health status of the Kenyan population and the Framework set out the following strategic imperatives:

²⁴ Established under The Rent Restriction Act Cap 296.

²⁵ Established under The Landlord and Tenant (Shops, Hotels and Catering Establishment) Act Cap 301.

- (a) Ensure equitable allocation of GOK resources to reduce disparities in health status;
- (b) Increase cost-effectiveness and efficiency of resource allocation and use;
- (c) Manage population growth;
- (d) Enhance the regulatory role of the Government in health-care provision;
- (e) Create an enabling environment for increased private sector and community involvement in service provision and financing;
- (f) Increase and diversify per capita financial flows to the health sector.

155. Overall, the thrust of the NHSSP II is to firmly address the downward spiral of Kenya's health status, to contribute to the reduction of health inequalities and to reverse the decline in the impact and outcome indicators. These health inequalities exist between urban and rural populations, between districts and provinces (compare Western Province having 68 per cent of the population below the poverty line with Central Province at 46 per cent). They are also related to gender, education and disability.

156. The Government recognizes the fact that its goal to reduce health inequalities can only be achieved effectively by involving the population itself in decisions on priority setting and consequently in the allocation of resources. This requires a fundamental change in the existing governance structures in order to allow such community ownership to take place. Active involvement and partnership with other stakeholders in the provision of care is needed. NHSSP II will establish a well functioning health system that relies on collaboration and partnership with all stakeholders whose policies and services have an impact on health outcomes.

157. Health is defined here in its broad sense, as not only the absence of disease but the general mental, physical and social well-being of an individual. In this definition, the environment in which people live — including access to nutritious food, safe water, sanitation, education and social cohesion — also determine health.

158. In addition, there are various Statutes that seek to address public health, social security and services issues which include:

- (a) The Public Health Act (Cap. 242);
- (b) The HIV and AIDS Prevention and Control Act, No. 14 of 2006;
- (c) The National Social Security Fund (NSSF) Act (Cap. 258);
- (d) The National Hospital Insurance Fund (NHIF) Act (Cap. 255);
- (e) The Malaria Prevention Act (Cap. 246);
- (f) The Mental Health Act (Cap. 248);
- (g) The Food, Drugs and Chemical Substances Act (Cap. 254).

Judicial measures

159. The jurisdiction of the City Courts extends to the enforcement of the provisions of the Public Health Act. In addition, the Medical Practitioners and Dentist Board is established to determine matters of negligence and malpractice by doctors and dentists while the conventional courts on the other hand also adjudicate on matters relating to health and medical care.

Administrative measures

160. The Division of Health Care financing, which is composed of a multi-disciplinary team, is responsible for monitoring, collection, control, custody, banking, programming and expenditure of cash and NHIF reimbursements to Ministry of health facilities in Kenya. The Division carries its core functions under the Department of Policy and Planning. The Vision of the Division is to Mobilize optimal financial resources for efficient and high quality health care system that is accessible, equitable and affordable for every Kenyan while its mission is to increase revenue collection efficiency for effective and efficient mobilization of financial resources for provision of integrated and high quality promotional, preventive, curative and rehabilitative health care services to all Kenyans.

161. There are District and Sub district Hospitals established throughout the country to ensure availability of basic health available to all. Majority of the health centres are already providing ARV services. There are 358 centres country wide providing the HIV care and treatment services with 47 satellites sites. In addition:

- (a) The Government has intensified its HIV and AIDS awareness and prevention campaigns in order to lower the prevalence rate which remains unacceptably high;
- (b) Campaigns geared towards combating Malaria and TB have also been intensified with the provision of TB drugs in all public health centres;
- (c) Children under 5 years of age are afforded free treatment in public hospitals;
- (d) Free mosquito nets are issue to expectant mothers and children under five years;
- (e) Cost sharing measures at Public Hospitals have been introduced for progressive realisation of the right to health;
- (f) Medical Schemes – NHIF, NSSF have been opened up to the informal sector and the unemployed; and
- (g) The establishment of the National Aids Control Council under the office of the President with the aim of coordinating stakeholders in the multi-sectoral response to HIV and AIDS in Kenya.

Article 5 (e) (v) Right to education and training

162. At independence in 1963, the Government recognized education as a basic human right and a powerful tool for human resource and national development and since then, policy documents have reiterated the importance of education in eliminating poverty, disease and ignorance. The Government has addressed challenges facing the education sector through Commissions, Committees and Taskforces. The first Commission, after independence, came up with the Report (The Ominde Report, 1964) that sought to reform the education system inherited from the colonial government to make it more responsive to the needs of independent Kenya. The Commission proposed an education system that would foster national unity and the creation of sufficient human capital for national development. Sessional Paper No: 10 of 1965 on African Socialism and its Application to Planning in Kenya formally adopted the Ominde Report as a basis for post-independence educational development.

163. The Report of the National Committee on Educational Objectives and Policies (The Gachathi Report, 1976), focused on redefining Kenya's educational policies and objectives, giving consideration to national unity, and economic, social and cultural aspirations of the

people of Kenya. It resulted in Government support for 'Harambee' schools and also led to establishment of the National Centre for Early Childhood Education (NACECE) at the Kenya Institute of Education (KIE).

164. The Report of the Presidential Working Party on the Second University in Kenya (The Mackay Report, 1981) led to the removal of the advanced (A) level of secondary education, and the expansion of other post-secondary training institutions. In addition to the establishment of Moi University, it also recommended the establishment of the 8:4:4 system of education and the Commission for Higher Education (CHE).

165. The Report of the Presidential Working Party on Education and Manpower Training for the Next Decade and beyond (The Kamunge Report, 1988) focused on improving education financing, quality and relevance. This was at a time when the Government scheme for the provision of instructional materials through the National Textbook Scheme was inefficient and therefore adversely affected the quality of teaching and learning. From the recommendations of the Working Party in 1988, the Government produced Sessional Paper No 6 on Education and Training for the Next Decade and beyond. This led to the policy of cost sharing between government, parents and communities.

166. The Commission of Inquiry into the Education System of Kenya (The Koech Report, 2000) was mandated to recommend ways and means of enabling the education system to facilitate national unity, mutual social responsibility, accelerated industrial and technological development, life-long learning, and adaptation in response to changing circumstances. The Koech Report recommended Totally Integrated Quality Education and Training (TIQET). While the Government did not adopt the report due to the cost implications some recommendations, such as curriculum rationalization have been adopted and implemented.

167. Recent policy initiatives have focused on the attainment of Education for All (EFA) and, in particular, Universal Primary Education (UPE). The key concerns are access, retention, equity, quality and relevance, and internal and external efficiencies within the education system. The effectiveness of the current 8-4-4 structure and system of education has also come under increasing scrutiny in light of the decline in enrolment and retention particularly at the primary and secondary school levels in the last decade. The Government is committed to the provision of quality education and training as a human right for all Kenyans in accordance with the Kenyan law and the international conventions, such as the EFA goal, and is developing strategies for moving the country towards the attainment of this goal. The implementation of Free Primary Education (FPE) is critical to the attainment of UPE as a key milestone towards the realization of the EFA goal.

Performance of the education sector

168. Since independence in 1963, the number of students enrolled at various levels of education has substantially increased. At the Early Childhood, Development and Education (ECDE) level, enrolment grew from 483,148 children in 1982 to 894,295 children (420,741 girls and 473,554 boys) in 2003. At the primary level, enrolment in formal public primary schools grew from 891,533 pupils in 1963 to 7.2 million pupils in 2004 (3.5 million girls and 3.7 million boys). At the secondary level, enrolment grew from 30,000 students in 1963 to 862,908 students in 2003 (415,246 girls and 447,662 boys). However, despite increased enrolment, the sector is still faced with issues of access, equity and quality.

169. Gross Enrolment Rate (GER) for pre-primary, however, declined from 35.4 percent in 1990 to 33.4 percent in 1999. Considering the importance of ECDE, this GER is low as there are many four-five year-old children who are still five out of school. The 1999 Population Census indicated that a total of 574,249 children were not enrolled in pre-primary schools and that a large proportion of children entering primary schools do not pass

through pre-primary. The low enrolment in pre-primary school level is due to various factors, including the fact that Government plays a rather limited role, lack of economic ability, and lack of awareness among communities and parents regarding the importance of pre-primary education.

170. The GER at public primary level peaked during the early 1990s to stand at 105.4 percent but declined to 87.6 percent in 2002. Similarly, GER at the public secondary level declined from 30 percent to 22 percent over the same period. However, following the implementation of FPE, there has been an upsurge in enrolment in public primary schools, resulting in a GER of 99 percent in 2003 (102 percent for girls and 97 percent for boys). Every effort is, therefore, required to sustain the current enrolment and address the key issues of improved access, equity and quality.

171. The population of people with special educational needs in Kenya is estimated at 10 per cent of the total population; about 25 per cent of these are children of school-going age. Enrolment in special education programmes is low given that out of a total population of 750,000 children with special needs who have reached school-going age, only an estimated 90,000 have been assessed to establish the nature of their special needs. Of this number, only about 26,885 are enrolled in educational programmes. This implies that over 90 per cent of children with special needs are at home. On average these children go to school when they are eight years and above. Consequently, they become adults before they complete their educational programmes. At the tertiary level, the enrolment level for people with special needs is very low. The Government policy initiatives have thus identified the need to strengthen mobilization and awareness programmes to eradicate taboos and beliefs associated with disability, as well as develop and implement a flexible curriculum that is child-centred and friendly to this category of learners. In addition, there are efforts to make all learning institutions truly inclusive by removing the key barriers. A special needs policy is also at an advanced stage of formulation to cater for the learning requirements of children with special needs.

Legislative measures

172. The following Laws give legislative effect to the education policy in Kenya:

(a) The Education Act Cap. 211 provides for the regulation and progressive development of education;

(b) Section 7 of Children's Act – entitles every child to education, the provision of which shall be the responsibility of the Government and the parents. Further every child shall be entitled to free basic education which shall be compulsory in accordance with article 28 of the United Nations Convention on the Rights of the Child;

(c) The Industrial Training Act Cap. 237 – makes provision for the regulation of the training of persons engaged in industrial work;

(d) Admission to Public Universities and colleges is open to all qualified Kenyans irrespective of race, tribe, and place of origin;

(e) The Higher Education Loans Board (HELB) Act Cap. 213 – makes provision for bursaries and education loans to all eligible students without any discrimination. These are supplemented through the devolved funds to the districts, to ensure accessibility of educational facilities and provision of bursaries, among others, by all Kenyans and more so those from the marginalized areas;

(f) Persons with Disability Act.

Judicial/administrative measures

173. In case of disputes arising out of the implementation of the education policy or the administration of the institutions of learning, the conventional courts have the jurisdiction to handle the matters if brought before them. The Government has implemented the FPE and free tuition in secondary schools. There is also an affirmative action policy, which allows for the admission of students from marginal areas into National Secondary Schools through a Quota System.

Article 5 (e) (vi)**Right to equal participation in cultural activities**

174. There exist various Administrative and other Measures that promote the right of every Kenyan to participate in a culture of his/her choice and these include:

- (a) Organization of cultural nights by different ethnic groups in Kenya;
- (b) Music and drama festivals for schools, colleges and universities promoting different cultural aspects of various communities;
- (c) Development of a national dress for Kenya;
- (d) National language – Kiswahili;
- (e) Documentaries on radio and TV promoting different cultures;
- (f) Vernacular Radio Stations licensed.

Article 5 (f)**Right of access to public facilities**

175. Generally, there exists no major complaints on the denial of access to any place or service intended for use by the general public such as transport, hotels, restaurants, café and parks based on race, colour, national or ethnic origin save for minor instances of de facto discrimination:

- (a) Some hotels are exclusive to members of non Kenyan descent who are given better services;
- (b) Some establishments have reportedly been turning away unaccompanied women;
- (c) Discrimination in access to beaches along the coast, as a result of beach hotels closing off public access roads as a security measure.

Article 6**Measures to ensure protection and remedies through national tribunals and other State institutions against any acts of racial discrimination****Legislative measures**

176. The principal law that accords protection against racial discrimination in Kenya is the Constitution. Section 82 (1) of the Constitution provides that no law shall make any provision that is discriminatory either in itself or in its effect. Section 82 (3) provides that the expression discriminatory means ‘according different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, place of origin

or residence or other local connexion, political opinions, colour, creed or sex whereby persons of one such descriptions are subjected to disabilities or restrictions to which persons of another such descriptions are not made subject to or are accorded privileges or advantages which are not accorded to persons of another such description'. The section protects all persons against discrimination.

177. The Government is also in the process of developing an equal opportunities law, which proposes to promote equal opportunities for all persons, prohibit discrimination and provide for remedies for victims of discrimination. The Equal Opportunities law will assist in the proper operationalization of section 82 of the Constitution.

178. To give more effect to the above provision, Section 84 of the Constitution provides access to the High Court for redress of human rights violations. The High Court is established under section 60 (1) of the Constitution and provides that the High Court shall be a superior court of record which shall have unlimited original jurisdiction in civil and criminal matters and such other jurisdiction and powers as may be conferred on it by the Constitution or any other law. The Chief Justice has promulgated rules to implement this section.

179. The Magistrates' Courts are established under the Judicature Act²⁶ and the Magistrates Courts Act²⁷ have jurisdiction to hear and determine criminal and civil cases relating to discrimination. The High Court has the power to award compensation for violations of fundamental rights and freedoms including the right not to be discriminated against.

180. The Wildlife (Conservation and Management) Act²⁸ does not provide for an equitable criteria for sharing of resources generated from tourism in the protected areas even where such areas are found on trust land which comprises communal land. The Act does not create a satisfactory mechanism for resolution of human wildlife conflicts, where such conflict results in loss of lives and property. The human wildlife conflict has perpetuated further marginalization of ethnic minorities. The Act establishes the District Wildlife Committees which assess claims of compensation. The maximum payable for death or injury of a person by a wild animal is Kshs. 200,000/- which is under review. So far no compensation is allowed for loss of property including livestock and crops. The process of establishing the national parks and national reserves has also come under review as it has not been hailed as consultative enough and has been government driven and leading to appropriation of trust land belonging to these ethnic minorities. In this regard the Government is currently in the process of reviewing the wildlife management and conservation policy with a view to creating a framework for resolution of human-wildlife conflicts including setting up of a Wildlife Compensation Trust Fund.

181. The Kenya National Commission on Human Rights Act establishes tribunal to investigate and determine cases on violations of human rights.

182. The children' Act establishes children courts that hear and determine cases dealing with children including maintenance, custody and also criminal charges committed by children.

Administrative/judicial measures

183. In 2001, the then Chief Justice Bernard Chunga promulgated the Constitution of Kenya (Protection of Fundamental Rights and Freedoms of Individual) Practice and

²⁶ Chapter 8 of the Laws of Kenya.

²⁷ Chapter 10 of the Laws of Kenya.

²⁸ Chapter 376 of the Laws of Kenya.

Procedure Rules, 2001 through Legal Notice Number 133 of 2001. The rules provided that any person charged in court for a criminal offence would have the court proceedings against them stayed automatically upon his or her filing an appeal to the High Court for determination of alleged human rights violations. Previously, there had been conflicting decisions from the courts in regard to the right of a litigant to have his or her rights redressed by the High Court as provided under the Bill of Rights in the Constitution of Kenya. Before then, some Judges of the High Court were cautious of exercising their jurisdiction to entertain applications on the grounds that there was lack of clear procedures for filing such applications.

184. For an example in the cases of *Gibson Kamau Kuria v. A.G.*²⁹ and *Maina Mbacha and two others v. A.G.*,³⁰ the High Court held that it lacked jurisdiction since the Chief Justice had not made rules of practice thus the need for the promulgation of the said rules. The failure by the past Chief Justices to make the rules under section 84 of the Constitution resulted in denial of access to courts by litigants to have questions of the enforcement of human rights redressed.

185. With the promulgation of the rules, the situation has changed as exemplified by the case of *Raila Odinga v. Republic*³¹ where it was held that the High Court had jurisdiction to entertain constitutional cases based on section 84 of the Constitution. The court held, “we appreciate that for an aggrieved party to come to us for redress under the Constitution only two sections prevail. S.84 is for a party whose fundamental rights and freedoms have been or are likely to be infringed ... Indeed it can be added that if by application of other sections of the Constitution one’s fundamental rights and freedoms are breached, by clearly showing that state of affairs as bringing that party under s. 84 for redress, this court will hear him or her”.

186. In a specific manner, the courts are aware of their duty to enforce individuals’ rights against discrimination as the High court stated in the case of *Rose Moraa and another v. A.G [2006] e KLR*. Quoting from the United Nations general comment supra pp. 104–106, paras. 55–57, the court appreciated that discrimination does not exist if the difference in treatment has a legitimate purpose and it does not lead to situations which are contrary to justice, to reason or to the nature of things. It follows that there would be no discrimination in differences in treatment of individuals by a State when the classification selected is based on substantial factual differences and there exists a reasonable relationship of proportionality between the differences and the aims of the legal rule under review. The court was of the view that, review by the court concerns only the conformity of those measures with the requirements of an international Convention. They also observed that the national authorities remain free to choose the measures which they consider appropriate in those matters governed by a convention. However, the court also acknowledged that on another hand, the role of the court is to uphold the provisions of the Constitution and cannot usurp the role of constituent assemblies or referendums to fill in existing constitutional gaps. They are bound by the provisions of the Constitution as they stand.

187. Much as the courts have deliberately declined to stretch the meanings of constitutional provisions, they have with certainty proclaimed the recognition of their role of harmonizing all rights as interdependent and indivisible.³² However, the courts seem to hold the view that, in the area of human rights, (except the right to a clean environment), one cannot purport to make an application for the general public interest as seen in *Rev*

²⁹ High Court Civil Application No. 55 of 1988.

³⁰ High Court Miscellaneous Application No. 356 of 1989.

³¹ Miscellaneous Civil Application No. 602 of 1992 (2008) 1 KLR (EP).

³² *P.K. Waweru v. A.G. & Others.*

*Timothy Njoya & Others v. the Attorney General, the Constitution of Kenya Review Commission, Kiriro wa Ngugi & Koitamet ole Kina.*³³ This case was determined after promulgation of the rules on enforcement of fundamental freedom and human rights. The case attempted to interpret section 47 of the Constitution of Kenya with regard to the power of constitution making. The High Court declared that the constitutional interpretation in regard to constituent power of the people and its implication should be given a proper approach based on the provisions of the Constitution and the rules made there under. The Court stated that the scheme of protection of fundamental rights envisaged by the Constitution is one of the individual as opposed to a community or group rights. There is no room for public interest litigation in matters subsumed in sections 70 to 83 of the Constitution. The Presiding Judge, Justice Ringera, stated that the Constitution admits no representative actions except if an individual has been detained as every other complainant of an alleged contravention of fundamental rights must relate to the right of a person. Therefore the applicant's application to court to halt the Constitution review process was denied.

188. In the case of *Rangal Lemeiguran and Three Others versus the Attorney General and Two Others (Refer to article 2 for case particulars)*, the above position was challenged as the presiding Judge, Justice Nyamu, stated that denying them the right to be heard would have been a violation of their freedom of expression. The Electoral Commission of Kenya's argument that the population was not large enough to warrant a constituency of their own was seen by Justice Nyamu as a narrow view which did not enhance democratic space in terms of adequate and effective representation and thus a limitation of the extent to which people should be able to enforce their rights. This is a progressive view which a citizen may be able to utilize should an issue of discrimination arise as it is one of the rights enunciated under section 82 of the Constitution.

189. In a further development, the Chief Justice through a Legal Notice Number 6 of 2006 amended the Rules which had earlier come into force in 2001. This came in the wake of the problems that arose from the aforementioned Rules which included:

(a) Automatic stay granted by rule 10 where individuals charged with criminal offences obtained automatic stay of trial by appealing to the Constitutional Court over alleged rights violations. This created a fertile ground for abuse of the process;

(b) The rules provided that the Chief Justice would determine who would sit on the bench hearing applications under the rules. This violated the rule of independent and impartial judges.

190. The revision was to ensure that litigants charged with criminal offences would be unable to delay the determination of their criminal cases on flimsy grounds by alleging that their rights had been violated. The amendments were promulgated in the wake of the case of *Dr. Chris Murungaru v. the Attorney General*³⁴ in which he made an application stating that his fundamental rights and freedoms were being violated as he was being asked to give evidence against himself which amounted to self incrimination. The High Court allowed the said application which also had an application for an order preventing his arrest.

191. The case of *Francis Kemai and Others v. the Attorney General and Others*³⁵ was determined before the rules were revised. The complainants claimed to be from the Ogiek a pastoralist, hunters and gatherers ethnic minority community. The applicants sued the Government and its officials for forceful eviction from the Tinet forest. The applicants

³³ Miscellaneous Civil Application No. 82 of 2004.

³⁴ Miscellaneous Civil Application No. 54 of 2006.

³⁵ Civil case No. 238 of 1999.

claimed that they had been living in the forest since time immemorial and had been facing harassment from the respondents. The applicants claimed that the eviction came after the Government had issued them with allotment papers. After the allotment, members of the community embarked on massive developmental activities like building schools, churches and trading centres. The applicants further claimed that the eviction was discriminatory and selective and that it targeted them as a minority community. They claimed that the eviction was unconstitutional and denied them their rights to their indigenous home.

192. The respondents in their defence denied that the eviction was discriminatory and stated that all persons invading a forest are subject to eviction regardless of which community such persons hailed from. Regarding the plaintiffs' averments that the eviction would deprive them of their right to livelihood, the respondents denied the allegation because the applicants also kept livestock meaning they did not solely depend on the forest for their subsistence. The respondent also stated that the applicant's claim of development on said land was not true as such could only take place if approved by the Commissioner of Lands as the custodian of government's land. Such approval had not been sought and granted.

193. The respondents also claimed that the applicants lacked *locus standi* to institute the suit claiming that they were from the Ogiek community. The genuine members were settled by the Government at Sururu, Likia and Tenet. Respondents also claimed that the community's activities were detrimental to environment protection and sustainable use of forests and that their claims of environmental conservation were not true. The court held that the plaintiffs knew other homes namely Sururu and Likia and Tinet and therefore, their claims that they had no other homes to go to was a dishonest claim. No proof was also given of the plaintiffs' lawful re-entry into the forest as they had claimed but the court noted that they simply kept on re-entering only to be met with repeated evictions. The court held that the plaintiffs' claim of being environmentally friendly was untrue since the Ogieks had adopted farming and other forest uses and taken to socio-economic pursuits which were environmentally degrading. The Government action complained of did not, therefore, contravene the rights of the plaintiffs to protection under the law not to be discriminated against and reside in any part of Kenya; it is they themselves who confine themselves to the forest. The eviction was not discriminatory as it was done for the purpose of saving the whole of Kenya from a possible environmental disaster. There was no evidence of discriminatory treatment of the applicants against them on ethnic or improper grounds. The Court dismissed the prayers sought.

194. Kenya is also in the process of developing a new constitutional framework which will ensure the creation of more effective institutions to protect human rights including strengthening independence and impartiality of the judiciary and creation of a national human rights institution grounded on the Constitution; an expanded Bill of Rights that includes both civil and political rights as well as economic, social and cultural rights and the establishment of a state resource distribution system to ensure equitable development in all parts of the country through devolution.

195. Of critical importance is the provision in the proposed constitution that the Chief Justice shall make rules providing for the court proceedings which shall satisfy the criteria that:

- (a) The rights of standing provided for are fully facilitated;
- (b) Formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation;
- (c) No fee may be charged for commencing the proceedings;

(d) The court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities; and

(e) An organization or individual with particular expertise may, with the leave of the court, appear as a friend of the court.

196. The Proposed Constitution further provides that the absence of rules contemplated does not limit the right of any person to commence court proceedings for the enforcement of the rights, and to have the matter heard and determined by a court.

Access to Justice in Arid and Semi Arid Areas (ASALS)

197. The mechanisms for access to justice in the ASALs where most cases of racial discrimination and/or marginalization occur are inadequate. There are very few courts and which are mostly found at the district headquarters. Further, there is increased insecurity in these areas and the area is not easily accessible by security agencies due to a poor infrastructural network. The Kenya legal system does not wholly embrace community justice systems for dispute resolution as it is usually subject to abuse, which would provide an alternative method for resolution of disputes. Further, access to justice is inhibited by complicated and expensive legal procedures. To enhance access to justice in Kenya, the Small Claims Court Bill has already been drafted by the Kenya Law Reform Commission and forwarded to the Attorney General for publication.

198. The Ministry of Justice and Constitutional Affairs is piloting a legal aid scheme with a view to rolling out a nationwide state funded legal aid scheme (refer to article 5 a for detail on the legal aid policy). The operationalization of a State-funded legal aid scheme is long overdue as Section 84 (5) (b) of the Constitution provides that parliament shall provide for funds to pay for the legal costs incurred by indigent litigants in cases of human rights violations.

Pauper Brief System

199. The Civil Procedure Act³⁶ allows for pauper brief applications for persons who are unable to pay court fees. The procedure offers a window for indigent litigants to access courts for resolution of their human rights.

200. The Kenya National Commission on Human Rights is established under an Act of Parliament. The Commission's mandate includes investigation of cases of human rights abuse in Kenya. The Commission has thin geographical spread and in a bid to devolve its services to the marginalized communities, the Commissions recently established two branch offices in Kitale and Wajir in addition to the head office in Nairobi. These two areas were selected due to the fact that they are in the ASALS area.

The National Land Policy

201. A draft National Land Policy has been developed to reorganize the land tenure systems to ensure community interests are adequately protected. The current land ownership system does not recognize communal ownership of land. The laws relating to land in Kenya are unnecessarily complicated and contained in over 20 Acts of Parliament.³⁷ Many indigenous communities in Kenya rely on the communal land for their livelihood.

³⁶ Chapter 21 of the Laws of Kenya.

³⁷ These include the Land Titles Act, Trust Lands Act, Registered Land Act, Government Lands Act, Registration of Titles Act, Registration of Documents Act, Physical Planning Act, Rent Restriction Act, Landlord and Tenants (Business Premises, Hotel, Catering Establishments) Act, Land Disputes Tribunals Act, Stamp Duty Act, among others.

Without an appropriate tenure system grounded in law, disputes relating to land use in these areas cannot be adjudicated in courts of law. This is one of the main problems the land policy intends to remedy.

The Industrial Court

202. The Labour Relations sets up the Industrial Court to hear and determine industrial disputes. The court can hear and determine cases relating to discrimination at the work place. Labour officers are charged with the responsibility of prosecuting employers who are perpetrating discriminatory practices at the work places. Other duties of the Labour Officers are to mediate disputes and report labour disputes to Industrial Court through the Minister.

Children courts

203. The Children Act creates special courts to hear and determine civil and criminal cases relating to children. Children officers have powers to initiate prosecution against offenders against children. Magistrates have been appointed to preside over Children Courts. These have jurisdiction in relation to all children. They are nevertheless stretched and there is a need to hire more children magistrates. The Children Act is currently undergoing review to make it more comprehensive as regards the protection and promotion of the rights of the child.

Criminal sanctions

204. Kenya has enacted laws that create crimes and prescribe penalties relating to racial discrimination. The Penal Code has created the following offences which would have discriminatory effects if not checked:

- (a) Promotion of warlike activities (section 44);
- (b) Alarming publications (section 66);
- (c) Subversive activities (section 77);
- (d) Incitement to violence and disobedience of the law (section 96);
- (e) Insult to religion (section 134);
- (f) Writing or uttering words with intend to injure religious feelings (section 138).

205. The National Cohesion and Integration Act has also criminalized racial and ethnic contempt as well as related discriminatory practices. Proposed hate speech legislation also contains provisions to punish the purveyors of hate speech.

206. The Government has also published the Organized Crimes Bill, with a view to proscribing organized groups that are responsible for perpetrating acts of racial discrimination, especially by fanning hatred between different ethnic groups. The Government is also developing the Hate Speech Bill which would deal with language that perpetuates discrimination. The National Cohesion and Integration Act and the commission to implement the act have been put in place. The objectives of the act include the promotion and elimination of all forms of discrimination on the ethnicity.

207. Quasi-judicial tribunal established by KNCHR has also improved access to remedies. The Government has also initiated the National Human Rights Policy and Action Plan development process aimed at guaranteeing the protection and promotion of ones rights.

Article 7

Measures taken in the fields of teaching, education, culture, and information with a view to combating prejudices which lead to racial discrimination and promoting understanding, tolerance and friendship among nations and racial or ethnic groups as well as propagating the purposes and principles of the United Nations Charter and the Universal Declaration of Human Rights, the United Nations declaration on the elimination of all forms of racial discrimination and the International Convention on the Elimination of All Forms of Racial Discrimination

208. Kenya has implemented the following measures with a view to combating prejudices which lead to racial discrimination as well as promoting understanding, tolerance and friendship among racial groups and ethnic groups.

Education and teaching

209. Under this, the legislative, policy and administrative measures taken include:

(a) Affirmative action for minority groups and indigenous peoples. Admissions to national secondary schools are pegged on a quota system which permits admissions from marginalized areas;

(b) Laying great emphasis on the education for the girl-child in accordance to the International Convention on the Elimination of All Forms of Racial Discrimination concerns about exacerbation of racial discrimination on account of gender (refer to general recommendation 25);

(c) Establishing Constituency Bursary Schemes and Constituency Development Fund which support needy school children's access to education. The CDF has been used to develop and expand education facilities including schools. The allocations per constituency are based on poverty indices;

(d) Introduction of the Free Primary Education and the subsidized secondary education. There are, however, challenges including the need for payment at the pre-school education which is discriminatory against younger children and is also a burden on parents. A further challenge is ethnic marginalization and the lack of facilities which have prevented some communities from achieving quality education;

(e) Mainstreaming Human rights education in the school curricula encouraging initiatives by civil society organizations to establish and support human rights clubs in schools;

(f) Introduction of Integrated education system. Persons with disabilities and disadvantaged groups have been integrated to learn together with other students. The Government has been supporting schools which admit persons with disabilities to give due attention to their special needs;

(g) Introduction of mobile schools and boarding schools in pastoralist areas supported by the Government;

(h) There is also a cash transfer programme for orphans and vulnerable children (OVCs) which has been successful in 37 districts.

Culture

210. The Government has taken the following measures to promote a culture that fosters racial integration:

- (a) The use of National Music and Drama Festival as a means of preservation of culture in primary, secondary and tertiary learning institutions;
- (b) Establishment and support of the Bomas of Kenya as a Kenya Cultural Centre to promote Kenya's cultural diversity and tolerance for each and every cultural affiliation;
- (c) The use of entertainment by cultural groups drawn from different cultures during national days;
- (d) Existence of Museums and the Heroes Corner at Uhuru Gardens, which assist in the conservation of culture and preservation of the country's history.

Information

211. The Government has developed a Freedom of Information Policy and promoted freedom of the press. There are also consultations towards formulating a Freedom of Information Act. This will enhance access to information for all Kenyans and assist in combating prejudices against ethnic communities. The Government is also supporting information, communication and technology development including the establishment of ICT centres, dubbed 'Digital Villages' in all parts of the country including rural areas. This will assist in information access at the local levels. This will enhance access to information to marginalized areas. To assist in this, the national media station the Kenya Broadcasting Corporation has a national reach and radio programmes that are broadcast in local languages. There are more than five private television stations having a wide coverage. Private vernacular radio stations have also been licensed to reach special groups. There are a number of national and regional newspapers published in English, Kiswahili as well as vernacular languages. The Public Service Week has also become a regular feature in which ministries, key departments and other government agencies interact with the public and provide information on their mandates and available services.

Annexes

Annex 1

The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)-related laws and regulations

1. Section 82 of the Constitution of Kenya

82. (1) Subject to subsections (4), (5) and (8), no law shall make any provision that is discriminatory either of itself or in its effect.

(2) Subject to subsections (6), (8) and (9), no person shall be treated in a discriminatory manner by a person acting by virtue of any written law or in the performance of the functions of a public office or a public authority.

(3) In this section the expression “discriminatory” means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, place of origin or residence or other local connection, political opinions, colour, creed or sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.

(4) Subsection (1) shall not apply to any law so far as that law makes provision:

(a) With respect to persons who are not citizens of Kenya;

(b) With respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law;

(c) For the application in the case of members of a particular race or tribe of customary law with respect to any matter to the exclusion of any law with respect to that matter which is applicable in the case of other persons; or

(d) Whereby persons of a description mentioned in subsection (3) may be subjected to a disability or restriction or may be accorded a privilege or advantage which, having regard to its nature and to special circumstances pertaining to those persons or to persons of any other such description, is reasonably justifiable in a democratic society.

(5) Nothing contained in any law shall be held to be inconsistent with or in contravention of subsection (1) to the extent that it makes provision with respect to standards or qualifications (not being standards or qualifications specifically relating to race, tribe, place of origin or residence or other local connection, political opinion, colour or creed) to be required of a person who is appointed to an office in the public service, in a disciplined force, in the service of a local government authority or in a body corporate established by any law for public purposes.

(6) Subsection (2) shall not apply to:

(a) Anything which is expressly or by necessary implication authorized to be done by a provision of law referred to in subsection (4); or

(b) The giving or withholding of consent to a transaction in agricultural land by any body or authority established by or under any law for the purpose of controlling transactions in agricultural land.

(7) Subject to subsection (8), no person shall be treated in a discriminatory manner in respect of access to shops, hotels, lodging-houses, public restaurants, eating houses, beer halls or places of public entertainment or in respect of access to places of public resort maintained wholly or partly out of public funds or dedicated to the use of the general public.

(8) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision whereby persons of a description mentioned in, subsection (3) may be subjected to a restriction on the rights and freedoms guaranteed by sections 76, 78, 79, 80 and 81, being a restriction authorized by section 76 (2), 78 (5), 79 (2), 80 (2), or paragraph (a) or (b) of section 81 (3).

(9) Nothing in subsection (2) shall affect any discretion relating to the institution, conduct or discontinuance of civil or criminal proceedings in a court that is vested in a person by or under this Constitution or any other law.

Annex 2

The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)-related cases and complaints

Table 1

Judicial decisions

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1. *Christopher Ndarathi Murungaru v. Kenya Anti-corruption Commission & Another [2006] eKLR*

Constitutional law – fundamental rights and freedom – freedom from self-incrimination – right to silence – freedom from discrimination, freedom from torture, inhuman and degrading treatment – notice issued to the applicant by the Kenya Anti-Corruption Commission requiring him to declare his wealth – applicant challenging the notice as unconstitutional for violating his fundamental rights and freedoms – whether sections 26, 27 and 28 of the Anti-Corruption and Economic Crimes Act are unconstitutional

International law – laws against corruption and economic crimes – United Nations Convention Against Corruption and its antecedent instruments

Interpretation of Statutes – Constitution – approach to adopt in interpreting the Constitution
 2. *Rosa A. Munywoki & 17 Others v. Investments And Mortgages Bank Limited & Another [2006] eKLR*

[Ruling] – Civil practice and procedure – suit – striking out – application to strike out the suit against the first defendant on grounds that it's frivolous and vexatious – effect of – factors the court considers in such applications – validity of order

Constitutional law – discrimination – where the plaintiffs' action against the defendants seeks a declaration that [a] provision of the law is unconstitutional – principle in *Madhwa v. City Council of Nairobi* – whether it is procedurally tenable for constitutional remedies to be sought by way of ordinary suit – Constitution section 82 (2)
 3. *Republic v. Minister for Finance & 2 others [2006] eKLR*
 4. *Andrew Manunzyu Musyoka (deceased) [2005] eKLR*

[Ruling] Constitutional law – fundamental rights and freedoms – freedom from discrimination – customary law tending to discriminate a married woman by disentitling her to inherit her father's estate – Kamba Customary Law – whether the custom was inconsistent with Constitutional and International Law – Constitution section 82 (1); Law of Succession Act sections 29, 40; Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW); Universal Declaration of Human Rights (1948); African Charter on Human and People's Rights (Banjul Charter) (1981)
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5. *Daniel Musili Nyeki v. Kenya Wildlife Services [2005] eKLR*

Constitutional law – fundamental rights – violation of – plaintiff claims that the defendant violated his constitutional rights by treating him in a discriminatory manner – racial discrimination – where the plaintiff claims that he was paid well below the required salary scale of his position as opposed to the other officials of different races – where the plaintiff claims to have been forcefully retired as a result of the acrimony between himself and the defendant – proof of discrimination – proof of forced retirement – whether the plaintiff established a prima facie case

6. *Hersi Hassan Gutale & Another v. Principal Registrar of Persons & Another [2004] eKLR*

Constitutional law – fundamental rights and freedoms – freedom from discrimination on racial grounds – where the task force created to look into the Somali citizens resident in the country refused to issue identification cards to some of the applicants – where the applicants claimed to be Kenyan residents – proof of – respondent claims that the papers presented as proof of Kenyan citizenship had been fraudulently acquired – effect of – price of national security – applicable principles – whether the applicants were entitled to the remedies sought – Constitution section 82 (4) (d)

Declaration – application for a declaration that the task force appointed by the Principle Registrar of Persons was unconstitutional and therefore illegal – where the respondents claim that the committee was appointed in accordance with the Constitution – effect of – whether the committee acted *ultra vires* in its refusal to issue the applicants with national identity cards – Constitution section 82 (4) (d); Registration of Persons Act sections 4 (2) and 8

7. *Faud Dumila Mohamed v. Republic [2005] eKLR*

Criminal law – evidence – corroboration – corroboration evidence in sexual offences – whether it is proper to require corroboration in all cases where women and girls were complainants in sexual offences – Evidence Act section 124 – Courts shall no longer be hamstrung by requirements of corroboration where the victim of a sexual offence is a child of tender years if it is satisfied that the child is truthful

8. *Nganga v. Republic [1985] eKLR 451*

Bail – bail pending trial – application for – principles applicable in such application – factors the court should consider – bail granted to first accused but denied to a jointly – charged co-accused – whether denial of bail to co-accused discrimination within the meaning of section 82 of the Constitution. Constitutional law – fundamental rights – discrimination – constitutional protection from discrimination – Constitution section 82 – meaning of discrimination – bail granted to one accused but denied to a jointly-charged co-accused – whether co-accused discriminated against
