



COMBINED 8<sup>TH</sup> -11<sup>TH</sup> PERIODIC REPORT ON THE AFRICAN CHARTER ON HUMAN & PEOPLES'  
RIGHTS

NOVEMBER 2014

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## **LIST OF ACRONYMS AND ABBREVIATIONS**

ADR	Alternative Dispute Resolution
AIDS	Acquired Immunodeficiency Syndrome
ALE	Adult Learning and Education
ARV	Antiretroviral
ASAL	Arid and Semi Arid Land
CAJ	Commission on Administrative Justice
CDF	Constituency Development Funds
COTU	Central Organization of Trade Unions
DCAH	Division of Child and Adolescent Health
DCS	Department of Children Services
DTAQA	Directorate of Technical Accreditation and Quality Assurance
EAC	East African Community
ECDE	Early Childhood Development and Education
eKLR	Electronic Kenya Law Report
ELC	Environment and Land Court
EMCA	Environmental Management and Coordination Act
FBO	Faith Based Organization
FDSE	Free Day Secondary Education
FGM	Female Genital Mutilation
KIE	Kenya Institute of Education
FPE	Free Primary Education
GDP	Gross Domestic Product
GER	Gross Enrolment Rate
HELB	Higher Education Loans Board
HIV	Human Immunodeficiency Syndrome
HMSF	Hospital Management Services Fund
ICC	International Criminal Court
ICH	Intangible Cultural Heritage
IDP	Internally Displaced Persons
IYCF	Infant and Young Child Feeding
JSC	Judicial Service Commission
KES	Kenya Shillings
KELIN	Kenya Ethical and Legal Issues Network
KNATCOM	Kenya National Commission for UNESCO
KNBS	Kenya National Bureau of Statistics
KNCHR	Kenya National Commission on Human Rights
KNHPG	Kenya National Health Policy and Guidelines
KPSA	Kenya Private Schools Association
MTP	Medium Term Plan
NALEAP	National Legal Aid Awareness Programme
NCCS	National Council on Children

NCIC	National Cohesion and Integration Commission
NEMA	National Environmental Management Authority
NER	Net Enrolment Rate
NGEC	National Gender and Equality Commission
NGO	Non- governmental Organizations
NHIF	National Hospital Insurance Fund
PMTCT	Prevention of Mother to Child Transmission
PPP	Public Private Partnership
PWD	People with Disabilities
SDA	Seventh Day Adventist
TJRC	Truth Justice and Reconciliation Commission
TSC	Teachers' Service Commission
TVET	Technical and Vocational Education Training
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNHCR	United Nations High Commissioner for Refugees
USD	US Dollars
WHO	World Health Organization

## INTRODUCTION

The Government of the Republic of Kenya has the honor to submit to the African Commission on Human and Peoples' Rights, its combined 8<sup>th</sup> -11<sup>th</sup> periodic report covering the period 2008- September 2014, in conformity with Article 62 of the African Charter on Human and Peoples' Rights (hereafter the "African Charter" or simply the "Charter"). The Report has been prepared through wide consultation between Government officials, Civil Society Organizations and independent national human rights institutions.

The report is divided into three parts:

- I. **Part A** outlines information concerning the general framework within which the human rights recognized by The Charter are protected in the reporting state.
- II. **Part B** outlines specific information on each of these rights, duties and fundamental freedoms in relation to appropriate individual articles of The Charter.
- III. **Part C** outlines specific information on economic, social cultural rights as outlined in the Charter.

### Part A

1. The Government of Kenya has since the presentation of the last combined report, made remarkable progress in safeguarding the rights, freedoms and duties of its people as enshrined in the Charter. The most important achievement has been the enactment of a new Constitution through a referendum in 2010. The Constitution has for the first time codified national values and principles that must underpin the review, formulation and implementation of public policies, administrative decisions and procedures, and enactment and application of the law. The values and principles, which include human rights, equality, non-discrimination, social justice, inclusiveness, protection of the marginalized, rule of law, democracy, participation of the people, human dignity, good governance, integrity, patriotism, national unity, sharing and devolution of power, bind all State organs , State officers , public officers and all persons.
2. Chapter four of the Constitution adopts an elaborate Bill of Rights which provides a stronger legal, policy and institutional framework for the protection and promotion of the civil and political rights as recognized in the Charter. The right to a fair trial, freedom of the media, freedom of expression, assembly, religion, freedom from torture are but some of the rights that the Government of Kenya as the primary duty bearer is committed to uphold...
3. The Bill of Rights applies to all law and binds all state organs. Article 21(1) stipulates that the state has the fundamental responsibility to observe, respect, protect, promote and fulfill the rights and fundamental freedoms in the Bill of rights. This means that whenever state and public officers perform their duties they must comply with the Bill of rights.

4. The Constitution of Kenya, 2010 allows some limitation of rights but moves away from sweeping draw-back clauses that were a major characteristic of the former Constitution. Article 24 (1) sets up a general limitations clause with clear criteria that have to be met by each limitation before it can be allowed to stand. The Limitation clause specifies that any constraint upon a human right or fundamental freedom should be done through legislation, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society that is based on human dignity, equality and freedom taking into account relevant factors.
5. Article 58 (6) of the Constitution provides that any legislation enacted in consequence of a declaration of a state of emergency may limit a right or fundamental freedom in the Bill of Rights only to the extent that the limitation is strictly required by the emergency, and the limitation is consistent with the state's obligations under international law that is applicable to a state of emergency.
6. The Courts have affirmed their willingness to apply rights by directly invoking treaties that Kenya is a state party to. This position has now been reinforced by Article 2(6) of the Constitution of Kenya, 2010 which provides that any treaty of convention ratified by Kenya becomes part of the law under the Constitution. There is now a growing jurisprudence where the courts have invoked the provisions of various human rights treaties that Kenya has ratified to enforce basic rights. For example, in *Muigai vs John Bosco Mina Kariuki & Jerioth Wangechi Muigai (2014) eKLR*, the Court of Appeal relied on international instruments that prohibit discrimination against women to wit, the Universal Declaration of Human Rights, the Covenant on Economic, Social and Cultural rights, the Convention on the Elimination of all forms of Discrimination Against Women and the Covenant on Civil and Political Rights, to state that the yoke and burden of discrimination should not be worn by the female gender anymore because, under the Constitution, the general rules of international law form part of the Laws of Kenya.
7. Article 23 (1) of the Constitution of Kenya 2010 gives the High Court jurisdiction to hear and determine applications for redress of a denial, violation, or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. Article 23 (2) mandates Parliament to enact legislation giving original jurisdiction to subordinate courts in appropriate cases to grant remedies for human rights violations. The Kenya National Commission on Human Rights (KNCHR) holds quasi judicial powers to investigate any complaint on any matter relating to human rights in any public or private office or private institution. The Commission on Administrative Justice (CAJ) also has powers to investigate and report on any act or omission in public administration in any sphere of government.
8. Where there is a violation or infringement of a human right, Article 22 of the Constitution provides that an individual or group may apply before a court for any of a number of remedies. Article 23 (3) enumerates the types of remedies that may be available to a litigant. These are: a declaration of rights, an injunction, a conservatory order, a declaration of invalidity of any law that violates any of the rights in the Bill of Rights, an order for compensation, and an order for judicial review.
9. Other measures taken to safeguard civil and political rights include the preparation of several pieces of legislation and policies. Examples of these are; *Persons Deprived of Liberty Bill 2013*, *Victims of Offences Bill*, and *Prevention of Torture Bill 2014* which are in various stages of development.

10. Strong constitutional institutions have been established to safeguard and uphold the principles of democracy and human rights, These are: the Kenya National Commission on Human Rights (KNCHR), the National Gender and Equality Commission (NGEC), the Commission on Administration of Justice (CAJ), the Independent Electoral and Boundaries Commission (IEBC), the Ethics and Anti Corruption Commission (EACC), the Independent Police Oversight Authority (IPOA) and the independent Office of the Director of Public Prosecution( ODPP).
  
11. To further guarantee that the people of Kenya enjoy their rights in a meaningful way, the Government has developed Sessional Paper No. 3 of 2014 on the National Policy and Action Plan on Human Rights, which gives effect to the Bill of rights in the Constitution. The National Policy provides a comprehensive and coherent framework that elaborates broad human rights principles to guide government and other actors in carrying out programmes, strategies and plans that will enhance the realization and enjoyment of rights by the people of Kenya.
  
12. The National Action Plan, which is an integral part of the Policy, includes specific targets and indicators to measure progress made in ensuring the enjoyment of rights in the country. It also clarifies responsibilities among the state actors who bear duties in the area of human rights.

## **PART B: SPECIFIC ASPECTS OF THE REPORT PURSUANT TO THE REPORTING GUIDELINES**

### **CIVIL AND POLITICAL RIGHTS**

#### **Article 2: Prohibition of discrimination**

13. The Government of Kenya is committed to ensuring the enjoyment of all rights and freedoms by all citizens. Indeed, the Constitution of Kenya provides the constitutional, legal and policy framework for the eradication and prevention of all forms of discrimination in Kenya. Article 10(2) (b) therein set outs important national values and principles of governance, such as human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized, which must be incorporated in all aspects of the Government's development agenda. The main prescriptions on equality and freedom from discrimination are found in Article 27. Article 27(2) specifically prohibits discrimination on any ground and guarantees equality which includes the full and equal enjoyment of all rights and fundamental freedoms. Women and men and other marginalized communities are granted equal rights to opportunities in political, economic, cultural and social spheres under Article 27(3) which states that "women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.
14. Article 27(4) provides that "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." Article 27(5) prohibits a person from discriminating directly or indirectly against another person on any ground. The Government is also committed to dealing with past injustices and cases of discrimination. To this end, the Constitution of Kenya, 2010 mandates the state to give full effect to the realization of the rights guaranteed under Article 27 by taking legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.
15. In furtherance of Article 59(4) of the Constitution three independent commissions were established to ensure the better realization of human rights for the people of Kenya. These are the National Gender and Equality Commission; the Kenya National Commission on Human Rights and the Commission on the Administration of Justice. The National Gender and Equality Commission (NGEC) works to promote the principles of: impartiality, gender equality and gender equity; inclusiveness, non-discrimination and protection of the marginalized groups consistent with Article 27 of the Constitution.

16. The Kenya Vision, 2030 which is the development blueprint for the Government of Kenya has as one of its foundations the need to “enhance equity and wealth creation opportunities for the poor”. It recognizes that no society can gain social cohesion if significant sections of it lives in abject poverty and has for this reason included equity as a recurrent principle in all its economic, social and political programmes and underscores the importance of investing in; arid and semi-arid districts, communities with high incidence of poverty, unemployed youth, women, and all vulnerable groups. The Kenya Vision 2030 further outlines strategies aimed at moving the country towards substantive equality measures to support regions and groups which have been historically disadvantaged on account of region or status. Under the Vision, the Government established education centres of excellence in every constituency in the country. Furthermore, the Constitution has introduced the Equalization Fund which uses a formula based on levels of poverty to provide basic services such as water, roads, health facilities and electricity in the most marginalised parts of Kenya (Article 204) with the constitutionally-established Commission for Revenue Allocation is playing key roles towards this end.
17. To address the issue of stigma associated with HIV/AIDS- the *HIV and AIDS Prevention and Control Act* was enacted in 2006 and became operational in 2009. This legislation lays down strict guidelines on confidentiality in treatment and proscribes hefty penalties where such rights are breached. It also addresses the right of access to health care, while outlawing any form of discrimination against persons living with HIV/AIDS in the workplace, at healthcare facilities, and in schools. It provides penalties in the event of such discrimination. The Act also established an Equity (HIV and AIDS) Tribunal (section 25) to determine complaints arising from complaints of breaches of this law.
18. The Uwezo Fund was established on 8th September 2013, with an initial budget of Kenya Shillings (KES) Six Billion (KES. 6,000,000,000/- Approximately USD 67,796,610/-). The objective of the Fund is to expand access to finance through grants and credit to promote youth and women businesses and enterprises at the constituency level, thereby enhancing economic growth towards the realization of the goals of Vision 2030; to generate gainful self-employment for Kenyan youth and women; and to model an alternative framework in funding community driven funding. Uwezo Fund is a revolving kitty, which guarantees KES 6 billion being set aside in every financial year. The Government through the Ministry of Devolution and National Planning released KES 5.35 billion (Approximately USD 60,451,977/-) out of the KES 6 billion that was approved by Parliament for the financial year 2013/2014. The Uwezo Board has already disbursed the funds to constituencies as stipulated in the Public Finance Management (Uwezo fund) Regulations 2014. The Government will offer capacity building training for all groups benefiting from the first phase of the KES 5.35 billion Uwezo Fund.
19. The 2007 Post Election Violence exposed the underlying challenges of inequality and the attendant tensions in the country. To build national cohesion and integration the Government enacted the *National Cohesion and Integration Act No. 12 of 2008*. The Act provides for the promotion of equality and harmonized relations in the society and outlines the measures that should be taken to tackle issues related to negative ethnicity and stipulates that all public institutions should not have more than one third of its employees from one community. It is therefore illegal for an employer to discriminate in the way he/she 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. The National Cohesion and Integration Commission oversees the implementation of the Act

by facilitating and promoting equality of opportunity, good relations, harmony and peaceful co-existence between persons of the different ethnic and racial communities of Kenya.

20. To curb discrimination in employment the *Employment Act, Cap 226, Laws of Kenya* enacted in 2007 protects persons from discrimination in the employment sphere. It prohibits discrimination in employment within three main aspects: (i) promotion of equality of opportunity in employment; (ii) elimination of discrimination in any employment policy or practice, including against prospective employees based on their race, color, sex, ethnic origin, HIV status, disability, pregnancy; and (iii) the payment of equal remuneration for work of equal value. The Act further mandates the Minister for Labour, Social Security and Services to promote and guarantee equality of opportunities in employment for all persons including migrant workers and members of their families who are lawfully in the country.
21. *VMK vs CUEA (2013) eKLR* was filed by a claimant against her employer in the Industrial court for discrimination. The suit challenged HIV discrimination in the work place and dealt with a telephone operator who had been dismissed from employment due to her pregnancy and on the basis of her HIV status after she was tested without her consent and the information disclosed to her colleagues and superiors who used the same to deny her benefits enjoyed by other employees and failed to confirm her as a permanent and pensionable employee eventually terminating her services. The case sought to challenge the right to non-discrimination, right to work, right to informed consent, and right to privacy and confidentiality. It was concluded in 2013 and the petitioner awarded KES 6,971,346/- (Approximately USD 78,772/-) as compensation. The court made relevant declarations in relation to the right to work, non-discrimination and informed consent in the context of HIV.
22. With regard to the general elimination of discrimination against persons with disabilities the Country has developed a draft National Policy on Disability. The policy seeks to eliminate disparities in service provision and to ensure that services are available to all citizens with disabilities. The policy has identified 21 policy targets and states five principles to guide its planning, implementation and monitoring. The five principles are; equalization of opportunities, human rights approach to the disability agenda, mainstreaming, accessibility and gender. Among the key components of the policy are prevention, awareness and public education; early identification and intervention; rehabilitation; education; and training. Other important elements are economic empowerment; culture; sports and recreation; health; HIV/AIDS; income maintenance and social support; transport; housing; and information and communication.
23. In addition, the policy encompasses registration; protection and legal services; organizations of persons with disability (PWDs); assistive devices and services; research and appropriate technology; and religion. It was recognized that successful implementation of the policy would require strong administrative structures, adequate resources, review of existing policies and legislation, formulation of new policies, enhanced local and international collaboration, monitoring and evaluation.
24. The *Persons with Disabilities Act 2003, Cap 133, Laws of Kenya* has undergone various reviews to reinforce its mandate which seeks to “provide for the rights and rehabilitation of persons with disabilities; to achieve equalization of opportunities for persons with disabilities; to establish the National Council for Persons with Disabilities; and for connected purposes”

25. Both public and private organizations have also embraced the mainstreaming of disability issues. For example the K-Rep Bank provides loans to groups of persons with disabilities. The retirement age for persons with disabilities in public service is pegged at 65 years while that for other public employees is 60 years as an affirmative action. Disability mainstreaming is laid down in the Public Service Commission of Kenya- Code of Practice on Disability Mainstreaming. The Guidelines developed by the National Council for Persons with Disability clearly outlines that institutions should advocate and facilitate the respect, equal opportunity, non-discrimination, accessibility, effective participation and inclusion for Person's With Disability in the work environment.
26. In order to ensure that the Government "walks the talk" on the integration of persons with disabilities in all the spheres of public life, all public organizations must include a measurable targets in their performance contract every year on actions they intend to take to mainstream persons with disabilities. Such targets are mandatory and no public body has an option of not contracting on it.
27. The Government is committed to the elimination of gender discrimination and has taken deliberate steps towards the achievement of equal rights in matters of succession and cultural acceptance. The Government's policy on land and gender rights is provided by Article 60(1) (f) Constitution of Kenya, which states that "elimination of gender discrimination in law, customs and practices related to land and property in land". This has found life in cases on succession matters that touch on land and in particular in *Samson Kiogora Rukunga vs Zipporah Gaiti Rukunga (2011)eKLR* where the Court held that as per the law, it matters not whether a daughter of the deceased is married or not when it comes to consideration of whether she is entitled to inherit her parent's estate. The learned Judge relied on Article 60(1) (f) of the Constitution which provides for the elimination of gender discrimination with regards to land. Therefore, there should be no discrimination between married and unmarried daughters of a deceased person who died intestate. In the matter of *Muigai vs John Bosco Mina Kariuki & Jerioth Wangechi Muigai (2014) eKLR*, the Court of Appeal relied on international instruments that prohibit discrimination against women to wit, the Universal Declaration of Human Rights, the Covenant on Economic, Social and Cultural rights, the Convention on the Elimination of all forms of Discrimination Against Women and the Covenant on Civil and Political Rights to state that the yoke and burden of discrimination should not be worn by the female gender anymore as under the Constitution, the general rules of international law form part of the Laws of Kenya and cannot be derogated against.
28. The Constitution provides that at least a third of members of the Senate, National Assembly and County Assemblies be of either gender. To fill the women's minimum quota, the Constitution reserved 47 women seats in the National Assembly and 16 such seats in the Senate. The concern here was that the mandatory number of women in the National Assembly in accordance with article 97(1) (b) of the Constitution amounts to a mere 13.4 % which would not reach the a "third threshold". Should the electorate then not elect the sufficient number of women to attain the balance there would be a Constitutional crisis. An advisory opinion was sought from the Supreme Court, which determined by majority decision that the realization of the right is progressive and the Country should come up with an implementation mechanism by 2015. A Committee has been set up under the leadership of the National Gender and Equality Commission to come up with the mechanism.
29. The *Kenya Citizenship and Immigration Act, 2011*, addresses certain issues of discrimination that were a matter of concern in earlier legislation on immigration matters, For example, a woman can now transfer

her citizenship to her spouse and children. The *Refugees Bill, 2012* provides protection to asylum seekers, refugees and their families of refugees from discrimination upon entering Kenya and the *Employment Act 2007* prohibits both direct and indirect discrimination on any ground.

### **Article 3: Right to equality before the law**

30. The Constitution of Kenya, 2010 recognizes that all individuals are equal before the law. Article 27(1) provides that “every person is equal before the law and has the right to equal protection and equal benefit of the law.” This is also anchored in Part 4 of the Constitution which provides for the Bill of Rights. Article 20(1) states that “the Bill of Rights applies to all law and binds all State organs and all persons” and Article 20(2) states that “every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom”. The Bill of Rights further provides under Article 22(1) that “every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.”
31. Article 25 provides for the fundamental rights and freedoms that cannot be limited under any circumstances. All citizens or any person appearing before a Court of law or tribunal shall at all times be entitled to a fair trial. The Independence Constitution had Rules for the enforcement of the fundamental rights and freedoms under Section 84(6). The Sixth Schedule the Constitution of Kenya, 2010 which deals with Transition and consequential provisions ensured that the said rules were in force until the Chief Justice developed the Protection of Fundamental Rights Rules that are currently in effect.
32. Pursuant to the provisions of Article 59(4) of the Constitution of Kenya, 2010, the Government enacted the *Commission on Administration of Justice (CAJ) Act Cap 102* Laws of Kenya which created the Commission on Administration of Justice whose mandate is to deal with complaints against any administrative action of public officials. The CAJ is guided by among others, the principles of impartiality and gender equity; and the rules of natural justice. The Constitution of Kenya, 2010 also states *inter alia* under Article 47(1) that “every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.”
33. In order to ensure equal protection of the law, the Judiciary has undergone major transformation that seeks to reposition it within the context of the Constitution of Kenya, 2010. This commenced with the competitive recruitment of the Chief Justice, other judicial officers as well as administrative and paralegal staff. A major re-organisation of the institution is currently underway to enable it fulfill its Constitutional mandate under Article 159 of the Constitution of Kenya, 2010 and meet public expectations. This is currently being done under the Judiciary Transformation Framework 2012-2016 which was launched in May 2012; and the Strategic Plan 2012-2016. According to the State of the Judiciary Report 2011-2012, the Judicial Service Commission (JSC) hired 251 senior staff during the reporting period. These include a Chief Justice, Deputy Chief Justice, 5 Supreme Court Judges, seven Judges of the Court of Appeal, 36 Judges of the High Court, the Chief Registrar of the Judiciary and the Deputy Chief Registrar, seven Directors, five Registrars, 109 Resident Magistrates, and 63 Legal Researchers, among others. It has also recruited 12 judges of Industrial Court, 15 judges for Environment and Land Court and 23 Kadhis.

#### **Article 4: The right to life and personal integrity**

34. Kenya has constitutional and legislative guarantees to the right to life. Article 26(1) of the Constitution of Kenya, 2010 states that “every person has the right to life” and that “the life of a person begins at conception” Article 26(2). Article 26(3) provides that “a person shall not be deprived of life intentionally, except to the extent authorized by this Constitution or other written law.”
35. The *Power of Mercy Act, 2011* provides for the President’s power of mercy pursuant to Article 133 of the Constitution of Kenya, 2010. To ensure independence, the Constitution provides that the Advisory Committee on the Power of Mercy comprises the Attorney General as the Chair, the Cabinet Secretary responsible for correctional services and at least five other members none of whom may be a State officer or in public service.
36. No child can be sentenced to capital punishment as contained under Section 18(2) of the *Children’s Act* which states that “notwithstanding the provisions of any other law, no child shall be subjected to capital punishment or to life imprisonment.” That aside, there is a *de facto* moratorium on the death penalty in force since 1987. This is based on the Government’s belief that the penalty is in conflict with the fundamental human rights norms as embodied in international instruments to which Kenya is a State party. Over the years, the President has commuted death sentences to life imprisonment.
37. The Kenyan Courts have also dealt with the issue of unconstitutionality of the mandatory death sentence in murder cases. In the case of *Godfrey Ngotho Mutiso v Republic [2010] eKLR in Mombasa Criminal Appeal No. 17 of 2008*, the Appellate Court held that Section 204 of the Penal Code which provides for a mandatory death sentence in instances where an accused person is found guilty of having committed murder is antithetical to the Constitutional provisions on protection against inhuman or degrading punishment or treatment and fair trial. Unfortunately, the challenge at this juncture is that Kenya is unable to abolish the death penalty as the public has overwhelmingly rejected the abolition of the death penalty for the most serious crimes. There is public concern that commuting death sentences to life imprisonment will lead to more criminality. However, the Government in collaboration with the Kenya National Commission on Human Rights and other stakeholders continue to raise public awareness against the death penalty.
38. The Government of Kenya respects the rights to life and has been unequivocal in condemning acts of extrajudicial killings by the police whenever they are alleged to have occurred because these are some of the most serious human rights violations. Any allegation of unlawful killing is investigated by the authorities and perpetrators are tried and convicted by a competent court if found to have used unreasonable force. Indeed, officers are now held personally responsible for their actions if found to have committed an offence.
39. The Government enacted the *National Police Service Act, 2011* that has overhauled police service in Kenya changing it from being a force to a service that is more responsive to the needs of the citizens and conforms to the requirements of a modern policing unit. The Constitution of Kenya, 2010 under Article 244 provides that the National Police Service should at all times strive for the highest standards of professionalism and discipline among its members; prevent corruption and promote and practice transparency and accountability; and comply with constitutional standards of human rights and fundamental freedoms; train staff to the highest possible standards of competence and integrity and to respect human rights and fundamental freedoms and dignity; and foster and promote relationships

with the broader society. The *Independent Policing Oversight Authority Act*, enacted in 2011 establishes the Independent Policing Oversight Authority whose objectives are to hold the police accountable to the public in the performance of their functions and ensure independent oversight of the handling of complaints by the service.

## **Article 5: Right to dignity, prohibition of torture and slavery**

40. Torture and slavery are prohibited and outlawed in Kenya. The right to be protected from torture, cruel, degrading and inhuman punishment or treatment, cannot at any time be limited under any circumstances. Article 25 of the Constitution of Kenya, 2010 states that despite any other provision in this Constitution, freedom from torture and cruel, inhuman or degrading treatment or punishment; and freedom from slavery or servitude shall not be limited. Article 28 of the Constitution of Kenya, 2010 provides that “every person has inherent dignity and the right to have that dignity respected and protected.” Article 29 adds that “every person has the right to freedom and security of the person, which includes the right not to be deprived of freedom arbitrarily or without just cause; subjected to any form of violence from either public or private sources; subjected to torture in any manner, whether physical or psychological; subjected to corporal punishment; or treated or punished in a cruel, inhuman or degrading manner. Article 30(1) states that “a person shall not be held in slavery or servitude” while Article 30(2) that “a person shall not be required to perform forced labour.”
41. The Government of Kenya is committed to the prevention of torture and other ill-treatment in the country and has taken various legislative, judicial and administrative steps to give effect to the provisions of the Charter and other relevant Conventions. In line with the Robben Island Guidelines Kenya has ratified or acceded to various international and regional instruments that prohibit torture. These include:
- a) The Protocol to the African Charter on Human and Peoples Rights establishing The African Court on Human and Peoples Rights
  - b) United Nations Convention against Torture, and Other Cruel Inhuman and Degrading Punishment or Treatment.
  - c) The International Convention on Economic, Social and Cultural Rights
  - d) The International Convention on Civil and Political Rights
  - e) The Rome Statute of the International Criminal Court
42. Further, the country promotes and supports the work of various international mechanisms on the prevention of torture. The Constitution of Kenya safeguards the freedom and security of the person and contains an absolute prohibition of torture and other, cruel, inhuman or degrading treatment. Several pieces of legislation have been enacted to criminalize torture and other ill treatment.
- a) The *National Police Service Act, 2011*, criminalizes torture and other cruel, inhuman and degrading treatment or punishment committed by the police, and proscribed heavy sanctions. .
  - b) The *Children’s Act 2001*, offers protection to children against torture, cruel treatment or punishment, unlawful arrest or deprivation of liberty,
  - c) The *Prohibition of Female Genital Mutilation Act, 2011* provides new opportunities for the total elimination of female genital mutilation,

- d) The Independent Police Oversight Authority is an independent complaint mechanism empowered to receive, investigate and take appropriate action on allegations of torture and other ill-treatment, and
- e) The *Counter Trafficking in Persons Act, 2010, No. 8 of 2010* also prohibits torture and slavery, The Prevention of Torture Bill 2011 provides a comprehensive legislative framework for the prevention, prohibition and punishment of acts of torture and other cruel, inhumane or degrading treatment or punishment and rehabilitation of victims of torture.

Similarly, the following laws have been prepared to protect the rights of persons to dignified treatment and freedom from torture and slavery in line with the Constitution of Kenya and other international standards:

- a) The *Persons Deprived of Liberty Bill 2014*, which has been tabled in Parliament gives effect to constitutional safeguards on the rights of persons detained, held in custody or imprisoned. The United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules) have informed the preparation of the Bill.
  - b) The *Prevention of Torture Bill 2014* provides a legislative framework for the prevention, prohibition and punishment of acts of torture and other cruel, inhumane or degrading treatment or punishment and rehabilitation of victims of torture.
  - c) The *Victim Protection Act 2014* is a critical framework for the reparation and compensation of victims of crime and abuse of power.
43. The independence and impartiality of the Courts in Kenya to adjudicate on matter involving torture and other ill treatment has been strengthened due to radical judicial reforms undertaken in the last few years.
44. The Constitution of Kenya, 2010 explicitly provides that the Kenya Police shall “comply with constitutional standards of human rights and fundamental freedoms” and that police staff shall be trained “to respect human rights and fundamental freedoms and dignity”. In October 2012, the Government created the Police Reform Implementation Committee to spearhead the transformation in the police service. Police Officers now receive training that inculcates respect for human rights in law enforcement activities.

## **Article 6: Right to liberty and security of person**

45. The Constitution of Kenya, 2010 contains specific provisions that promote the right to liberty and security of person. Article 29 states that every person has the right to freedom and security of the person, which includes the right not to be deprived of freedom arbitrarily or without just cause; detained without trial, except during a state of emergency, in which case the detention is subject to Article 58; subjected to any form of violence from either public or private sources; subjected to torture in any manner, whether physical or psychological; subjected to corporal punishment; or treated or punished in a cruel, inhuman or degrading manner.

46. The rights of an arrested person are contained under Article 49 of the Constitution of Kenya, 2010 and they include the right to be informed promptly, in a language that the person understands, of the reason for the arrest; the right to remain silent and the consequences of not remaining silent; the right to remain silent; the right to communicate with an advocate, and other persons whose assistance is necessary; the right not to be compelled to make any confession or admission that could be used in evidence against the person; the right to be held separately from persons who are serving a sentence; the right to be brought before a court as soon as reasonably possible, but not later than twenty-four hours after being arrested or if the twenty-four hours ends outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day; the right at the first court appearance, to be charged or informed of the reason for the detention continuing, or to be released; and the right to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released. However there's been concern in the country that suspects accused of terrorism are out on bail and roaming freely. The Judiciary has been called upon to exercise its discretion in accordance with the Constitution when granting bail, particularly to those suspected of terror attacks.
47. To ensure that petty offenders do not end up in remand, Article 49(2) of the Constitution of Kenya, 2010 states that "a person shall not be remanded in custody for an offence if the offence is punishable by a fine only or by imprisonment for not more than six months." To protect the rights of those under arrest the *Persons Deprived of Liberty Bill* was developed in 2012. The Bill provides for the humane treatment of persons detained, held in custody or imprisoned and gives effect to the provisions of international human rights instruments and rules on such persons. The bill is due for enactment by August 2014 in accordance with Constitutional stipulations. The obligations of law enforcement officers and private persons in authority in relation to persons deprived of liberty are clearly set out in the Bill.
48. Article 157(1) of the Constitution of Kenya, 2010 creates the Office of the Director of Public Prosecutions as a separate and independent Constitutional office from the Office of the Attorney General. The Director of Public Prosecutions is allowed to take over and continue any criminal proceedings commenced in any court (other than a court martial) instituted or undertaken by another person or authority, with the permission of the person or authority. He can also discontinue at any stage before judgment is delivered any criminal proceedings. This has led to an improvement in access to justice for accused persons. These provisions have to be read together with Section 6 of the *Office of the Director of Public Prosecutions Act, 2013* which seek to safeguard the independence of the office.
49. The Kenya Prisons Services has undergone major reforms since 2003. One of the objectives of the reforms has been aimed at decongesting the prisons. This is in recognition of the fact that a prisoner is entitled to the basic freedoms guaranteed by the Constitution and other international human rights standards. *The Prisons Act* (Cap. 90) has been reviewed to comply with constitutional imperatives. Programmes that focus on strategic issues that are human rights based, promote governance and democratic practices in prison management have been implemented. *The Borstal Institutions Act* (Cap. 92) is under review to synchronize it with the Children's Act to capture the multiple needs and challenges of juveniles in prison custody. The Government has also embarked on structural development programmes for the prisons with a view to improving prisons conditions through infrastructural upgrades and civil works in many prison facilities countrywide. These facilities will increase spaces for the accommodation of prisoners and therefore humanize the general prison conditions. The prisoners that are often released are those jailed for petty crimes, and prisoners,

including those on long sentences, who can demonstrate that their behavior and character have improved. Such decongestion programmes always lead to an improvement in conditions and better diet for those who remain in prisons.

<b>Kenya Prison Composition</b>			
<b>Year</b>	<b>Pre-trial</b>	<b>Convicted</b>	<b>Total</b>
2009	19,636	29,032	49,554
2010	15,092	33,259	48,351
2012	20,140	36,040	53,000

50. Although prisons only have a capacity of 22,000, prisons are currently at 240 per cent occupancy at 53000, of whom 38 per cent are pretrial, up from 31 per cent in 2010 but down from 39 per cent in 2009. The Government is committed to alternatives to imprisonment including orders for probation, community service orders, and supervision in 'Borstal' schools for young offenders; supervision; and parole which is theoretically available when an inmate is three months from release and permits the inmate to be released for two weeks on parole before their release. Parole Guidelines are being developed for the provisions to be used. There are also conditional release, fines, compensation, and suspended sentences.

51. There is also the Probation and After Care Service in Kenya which helps in decongesting prisons. There are 650 professional probation officers in all courts in Kenya. In addition there are 300 volunteer probation officers providing auxiliary services. There are 18 field offices in all 47 counties of Kenya. The Probation Service helps courts make informed decisions on sentencing, regarding the protection of victims, on bail, and provides penal release assessment. It also makes community service placements. During the year 2011, there were 13,854 probation orders and 42,555 community service order placements.

## **Article 7: Right to a Fair Hearing**

52. The right to fair hearing is guaranteed under Article 50 of the Constitution of Kenya, 2010 which states that “every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.” The Courts include the Supreme Court of Kenya established under Article 163(1), the Court of Appeal established under Article 164(1), the High Court established under Article 165(1) and the subordinate Courts established under Article 169 including the Magistrate’s Courts, the Kadhis Courts the Court Martial.

53. The High Court is the one that is vested with original jurisdiction with regard to violations of human rights and it states under Article 165(3)(b) that the High Court has the jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened. Article 164(3) grants the Court of Appeal powers to entertain appeals from the decisions of the High Court. Article 50(2)(q) guarantees a convicted person the right to appeal to, or apply for review by, a higher court.

54. Article 50(2) provides that every accused person has the right to a fair trial, which includes to be presumed innocent until the contrary is proved; to be informed of the charge, with sufficient detail to answer it; to have adequate time and facilities to prepare a defence; to a public trial before a court established under this Constitution; to have the trial begin and conclude without unreasonable delay; to be present when being tried, unless the conduct of the accused person makes it impossible for the trial to proceed; to choose, and be represented by, an advocate, and to be informed of this right promptly; to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly; to remain silent, and not to testify during the proceedings; to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence; to adduce and challenge evidence; to refuse to give self-incriminating evidence to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial.
55. Article 50((2))(n) protects individual from conviction for an act or omission that at the time it was committed or omitted was not an offence in Kenya or a crime under international law.
56. The Constitution of Kenya, 2010 even goes beyond the provisions of the Charter by prohibiting double jeopardy under Article 50(2)(o) which prohibits one from being tried for an offence in respect of an act or omission for which the accused person has previously been either acquitted or convicted; to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing.
57. The Government has adopted the National Prosecution Policy which seeks to regulate and standardise how prosecutions are conducted. It has prescribed policy considerations for public prosecutors in the initiation and conduct of prosecutions in the Republic of Kenya. The policy ensures that the public is empowered and know what to expect and demand fair, efficient and effective public prosecution services.
58. The Judiciary has undergone radical reforms in the recent past. Article 173 of the Constitution of Kenya, 2010 creates the Judiciary Fund. This has increased the independence of the Judiciary. During the 2013-2014 Budget, the fund was allocated the sum of Kenya Shilling 3.5 Billion to be used for administrative purposes and other matters to facilitate efficient delivery of services by the Judiciary. This fund has been instrumental in implementing the Judicial Transformation Framework 2012-2016. The Judiciary has also digitized over 60 million pages of cases for the High Court across Kenya and over 10,000 records for the Court of Appeal covering the years 1999 to 2010.
59. The Constitution stipulates the number of Judges that shall sit in the Supreme Court as the Chief Justice, the Deputy Chief Justice and 5 other Judges. Article 164(1)(a) provides that the Court of Appeal shall have at least 12 judges but the actual number to be determined by an Act of Parliament. There are currently over 30 Judges sitting in the Court of Appeal. There are currently over 70 Judges in the High Court. It is envisaged that the increase in the number of Judges will lead to an improvement in the disposal of cases.

60. The Government has drafted *the Legal Aid Bill, 2013* which seek to give effect to Articles 48, 50(2)(g) of the Constitution, to establish the National Legal Aid Service and to make provision for legal aid and access to justice. A national policy to this effect has also been finalised.
61. There are Court Users Committees established in every Court station which bring together stakeholders in the justice sector including the Judiciary, the Kenya Police, Kenya Prisons Services, and Probation and After Care Services. They foster effective and efficient criminal justice system. These Committees have facilitated Case mentions in Prison instead of transferring accused persons to court for the same, thus reducing the time taken to conclude cases.
62. *In The High Court of Kenya At Nairobi (Nairobi Law Courts) Constitutional Petition 318 of 2011, John Swaka v The Director of Public Prosecutions & 2 others [2013] eKLR*, the Office of the Director of Public Prosecution and the Department of Justice reaffirmed the Government's commitment to comply with the provisions of Article 50(2)(h) of the Constitution which gives a an accused person the right to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly. The applicant in this case was charged. The High Court at *Nairobi (Nairobi Law Courts) Petition 459 of 2006 Joshua C. Kulei V Kenya Anti Corruption Commission & Another [2013] eKLR*, the Court held among other things that the law cannot be applied retrospectively keeping in mind the right to a fair trial and the rights of an accused person .
63. For enhanced awareness of the law, the National Council for Law Reporting has created a data base of all Laws, Bills, Legal Notices and Gazette Notices. It has also uploaded selected cases that have been determined in Kenyan Courts.
64. As at 1st April 2014 there were 10,960 lawyers who had signed the Roll of Advocates. Out of this 6,003 were active members and possess current practicing certificates while 3,432 were inactive. 54 had been struck off the Roll of Advocates while 38 had been suspended. Though the ratio of lawyers to the public remains low, this is considerable progress.
65. Article 105(2) requires that election petitions be heard and determined within 6 months after the elections. Following the March 2013 general elections, the Judiciary established Election Courts to hear and determine the election petitions that were filed in Court. These were concluded and all judgments delivered by 4<sup>th</sup> October, 2013 thereby ensuring that the same do not increase the backlog of cases. A number of appeals are still in the Courts at the time of submitting the report.

## **Article 8: Freedom of Conscience and Religion**

66. Article 8 of the Kenyan Constitution states that there shall be no State religion while Article 32 guarantees freedom of conscience, religion, belief and opinion and it provides that "every person has the right to freedom of conscience; right to manifest any religion or belief through worship, practice, teaching or observance. The Constitution further prohibits discrimination on the basis of one's religious belief by specifically providing that a person may not be denied access to any institution, employment or facility, or the enjoyment of any right, because of the person's belief or religion. The Constitution also bars one from being compelled to act, or engage in any act, that is contrary to the person's belief or

religion. In terms of legislative provisions, Section 8 of the *Children's Act Cap 141*, Laws of Kenya states that every child has the right to religious education but with a limit to the parental guidance.

67. Constitutional provisions that relate to the recognition the freedom of conscience include Article 8 and Article 169 of the Constitution. Article 170 provides for the Kadhi's Courts in recognition of the right of those who profess the Islamic faith to their religion and personal beliefs. Article 44 deals with the right to language and culture while Article 32 encompasses all the above rights. There is also the Societies Act, (Cap. 108) laws of Kenya which regulates churches in Kenya and makes it a requirement for churches to meet certain requirements before being registered. Faith Based Organizations are also not taxed. The protection of the freedom to religion has seen an exponential growth in the number of churches in the last decade.
68. In Kenya, there are very many churches. This is a reflection of the freedom of worship that is enshrined in Kenya's constitution. However, have been many cases where church revelers make excessive noises which studies show could cause hearing impairment to human beings. The Government is committed to ensuring that freedom of religion is not used as an excuse to inconvenience other people. To this end, the National Environmental Management Authority (NEMA) published the Environmental Management and Coordination (Noise and Excessive Pollution Control) Regulations 2009 that seek to regulate the noise levels that are permissible. The regulations require anyone who intends to make noise to apply for a permit to emit excess noise beyond the acceptable limits.
69. Some of the challenges with the freedom of religion have been that there are some religious groups or cults whose practices are in conflict with human rights principles as they do not take their children to school or hospitals. Also, conmen have registered churches with the sole aim of conning unsuspecting faithful in the pretence that they can heal them from various diseases. The State is in the process of developing policies to regulate the conduct of churches and other religious organizations.
70. The last two years have also seen the rise of religious tension between Christians and Muslims. Both the Christians and the Muslims have religious gatherings which are a common sight along streets and at open-air markets in Kenya, in which preachers aim to educate their followers and convert people of other faiths. The Christian gatherings are locally known as "crusades" while the Muslim gatherings are known as "muhadaras". Recently, such gatherings have been the source of fiery, provocative speeches that have stirred up sectarian tension. In cautioning the public about this tension, the Inspector General of Police said, "We have fundamentalists from Christianity, Islam and even Hinduism who can react violently if they view that their religion is under attack," In particular, he said, the gatherings should desist from debating the Qur'an and the Bible.

## **Article 9: Freedom of Information and Expression**

71. Articles 33 of the Constitution, guarantees every citizen the freedom of expression, which includes freedom to seek, receive or impart information or ideas; freedom of artistic creativity; and academic freedom and freedom of scientific research. However, this freedom of expression does not extend to propaganda for war; incitement to violence; hate speech; or advocacy of hatred that constitutes ethnic incitement, vilification of others or incitement to cause harm; or is based on any ground of

discrimination specified or contemplated in Article 27(4). However, in the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others.

72. The right of every citizen to access information is guaranteed under Article 35 of the Constitution. Indeed, every citizen has the right of access to information held by the State; and information held by another person and required for the exercise or protection of any right or fundamental freedom. Article 35(3) requires the Government to publish and publicise any important information affecting the nation.
73. The Government is committed to providing information in a manner that is responsive to technological advances. To this end, the Government enacted the *Kenya Information and Communications Act, CAP 411A* that provides a framework for the establishment of e-Government, a portal where one can access Government documents and information. The portal seeks to ensure that a Ministry or Government department, agency or local authority, established by or under any law or controlled or funded by the Government can provide public services electronically without necessarily having the public physically visiting the offices.
74. Article 54 of the Constitution also recognizes the rights to persons with disabilities to access information. In order to enhance access to information by persons with disabilities, the Constitution and the *Persons with Disabilities Act, Cap 133, Laws of Kenya* have recognized Braille and other communication formats and technologies available to persons with disabilities as part of the languages of Kenya.
75. The Government is committed to media freedom. Article 34 of the Constitution guarantees the freedom of the media and for that reason, the Government cannot exercise control over or interfere with any person engaged in broadcasting, the production or circulation of any publication or the dissemination of information by any medium; or penalise any person for any opinion or view or the content of any broadcast, publication or dissemination. The Government also encourages the establishment of media houses provided they have registered and secured licenses. Article 34(3)(b) ensures that media houses are independent of control by government, political interests or commercial interests.
76. Article 34(4) states that all State-owned media are free to determine independently the editorial content of their broadcasts or other communications; be impartial; and afford a fair opportunity for the presentation of divergent views and dissenting opinions. The Government enacted the *Media Act, Cap 411B, Laws of Kenya* which create a regulatory framework to govern the media in Kenya. This freed the airwaves and saw an increase in the number of TV and FM stations.
77. The Government acknowledges the threat that an unregulated or rogue media poses to national security. The Government enacted the *Kenya Information and Communication (Amendment) Act No. 41 A of 2013* which amended the Information and Communications Act, 1998 to regulate hate speech and freedom of expression and also provide for the functions of the Communications Commission of Kenya which includes the promotion of “diversity and plurality of views for a competitive marketplace of ideas” and provides that the government may “make regulations generally with respect to all broadcasting services and without prejudice to ... the facilitation, promotion and maintenance and plurality of views for a competitive marketplace of ideas”. Further, the Act requires all licensed broadcasters to provide responsible and responsive programming that caters for the varied needs and

susceptibilities of different sections of the Kenyan community; ...and ensure that derogatory remarks based on ethnicity, race, creed, colour and sex are not broadcast ...”

78. There has been an increase in public access to Government information which enhances transparency and accountability. The challenge however has been the lack of censorship in the social media and text messages. The penetration of mobile phones in Kenya has enhanced access to information to citizens thereby creating a positive effect. For example, farmers can now receive information on the expected weather patterns from the Meteorological Department through text messages.

## **Article 10: Freedom of Association**

79. Article 36 of the Constitution guarantees freedom of association. It states that every person has the right to freedom of association, which includes the right to form, join or participate in the activities of an association of any kind. A person shall not be compelled to join an association of any kind. It further adds that any legislation that requires registration of an association of any kind shall provide that registration may not be withheld or withdrawn unreasonably. The freedom of association is further protected in national legislation in force, such as the Cooperative Societies Act and the Societies’ Act. Kenyan Law also protects many professional associations and organizations, such as the medical association, the Bar Association, the Architectural Association of Kenya.

## **Article 11: Freedom of Assembly**

82. Article 37 of the Constitution allows every person the right, peaceably and unarmed, to assemble, to demonstrate, to picket, and to present petitions to public authorities. In the recent past this right has been threatened by political inflammatory remarks that spark ethnic clashes. Kenya’s security agencies have been criticized whenever they issue orders against public rallies due to security concerns. The issue remains one of balancing the exercise of the right to assemble on the one hand and securing citizens at any given time.

## **Article 12: Freedom of Movement**

83. Kenyan citizens have constitutional rights to travel, reside in, and/or work in any part of the state where one pleases within the limits of respect for the liberty and rights of others, and to leave that state and return at any time. The constitution further protects the right of every person, including non citizens to move freely in the country and to leave Kenya. The right to freedom of movement is governed by various laws which also spell out certain restrictions on the right, particularly with regard to national security, public health and morals or other rights and freedoms. An examination at border areas for health reasons such as the Ebola virus are done within the purview of the Public Health Act and Kenya Citizenship and Immigration Act, enacted in 2011 the particularly for non citizens.
84. The *Kenya Citizenship and Immigration Act, 2011* makes provisions for the acquisition, loss and regaining of citizenship, duties and rights of citizens; issuance of travel documents; entry, residence and exit out of Kenya. The Act prohibits the entry into Kenya non citizens who engages in human trafficking, human smuggling, sexual exploitation and sex crimes.

85. With regard to Refugees matters-Kenya has been seen as a relatively stable haven for those fleeing persecution or conflict in their home countries, in a region frequently plagued by political turmoil, ethnic violence, armed conflict and drought. As of September 2012, there were over 600,000 refugees in Kenya. This substantial population necessitates a rights-based approach to ensuring the protection and assistance of refugees and asylum seekers especially since Kenya has a policy of encampment.
86. A *Refugee Bill* was developed in 2012 and is currently under review by the Commission on Implementation of the Constitution. The Bill provides for a smooth operational coherence between the *Refugee Act 2006* and the *Kenya Citizenship and Immigration Act 2012* hence protecting refugees and asylum seekers against refolement.
87. Refugee Regulations developed in 2009 contain operational guidelines to ensure the effective implementation of the *Refugee Act, 2006*. *The Refugee Act of 2006* is the main legislative framework covering the administration of refugee matters in the country. It specifies the objective procedures for processing the applications of those seeking refugees status and prohibits the refolement of persons seeking admission into the Kenyan territory. The applicants and their families are allowed to remain in Kenya, during the period of determination of their status and the period of appeal in case of unsuccessful applicants. The Department of Refugee Affairs under the Refugee Act is the main body responsible for refugee matters in Kenya.

### **Article 13: Right to Participate in Government**

88. Public participation has been codified as a major theme of the Constitution of Kenya, detailed as a national value in Article 10, as well as in a number of specific provisions, in relation to either certain public institutions or processes. To guide county governments in the conduct of public participation, a model law on Public participation has been developed. The Government is also in the process of developing a National Policy on Public Participation, to provide an overarching comprehensive and coordinated framework for public engagement to ensure the meaningful participation of the people of Kenya in public affairs. The policy contains guidelines to ensure that the views of the public are heard and their input considered, it lays down the framework to encourage citizen participation, to understand how government works and its decisions, advance synergies from government and private sector and ensure inclusion of different interest groups.
89. Article 174 of the Constitution introduces a devolved system of government. Kenya is divided into 47 counties under county governments. Devolution calls for increased participation of the people in the decisions that concerns them, gives powers of self governance to the people, reinforces the promotion and protection of the interest and rights of the minorities and marginalized communities and provides for the equitable sharing of national and local resources throughout Kenya.
90. Article 196(1) state that a county assembly shall conduct its business in an open manner, and hold its sittings and those of its committees, in public; and facilitate public participation and involvement in the legislative and other business of the assembly and its committees. Citizens are also allowed to participate in matters of public finance. Article 201 sets the principles that guide all aspects of public finance and these include openness and accountability, public participation in financial matters.

91. Since independence, Kenya has had regular general elections that are held every five years which enable citizens to participate in the election of their elective public officers. Article 38(2) of the Constitution of Kenya, 2010 provides for political rights and it states that every citizen has the right to free, fair and regular elections based on universal suffrage and the free expression of the will of the electors for any elective public body or office established under this Constitution; or any office of any political party of which the citizen is a member.
92. The development of the Kenya Vision, 2030 together with the Medium Term Plans have espoused public participation in their development and aspirations as Kenya prepares to be a middle income country by 2030. The Political Pillar envisages a country where the politics is “genuinely competitive and issue-based politics”. In order to achieve this, the Government is committed to ensuring that the laws and regulations covering political parties are people centered; enhance the legal and regulatory framework covering the electoral process; and conducting civic education programmes to widen knowledge and participation among citizens, leading to an informed and active citizenry. The level of public participation in politics has increased during the last few electoral processes that Kenya has undergone.
93. The Kenyan Judiciary has been very progressive with regard to determining cases relating to the citizen’s right to vote. For example, the High Court made a ruling on a case on the right of prisoners to vote in the case of *Kituo cha Sheria Vs. Interim Independent Electoral Commission & 2 others*(2013) *eKLR*. The issues that the Court considered were whether prisoners have the right to vote under the Constitution and whether this right has been violated by the respondents. In its judgment, the Court reaffirmed inter alia that the Constitution as the supreme law of the land and is founded on the sovereignty of the people of Kenya which is exercised through voting for representatives in the National and County governments who exercise delegated authority of the people. The right to vote is a fundamental right and part of Kenya’s system of government. The Court further reaffirmed that the Constitution, with its emphasis on the peoples’ sovereignty, the values on rule of law, equity, inclusiveness, equality, human rights as well as the right to vote guaranteed under Article 38(3) and the qualification of voters provided under Article 83 does not exclude prisoners from being registered to vote and consequently voting in an election. Thus the government has a positive responsibility to ensure that all the people of Kenya and particularly those who are marginalised or vulnerable are able to exercise this fundamental right.
94. In *Civil Appeal No. 350 of 2012* the appellants sought from the High Court a declaration that Kenyan citizens in the Diaspora possess a fundamental and inalienable right to be registered as voters and to vote and/or seek elective office pursuant to Article 38(3) (a) and (b) of the Constitution; a declaration that the failure by the Independent Electoral and Boundaries Commission (IEBC) to provide the Diaspora with the opportunity to register and vote is a violation to their fundamental right to vote and a contravention of Article 82 (1) of the Constitution which provides for the progressive registration of citizens residing outside Kenya and the progressive realization of their right to vote; a declaration that Kenya citizens in the Diaspora who are dual citizens need not register as Kenyan citizens and are eligible to be registered as voters and to participate in the general election; an order that the respondents do adequately provide for voter registration and satisfactory voting mechanisms for Kenyans living in the Diaspora, not just for presidential but also for all other offices as well; that the IEBC be ordered by the Court to declare and set up more polling centers over and above embassies and consulates and deploy IEBC officials as returning officers or to collaborate with host electoral

bodies to provide similar service; that the Court to order the IEBC , where tenable, to give priority and preference to and accordingly make provision for secure electronic voting through online system and mobile phone based text facility; an order that the respondents jointly and severally do put in place infrastructure to allow for maximum number of Kenyans in the Diaspora to register as voters and to participate in the general elections on a cost effective basis either by electronic voting or otherwise; costs of the petition and any other relief or orders that the court shall deem just and fit to grant.

95. The Court of appeal held among other things that:

Over and above the other provisions of the Constitution considered above, Article 82(1) (e) of the Constitution leaves no doubt that the right to vote of Kenyans in the Diaspora is to be achieved progressively. Article 82, which requires Parliament to enact legislation on elections requires parliament to enact legislation that among other things provides for *“the progressive registration of citizens residing outside and the progressive realisation of their right to vote.”* Considering that the right to vote is to be enjoyed without distinction, Kenyan citizens in the Diaspora who are dual citizens are eligible to be registered as voters. That the IEBC should progressively set up more registration centers in the Diaspora. That the Government organs and IEBC adequately provide for progressive voter registration for Kenyans living in the Diaspora for all elective positions. That the Government organs and IEBC do jointly and severally put in place infrastructure to allow for maximum number of Kenyans possible in the Diaspora to register as voters in order to facilitate them to participate in the forth coming general elections on a cost effective basis.

96. Article 69 of the Constitution that deals with the State’s obligation on the environment requires the State to encourage public participation in the management, protection and conservation of the environment. Land is a very emotive issue in Kenya. This requirement for public participation in land matters is also found in the National Land Policy which requires that there should be effective stakeholder and public participation in decisions that involve land use in Kenya. It seeks to ensure that that the preparation and implementation of land use plans at all levels must provide for effective participation of all stakeholders. Further, the development and implementation of national and regional physical development plans, rural land use plans, and urban and peri-urban land use plans, all of them developed with the full participation of stakeholders. Indeed, the Policy requires that the development of a framework for administration of community land, public land, land within urban areas, etc should ensure accountability and allow for public participation. Further, the National Land Commission should also embrace public participation and democracy in its operations.

97. Since 2007, the Judiciary has established the Land and Environmental Division of the High Court to specially deal with land and environment law matters. All disputes relating to land and all environment law matters that may be filed under in the high court are heard by this division.

98. The positive effect of public participation in Kenya has been that it has led to the establishment of conflict resolution mechanisms in land issues. It has also opened up democratic space through voting. Finally, engaging the public has in processes enhanced ownership of programs and decisions thereby leading to sustainability of the same.

## Article 14: Right to property

99. The Government is committed to ensuring that all citizens enjoy the right to property. To this end, some of the policies that have been adopted by the Government adopted the National Land Policy which provides a framework on land administration and management in Kenya.
100. Article 40 of the Constitution allows every person the right to acquire and own property. Parliament is prohibited from enacting legislation that deprives a person of his property arbitrarily. Article 40(3) and 40(4) provide for compensation to persons for land compulsorily acquired by the Government. Such acquisition has to be only for public use and the Government has to pay promptly and in full. Such compensations are based on open market value and must include disturbance allowance. Article 60(1) deals with the Principles of the Land Policy which includes the elimination of gender discrimination in law, customs and practices in related to land and property. Article 27 provides for equality and freedom from discrimination. Article 11(2)(c) protects intellectual property rights of people of Kenya; and Article 11(2)(b) protects ownership of indigenous seed and plant variety.
101. The *Land Act Cap 280, Laws of Kenya* under Section 107 and 110 regulates compulsory acquisition of land in Kenya. One has to be given notice and such acquisition has to be for public interest or purpose (e.g. transport, public buildings/utilities, national security and installations, settlements of squatters). Section 111 also deals with compensation which has to be just and prompt. To this end, the National Land Commission is required to make rules for the assessment of just compensation. In *Musa Dagane & others vs. the AG & others (Petition No.56 of 2009)* the court awarded compensation to a community whose land had been compulsorily acquired.
102. The Land Registration Act protects the sanctity of title to land. It deals with acquiring and disposing land, consolidates and rationalizes the registration of titles to land, to give effect to the principles and objects of devolved government in land registration, and for connected purpose.
103. Challenges associated with land use have increased in both urban and rural areas as a result of rapid urbanization, inadequate land use planning, and unsustainable production methods and poor environmental management. The Government is developing a National Land Use Policy that will deal with sustainable, peaceful enjoyment and use of land in Kenya by applying land use planning principles as a basis for land use management and amend physical planning and local government laws to strengthen the enforcement of planning regulations. The Policy will ensure the development and implementation of national and regional physical development plans, rural land use plans, and urban and peri-urban land use plans, all of them developed with the full participation of stakeholders. It will promote the use of urban land for different purposes within a planned framework and establish laws and systems for the proper management of urban land use, including the practice of urban agriculture and forestry as well as informal commercial activities. The Government is also deliberating the Spatial Planning Land Draft Bill that will seek to regulate land use.
104. The Government also established the *Environment and Land Court Act, Cap 12A Laws of Kenya* whose objective is to resolve disputes related to land and the environment. The Court can give interim or permanent reservation orders, specific performance and can also award compensation. Section 20(1) of the Environment and Land Court Act provides that the Court can direct a case to be subjected to alternative dispute resolution (ADR) including traditional dispute resolution mechanisms.

105. The *National Land Commission Act, Cap 5D, Laws of Kenya*, establishes the National Land Commission to manage public land on behalf of the National and County Governments; to recommend a national land policy to the National Government; to advise the National Government on a comprehensive programme for the registration of title in land throughout Kenya; to conduct research related to land and the use of natural resources, and make recommendations to appropriate authorities; to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress; to encourage the application of traditional dispute resolution mechanisms in land conflicts; to assess tax on land and premiums on immovable property in any area designated by law; and lastly to monitor and have oversight responsibilities over land use planning throughout the country.
106. Section 58 of the *Environmental Management and Coordination Act, Cap 387, Laws of Kenya* requires that an Environmental Impact Assessment be carried out before commencing any developments. This is to safeguard the use of property. It is also intended to identify the impacts (both beneficial and adverse) of a proposed public and private development activities on the environment. Often, the focus is dominantly environmental (biophysical); but good practice also addresses social and economic aspects.
107. The *Truth Justice and Reconciliation Act* established the Truth Justice & Reconciliation Commission (TJRC) whose duty was among other things, to deal with historical land injustices. At the time of submitting this report, the TJRC report is before the National Assembly for their consideration before implementation commences. Further, there is the *Community Land Bill, 2013* which seeks to protect group rights and vulnerable communities.
108. The Ministry of Lands and Housing has developed Eviction Guidelines and developed the *Eviction and Resettlement Procedures Bill, 2012*. The Bill provides guidelines for evictions in line with the Constitution and internationally accepted standards. For instance, prior to evictions, residents must be consulted and provided adequate and reasonable notice. The environmental, economic and social impact resettlement action plans and an opportunity for legal redress are also addressed. Also, the proposed law requires that before decisions to carry out evictions are made, a notice of intent should be issued three months in advance. In addition, adequate information on the reasons for the proposed eviction and alternative purpose for which the land will be used must be indicated.
109. The Bill also provides for special measures to ensure women are not subject to gender-based violence or other forms of discrimination during evictions. After evictions, authorities should facilitate management and handing over of proper infrastructure to the resettlement site. The proposed law insists that evictions must be carried out in a manner that respects human dignity, right to life and security of the affected. The Bill was developed after wide consultations with stakeholders.
110. With regard to Internally Displaced Persons (IDP), the Government has adopted the Internally Displaced Persons Policy to prevent future displacement and to fulfill the country's obligations under the regional and international IDP law. The policy is in line with the UN Guiding Principles on Internal Displacement. The Government has also drafted the *Internally Displaced Persons Bill* that seeks to protect vulnerable groups.

111. The *Land Acts* and the National Land Management information system make provisions for the digitalization of documents relating to land. The positive effect of the amendments to the legal regime relating to property have led to the simplification/streamlining of the processes. There has also been an improvement in the capturing of information and data relating to land. The Government is in the process of automating the land registries all over the country thereby leading to an improvement in land transaction and reducing corruption. However, some of the challenges to the efficient management of land include cultural attitudes, the manual system of land records and non Sustainable land use. It is hoped that that some of the challenges will be addressed by the National Land Commission and the new land laws.

## **MEASURES TAKEN TO FULFIL ECONOMIC AND SOCIAL RIGHTS**

112. For the first time in the country's history, the Constitution of Kenya protects economic, social and cultural rights (ESC). Article 19 (1) prefaces the Bill of Rights by stating that it: "... is an integral part of Kenya's democratic State and is the framework for social, economic and cultural policies." The Bill of Rights provides for ESC rights under three classes; Stand alone ESC rights governed by the principle of progressive realisation of rights under Article 43 of the Constitution, specific ESC rights for women; consumers; children; persons with disabilities; youth; older persons; minorities and marginalised groups; and group rights applicable to communities rather than individuals.

113. Kenya *Vision 2030* is the country's developmental blue print whose overall aim is the transformation of Kenya into a newly industrialising 'middle income country providing high quality of life for all of its citizens by 2030'. The Vision also aims to 'create a cohesive, equitable and just society based on democratic principles grounded in the existing rich and diverse cultures'. As part of its international obligations to respect, protect, promote, ensure and fulfil human rights, the Kenya *Vision 2030* also commits to ensuring 'economic development across all regions of Kenya, to build a just and cohesive society with social equity in a clean and secure environment' as well as the realisation of a 'democratic political system founded on issue-based politics that respects the rule of law and protects the rights and freedoms of every individual...'

114. The Vision, implemented through five-year Medium Term Plans (MTPs) is currently in its second five-year phase. Each year, the Ministry for National Planning and *Vision 2030* has issued annual progress reports on the Implementation of the First MTP with each Ministry reporting according to pre-agreed targets reflected in their performance contracts and measured against the National Handbook of Indicators. Tracking progress on public programmes and specifically economic, social and cultural rights has therefore significantly improved and is set to be strengthened in the newly-developed MTP which will cover the period from July 2013- June 2018.

### **Right to Housing**

115. Article 43 (1) (b) of the Constitution of Kenya makes provision for the right to accessible and adequate housing and reasonable standards of sanitation. Article 60(1)(f) provides for important principles that must underpin any land policy and include elimination of gender discrimination in law, customs and practices related to land and property, sound conservation and protection of ecological sensitive areas, sustainable and productive management of land resources. Article 27 prohibits the State from

discriminating 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.

116. To promote the right to accessible and adequate housing, the Government has among others: Taken legislative, policy and other measures to guarantee the right of access to adequate housing, to ensure security of tenure for all citizens, particularly for the vulnerable and marginalized; ensured housing is provided within the framework of legal security of tenure, habitability, location, availability of utilities, economic and physical accessibility as well as cultural acceptability; and ensured that if expropriation takes place it is carried out in line with international human rights standards.
117. The Government has developed policies, legislation and regulations to safeguard constitutional rights to housing: the National Housing Policy facilitates the provision of adequate, affordable and quality housing in sustainable human settlements; the Draft National Prevention of Slums Upgrading Policy provides for better housing particularly for youth and women. The Draft National Building and Maintenance Policy contains extensive provisions to allow all Kenyans and more so PWD access to better housing facilities. The policy ensures consistency approach to the maintenance of the built environment to safeguard health, safety and environmental standards, convenience and comfort of users.
118. The Kenya *Vision 2030* has made provision with regard to housing by including it as one of its social pillars. It has flagship projects which are; to produce 200,000 Housing Units Annually under Public Private Partnerships (PPPs) and Other Initiatives; to establish Housing Technology Centres in Each Constituency; to Install Physical and Social Infrastructure in Slums in 20 Urban Areas; to enact a Housing law, to Legislate for a One-Stop Housing Development Approvals Mechanism; and lastly to develop an Integrated Growth and Development Strategy for Six Metropolitan Regions.
119. In so far as legislation is concerned, a number of bills have been drafted to provide for better access to housing: The *Housing Bill*, seeks to provide for the effective coordination, facilitation, capacity building and monitoring of the housing and human settlement sector; The Built Environment Bill seeks to manage the way buildings are constructed so as to ensure safety and quality.; the landlord and tenant bill is under review by key stakeholders to address issues of evictions in housing and increase the protection of tenants. The *Persons with Disability Act, Cap 133*, Laws of Kenya has also made provisions with regard to housing by; establishing the National Council for Persons with Disabilities under section 3. Section 4(1)(c)(vi) requires that one of the members of the council should be a representative of the Ministry of Housing. Section 6 establishes the Office of the Director of the Council with a mandate to consult with Ministries and local authorities to secure the implementation of measures recommended under the Act by the Council for the benefit of persons with disabilities.
120. Access to adequate housing remains a major challenge in Kenya. The majority of the residents in Kenya's largest urban centres, Nairobi, Mombasa, and Kisumu live in informal settlements. A number of informal settlements also exist in forest and rural areas. These informal settlements are characterized by low quality of housing with poor infrastructural services, overcrowding, inadequate access to water or electricity, poor sanitary conditions, insecurity, lack of privacy and poor accessibility in times of disasters. The Government has committed to ensure that this challenge is addressed through the measures discussed above.

## **Article 15: Right to work under equitable and satisfactory conditions**

121. The State is extremely conscious of the eminent role that gainful work plays in the lives of Kenyans. Work facilitates a host of other rights – from the right to be free from hunger, the right to housing and the right to education. Ultimate State policies continue to be informed by the fact that a person may not live a dignified life if he does not have work. The importance of this right is affirmed by the fact that Kenya has ratified 49 International Labour Organization (ILO) Conventions, including seven of the eight Fundamental Conventions; three of four Governance Conventions (Priority); and 39 of the 177 Technical Conventions. This ensures that just and favorable conditions of work and decent work conditions for Kenya’s workers remains an essential part of the country’s policy-making and implementation.
122. The Kenya Vision 2030 identifies work as a critical component of the economic pillar, stressing that social cohesion may not be attained when significant segments of the population remain in abject poverty. Ultimately, Kenya aims to establish a sustained gross domestic product (GDP) rate of 10 per cent to drive wealth-creation. In 2012, the Government expected the economy to grow by 5.1 per cent to rise to 10 per cent over the next few years. The current Medium Term Plan of the Vision 2030 (MTP 2013-2018) aims to raise the average annual income per person from USD 901 in 2012 to USD 1,200 by 2017; and to reduce national poverty levels from 44 per cent in 2012 to 28 per cent in 2017. The Government acknowledges that work opportunities will keep growing if the economy remains competitive.
123. New jobs have been generated both in the formal and informal sectors between 2008 and 2012. In 2008, over 474,700 new jobs were generated. In the 2009/2010 financial year, the number rose to 502,900 and went up further to 503,500 in the 2010/2011 financial year. The formal sector generated 62,600 new jobs in 2010 compared to 56,300 jobs created in 2009 representing 12.4 per cent of the total jobs generated. The informal sector, which represented 80.6 per cent of the total employment, generated an additional 440,900 jobs. The increase in the generation of jobs is attributed to improved economic performance coupled with increased access to cheaper credit from banks, and from the Women Enterprise Fund and the Youth Development Fund which provide business development loans to young people aged 18 to 35 to enable them to form viable businesses that would create jobs.
124. In 2009, the Government instituted the *Kazi Kwa Vijana* Programme (Jobs for the Youth) which was aimed to employ 200,000 to 300,000 Kenyan youth in public works initiatives: when it ended, it had employed 298,000 youth. Some of the challenges with the programme were that the jobs were short-term and the programme was faced challenges of accountability.
125. In 2013, the Government established the Uwezo Fund to empower women and the youth. President directed that 30 per cent of all Government procurements be reserved for women and the youth. It is envisaged that this initiative will create more jobs for women and the youth. (More information on the UWEZO Fund has been given earlier in the report).
126. Articles 30, 41, 43 of Constitution of Kenya, 2010 ; the *Employment Act, 2007*; *Persons with Disability Act Cap133* ; *Children’s Act Cap141* ; *NHIF Act Cap 255*; *Labour Relations Act Cap233*; the *Kenya Citizens and*

*Immigration Act , Cap 172; the Price Control (Essential Goods) Act , Cap 113; all ensure regulation of the employment sector in a human rights based approach.*

127. The Courts have on several instances reaffirmed the right to form trade unions as was in the Nurses Union case *High Court at Nairobi (Nairobi Law Courts) Seth Panyako vs Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers (2013) eKLR*.
128. Courts have also intervened to protect the right to work, for example in the case of a police officer who was retired 'on medical grounds' when he got a physical disability. The High Court ruled that the employer should have reassigned the petitioner and instituted reasonable accommodation measures to enable him continue working as a police officer in *Paul Pkiach Anupa & Another vs Attorney General & Another (2012)eKLR* . In the case *Aviation Services Workers Union v Kenya Airways Ltd (2012) eKLR* – the industrial court reinstated 447 workers who Kenya Airways had declared redundant.
129. Some of the administrative measures that the Government has put in place include the establishment of a National Poverty Centre that among other things undertakes mapping and provides policy advice on how to deal with poverty. There is the National Integrated Framework for Employment Creation and Social Protection. The Government has constructed four multi-purpose dams for sustainable utilization and management of basin based resources. Further, there is the Youth Enterprise Development Fund which seeks to establish a Youth Bank. There are plans to enhance entrepreneurial training. Women are being trained on the formation of co-operatives and financial management ran by the Women Enterprise Development Fund as a way of empowering them.
130. The Government has established State agencies with a mandate to ensure that minimum work standards apply within the informal sector. This is geared towards ensuring that the situation of workers in informal employment is gradually improved through their inclusion in social protection schemes and health schemes. For example, workers with minimal earnings can now join the National Hospital Insurance Fund (NHIF).
131. The *Employment Act Cap 226*, as well as the *Occupational Health and Safety Act Cap 514, Laws of Kenya* apply in export processing zones as much as they apply to employers outside such zones. The Government has set a minimum wage which is responsive to the high cost of living. The State undertakes on an annual basis a review of the minimum wage applicable to different cadre of workers. Under the *Labour Institutions Act, Cap 234, Laws of Kenya* the Government constitutes Wages Councils to deal with emerging sectors of the economy. These include: the Protective Security Services Wages Council which was reconstituted in August 2012 to take care of the workers in the private security sector. In addition the Floricultural Wages Council continues to address issues affecting workers in the flower industry. The State has taken concerted actions to ensure that domestic workers who tend to be particularly vulnerable do get a minimum wage.
132. Kenya also has the Labour Office whose duties include the administration, co-ordination, implementation and enforcement of the Country's Labour Policy, laws and Regulations. The Central Organization of Trade Unions (COTU) is the umbrella body for trade unions in Kenya and the Confederation of Public Service Trade Unions of Kenya who negotiate tripartite agreements on behalf of their members that have led to improved terms for workers, increased awareness on labour rights, career advancement through various training programs, and merit based employment.

133. Article 230 of the Constitution of Kenya, 2010 established the Salaries and Remuneration Commission whose functions include setting and reviewing the remuneration and benefits of all State officers. The Commission is in the process of rationalizing the salaries within the public sector thereby reducing the disparity between the highest and lowest paid public officer from the current 159 per cent to 87 per cent.
134. Some of the challenges to the right to work include high unemployment rates. In 2011 this was 40 per cent, up from 12.70 per cent in 2006. The State still faces the challenge of not only how to create jobs but how to establish sustainable jobs which comply with minimum labour standards and how to balance between formal employment and employment within the informal sector. Opportunities for formal sector jobs remain far more limited than opportunities for informal sector jobs. By 2010, formal sector jobs compared to informal sector jobs had shrunk to 18.8 per cent.
135. The State also faces the challenge of effective implementation and does not have adequate resources to deploy enough labour inspectors to the numerous sites where workers' rights do keep being violated especially in the informal sector.
136. There are objections to the minimum wage with employers arguing that that the market forces of supply and demand be allowed to apply and that that the insistence on minimum wage makes the cost of doing business very expensive resulting to high costs of goods and services.
137. Child labour still remains a challenge because of poverty. There are also still bad working conditions for some who work in the horticultural sector although the sector is under more Government scrutiny than before which has led to significant improvement. There is also the challenge of Kenyan migrant workers who go to look for employment in countries that do not acknowledge labour rights and the Government has more often than not intervene to bring the workers back home.

## **Article 16: The Right to Health**

138. The Constitution of Kenya, 2010 specifically recognizes the right to health and stipulates under Article 43 (1) (a) that 'every person has the right to the highest attainable standard of health, which includes the right to health care services, including reproductive health care'. Article 43 (2) further provides that 'a person shall not be denied emergency medical treatment'. Article 43 also includes other rights that have a bearing on the rights to health namely: the right to clean water, the right to housing and sanitation, the right to education, the right to food, and the right to social security. Like all other rights, there is guarantee of equal and full enjoyment of this right without discrimination in the terms set out in Article 27 of the Constitution. Article 53 (1) (c) provides for the Children's right to health and Article 56 (e) provides for the minorities and marginalised groups right to health., The Constitution also recognizes that consumers also have the right to the protection of their health as provided under Article 46 (c).
139. Attendant to the right to health is the right to a clean and healthy environment under Article 42 which also includes the right to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69 in respect of environment and Article 70 which provides for the enforcement of environmental rights.

140. Other notable legislative measures that give effect to the right to health include the *Public Health Act Cap 242* which governs the Ministry of Health operations with the aim of ensuring efficient health services to the citizens of Kenya. The *HIV and AIDS Prevention and Control Act Cap 246 A* provides the legal framework that for the prevention, management and control of HIV and AIDS. The *Cancer Prevention and Control Act Cap 246 B* has also been enacted. This is particularly important because cancer has become a major killer in Kenya and only one public hospital, Kenyatta National Hospital, offers cancer treatment. The new law commits to 'promote access to quality and affordable diagnostic and treatment services for persons with cancer'. Resources to back this up are a priority in the Medium Term Plan (MTP) currently in place.
141. For persons with disabilities, Section 20 of the *Persons with Disabilities Act Cap 133* mandates the National Council for Persons with Disabilities to monitor the provision of health care to persons with disabilities so as to ensure that the services are devoid of any form of discrimination. It also is supposed to ensure that the programmes of the Ministry of Health are geared towards prevention of disability; early identification of disability; early rehabilitation of persons with disabilities; enabling persons with disabilities to receive affordable rehabilitation and medical services in public and privately owned health institutions; availing essential health services to persons with disabilities at an affordable cost; and availing field medical personnel to local health institutions for the benefit of persons with disabilities. The Government's commitment to the health of persons with disabilities is also reiterated in several policies including the National Reproductive Health Policy, 2008 which recognizes specific needs of women with disabilities right to access reproductive health services. It has identified the need to improve the sexual and reproductive health of youth with disabilities.
142. The following include other legislations that touch on the right to health:-
- a) *Kenya Medical Practitioners And Dentists Act (CAP 253 Laws of Kenya)*
  - b) *Nurses Act (CAP 257 Laws of Kenya)*
  - c) *Nurses (Amendment) Act (No. 27 of 2011 Laws of Kenya)*
  - d) *Dangerous Drugs Act (CAP 245 Laws of Kenya)*
  - e) *Food, Drugs And Chemical Substances Act (CAP 254 Laws of Kenya)*
  - f) *Human Tissue Act (CAP 252 Laws of Kenya)*
  - g) *Tobacco Control Act (No. 4 of 2007 Laws of Kenya)*
  - h) *Nutritionists And Dieticians Act CAP 253B, Laws of Kenya*
  - i) *Pest Control Products Act (CAP 346 Laws of Kenya)*
  - j) *National Hospital Insurance Fund Act ) CAP 255*
  - k) *Anatomy Act (CAP 249 Laws of Kenya)*
  - l) *Pharmacy And Poisons Act (CAP 244 Laws of Kenya)*
  - m) *Alcoholic Drinks Control Act CAP121A, Laws of Kenya*
  - n) *The Agriculture, Fisheries and Food Authority Act, 2013 (No. 13 of 2013)*
  - o) *Kenya Agricultural And Livestock Research Act (No. 17 of 2013)*
  - p) *Crops Act (No. 16 of 2013)*
  - q) *Standards Act (CAP 496)*
  - r) *Weights And Measures Act (CAP 513)*
  - s) *Kenya National AIDS Commission Bill 2012*

Additionally, the *Reproductive Healthcare Bill 2014* has been tabled before Parliament. The legislation recognizes reproductive rights, sets the standards of reproductive health; and provides for the right to make decisions regarding reproduction free from discrimination, coercion and violence

143. In addition, Kenya has introduced the Draft *Health Bill, 2013*, which is intended to: consolidate the laws relating to health; provide for regulation of health care service and health care service providers; provide for establishment of national regulatory institutions; coordinate the inter relationship between the national and county health institutions; establish a coordinating agency of professionals within the health industry; and provide for attainment of the basic right to health has been developed

## **Policy measures to give effect to the right to health**

144. The Kenya *Vision 2030* recognizes that the achievements of its development goals is contingent upon a healthy working human resource which should be partly achieved through the provision of quality, efficient and acceptable health care systems. Its goal for the health sector is to “provide equitable and affordable health care at the highest affordable standards to her citizens”. The Government has therefore put in place several measures including placing greater emphasis on preventive healthcare and devolving healthcare funding and management to give greater responsibility for healthcare delivery to hospitals, health centres and dispensaries. However, with Kenya’s population growing at a rate of 3 per cent annually, the population will continue to place a huge demand for health services.

145. Immediately after the establishment of a coalition government following the 2007 general elections, the then Ministry of Health was divided into the Ministry of Public Health and Sanitation and the Ministry of Medical Services. Whereas having a Ministry of Public Health and Sanitation proved positive in terms of giving prominence and bringing more resources to preventive care, this reorganization had an effect on the implementation momentum that had been built over the previous five years as would, any complex system with multiple actors. On occasion, implementing agencies as well as consumers were not very clear on the functions of the different Ministries. Following the 2013 general elections the functions of the two ministries have now been merged in view of the Constitutional requirement which has reduced Government Ministries from 44 to a maximum of 22.

146. The Ministry of Health in putting together the new Kenya Health Policy, new National Health Sector Strategic Plan and the Second Health Sector Plan of the *Kenya Vision 2030*, have considered how to interpret the right to health vis-à-vis their services and particularly under the devolved structure of government.

147. In particular, the Kenya Health Policy (2012-2030) aims at ‘attaining the highest possible health standards in a manner responsive to the population needs’. The Policy seeks to achieve this goal through supporting provision of equitable, affordable and quality health and related services at the highest attainable standards to all Kenyans. It is designed to take the country beyond the traditional health services approach towards focus on health using a primary health care approach which remains the most efficient and cost-effective way to organize a health system. The focus of the Policy applies a human rights based approach, a strategy that will enable rights holders enjoy the highest possible level of health and consequently ensuring that they are able to participate in development activities maximally as envisaged in *Kenya Vision 2030*. Six policy objectives are defined:

- a. Eliminating communicable conditions;
- b. Halting and reversing the rising burden of non communicable conditions;
- c. Reducing the burden of violence and injuries;
- d. Providing essential health care;
- e. Minimizing exposure to health risk factors; and
- f. Strengthening collaboration with health related sectors.

148. The health policy framework also seeks to encourage other health providers to establish health facilities in underserved communities and especially in rural areas and remote areas including urban informal settlements. Furthermore, the adoption of the Sector Wide Approach to health has provided a framework for structured engagement for all health sector stakeholders. Notable developments in this regard include the adoption of joint annual implementation planning and annual review of sector performance. Through these processes, it has become increasingly possible to determine the level of donor and partner resources available for health through either budgetary support or off budget, which is important for determining the sector's resource envelope. Other advances include the development of a national health infrastructure plan to guide investments in health; the restructuring of the National Medical Supplies Agency to facilitate timely procurement and distribution of medical supplies; a human resource strategy linking demand and supply for human resources; encouragement to manufacturers to produce drugs and related commodities locally to reduce the cost of healthcare; and strengthening of the referral system through provision of autonomy for district and provincial hospitals.

149. Other policy measures that have been put in place by the State to enhance the right to health include the: Kenya National Action Plan on Health and the HIV/Aids Workplace Policy.

### **Administrative and other measures to give effect to the right to health**

150. In addition to the legislative and policy measures, the State has in place the following administrative and institutional measures that seek to enhance the right to health.

- a) The Malaria Control Programme
- b) The Food Security Programs- Njaa Marufuku Kenya, National Agriculture Accelerated Input
- c) The Access Program
- d) The NACADA
- e) The Division of Vaccines and Immunization
- f) The HPV-Programme
- g) The NHIF Board
- h) The Tobacco Control Board
- i) The TB and Leprosy Program
- j) The Radiation Board
- k) The Pharmacy And Poisons Board
- l) The Kenya Medical And Dentists Board
- m) The Mental Health Board

## Measures To Enhance Access to Health Facilities

151. Accessibility to health facilities in Kenya is estimated at 52 per cent based on the 5km radius norm although there are variations across the country especially in the Northern part of Kenya. To address the situation, the health related flagship projects on improving health infrastructure network in the country made useful access related gains with inputs from the Constituency Development Fund (CDF) that has aided facility infrastructure development/upgrading and from the Economic Stimulus Package for hiring of staff for rural health facilities which has seen a total of 3,866 nurses recruited under the Economic Stimulus Package and posted to health centres and dispensaries within constituencies countrywide. This is in comparison with the flagship project of recruiting 20 nurses per constituency starting September 2009.
152. There has been an increase in the number of hospitals from 167 in 2008 to 275 in 2012 and this number is set to increase with the devolution of health services to the 47 counties.
153. Access to affordable and essential drugs and medication is a pre-requisite for the realisation of the right to health and licensing the use of generic drugs is one way to ensure affordability. However this should be balanced with the reality that ridding the market of counterfeit drugs also contributes towards this goal. In a move to fight counterfeit drugs, Kenya enacted the *Anti-Counterfeit Act, Cap 130A*, Laws of Kenya to prohibit trade in counterfeit goods including drugs. However, in April 2012, the High Court declared the Anti-Counterfeit Act a violation of the right to the highest attainable standard of health in as far as it limited access to generic medicines and drugs-*PAO and 2 others v. Attorney General (2012) eKLR*. The three petitioners in the matter were adults living with HIV/AIDS and at the time of the petition had been taking medication since generic ARVs became widely available. The petitioners averred that Section 2 of the legislation did not differentiate between counterfeits and generic drugs and thus they were afraid that, in its enforcement, the very drugs on which their lives depended would be criminalized and thus liable to seizure. Further that the cost of their treatment was likely to increase considerably as they would have to rely on branded drugs that are more expensive. The Court asked the State to reconsider the provisions of Section 2 of the Act alongside its Constitutional obligation to ensure that citizens have the highest attainable standards of health and make the appropriate amendments to the Act. It is expected that the required amendments will be passed by the 11<sup>th</sup> Parliament. The decision comes at a time when the donor-driven financing for the provision of HIV/AIDS related medical services especially life-saving drugs is decreasing; hence its importance. Moreover, for a country with a high disease burden, the availability of cheaper drugs and medicine should be a priority if the right to health is to be realized.

## Measures taken to reduce the still-birth rate and infant mortality

154. The State has in place policy measures to enable free access to healthcare in public hospitals for children aged less than five years including children with disabilities. This has resulted in remarkable achievements in the reduction of mortality for children aged less than five years from 115 per 1,000 live births in 2003 to 74 per 1,000 live births in 2008/9 and infant mortality from 77 per 1,000 live births to 52 per 1,000 live births in the same period.
155. The proportion of children fully immunized against communicable diseases increased from 64 per cent in 2005/06 to 77 per cent in 2009. However, the declining maternal health indicators are worrying. Maternal mortality ratio has deteriorated from 414 in 2003 to 488 deaths per 100,000 live births in 2008-

09; only 43 per cent of children are delivered in a health facility. Births attended by skilled health personnel declined from 51 per cent in 2007 to 43 per cent in 2010/11.

156. In a bid to reduce the high infant and maternal mortality rate, the State in 2013 introduced the free maternal health care in public hospitals in order to encourage pregnant mothers to deliver in hospitals attended by skilled workers as opposed to delivering at home. The First Lady, Her Excellency Margaret Kenyatta initiated the *Beyond Zero Campaign* aimed at accelerating reduction of maternal and new born morbidity and mortality. Around 100 million has been raised so far and this will be directed at establishment of mobile clinics which will provide integrated HIV, maternal and child outreach services in the country.

## **Reproductive health**

157. The State has put in place the innovative Output-Based Aid Voucher system intended to contribute to reduction in both maternal and infant mortality rates by improving access to and utilization of reproductive health services by economically disadvantaged populations. The programme was piloted in three rural districts (Kisumu, Kiambu and Kitui) and in two urban sites in Nairobi (Viwandani and Korogocho). Plans are under way to scale-up the initiative to other counties. Since its inception, the programme has reached 51 per cent of poor pregnant women in the pilot sites, an indication that the programme has registered success in increasing the proportion of institutional deliveries with a skilled birth attendant. The challenge though with this initiative, is its heavy reliance on external funding. In 2013, the Government introduced a waiver of maternity fees in all public hospitals, a measure that should play a significant role in reducing maternal mortality rates.

158. A Community strategy is also being implemented through the establishment of community units and the training of community health workers to provide basic community-based services through enhancing communities' awareness of health preventive and promotional strategies to encourage them to adopt positive health seeking behaviour.

## **Measures taken for the healthy development of children**

159. The Department of the Children's Services (DCS), the National Council for Children Services (NCCS), the Kenya National Commission on Human Rights (KNCHR) and the National Gender and Equality Commission (NGEC) work closely to ensure the realization of the children's rights by enhancing the promotion and protection of these rights as provided for in the Constitution, legislation, regional and international instruments that Kenya is a state Party to.

160. The Ministry of Public Health and Sanitation has a key Division of Child and adolescent health (DCAH) which is mandated to promote and participate in the provision of an integrated and high quality promotive, preventive and rehabilitative health care for all children and adolescents. The DCAH ensures survival, growth development of children under the age of 5 years, health promotion in all children between 0-18 years, promotes good nutrition for children, expectant and nursing mothers and the health rights of the child.

161. Kenya has also formulated the following national policies, strategies and plans for actions that seek to enhance the healthy development of children, namely:

- a) Multi-year strategic plans, such as, the National health strategic plan, the health information systems strategic plan 2009-2014.
- b) *Malaria Prevention Act ( Cap 246, Laws of Kenya)*, Diarrhea policy, Pediatric Protocols, Essential newborn care
- c) *Children's Act Cap 141, Laws of Kenya* , which provides for the right to health of child and in particular the right to the highest attainable standard of health.
- d) *The HIV/AIDS Prevention and Control Act Cap 246A, Laws of Kenya*; provides for free prevention of mother to child transmission (PMTCT) services in government health facilities.
- e) *The Sexual Offences Act Cap 62 A, Laws of Kenya*, specifically section 35 advocates for free access to medical attention for all survivors of sexual abuses in any public hospital.
- f) *The Prohibition of Female Genital Mutilation Act, Cap 62 B, Laws of Kenya* provides for opportunities for eradication of Female genital mutilation (FGM) to combat traditional practices which are harmful to the health, survival and development of children.
- g) *The Tobacco Control Act, Cap 245A, Laws of Kenya* provides for the protection of the health of the persons below eighteen years by preventing access to tobacco products and tasks the Ministry of Education is to integrate tobacco matters into syllabuses.
- h) *The Employment Act, Cap 226, Laws of Kenya* bars employment of children between the age of 13-16 years to perform work which is likely to be harmful to the child's health or development.

162. Several policies have also been developed by the various stakeholders in the health sector all with the aim of ensuring promotion and realization of children's right to health. They include:

163. Kenya National Health Policy and Guidelines (KNHPG) which were launched in 2009 with the aim of making significant progress towards improving health and education standards of school children. The Policy compliments other existing education and health policies while the Guidelines include 8 thematic areas such as values and life skills, gender issues, child rights and protection, water, sanitation, hygiene, nutrition, disease prevention and control, infrastructure and special needs. The KNHPG pays particular attention to the principles of gender and non discrimination and respects the inter relatedness of human rights by linking the rights to health to other rights such as right to water, sanitation, information, food /nutrition, privacy and education.

164. The Child Survival Development Strategy 2008-2015, aimed at ensuring delivery of efficient and effective services to improve the lives of women and children thus reducing health inequalities and reversal of the downward trend in health related indicators with a focus on child survival and development. In a nutshell, it identifies the priority interventions/ actions to address child health problems.

165. The National Manual and Guidelines on the Identification and Referral of Children with Disabilities and Special Needs and the National HIV/AIDS Strategic Plan 2009/10-2012/13 which borrows from the national guidelines on prevention of mother to child transmission (PMTCT). These services are free in the government facilities and the country has also adopted the WHO guidelines on infants and young child feeding in the context of HIV, this has further promoted breastfeeding with the use of antiretroviral therapy (ARVs) to protect infants and early diagnosis.

166. The needs of children aged 0-3 years have been addressed with health and nutrition interventions through integration of psychosocial stimulation in infant and young child feeding (IYCF) and Community level component of integrated management of childhood illnesses(C-IMCI). However, there is need to address the component on pregnancy to make the programme more holistic in addressing all aspects of a child's development. Further actions such as increase in primary health facilities under the Strategic Plan for Rationalization of Health care Services in level 3 and 4 of hospitals are ongoing. Health facilities in Kenya are grouped into six levels;

Level 1 - community

Level 2 - dispensaries

Level 3 - health centres

Level 4 - district and sub—district hospitals

Level 5 - provincial hospitals

Level 6- national referral hospitals

167. In recent years, the Government of Kenya has improved the state of health institutions. They receive funds to make the compounds, wards, kitchens and laboratories more comfortable for staff to work and patients to receive services. However, many dispensaries, health centres and district hospitals still lack critical equipment. This explains congestion at referral and provincial hospitals, a situation that the Government will improve now that health services have been devolved to the Counties and the County Governments are expected to establish their own priorities.

168. Health facilities in Kenya by province both public and private, 2010:

Rift Valley Province – 1,732

Central Province with - 1,251

Eastern Province – 1,206

Nyanza – 773

Coast – 770

Western – 426

Nairobi – 406

North Eastern – 232

169. The Government has also adopted guidelines developed by W.H.O on Universal Immunization of Children against the 6 vaccine preventable diseases, which is crucial to reducing infant mortality and child mortality. This has led to substantial increase in childhood immunization coverage levels at the national level for example in north eastern the population that is fully immunized from 9% in 2003 to 48% in 2008-09.

## **Health Financing**

170. Funding to the health sector has been increasing gradually which is partly attributable to a rise in development funding by development partners. There has been an increase (in absolute numbers) from Kshs Million 34, 845 in 2008/09 to 47,011.5 in 2009/10; 55,155.5 in 2010 /11 to 64,019 in 2011/12; and 86,968.3 in 2012/13. However, this allocation remains inadequate as the overall allocations have remained at 6 per cent of the overall Government budget for the last three years.

171. The Hospital Management Services Fund (HMSF) was established vide Legal Notice No. 155 of 2009 and operationized in the financial year 2010/11. During the financial year, a total of Kshs 879 million was disbursed to over 270 hospitals. In the same year, 3.2 billion was collected through user fees in these facilities. User fees (cost-sharing revenue) continue to be an important source of financing health services in hospitals, especially in supplementing the operation and maintenance (O&M) funding. Cost-sharing revenue collections have tripled from Kshs 1.03 billion in 2002/03 to Kshs 3.2 billion in 2010/11. However, cost sharing also continues to be a hindrance to accessing healthcare especially for the lower end of the population. If these resources were to be pooled, they will provide a more effective way of addressing healthcare needs than is currently happening. The development of the draft Health financing strategy, is aimed at strengthening the pooling of resources under social health insurance and ensuring their efficient use.
172. In the past five years, through its Health Services Sector Fund, funds pooled from both Government and private sector actors have been disbursed directly to health centres across the country with the aim of increasing access to health services, addressing equity in health service delivery and improving quality and responsiveness of health systems and services to the needs of the population. It also aims to increase efficiency and effectiveness in the management of financial resources by empowering the Facility Management Committees, reducing bureaucracies in the disbursement of financial resources to levels I-III facilities. This has strengthened the intended focus on health care. Between November 2010 and 30th June 2011, a total of Kshs 353,352,000 had been disbursed to 653 Health Centres.
173. While universal health coverage remains a key challenge in Kenya the Government remains committed to its provision. In 2004 and again in 2011, there have been serious but unsuccessful efforts to enact laws providing for universal health coverage. However efforts to move towards universal coverage continue to be implemented progressively. The National Health Insurance Fund (NHIF) has been the main vehicle for this effort and since 2006 it has increased its membership of formal and informal sectors alike and unlike private insurance companies, provides in-patient cover to the elderly. There are ongoing efforts to develop an alternative scheme referred to as the National Social Health Insurance (NSHI) which is yet to be implemented, with the hope of making health insurance more accessible to the poor through decentralization.
174. One of the most ambitious and laudable first steps that has been undertaken by the Government through NHIF is the roll out of a medical cover for civil servants and Disciplined Services which began in 2012. The teachers union followed suit with another enhanced cover for teachers with NHIF. This is a comprehensive medical insurance cover for its employees and their eligible dependants. The programme offers out-patient and in-patient services to teachers, civil servants and members of disciplined forces in a cover worth Kshs 4.5 billion annually. However, accountability issues in the Fund remain a challenge in the achievement of universal health coverage. Currently, only the formal sector employees are contributing to NHIF on mandatory basis. The informal sector, that includes farmers, livestock owners, small businesses (a number who are financially able) only enroll on voluntary basis.
175. Pursuant to government restructuring following the first general elections since the promulgation of the Constitution, the health sector has had several reviews of performance, addressing challenges and aligning its targets to the Constitution as well as rationalizing role sharing between the National and County Governments. Among key challenges identified are the institutional deliveries which are at a

low of 43 per cent, inadequate universal health coverage, inadequate budgetary allocation and improper resource use. It is expected that the new MTP will set new targets for addressing these challenges progressively. The Budgeting Guidelines launched in 2010 are aimed at better link between the national and sub national planning and budgeting with priority of community needs.

## **Article 17: The Right to Education and Culture**

176. The Constitution of Kenya, 2010 now specifically recognises the right to education and provides under Article 43(f) that 'Every person has the right to education'. Article 53(1) (b) further provides that 'Every child has the right to free and compulsory basic education. Article 55(a) on access to relevant education and training, provides that 'The State shall take measures, including affirmative action programmes, to ensure that the youth access relevant education and training'. Article 54(1) (b) provides that 'a person with any disability is entitled to access educational institutions and facilities for persons with disabilities that are integrated into society to the extent compatible with the interests of the person'.
177. Article 56(b) stipulates that 'The State shall put in place affirmative action programmes designed to ensure that minorities and marginalised groups are provided special opportunities in educational and economic fields. The Children's Act also acknowledges and protects every child's right to education. Section 7 of the Children Act obligates the Government and parents to ensure that every child shall be provided with education. It goes on to state that every child is entitled to free basic and compulsory education in accordance with Article 28 of the UN Convention on the Rights of the Child. Any person infringing on the rights of a child whether willfully or as a result of culpable negligence is liable upon conviction to imprisonment not exceeding 12 months or a fine not exceeding Kshs. 50,000/- or both.
178. The State is committed to enhancing access to education as the key to empowering the most marginalised and vulnerable individuals in society. Marginalised individuals like the girl-child, pastoralists and persons with disabilities also tend to have the least opportunities of acquiring an education; and the State continues to make conscious and concerted efforts on an affirmative basis to enable these individuals to best exploit their life-chances alongside their other Kenyan peers through primary, secondary and tertiary education.
179. Investment in Free primary education (FPE) and Free Day Secondary Education (FDSE) has remained a key flagship programme, coming among the top five recipients of public expenditure in the last five years. Since the introduction of FPE, enrolment has improved dramatically and a combination of other measures have also been undertaken to enhance progressive realization of this right.
180. The State has enacted various pieces of legislation to implement the Constitutional provisions on education. These include the *Basic Education Act (No 14 of 2013)* which has been passed into law to regulate the provision of basic education and adult basic education in the country. The law also clarifies the roles of the National and County Governments in regards to education as provided for in the Fourth Schedule of the Constitution. Under this Schedule, the National Government shall be responsible for educational policy, standards, curricula, examinations and the granting of university charters, tertiary education, institutions of research and higher learning, primary and secondary schools as well as special education. The County Governments on the other hand are in charge of pre-primary education, village polytechnics, home craft centres and child care facilities. The Act also sets standards and quality assurance. It establishes the Education Quality Assurance Council that ensures

standards and maintains basic quality in institutions of basic education; administers policies and guidelines set for basic education; supervises and oversees curriculum implementation and delivery; monitors the conduct of assessments and examinations in institutions of basic education; and monitors and evaluates standards in quality education.

181. *Kenya Institute of Curriculum Development Act, No. 4 of 2013* establishes the Kenya Institute of Curriculum Development, a successor to the Kenya Institute of Education. It has the mandate to advise the Government on matters pertaining to curriculum development and to implement policies relating to curriculum development in basic and tertiary education and training; evaluate, vet, and approve for application in Kenya, any local and foreign curriculum support materials in relation to the levels of education and training.
182. *Kenya National Examination Council Act, Cap 255A, Laws of Kenya* establishes the Kenya National Examinations Council which is tasked with overseeing setting and conduct of public academic, technical and other national examinations within Kenya at basic and tertiary levels; award of certificates or diplomas to candidates, confirming authenticity of certificates or diplomas issued by the council upon request by the Government, among other things.
183. *The Teachers Service Commission Act Cap 212, Laws of Kenya* mandates the Teachers' Service Commission to oversee, lead and direct the teaching fraternity; ensure that teachers comply with teaching standards prescribed by the Commission; manage the payroll of teachers in its employment; facilitate career progression and professional development for teachers and monitor the conduct and performance of teachers, among other things. The Government has been conducting massive recruitment of teachers at all levels to reduce the teacher student ratio and ensure quality education is offered.
184. *Universities Act, No 42 of 2012* is enacted for purposes of development of university education, the establishment, accreditation and governance of universities, establishment of the Commission for University Education, the Universities Funding Board and the Kenya Universities and Colleges Central Placement Service Board. The placement board is responsible for *inter alia* co-coordinating the placement of the government sponsored students to universities and colleges. It provides that in performance of its duties, the placement board shall promote equity and access to University and college education by developing criteria for affirmative action for the marginalized, the minorities and persons with disabilities.
185. *KNA Commission for UNESCO Act (KNATCOM) No 5 of 2013, Laws of Kenya* provides for the establishment of a Commission, for United Nations Educational Scientific and Cultural Organization (UNESCO), whose programmes include five areas of competence Education, Natural Sciences, Social and Human Sciences, Culture, Communication and Information.
186. Kenya is committed to the Protocol on the Establishment of the East African Community Common Market. Article 11 of the Protocol provides that for purposes of ensuring free movement of labour, the partner states Kenya, Tanzania, Uganda, and Rwanda undertake to mutually recognize the academic and professional qualifications granted experience obtained, requirements met, licences or certifications granted in the partner states; harmonize their curricula, examinations, standards, certification and accreditation of educational and training institutions. Implementation of this provision is underway.

187. The *Alcoholic Drinks Control Act, Cap 121A*, Laws of Kenya provides under section 12 (1) (a) that a license must not be granted to sell alcoholic drinks in any institution of basic education including primary and secondary schools or any residential area as demarcated by written law. The Government is tasked with promoting public awareness through nationwide education and information campaigns in form of education and information campaign which focus on the family as the basic social unit and is carried out in all schools and other institutions of learning, all prisons, remand homes and other places of confinement, amongst the disciplined forces, at all places of work and in all communities in Kenya (Section 65 (2)). Section 66 requires the relevant agency to liaise with the Minister responsible for education, to integrate instruction on the health consequences, addictive nature and mortal threat posed by alcoholic drink consumption in subjects taught in public and private schools at all levels of education, including informal and non-formal and indigenous learning systems.

### **Policy measures to give effect to the right to education**

188. Two key policy documents have been formulated. The finalization of the Sessional Paper No. 14 of 2012 on Aligning Education and Training to the Constitution of Kenya and Kenya Vision 2030 (May, 2012) gives guidance on the areas of reforms and institutional strengthening. The Paper proposes reforms that cut across the entire education sector and include policies and strategies for addressing institutional reforms, management and financing of education, the curriculum, teacher education, teacher development and management, and strategies for bringing digital technology within the reach of every Kenyan child. The policy identifies a number of challenges, gaps and concerns that have led to the question on whether the Kenyan Education System, its institutions and programmes are fit for the purpose. Specific issues have been identified including relevance with regard to content and delivery; sufficient flexibility to adapt to the changing socio-economic needs and requisite quality to match global competitiveness and to address challenges of the 21st century.

189. Other issues addressed include effective governance and management; retention and transition rates at various levels; teacher education, management and attrition; effective structure; Standards and Quality Assurance; Monitoring and Evaluation; access especially to the vulnerable and a sufficiently flexible and responsive regulatory framework to deal with the current and emerging challenges and ensure total access, equity and quality.

190. The Sessional Paper on Science, Technology and Innovation aims at providing the national policy framework to acquire, develop and promote science, technology and innovation for national transformation to a knowledge economy. It aims to mainstream application of science, technology and innovation in all sectors and processes of the economy to ensure that Kenyans benefit from acquisition and utilization of available capacities and capabilities to achieve the objectives of Kenya Vision 2030. However, Kenya acknowledges the challenge of lack of integration of culture in the formal education system which impedes cultural creativity and expression.

191. Despite the policy on Free Primary Education, nomadic communities may not be fully benefiting from the education services as shown by their participation rates. Therefore the government has developed a Policy to Guide Nomadic education. This is in recognition of the fact that the needs of nomadic communities are generally complex and that those providing education face even more challenges. Another challenging fact is that education cannot

be provided to the nomadic communities in disregard of their spiritual, social, security, moral and other developmental concerns.

## **Policy on adult and continuing education**

192. The Government of Kenya places Adult Learning and Education (ALE) on its development agenda as part of the country's general policy of bringing about accelerated and sustainable socio-economic development. It recognises the important role played by ALE in maximizing the human resource potential. This commitment is evident in various legislative and policy documents.
193. Kenya has also developed a Special Needs Education Policy. Special Needs Education is a crucial subsector for accelerating the attainment of Education for All and the Millennium Development Goals. Special education has for a long time been provided in special schools or units attached to regular schools and, more recently, at inclusive settings in regular schools. However, the schools and units only cater for children with special needs in hearing, visual, mental or physical challenge. Excluded from the programmes are children with other needs; the gifted and talented, psycho-socially different, autistic, multiple-handicapped and with learning difficulties and communication disorders.
194. A national policy is in the pipeline intended to define all special needs and design programmes to enhance their inclusion in education. In addition, the Kenya Institute of Special Education has been restructured and strengthened to train special education teachers in autism, communicative disorders and multiple handicaps.
195. The Government, through the Ministry of State for Development, through Sessional Paper No. 8 of 2012 on National Policy for the Sustainable Development of Northern Kenya and other Arid Lands, referred to as arid and semi- arid lands (ASALS) commits to the introduction of flexible education systems of high quality which are responsive to the needs of the area and which reinforce traditional knowledge systems in pastoral societies; promote the use of appropriate ICT and other technologies in service delivery; revise the Education Act to incorporate alternative ways of providing education services to nomadic communities such as distance and mobile education and establish the National Council on Nomadic Education. While appreciating the challenges posed by Northern Kenya and other Arid areas, the Government is committed to spearheading Policy Interventions including: improved infrastructure for education and training at all levels including the tertiary level; increasing the number of trained professionals and develop a mechanism to attract and retain high calibre officers; introduce affirmative action programmes for people from North Eastern and other arid areas especially women to all public institutions; target a percentage of bursaries for students from North Eastern and other arid areas who wish to pursue tertiary and university education; expand adult literacy levels and use education to reduce inequalities experienced by certain social groups. This then means that the ASALS get equal opportunities to engage in gainful satisfying and productive employment as encapsulated in Vision 2030.

## Policy on safety of school children

196. Towards the realisation of the set goals, the Government has developed various interventional strategies to ensure safe and secure school environments. This strategy arises from the strong conviction that: Safe and secure school environments facilitate and foster quality teaching and learning in educational institutions. Safety, especially in schools, is even more critical given the fact that young children are vulnerable to insecurity. In insecure school environments, delinquency, truancy and absenteeism, especially among girls, are common. When teaching and learning is interrupted by acts of violence among learners, through ethnic or land clashes, cattle rustling, cultural practices such as female genital mutilation, learner performance in national examinations is inevitably compromised. Comprehensive school safety is, therefore, fundamental to school success and learner achievement. The Government's commitment to the promotion of access, equity, participation, retention, completion and quality at school level of education is bound to be affected if safety and security concerns are not addressed fully.
197. School Safety has been recognized as an integral and indispensable component of the teaching and learning process. The Government constantly brings out the obligation of educational stakeholders to foster safe and secure school environments to facilitate increased learner enrolment, retention and completion and hence attainment and quality education. In this respect, School Management Committee/Board of Governors members, the head teacher, teachers, learners, parents and other stakeholders have important roles to play in facilitating and enhancing safety in schools. Nonetheless, the direct responsibility of overseeing school safety should fall within a specific School Safety Committees which are usually put to task whenever a safety issue in any school occurs.
198. According to the latest Demographic and Health Survey, 2008/2009 data, 40% of Kenyan adolescent girls without any education are either pregnant or have already become mothers. For those who have completed primary education 26% are mothers compared to only 8% of those with secondary education or higher. Women with higher levels of education have fewer children than those with lower or no education at all.
199. One of the factors contributing to school girl drop out and consequently affecting the education attainment of girls is teenage pregnancy and related consequences. Recognizing the negative impact of teenage pregnancy on girls' education, the Ministry of Education put in place the return to School Policy Guideline in the mid-1990s to ensure that girls who became pregnant while still in school got a second chance. The implementation of the guidelines has however been hindered by range of challenges including negative perceptions from the community, stigma and lack of awareness at various levels.
200. Other policies measures that the State has put in place that touch on the right to education include:-
- a) Policy on HIV with interventions against stigma and education
  - b) Gender parity in institutions of learning
  - c) Service Charter and Citizens delivery charters on education
  - d) Affirmative Action for the girl child, lower the university entry marks for girls.
  - e) The conversion of provincial secondary schools into centres of excellence (national schools)

## **Administrative and other measures to enhance access to education**

201. In ASAL regions, there is a food programme for school meals. Kenyans living in rural areas and ASALs suffer from poor land quality and chronic water shortages, which have contributed to food insecurity in these areas. The School, Health and Nutrition Programme is a partnership between the Ministry of Education and the World Food Programme to promote universal basic education among disadvantaged children. Target group are pre-primary and primary school pupils in ASAL districts and urban slums. The programme targets about 1.5 million children for mid-day meals. As a result, enrolment has increased in the districts and areas covered.
202. There is also affirmative action on admission (quota) system for children from ASAL regions. The Quota system of selection was launched on 11th January, 2011. The quota system for national schools involves a formula in which the total number of pupils in a district is divided by that of the entire country and then multiplied by the vacancies available. The figure arrived at represents the national school slots available for each district with the final selection based on the public-private school ratio. The move was meant to address concerns that pupils from public schools who are presumed to be disadvantaged in terms of education facilities and social background lose out to pupils from private schools that have better facilities and learning atmosphere. The Kenya Private Schools Association (KPSA) has opposed this criterion arguing that it is discriminatory.

## **Access to Primary education**

203. The Government recognises the significant social and economic payoffs derived from investment in Early Childhood Development and Education (ECDE) including overcoming children educational disadvantages for poor children, supporting parents and increasing female employment because of the level of care needed at this level of education. Previously investment in this area has been left mostly to the household, private sector and religious organizations. Since 2012, the processing of capitation grants to support ECDE with a budget of Kshs 1.6 billion to about 19,000 public ECDE centres with 1.4 million children commenced.
204. Enrolment in the ECDE increased from 1.914 million (967,544 boys and 946,678 girls) in 2009 to 2.13 million (1,100,890 boys and 1,092,181 girls) in 2010. The Gross Enrolment Rate (GER) increased from 60.2 per cent (61.6 for boys and 58.7 for girls in 2009 to 60.9 per cent (60.3 for boys and 61.4 for girls) in 2010. The Net Enrolment Rates (NER) increased from 40.4 per cent (40.8 per cent for boys and 40.0 per cent for girls) in 2009 to 41.8 per cent (42.3 per cent for boys and 41.2 per cent for girls) in 2010 against the MTP target of 76.6 per cent (76.9 per cent for boys and 76.2 per cent for girls).
205. Likewise at the primary education level the GER increased from 108.9 per cent (118 and 106 per cent for boys and girls respectively) in 2007 to 110.0 per cent (112.8 per cent and 107.2 per cent for boys and girls, respectively) in 2009, and dropped slightly to 109.8 per cent (109.8 per cent and 109.9 per cent for boys and girls, respectively) in 2010. The NER increased from 91.6 per cent (94.1 per cent and 89.0 per cent for boys and girls, respectively) in 2007 to 92.9 per cent (93.6 per cent and 92.1 per cent for boys and girls, respectively) in 2009 and then dropped marginally to 91.4 per cent (90.6 and 92.3 per cent for boys and girls, respectively) in 2010. The gender disparity in enrolment has been improving in favour

of girls. The gender parity index at primary level was 0.97 in 2007, then 0.98 in 2009 while in 2010 it was 1.02.

206. To improve availability of opportunities for education, the Government has supported the construction and rehabilitation of existing facilities and for pastoralist areas, provision of boarding and mobile schools. In what the MTP called the flagship projects in the education sector for 2009/2010, two model schools per constituency (making 420) were supported with Kshs 3.5 million per school to expand opportunities for the increased number of enrolled pupils. Subsequently, for example, the NER for North Eastern Province (now Garissa, Wajir and Mandera Counties) was 40.3 per cent (41.5 per cent male, 38.9 per cent female) against an MTP NER target of 38.6 per cent for 2010 under Kenya Vision 2030. This shows that the target was achieved and this was attributed to continued implementation of FPE as well as sensitization of parents/communities.
207. In a bid to enhance retention of children in school, the State has strengthened the school feeding programme which continued to provide mid-day meals to approximately 1.2 million pre-primary and primary school children in 64 arid and semi-arid districts and informal settlements of Nairobi.
208. The Government recognises that gender mainstreaming is a social justice issue and has therefore continued to seek ways of identifying ways of responding to the needs of women so as to advance gender equity in education. In 2007, the Government developed the National Gender Policy in Education with the aim of ensuring gender responsive education. During the reporting period, under this Policy, there have been initiatives aimed at providing grants for the construction of laboratories and supply of equipment to girls' schools as a way of improving girls' performance in science and technology. The policy allows girls to join higher institutions with lower grades than boys. Girls are also being provided with sanitary towels to ensure school attendance during menstruation.
209. Another measure that has been taken and which is in line with the Commission's recommendations relates to increasing bursaries and textbook subsidies for children from poor families. During the reporting period, the textbook-pupils ratio (TPR) for lower primary school has improved from one textbook for more than 10 pupils before 2003 to 1:3 in 2007, 1:2 in 2008, remaining at 1:2 in 2009 and 1:1 in 2010. For upper primary TPR has improved from 1:2 in 2007 to 1:1 in 2008 and 1:1 in 2009 and 2010, thus improving the quality of education.
210. However there is still an ongoing challenge with regard to the teacher pupil ratio despite the fact that the Government has recruited 29,060 teachers in the last five years. Shortage of teachers means that many schools have a pupil to teacher ratio above 40:1, with as high as 85:1 ratio in the high potential and urban areas. On the average, the pupils to teacher ratio at primary level moved from 44:1 in 2007 to 45:1 in 2008, 2009 and 2010.

### **Children with special needs**

211. The Commission's recommendation that the Government takes measures to cater for special needs of children with disabilities, and integrate refugee children and internally displaced children in the regular school system has been happening progressively. Measures have been taken to enhance education in the informal settlements, with the Government providing capitation grants to 474 non-formal schools. However, this was below the MTP target of 700.

212. With regard to children with disabilities, the Government has progressively established programmes in various institutions to cater for these learners. There are presently 1,882 primary and secondary schools in Kenya that provide education for learners with special needs. These schools have 50,744 enrolled learners with disabilities. 24,000 of these learners are in special schools while the rest are in regular schools. This increase has been realized as a result of the efforts made to include learners with disabilities in regular schools through FPE. There are also 15 special secondary schools and integrated programmes.
213. With regard to internally displaced children, the Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act, places the primary responsibility for the provision of economic and social rights which include education on the Government. Refugee children are provided with educational opportunities within their areas of residence as part of the international assistance that Kenya receives. They are provided with primary, secondary, technical as well as vocational education and there are also university scholarships through UNHCR. The schools within the refugee settings follow the Kenyan curricula which enable refugees to acquire academic certificates that they can use once they return home or proceed to be resettled abroad.

### **Access to Secondary education**

214. The state is in the process of constructing and fully equipping 560 secondary schools and rehabilitating existing ones. In the first year alone of the MTP, funds covering 200 such schools had been disbursed. Another Government initiative that has complemented this effort is the Constituency Development Fund (CDF) that has also facilitated construction of many district schools thereby increasing access.
215. These have seen the number of secondary schools increase from a total of 6,485 secondary schools in 2007 to 6,971 in 2009 and 7,308 in 2010. Enrolment grew from 1.18 million students in 2007 (639,393 boys and 540,874 girls) to 1.5 million (804,119 boys and 695,896 girls) students in 2009 and, further, to 1.7 million (916,302 boys and 792,818 girls) students in 2010.
216. The GER for secondary increased from 38.0 per cent (41.4 per cent for boys and 34.6 per cent for girls) in 2007 to 45.3 per cent (49.0 for boys and 41.8 for girls) in 2009. In 2010, the GER increased to 47.8 per cent (50.9 per cent for boys and 46.3 per cent for girls). The NER recorded an increase from 28.9 per cent (29.8 per cent for boys and 27.9 per cent for girls) in 2007 to 35.8 per cent (36.5 per cent for boys and 35.1 per cent for girls) in 2009. In 2010, the NER dropped to 32.0 per cent (32.4 per cent for boys and 32.9 per cent for girls).
217. In 2008, the Government put in place and started implementing Free Day secondary Education (FDSE) which provides financing to take care of tuition with a view to making secondary school education affordable. There is also a secondary bursary scheme meant for vulnerable groups including orphans, girls and children from poor families in informal settlements, poverty-stricken families in high potential areas, and families in ASAL districts. Although the Government has introduced FDSE, the programme has also assisted the poor to meet other secondary education expenses not catered for by the Government during the period under review. The Government continues to implement FDSE towards progressive realisation of free secondary education across the country. Further, the

development of 'Return to School Guidelines' are ensuring that schools are able to readmit girls who may have dropped out due to pregnancy or other factors.

## **Access to Further / higher Education**

218. One of the key goals of the Kenya Vision 2030 is to ensure that every Kenyan has decent and gainful employment. It is therefore imperative that education is relevant and prepares learners for the job market. To move towards this goal, the Government initiated the construction of 13 new public Technical and Vocational Education and Training (TVET) institutions across the country to expand access to TVET. In addition, in order to provide quality and relevant skilled human resources in the post secondary school level cadre, the Ministry of Education established a Centre of Excellence Programme where technical training institutions were provided with modern equipment as well as the upgrading of teaching staff, with a view to producing the best graduates for the market. Under the Economic Stimulus Package of 2009/10 a total of Kshs 2.1 billion was utilised for the construction of new laboratories and workshops in all TVET Institutions under the Ministry. The number of registered public and private TVET institutions has since increased to a total of 813 TVET institutions of which 493 have full registration status as at June 30th 2012.
219. Other measures in this sector include the introduction of a bursary scheme; establishment of standards; and the development of curricula. In regard to standards, the Directorate of Technical Accreditation and Quality Assurance (DTAQA) was established in May, 2008 to discharge the quality assurance and standards functions. This has enabled the Ministry of Education to coordinate and develop technical training through facilitation and supervision of TVET institutions, their registration and approval of programmes. Additionally, a TVET Accreditation Handbook with criteria for assessment of TVET institutions has been developed to protect the quality of education provided in these institutions.
220. With regard to curricula, in 2010/2011 the Ministry prepared a 'TVET Curriculum Development Standard' with a view to ensuring that any curricula developed is relevant to the job market thereby making it easier for graduating students to be absorbed in the world of work after graduation.
221. To secure and enhance these gains, *the Technical and Vocational Education and Training Act No. 29 of 2013* was enacted. One of the guiding principles set out under Section 3(1)(b) is the institution of appropriate mechanisms to promote access, equity, quality and relevance in training to ensure adequate human capital for economic, social and political development.
222. Attainment of higher education unleashes huge public benefits that are critical to a developing economy like Kenya. The State recognises the importance of higher education and has made enormous legislative, policy and institutional investments in the sector so that as many students as qualify to enroll in universities have the opportunity to do so. *The Universities Act (No 42 of 2012)* has set the framework for higher education reforms which includes the incorporation of private universities into the selection body that will in future pick State-funded students to both public and private universities. Further, Adult and Continuing Education are now included in the *Basic Education Act (No. 14 of 2013)*.
223. The Government has also created the necessary supportive environment for private sector investment in higher education and also invested in public universities growth. The sector has witnessed

tremendous growth in terms of enrolment and the numbers of universities and university constituent colleges. The number of private universities has increased from 13 in 2003 to 26 in 2012, while the number of public universities and university constituent colleges increased by 340 per cent, rising from six universities and one university constituent college in 2003, to seven fully fledged public universities and 24 university constituent colleges in 2012. The total number of universities in the country now stands at 60 institutions and all the 24 university colleges may apply for accreditation into fully fledged national public universities under the provisions of the Universities Act. This growth has however generated issues relating to the quality of education being offered in these institutions which is the single most challenging issue that the Government is faced with but which the newly enacted Universities Act has sight of. While this increase will somewhat ease Kenya's crisis of admissions, more still needs to be done to accommodate all qualifying students. Currently, only about half get places in public universities.

224. The increase in enrolment at higher learning institutions has been accelerated by the introduction of FPE and FDSE programmes in 2003 and 2008 respectively, which trend is expected to continue. As at June 2012, the number of university students was estimated at 218,862 spread across the seven public universities.

225. The Higher Education Loans Board continues to give financial support to university students. During the fiscal year 2011/2012, a total of KES 4,810,876,250 (Approximately USD 54,360,183/-) was disbursed to 106,136 Kenyan students pursuing undergraduate and post graduate university education locally and within the EAC.

## **Article 17: Right to take part in cultural life**

226. Cultural expression and respect for the diverse cultural practices in Kenya has historically had the requisite space for existence though the institutional infrastructure important for growth and development has been inadequate. However, with the passage of the Constitution of Kenya, 2010, culture has received renewed prominence and is now recognised in the Constitution under Article 11 which identifies culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation. It provides under subsection (2) that The State shall—(a) promote all forms of national and cultural expression through literature, the arts, traditional celebrations, science, communication, information, mass media, publications, libraries and other cultural heritage;(b) recognise the role of science and indigenous technologies in the development of the nation; and(c) promote the intellectual property rights of the people of Kenya. (3) Parliament shall enact legislation to—(a) ensure that communities receive compensation or royalties for the use of their cultures and cultural heritage; and (b) recognise and protect the ownership of indigenous seeds and plant varieties, their genetic and diverse characteristics and their use by the communities of Kenya.

227. Article 7 provides that the national language of the Republic is Kiswahili. (2) The official languages of the Republic are Kiswahili and English.(3) The State shall—(a) promote and protect the diversity of language of the people of Kenya; and (b) promote the development and use of indigenous languages, Kenyan Sign language, Braille and other communication formats and technologies accessible to persons with disabilities.

228. Article 44 provides for the right of every person to use the language of the person's choice and to participate in their cultural life as echoed in the preamble to the Constitution that 'We, the people of Kenya PROUD of our ethnic, cultural and religious diversity, and determined to live in peace and unity as one indivisible sovereign nation' adopt, enact and give this Constitution to ourselves and to our future generations.
229. Article 19(1) of the Constitution provides that the Bill of Rights is an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies. Article 27(3) provides that women and men have equal right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres. Article 174 (d) recognises the right of communities to manage their own affairs and to further their development; (e) to protect and promote the interests and rights of minorities and marginalised communities.
230. Other legislative measures that have been under taken to give effect to the right to take part in cultural life in Kenya include:
- a) Draft *Kenya Languages Bill*
  - b) Enactment of *the Kenya National Commission for UNESCO Act* safeguarding the intangible cultural heritage and promotion and preservation of the diversities of cultural expression
  - c) *National Museums and Heritage Act Cap 216*, Laws of Kenya
  - d) *Kenya Cultural Centre Act, Cap 218* , Laws of Kenya
  - e) Draft Kenya National Music Policy

## **Policy and administrative measures giving effect to the right to take part in cultural life**

231. In Kenya, recognition of the distinct ethnic groups is an important part of any people's cultural determination. The Government recognises this and during the 2009 Census which was made operational under the banner of "Nipo! Natambulika!" (Loosely translated as 'I am here, I am recognised'), provided for individuals to determine and state their preferred identification of ethnic affiliation. Previously unidentified small ethnic groups including the Yaaku, Nubians, Ilchamus and Sakuye communities were captured in the census as such. The choice to self-identification also included a category of individuals who were opposed to being identified as affiliated to any ethnic group. These were given the option of being captured as just 'Kenyan'.
232. At the policy level, the National Policy on Culture and Heritage has been developed. The Policy operationalises the Constitutional recognition of Kiswahili as an official language. Kiswahili has been a national language and its recognition as an official language will significantly enhance access to official documents and therefore access to information to Kenyans who would otherwise have been excluded. Further, under Article 7, the State is enjoined to promote the diversity and the languages of the people of Kenya, including use of Kenya Sign language, Braille and other communication formats.
233. Schedule 4 of the Constitution also requires county governments to recognize and promote the role of culture in governance and development in the counties. The Government through the Kenya Copyright Board is developing a bill to protect traditional knowledge and traditional cultural expression and the question of copyright and scientific research.

234. The Department of Culture has undertaken several programmatic initiatives including the construction of 16 community cultural centres, with a budgetary allocation of Kshs 294,355,000 over five years since 2009. When fully operational, these centres are expected to provide full and sustained support for the development of the diverse cultural expressions in the country and Supporting Arts exhibitions for non-educational institutions and for cultural practitioners including exchange programmes for poor rural schools.
235. The Department of Culture also coordinates about 50 Community Cultural Festivals annually in various regions of the country in partnership with local communities including the marginalised and people with disabilities. These programmes act as avenues for promoting and preserving the rich cultural heritage as well as facilitating participants in enjoying their cultural life and building national cohesion and integration.
236. After the ratification of the 2003 and 2005 UNESCO Conventions on Safeguarding of the Intangible Cultural Heritage and the Convention on Preservation and Promotion of Diversity of Cultural Expressions, the Department of Culture has initiated community projects on safeguarding of the traditions and practices associated with several communities. The traditions of the Miji Kenda community, the Isikhuti Dance among the Luhya, the rites of passage among the Maasai and the skills of the Wamunyu wood carvers among the Kamba are some of the unique cultures which will be safeguarded under UNESCO funding.

### **Administrative and other measures**

237. The Department of Culture has supported the setting up of Communities' cultural and language committees. These Committees coordinate the recording of cultural music and cultural exchange programs. They are also in charge of community cultural centers and festivals. The Department also sensitizes the communities on harmful cultural practices.
238. In order to promote culture the relevant Ministries National Music and Cultural Festivals in which the government gives certificate of recognition. There is also a strong element of Private Public Partnership with NGOs to promote culture e.g. in setting up museums and national archives to show case cultural heritage.
239. The Ministry responsible for culture has also developed sensitization and awareness programs for children against harmful cultural practices and have also involved the traditional council of elders, which are being revived e.g. the Luo Council of Elders and the Njuri Ncheke, Kaya elders etc. These are very influential especially where cultural issues are concerned on issues of land, society and morals and safeguarding of traditions and practices of communities.
240. As a way forward, the government intends to intensify the development of creative cultural industries which are currently being mapped. Coupled with this, the government intends to ensure that intellectual property that is Kenyan remains so to protect against incidences where foreigners patent Kenyan inventions as happened with the kiondo and Kikoi Cases.

## **Challenges affecting the degree of realisation of the right to take part in cultural life**

241. Challenges in ensuring the right to culture include the lack of cultural data and statistics to support its development for planning purposes, as it falls in the informal sector. Due to its informal status, the level of technical and financial support is minimal leading to inadequate infrastructure, research, and lack of lobbying skills for approval of cultural legislative frameworks. As a result, the sector which has a lot of potential has not had a major impact in addressing pertinent cultural practices and traditions affecting gender, FGM, negative ethnicity, health, tourism, employment and children rights.

However, the Government is committed to ensuring data for the cultural sector is developed. In 2012, Kenya partnered with the EAC Partner States in conducting a national mapping study on creative cultural industries. Already a pilot study has been successfully carried out and a road map for the full national study has been finalized. This will result in development and enjoyment of the cultural creative industries sector and enhanced linkages between culture and mainstream tourism sector to ensure exploitation of cultural heritage is beneficial to every Kenyan. Challenges facing the country's cultural sector include:

- a) Negative ethnicity
- b) Inadequate cultural infrastructure and formal industrial support
- c) Lack of funding
- d) Lack of technical capacity to exploit cultural knowledge
- e) Inadequate research in the culture sector
- f) Negative attitude towards culture

242. As a way forward, the Government is encouraging research, utilization and development of indigenous knowledge and appropriate technology as an essential ingredient for encouraging innovations and finding community-based solutions to challenges facing the nation as well as setting the foundation for sustainable development. Other benefits of developing the culture sector will be; empowering the communities to safeguard and promote the environment by tapping on indigenous knowledge systems on environmental management and integrating culture to the education system which leads to creativity and scientific innovation.

## **Article 18: Right to family, women, children and disabled**

### **Right of the family**

243. The Government of Kenya is committed to ensuring that the family is protected. The foundational tenets of protection are set out in Paragraph 5 of the Preamble to the Constitution of Kenya, 2010 which reaffirms the commitment to nurture and protect the well-being of the individual, the family, communities and the nation. Article 45(1) of the Constitution of Kenya, 2010 acknowledges the role of the family and states that it is the natural and fundamental unit of society and the necessary basis of social order, and shall enjoy the recognition and protection of the State. Article 45(2) adds that every adult has the right to marry a person of the opposite sex, based on the free consent of the parties while Article 45(3) states that parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage.

244. Article 45(4) requires Parliament to enact laws that recognize marriages concluded under any tradition, or system of religious, personal or family law; and any system of personal and family law under any tradition, or adhered to by persons professing a particular religion, to the extent that any such marriages or systems of law are consistent with this Constitution.

## **Rights of women**

245. The issue of rights of women to property and in particular, land has been a contentious issue for many years in Kenya. However, the Constitution of Kenya, 2010 now prohibits discrimination of any individual on any grounds. Article 60 provides that the principles of land policies shall include the elimination of gender discrimination in law, customs and practices related to land and property in land. Article 45(3) of the Constitution guarantees both parties equal rights in marriage. The same situation is reflected in Section 3 of the *Marriage Act 2014*. The Act provides for registration of customary marriages and recognition of polygamous marriages.

246. The National Land Policy seeks to ensure that laws are enacted to protect the land rights of women, and existing laws that discriminate against women in relation to land are repealed. Indeed the *Land Act (No. 12 of 2012)* and the *Land Registration Act (No. 3 of 2012)* increase women's access to land ownership and use, through inheritance and through personal acquisition. Customs and practices that discriminate against women are outlawed. Provision is made for land to be registered jointly in the names of husbands and wives, and for both partners to give consent before land is sold. This is reinforced by the provisions of the *Matrimonial Property Act, 2013*.

247. The *Matrimonial Property Act* has drawn criticism from human rights organizations and the women themselves as being discriminatory against women and a retrogressive step for women's rights to land and property in Kenya. The Act defines matrimonial property as only property that is jointly owned by the spouses, and disallows women the right to property upon the death or divorce by requiring them to prove their contribution to the acquisition of the property during the marriage. The fact that few Kenyan women own or jointly own property with their spouses, and given that many Kenyan women do not work in paid employment, many are unable to contribute financially in the acquisition of matrimonial property. In effect the Act strips women of rights to family property, including the matrimonial homes if they are unable to prove financial contribution. This is unconstitutional in that the Constitution does not talk of contribution but gives equality to both the man and the woman, during and after dissolution of marriage.

248. Despite the eagerness with which the Kenyan women waited for the *Marriage Act*, it contains a provision that formally permits polygamy, but omits the critical long existing cultural context that permitted first wives to weigh in or veto a husband's choice. In effect, the new clause permits men in Kenya to take as many wives as they desire without the existing wife's consent, violating the Constitutional guarantees on equality and undermining the rights of women. A lot of women view the concept of polygamy under the *Marriage Act* as extremely demeaning to Kenyan women and waters down the gains the country has made against inequality. Both the *Marriage Act* and the *Matrimonial Property Act* have been criticized as retrogressive in nature and in clear violation of Kenya Constitution, 2010, which gives significant prominence to human rights and international law, and entrenches the rights and fundamental freedoms of all, including the right to equality and freedom from discrimination. They are also contrary to Kenya's legal obligations embodied in regional and

international instruments. Kenya has ratified, namely: the African Charter on Human and Peoples' Rights, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa ("the Maputo Protocol"), the International Covenant on Civil and Political Rights (ICCPR), and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).

249. Equality of both women and men has gained support from the Courts of law. In the *High Court of Kenya decision on Civil Suit No. 7 of 2012- Lucy Kemboi v Cleti Kurgat & 5 Others*, the Court pointed out that Article 27(3) and (4) of the Constitution of Kenya, 2010 provide for equal treatment including the right to equal opportunities in political, economic, cultural and social spheres; and non discrimination against anyone on account of among other things, gender. The Court noted that a widow should not be discriminated upon by cultural practices. It also ordered that the widow be allowed to bury her deceased husband where the couple had established a home. In this case, it was the Court's view that though Keiyo customary law was applicable and that under the said customary law the clan together with the deceased brothers were responsible for the burial of the deceased, Lucy having been married to the deceased had a right derived from written law to bury the deceased. The Court was of the view that the rights of Lucy were provided for and protected by the Constitution, in that Lucy should not be discriminated upon by cultural practices, that she had an equal right as her in-laws and the clan did, to bury her husband's remains.

250. The State party is sensitive to the fact that women in Kenya face numerous obstacles in achieving representation in governance. Cultural and societal dynamics have contributed heavily to the under representation of women in both public and private spheres. While considerable effort has been made to ensure that women are appointed to key public positions, they have not fared very well in the elective field as depicted in the table below. To give women a better chance of participating in contemporary formal politics and thus affect the quality of public policy, the Constitution in Article 81(b) espouses the principle that "not more than two-thirds of the members of elective public bodies shall be of the same gender." A major challenge here was that for the constitutional threshold to be realized at least 117 Members of Parliament would have to be female (or male if women made up the majority in Parliament). It is not clear under the Constitution how this rule would be implemented. The achievement of the gender equality rule in the first general elections under the Constitution was not realized. Women won a mere 13.4 % which did not attain the a "third threshold as outlined in the table below Kenyan with no woman candidate winning governor and senator positions, meaning none of Kenya's 47 local governments is led by a woman.

251. To address the Constitutional anomaly, just before the March 2013 general elections in Kenya, the Attorney General, sought an advisory opinion from the Supreme Court on how the Constitutional threshold could be achieved. The Supreme Court held that the achievement of the provision would be progressive and decreed that a mechanism towards this be put in place by the 27th August 2015. The Attorney General has set up a Working group to work out a legal framework to the facilitate compliance with the Constitutional provisions of the two third gender rule in representation of women in elective and appointive positions.

252. **The Table outlines the status of implementation of the principle of gender representation in elective and appointive positions (public) in Kenya as of January 2014:**

No.	Position	Total	Men	Women
	Governors	47	47	0

	Deputy Governors	47	38	9
	Women Representatives to the National Assembly	47		47
	Member of National Assembly (elected)	*290	274	16
	Nominated	12	8	4
	Senate (elected)	47	47	0
	Nominated	20	2	18
	Member of County Assembly (elected)	1450	1362	88
	Nominated	778*	0	632
	County Assembly Speakers	47	44	3
	Cabinet Secretaries	18	12	6
	Principal Secretaries	26	19	7
	Chairpersons of independent offices	2	1	1
	Chairpersons of Constitutional Commissions	12	7	5

253. During the process of recruiting Judicial Officers (Magistrates and Judges), the Judiciary through the Judicial Service Commission is guided by the principles of competitiveness, transparency and promotion of gender equality. So far 42 women have been competitively appointed to the bench. The number of women judges is set to increase following the amendment of the Judicature Act to increase the number of Court of Appeal judges from 14 to 30 and the High Court judges from 70 to 150.

**a. The table below compares the number of men to female judges in Kenya as of June, 2014**

<b>Court</b>	<b>Total</b>	<b>No. of women Judges</b>	<b>No. of male judges</b>
Supreme Court of Kenya	7	2	5
Court of Appeal	26	8	18
High Court	82	36	57

**Rights of children (also refer to Kenya's 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Report to the UNCRC Committee)**

254. Kenya is a state party to various international and regional human rights instruments that protect the rights of children. These include the UN Convention of the Rights of the Child (CRC) and the African Charter on the Rights and Welfare of the Child. At national level children's rights are protected; in the Constitution, under various laws that protect children against harm and exploitation, in a national plan of action and coordinating organizations on children's rights.

## Constitutional safeguards

255. The Constitution establishes in Kenyan law internationally acclaimed principles on the rights of children, such as best interests of the child which is now to be paramount in every matter concerning children. The Constitution adopts the United Nations definition of the child as any person under the age of 18. Children enjoy the right to; a name and nationality from birth; free and compulsory basic education; basic nutrition, shelter and health care; protection from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment, and hazardous or exploitative labour; parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not.

## Legislative measures

256. The *Children's Act No.8 of 2001* domesticates CRC and contains standards for the protection of children in Kenya. With the passing of the Constitution in 2010, the Children Act (Amendment) Bill was developed and proposes various amendments to align the provisions of the mother act with the Supreme law. It expands the realm of punishable offences to include the prohibition of corporal punishment and any cultural practices which dehumanizes or are injurious to the physical and mental well being of the child. It also proposes that where the word "arrest" appears anywhere in the text it must be substituted with the word "apprehend".

257. The *Counter Trafficking in Persons Act* is an important piece of legislation enacted in 2010 to implement Kenya's obligations under the United Nations Convention against Transnational Organized Crime particularly its Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children and to provide for the offences relating to trafficking in persons and for connected purposes. As a deterrent measure, the penalties for offences under the Act are quite punitive with fines of up to the equivalent of EUR 300,000 (Approximately USD384,000/-) and in some cases imprisonment for life. The Act creates a Counter Trafficking in Persons Advisory Committee to enhance inter-agency co-operation in combating trafficking in persons. Children below 4 years of age are allowed to stay with their mothers who are serving prison sentences. This state of affairs is not desirable and occurs because of the lack of adequate frameworks for the care of the children. The Government has established day care centers in prisons and availed social workers to look after such children. All the children are registered by the National Registration Bureau. The Kenya Prison Service has also established Family Days where children visit their parents in prison thus providing an opportunity for the families to bond.

258. The *Prohibition of Female Genital Mutilation Act*, enacted in 2011 provides a framework for the elimination of Female Genital Mutilation (FGM). The Act criminalizes the practice and provides heavy sanctions. The Prohibition of FGM Act creates a Prohibition of FGM Board charged with ensuring adherence to the Act.

## National policies to protect Children

259. National policies developed to protect children include: The National Plan of Action for the Elimination of Female Genital Mutilation 2008-2012 that provides a road map on the implementation of anti- FGM activities, National Plan of Action on Children 2008-2012 (currently under review), the National Plan of Action against Sexual Exploitation of Children in Kenya- 2013-2017. The Chief Justice published Sexual Offences Rules of Court, which represents a key milestone in the development of the criminal law in the county. The regulations address the plight of victims and witnesses – the other facet in criminal trials without which no conviction can prevail

### **Rights of persons with disabilities (reference should be made to the Initial State report on the UN Convention on the Rights of People with Disabilities)**

260. Since the submission of the initial report a host of measures have been undertaken nationally to establish legislative, policy, legislative and administrative frameworks for redressing and enhancing the rights of persons with disabilities:

#### **Constitutional safeguards**

261. Article 27(4) of the Constitution proscribes discrimination on any ground including disability. The concept of reasonable accommodation for persons with disabilities is recognized under Article 54 of the Constitution, which provides for the rights of persons with disabilities (PWD). PWD are entitled to be treated with dignity and respect and to be addressed and referred to in a manner that is not demeaning; to access educational institutions and facilities for persons with disabilities that are integrated into society to the extent compatible with the interests of the person; to reasonable access to all places, public transport and information; to use Sign language, Braille or other appropriate means of communication; and to access materials and devices to overcome constraints arising from the person's disability. Article 54(2) further provides that measures should be taken to ensure the progressive implementation of the principle that at least five percent of the members of the public in elective and appointive bodies are persons with disabilities. Significant progress has been made and there are now a considerable number of PWDs in elective and appointive public positions.

#### **Legislative measures**

262. The main legal framework for the protection of the rights of persons with disability is the Persons with Disabilities Act 2003. Other pieces of legislation include:

263. *The Employment Act 2007 (Act No. 11 of 2007)*, explicitly prohibits an employer from discriminating directly or indirectly, against an employee or prospective employee, or harass an employee or prospective employee on grounds of disability.

264. *The Sexual Offences Act (Act No. 3 of 2006)*, extends special protection to persons with disability by providing that in sexual offences where the alleged victim is a person with mental disabilities, the concept of a "complainant" is extended to include a person who lodges a complaint on behalf of the alleged victim where the alleged victim is on account of the disability unable or inhibited from lodging and following up a complaint of sexual abuse.

265. *The Witness Protection Act 2008* (Chapter 79 of the Laws of Kenya), establishes the Witness Protection Unit which is obliged to give due regard to the particular needs persons with disabilities.

266. To ensure the effective implementation of the PWD Act, 2003 and give greater effect to the UNCRPD, the following pieces of subsidiary legislation were made: -

- a) The Persons with Disabilities (Access to Employment, Services and Facilities) Regulations, 2009.
- b) The Persons with Disabilities (Cost Care, Support and Maintenance) Regulations, 2009.
- c) The Persons with Disabilities (Registration) Regulations, 2009.
- d) The Persons with Disabilities (Income Tax Deductions and Exemptions) Order, 2010.
- e) The Persons with Disabilities (National Development Fund for Persons with Disabilities) (Conduct of Business and Affairs of the Board of Trustees) Regulations, 2009.

### **Policy and administrative measures**

267. Besides the legislative framework , the Government of Kenya has in place a number of policies that protect and promote the rights of persons with disabilities. It is worth noting that the Government now requires that all policies that are being developed must mainstream and take into consideration issues relating to the rights of persons with disabilities. Some of the policies that are in place or currently being developed include:

- a) The National Disability Policy
- b) The Draft Special Needs Education Policy
- c) The Draft National Social Protection Policy
- d) Draft Human Rights Policy
- e) The National Land Policy

268. Administrative measures taken to eradicate the link between poverty and disability include the provision of financial support to organisations and individuals as follows: The Public Procurement (Preference & Reservations) (Amendment) Regulations was developed in 2013 to allow 30 per cent of public contracts to be given to the youth, women and persons with disability without competition from established firms. The Uwezo Fund was then set up by his Excellency the President to enable women and youth access to grants and interest-free loans to take advantage of the 30% share.

269. The National Development Fund for Persons with Disabilities was operationalised in 2010 with an allocation of KES 200 million. It provides assistive devices and services that improve mobility and access including wheelchairs, crutches, surgical shoes, hearing aid, white cane and others; educational assistance such as scholarships for persons with disabilities; economic empowerment and revolving fund to help groups of persons with disabilities to set up small businesses or revolving fund schemes; infrastructure and equipment assistance or social care and education institutions that provide services to persons with disabilities; and cash transfers to support households of persons with severe disabilities who are in extreme poverty. Since 2009, the National Fund for the Disabled of Kenya has been receiving a grant of Kshs 100 million from the Government annually to help persons with disability countrywide.

270. In April 2011 a Cash Transfer Programme was created for Persons with Severe Disabilities targeting 10 households in every electoral constituency. Persons with Disabilities are also exempted from the

payment of income tax pursuant to Section 12 (3) of the Persons with Disabilities Act which enables them to secure additional disposable income. To this end, the National Council for Persons with Disabilities facilitates the exemption of persons with disabilities registered with the Council from the payment of income tax. During the 2009-2010 Financial Year, subsidiary legislation (Rules and Regulations) was gazette to govern the tax exemption regime in relation to personal income of persons with disabilities;

271. The National Council for Persons with Disabilities is in the process of carrying out a census to determine the number of persons with albinism in Kenya for the purposes of providing them with sunscreen lotion and other services to protect them from harmful sunrays.

### **Article 19: All peoples shall be equal**

272. Government policy on equality is guided by Article 27, which guarantees equal and effective protection against discrimination on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, property, birth or other status. The State is required to enact legislation and formulate policies to address inequalities in society, suffered by individuals or groups who because of various factors have remained disadvantaged. Schedule 5 of the Constitution directs that a legal framework for the protection of marginalized people should be in place by 2015. Kenya is now devolved into 47 counties. Each government is expected to empower their respective regions to ensure equal economic, social and cultural development.

273. The Constitution also promotes “equality” has an important national value and principle of governance, which must bind all state organs , state officers, public officers and all persons whenever they apply or interpret the constitution, enact laws and develop or implement public policies. A draft National Policy on National Values and principles of Governance has been developed and adopted by the Cabinet. The policy provides broad guidelines to government, non-state actors and citizens to develop action plans to mainstream National Values and Principles of Governance, as provided for in Article 10 of the Constitution, into their day-to-day programmes and activities, and ultimately ensure that the shared values become a way of life for the people of Kenya.

### **Article 20: Right of peoples to existence and self determination**

274. Kenya is a sovereign republic and a multiparty democratic State. Indeed, the Preamble of the Constitution of Kenya provides that Kenyans exercise their “...sovereign and inalienable right to determine the form of governance of our country”. Article 1 stipulates that all sovereign power belongs to the people of Kenya and shall be exercised either directly or through democratically elected representatives through the Parliament and the legislative assemblies in the county governments; the national executive and the executive structures in the county governments; and (c) the Judiciary and independent tribunals. The principle of non-discrimination runs throughout the Constitution as a further affirmation of the country’s commitment to recognise and protect the diversity of the people in Kenya and their right to self-determination as equal members of the Kenyan population. The Government of Kenya promotes respect for all cultures, ethnicities, races, gender, political opinions and religious beliefs.

275. The Constitution of Kenya, 2010 established a devolved system of governance to give the Kenyan people a greater say in determining the development initiatives in their local areas. It is strengthened further by the constitutional requirement of public participation in governance, legislation, policy-making, financial management and other functions. Kenya embraces the right to self-determination that eliminates discrimination in political, legal and administrative institutions while recognizing and protecting special group rights.

276. In the lead up to the 2013 general elections, Kenya faced the challenge of a group called the Mombasa Republican Council (MRC) seeking secession of parts of the Coastal region from the rest of the country. Although they did not have the support of the majority of the residents of Mombasa County and other coastal counties, the MRC embarked on initiatives aimed at frustrating processes such as voter registration, political party nominations and even elections. Some members of the group used violence in pursuing their objectives that put many Kenyans at risk. MRC activities also coincided with increased terror attacks that Kenya was facing from Al Shabaab militants, which heightened insecurity particularly in the region. The Government, pursuant to the Prevention of Organized Crime Act (Cap 59, Laws of Kenya) banned the MRC by a Gazette Notice. The MRC challenged the Government's ban on the group in the High Court of Kenya, *Miscellaneous Application No. 468 of 2010, Randu Nzai Ruwa and 2 Others -v- the Internal Security Minister and Another*. Although the court reversed the order banning MRC finding that it was a political group, it also clarified that the Constitution did not contemplate secession and instead asserted the unitary and indivisible sovereignty of Kenya. The Government appealed the ruling lifting the ban on MRC, however, this situation demonstrates some of the challenges of varied interpretations as well as misinterpretations of the right to self-determination in the country.

277. Externally, Kenya has had to confront increased terror attacks directed by Al Shabaab militants particularly based in Somalia. Kenya had to intervene militarily in Somalia to stop this Al-Shabaab threat. Second, Kenya faces a further challenge to its territorial integrity in relation to a claim made by Uganda over Migingo Island in Lake Victoria which is part of the Kenyan territory. The standoff started when Ugandan authorities began levying an illegal fee on the fishermen living there and intimidating, evicting and brutalizing many of the island inhabitants. Kenya maintains its claim over the Island, but as a member of the East African Community (EAC), it is using amicable means to settle its claim.

## **Article 21: Right to free disposal of wealth and natural resources**

278. The Government recognizes the potential of minerals and natural resources as key drivers of economic and social development, and therefore has taken appropriate action to ensure that they are managed in a way that benefit the people of Kenya. Kenya Vision 2030 the country's long term economic development blueprint identifies the mineral and energy sectors as one of the drivers of economic development. The Constitution vests sovereign power directly in the hands of the people of Kenya and it is to be exercised in accordance with the Constitution. Further, Article 69(h) requires the Government to utilise the environment and natural resources for the benefit of the people of Kenya. The implication is that any mining exploration and exploitation contracts must be in the interest of the people of Kenya or otherwise be unconstitutional and therefore null and void. This is relevant to optimum mineral exploration and exploitation because it falls under the purview of

permanent sovereignty which has hitherto been vested and exercised by the executive arm of the government.

- The Government is in the process of strengthening the legal, policy and institutional frameworks that govern the exploitation, management, utilization and conservation of minerals; and, natural resources for maximum economic benefit of the country and local communities:
- The *Mining Bill 2014*: the main objective of the Bill is to repeal the existing legislation relating to mining and establish new legal framework for the management of mineral resources as stipulated in the constitution.
- *The Energy Bill 2014* to provide a legislative framework to manage and regulate the energy sector.
- The draft National Minerals and Mining Policy: the main goal of the policy is to sustain mineral resources development so as to maximize on accruing benefits while maintaining Kenya as an attractive investment destination.
- The National Energy Policy: The overall objective of the energy policy is to ensure affordable, competitive, sustainable and reliable supply of energy to meet national and county development needs at least cost, while protecting and conserving the environment.
- The Ministry of Mining is a new Ministry, established after the March 2013 General Elections, to provide strategic oversight over all mining activities in the country. Part of the Ministry's mandate is to formulate legislation and mining policies and expand the industry around mining, making Kenya a mineral and metal hub for the region.

279. Kenya boasts of a diverse and abundant wildlife and natural resources. These include amongst others; the Kenyan coast region, the Great Wildebeest Migration in the Maasai Mara, various game reserves, picturesque lakes and mountains. These resources attract thousands of tourists every year. Tourism plays a very important role in Kenya's economy. It is a major contributor to the Gross Domestic Product, creation of investment and employment opportunities, foreign exchange earnings, and infrastructure development as well as in the expansion of the commercial sector. It provides employment both directly and indirectly to thousands of people. However Kenya has faced challenges in the last few years due to insecurity stemming from terrorism attacks. Travel advisories, by some western countries, warning their citizens against visiting Kenya, have had a major setback to tourism activities in the country. Tourism has a multiplier effect, so many people depend on it for their livelihoods.

## **Article 22: Rights of peoples economic, social and cultural to development**

280. The Government of Kenya has taken important steps to create an enabling environment for realization of the right to economic, social and cultural development. The Bill of Rights states that the purpose of recognizing human rights and fundamental freedoms is, *inter alia*, to preserve the dignity of all individuals and communities. The Constitution, now, recognizes economic, social and cultural rights, such as the right to education, right to housing, right to reasonable standard of living, right to health and the right to culture. Every person in Kenya must be able to enjoy these rights free from discrimination. Kenya has formulated national development policies and programmes to enhance the right to economic, social and cultural development:

### **Second medium term plan on Kenya Vision 2030**

281. Under Kenya Vision 2030, the country's economic blueprint, Kenya aims to be a middle-income rapidly industrializing country by 2030, offering all its citizens a high quality of life, which is a key to the preservation of the dignity of the human person. The vision is being implemented through periodic medium term plans covering 5 years. Its first Medium Term Plan was implemented between 2008 and 2012. The Second Medium Term Plan outlines the policies, programmes and projects which the Government intends to implement during the five year period starting 2013 to 2017 in order to deliver accelerated and inclusive economic growth, higher living standards, better education and health care, increased job creation especially for youth, commercialized agriculture providing higher rural incomes and affordable food, improved manufacturing sector and more diversified exports. All this is necessary in order to address the acute challenges of poverty, joblessness, and inequality and to facilitate faster realisation of Kenya Vision 2030.

282. Some of the major flagship projects being undertaken in the Plan include:

The Lamu Port and New Transport Corridor Development to Southern Sudan and Ethiopia (LAPSSET); The project involves the development of a new transport corridor that will foster transport linkage between Kenya, Southern Sudan and Ethiopia and thus promoting not only national but also regional socioeconomic development along transport corridor especially in the hitherto underserved Northern, Eastern and North – Eastern parts of Kenya.

The new Standard Gauge Railway, which is also a Vision 2030 Flagship project to be implemented by the Kenya Railways Corporation. The project involves the development of a modern high speed, high capacity standard gauge railway for passengers and freight which will stretch from the port city of Mombasa all the way to Kigali in Rwanda and Juba in South Sudan. The investment in the project will be positive considering the key deliverables such as the provision of a modern and efficient transport system; creation of new sustainable businesses and jobs and the enhancement of local and regional commerce.

### **Devolved government**

283. The Constitution also introduced a devolved system of governance that came into operation after the March 2013 elections. Devolution gives Kenyans a greater say in determining the development initiatives in their local areas. Devolution strengthened further by the Constitutional requirement of public participation in governance, legislation, policy-making, financial management and other functions.

### **The Equalization Fund**

284. The Constitution sets up the Equalization Fund to accelerate the developmental growth of areas in Kenya which have been left behind for years as a result of historical injustices. The Commission on Revenue Allocation, created to manage the Fund, has prepared a Marginalization Policy (2011-2014), setting out the criteria for identifying marginalized areas in Kenya. The Fund will be in existent for a period of 20 years and is allocated at a rate of 0.5 of the national revenue

285. In 2011, the Commission on Revenue Allocation identified 14 counties as the most marginalized in the country. According to the criteria for identifying marginalised areas for the purposes of the Equalization Fund released by the Commission on Revenue Allocation, Turkana county received the lion's share of the allocation with USD 3,074,305, followed by Mandera USD 2,824,730/-, Wajir USD

2,722,632/- and Marsabit USD 2,586,500/-. Other counties benefit as follows: Samburu USD 2,541,123/-, West Pokot USD 2,529,778/-, Tana River USD 2,507,090/=-, Narok USD 208 million and Kwale USD 2,325,581/=-, Garissa USD 2,291,548/=-, Kilifi USD 2,234,827, Taita Taveta USD 2,200,794, Isiolo USD 2,178,106/- and Lamu USD 2,110,040/-.

286. The Fund is used for the specific purpose of providing basic services including water, roads, health facilities and electricity to marginalised areas to the extent necessary to bring the quality of those services in those areas to the level generally enjoyed by the rest of the nation, so far as possible.
287. The Kenyan Constitution sets forth several provisions that require the Government to take action to protect 'culture' and 'genetic resources.' Article 11 recognizes culture as "the foundation of the nation," and mandates Parliament to enact legislation to "ensure that communities receive compensation or royalties for the use of their cultures and cultural heritage," and "recognize and protect the ownership of indigenous seeds and plant varieties, their genetic and diverse characteristics and their use by the communities of Kenya.
288. Government is currently working on a legal framework on traditional knowledge and traditional cultural expression. The Government has also adopted the National Policy on Culture and Heritage which reiterates the centrality of culture and national heritage to the socio-economic and sustainable development needs of Kenya. The government recognizes the vital role culture plays in sustainable development and ensuring the inclusion and participation of all citizens are guarantees of social cohesion and a prerequisite for peace.
289. Cultural heritage is deemed to include traditional knowledge. Under Article 69, the state is to "protect and enhance intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities." The National Policy on Traditional Knowledge, Genetic Resources and Traditional Cultural Expressions was adopted by the Kenyan government in 2009. The goal of the Policy is to enhance the preservation, protection, and promotion of sustainable use of traditional knowledge, genetic resources and traditional cultural expressions in Kenya
290. Courts have had occasion to handle issues on utilization of community land and the impact of projects commenced in those places. For example, in Nairobi *HCC NO. 14 of 2010 Abdalla Rhova Hiribae & 3 others vs The AG and 6 Others*, the petitioners alleged that several projects ranging from shrimp and prawn farming to sugarcane growing and titanium extraction within the Tana Delta had been approved by the respondents without the requisite land use plan and EIA and their implementation without a multiple and comprehensive land use Master Plan would result in violation of the constitutional rights of the petitioners and communities living within the Tana Delta. The court ordered that the responsible agency for the development of the Tana Delta has a responsibility to ensure that any initial plans to develop an area must take into accounts the needs and views of the community; that the plans prepared after the process of consultations must be availed to the community; and the project must be periodically monitored to ensure that that its implementation does not injure the interest of the community or the environment.

## Article 23: Rights of peoples to peace and security

291. The Government of Kenya has since independence worked tirelessly to ensure peace within and without its borders. It has always maintained friendly relations with its neighbors and the international community as a whole. Indeed, soon after the 2008 post election violence parties quickly agreed to enact the National Accord and Reconciliation Act 2008 to end the political crisis. The National Accord laid the foundation for power sharing arrangement to end violence and bring back peace in the country. Various recommendations were made to address the causes of the crisis, reconcile communities, and preventing future conflicts in the country. All these recommendations have been implemented.
292. The development of a new constitution of Kenya was one of the recommendations of the National Accord. Article 238 of the Constitution of Kenya requires that the State be protected against internal and external threats to Kenya's territorial integrity and sovereignty, its people, their rights, freedoms, property, peace, stability and prosperity, and other national interests. National security shall only be pursued in compliance with the law and with the utmost respect for the rule of law, democracy, human rights and fundamental freedoms.
293. Article 239 (1) of the Constitution establishes national security organs, which are— the Kenya Defence Forces; the National Intelligence Service; and the National Police Service. The primary object of the national security organs and security system is to promote and guarantee national security.
294. Kenya has however faced challenges in promoting national security due to an upsurge of terrorism attacks. In October 2011, a coordinated operation between the Somali military and the Kenyan military , known as operation Linda Nchi, began against the Al-Shabaab group of insurgents in southern Somalia. The mission was officially led by the Somali army, with the Kenyan forces providing a support role. In early June 2012, Kenyan forces were formally integrated into African Union Mission in Somalia (AMISOM). Since then, a series of terrorist attacks, believed to have been retaliatory attacks by Al-Shabaab have rocked various areas in Kenya.
295. Increasingly, a large number of terrorist attacks have been carried out by radicalized Kenyan youth. Unemployment, poverty and political marginalization are contributing to the Islamic radicalization of Kenya's youth, a situation which the government of Kenya is attempting to address through economic empowerment and inclusive policies.
296. The Government of Kenya has put in place considerable effort to protect national security and to stem terrorism in the country. Any such effort is made under strict adherence to the national and international standards. The Constitution contains comprehensive provisions on the protection of human rights and fundamental freedoms. Indeed national security can only be pursued in compliance with the law and with the utmost respect for the rule of law, democracy, human rights and fundamental freedoms. The Government, thus, ensures that any legislation, policy and administrative action taken in the fight against terrorism conform to the provisions of the Constitution. *The Prevention of Terrorism Act No. 30 of 2012* contains strict guidelines to be followed in any action to combat terrorism.

## Article 24: Rights of peoples to a satisfactory environment

297. The entrenchment of environmental rights and principles in the constitution is a testimony to Kenya's unwavering commitment to the effective protection of the environment for current and future generations. The Constitution presents in great detail, State obligations in respect of specific natural resources, as well as the human aspects of environmental management. Environmental rights and freedoms are found in Article 42 of the new constitution, which states: "Every person has the right to a clean and healthy environment, which includes the right – (a) To have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69; and (b) To have obligations relating to the environment fulfilled under Article 70.
298. The State's obligation in ensuring sustainable development as well as the importance of equitably sharing benefits derived from the environment is well captioned under Article 69 which provides that the " State shall ensure sustainable exploitation, utilization, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits ' "
299. Kenya Vision 2030 also emphasizes the need to achieve economic growth in a sustainable manner.
300. *The Environment and Land Court Act No 12A of 2011* establishes the Environment and Land Court to hear and determine disputes relating to the environment and the use and occupation of, and title to land and to make provision for its jurisdiction functions and powers. Article 70 of the Constitution of Kenya, 2010 allows an individual to apply to a court for redress in addition to any other legal remedies should they believe that their rights have been or are likely to be infringed. The court may make any order, or give any directions to prevent, stop or discontinue any act or omission that is harmful to the environment; to compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment; or to provide compensation for any victim of a violation of the right to a clean and healthy environment.
301. *The Environmental Management and Co-ordination Act* was enacted in 1999 to provide for the establishment of an appropriate legal and institutional framework for the sound management of the environment. *The Environmental Management and Co-ordination (Amendment) bill 2014* has been tabled before the National Assembly and seeks to bring the provisions of the mother act in conformity with the Constitution. Subsidiary legislation has also been enacted to support EMCA, and it includes the following: The Environmental Management and Coordination (Noise and Excessive Vibration Pollution) Control Regulations of 2009; the Environmental Management and Coordination (Wetlands, Riverbanks, Lake Shores, and Sea Shore Management) Regulations of 2009;
302. The National Environmental Management Authority (NEMA) was established by the Government to exercise general supervision and co-ordination over all matters relating to the environment and to be the principal instrument of Government in the implementation of all policies relating to the environment.

303. A key challenge that Kenya faces in ensuring the right to a clean environment is the massive encroachment into forests. Forests contribute significantly to the delicate balance of the ecosystem which in turn supports the environment. Nonetheless, Kenyan forests have fallen victim to increasing demand for products and services, competition with other land uses, and poor governance. One such forest is the Mau Forest Complex, which is the largest water catchment area in Kenya. The Government is battling with the issue of deforestation and protecting water catchment areas and as such enacted the Forest Conservation and Management Act, 2014 to provide for the establishment, development and sustainable management, including conservation and rational utilisation of all forest resources for the socio-economic development of the country.

## **Article 25: Duty to Promote Awareness of the Charter**

304. Human rights awareness in Kenya is promoted through civic education, teaching and publications. The African Charter on Human and Peoples' Rights is one of the basic documents used for training of human rights in Kenya. One of the main missions of the Kenya National Commission on Human Rights is to provide human rights education, training and campaigns. The Commission routinely trains the police, prison officers and prosecutors on the respect of human rights. Human rights education is part of the Law Degree Syllabus taught at the various Law Schools. The National Police Service is the main institution charged with the responsibility of training police officers in Kenya on the respect for human rights and fundamental freedoms. The Service develops training policies, approves training curricula and reviews the curricula to ensure its relevance to policing standards. All law enforcement officers are trained on the respect of human rights that enable fair, just and humane treatment of the public.

## **Article 26: Independence of the Courts**

305. The Constitution provides for a judiciary that is adequately empowered to uphold the supremacy of the Constitution, enforce respect for human rights and ensures that legislation and government actions are in line with its provisions. Firstly, the independence of the judiciary and judicial officers is fortified and indeed expounded upon in the constitution which provides that in the exercise of judicial authority, the judiciary, shall be subject only to this constitution and the law and shall not be subject to the control or direction of any person or authority. Secondly, a critical component of judicial independence is financial autonomy. It also sets up the Judiciary Fund which reaffirms this independence. The Fund is administered by the Chief Registrar is a charge on the Consolidated Fund and therefore frees the finances of the judiciary from the control of the executive arm of Government. Thirdly, the Constitution safeguards the independence of the judges by granting them security of tenure till the age of seventy.

306. The Judges and Magistrates Vetting Board was established by *the Judges and Magistrates Vetting Board Act of 2011*. The objective of the board is to vet the suitability of all the Judges and Magistrates, who were in office on the effective date of the new constitution of Kenya to continue to serve in accordance with the values and principles set out in the constitution. The Vetting Board has finalized the vetting of all judges and has embarked on examining the suitability of magistrates. A number of Judges declared not suitable by the Board appealed to the High Court and in some cases the appeals were successful.

307. The Constitution established several independent institutions charged with the task of promoting, protecting and monitoring the enjoyment of human rights and freedoms. These include the Kenya National Commission on Human Rights, the National Gender and Equality Commission and the Commission on Administrative Justice.

### **Article 27: Duty of family**

308. Article 53. (1) of the Constitution creates responsibilities for parents towards their children. It states that: “Every child has the right— To parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not.

309. Everyone in Kenya is expected to observe the important national values and principles of governance whenever they apply the Constitution; enacts, applies or interprets any law; or makes or implements public policy decisions. The national values and principles of governance include— (a) patriotism, (b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized;

### **Article 28: Freedom from discrimination**

310. Article 27(5) of the Constitution prohibits discrimination directly or indirectly against another person on any ground, including race, sex, marital status, religion, dress, culture, disability. Indeed, the Court *in Constitutional Petition Number 160 of 2013: Rose Wangui Mambo and Limuru Country Club* declared that a byelaw passed by a private club to exclude female members in a golf committee was discriminatory in nature and offend Article 27 of the Constitution.

311. The National Cohesion and Integration commission was established in 2008. The mandate of the Commission is to facilitate and promote a Kenyan society whose values are harmonious and non-discriminatory for peaceful co-existence and integration. The overall objectives of the Commission are to encourage national cohesion and integration by outlawing various forms of discrimination, carried out by state agencies and any person. Forms of discrimination under the Commission’s mandate include discrimination based on: ethnic grounds, employment, membership of organizations, access to and distribution of public resources, property ownership management and disposal, hate speech.

### **Article 29: Duties**

312. The Constitution of Kenya celebrates culture and the traditions of the people of Kenya. Article 44 of the Constitution of Kenya, 2010 guarantees every individual the right to use the language, and to participate in the cultural life, of the person’s choice. Most cultures in Kenya value older people and respect them. The Department of Culture has undertaken several programmatic initiatives to support the development of the diverse cultural expressions in the country.

313. Everyone has a duty to maintain public order and national security. The Penal Code establishes offences and sets stringent penalties against those who compromise national security. Offences include, treason, inciting mutiny, administering unlawful oaths to commit offences.

## 2007 CONCLUDING RECOMMENDATIONS OF THE AFRICAN COMMISSION ON HUMAN AND PEOPLE'S RIGHT

In this part of the Report the State party presents information to the 2007 Concluding observations of the African Commission on the Human and Peoples' Rights.

*a) Domesticate the African Charter and other instruments it ratified as this exercise would enable the Country to take necessary measures to implement and take concrete actions to give effect to the provisions of the African Charter;*

### *Response:*

The Constitution of Kenya was promulgated in 2010 and largely reflects the rights and freedoms enshrined in the Charter. Indeed, the Constitution also specifies that conventions and treaties ratified by Kenya automatically become part of Kenyan law (Article 2 (6)). This means that the African Charter is now part of the laws of Kenya and makes it easier for right holders to seek remedies for the violation of rights. The Government of Kenya is required by constitutional imperatives to enact various laws to implement its obligation within a period of 5 years. Some of the legislation already enacted and whose implementation would promote and protect the rights in the Charter are attached as an annexe to this report. Other policy and administrative measures taken, since the last report, to implement the Charter's provisions, include:

- i. The development of a National Policy an Action Plan on Human Rights to provide a comprehensive and coherent framework for the promotion and protection of human rights.
- ii. A National Land Policy to provide a framework within which land disputes and historical injustices relating to land will be addressed. The policy recognizes the vulnerability of minority and marginalized groups and provides for collective land rights and a de-centralized land governance structure.
- iii. The National Policy on the Abandonment of Female Genital Mutilation. Other important policies include: the draft National Legal Aid Policy, The Bail information and Supervision Policy and the draft National Refugee Policy.
- iv. The mainstreaming of gender, disability issues in all government departments.
- v. Kenya National HIV and AIDS Strategic Plan of 2009/10 – 2012/13: lays out strategies for achieving universal access to essential services for HIV prevention, treatment, care and support using a number of various approaches.

**b) Deposit the instruments of ratification of the Protocol to the African Charter on the rights of women in Africa**

**Response:** Kenya ratified the Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa on the 6<sup>th</sup> October, 2010.

**c) Enact a more stringent law to address domestic violence and sexual offences; discrimination against women, and undertake concrete steps and policies which will enhance the participation of women in government and in key positions;**

### **Response**

The Constitution of Kenya contains several safeguards for the protection of women, children and all persons from all forms of violence. Besides embracing the principle of the inherent dignity of the person, the Constitution also safeguards the fundamental freedom and security of the person. It explicitly outlaws any form of violence from either private or public sources. Freedom from torture and cruel, inhuman and degrading treatment or punishment and freedom from slavery and servitude are some of the non-derogable rights in the constitution. A number of legislative and policy measures have been taken to protect women. A more comprehensive list of legislation and policies has been provided in the main body of this Report. Following are some of the administrative and programmatic measures taken:

*The Protection against Domestic Violence Bill 2014* is currently before Parliament for discussions. The legislation once enacted will provide protection and relief of victims of domestic violence. The Bill addresses, among other issues, violence within families, forced wife inheritance and harassment by in-laws. It seeks to protect victims of domestic violence and provide protection for spouses and any children or dependants within the family. In addition, it recognises sexual violence within marriage, child marriage, FGM, incest, defilement and sexual abuse as forms of domestic violence. Economic abuse, damage to property, emotional or psychological abuse, virginity testing and widow cleansing are also described as forms of domestic violence.

Public awareness and community dialogue on the *Female Genital Mutilation Act 2011* and the dangers of FGM are being undertaken in the four districts where the practice is rampant.

A Sexual Offences, Gender Violence and Victim's Rights Section was set up in the Office of the Director of Public Prosecutor to conduct trainings and sensitization of investigators, police prosecutors and judicial officers on Sexual and Gender based violence cases throughout the country with the objective of enhancing their capacity to respond effectively to these crimes. The Section also conducts specialized training on forensic investigations, crime scene management, collection, preservation and presentation of evidence;

- A Prosecutor's Manual on Sexual Offences has been developed and is being used to train investigators and Police Officers on the investigation and prosecutions of sexual offences;
- Gender units have been set up in all ministries to enhance gender sensitivity in administrative operations when giving services. There are also various awareness initiatives that have been undertaken by ministries even in collaboration with CSO to sensitive members of the public on gender issues; and

The training curriculum for police officers has been reviewed and now incorporates training on human rights including the prohibition of torture and ill treatment. The curriculum was engendered through the concerted efforts of government and UN women. Gender Violence Recovery centres have been opened in major public hospitals across the country to deal with matters of gender violence.

**d) Take necessary steps for the ratification and domestication of: *The Protocol to the African Charter establishing an African Court on Human and Peoples' Rights* and make declaration under Article 34**

### **Response**

Kenya ratified the protocol to the African Charter on the Establishment of An African Court on Human and Peoples' Rights on the 04/02/2004 and deposited its instruments of ratification on 18/02/2005

**e) Ratify the OAU Convention on Combating Corruption in Africa;**

*Response*

The Government of Kenya ratified the OAU Convention on Combating Corruption in African in September 2007.

**f) Review its decision to close the border with Somalia and more specifically, observe the principle of non refoulment;**

*Response*

As the commission is aware Kenya host about 600,000 refugees and every year a large number of Somali refugees are admitted into refugee camps in Kenya.

**g) Demonstrate in its next periodic report necessary measures taken to fully Implement the Robben Island Guidelines as well as the United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules).**

*Response*

Please refer to the responses provided on Article 5: right to dignity, prohibition of torture and slavery.

**h) Delimitation of the marginalization of indigenous populations by adopting measures of affirmative action and strengthening central government services to eradicate poverty, overcome insecurity and foster development;**

Kenya's new constitution provides several avenues for the protection and strengthening of indigenous peoples' personal and collective rights. Indigenous communities issues are addressed within the purview of vulnerable and marginalized groups. The Constitution defines "Marginalized community" to mean a "..... an indigenous community that has retained and maintained a traditional lifestyle and livelihood based on hunter or gatherer economy; or pastoral persons and communities whether they are nomadic or a settled community that because of its relative geographic isolation has experienced only marginal participation in the integrated social and economic life of Kenya as a whole." Article 56 obligates the State to provide for adequate representation of "marginalized groups" in all levels of government, execute affirmative action on behalf of these groups, and promote the use of Indigenous languages and the free expression of traditional cultures. Article 100 of the Constitution completes provisions of Article 56 by allowing Parliament to enact laws which will help to provide clear recognition, promote and protect the interests of minority/marginalized groups which include women and youth.

The Constitution provides specifically for economic, social and cultural rights. It guarantees every person the rights to: the highest attainable standard of health; accessible and adequate housing; freedom from hunger and having adequate food of acceptable quality; clean and safe water in adequate quantities; social security; and education (Article 43). It requires the State to take legislative, policy and other measures to progressively achieve the realization of those rights (Article 21). The Constitution also recognizes the rights

of marginalized people and culture as the foundation of the nation in promotion of all forms of national and cultural expression (Article 11) and guarantees everyone the right to language and culture (Article 44). Indigenous communities are protected within the purview of marginalized people.

The State has put in place policies and legislation to implement the constitutional provisions covering economic, social and cultural rights. New education laws, including the Basic Education Act (No. 14 of 2013), have been enacted; and a new health law is also being discussed with a view to realigning it with constitutional guarantees. Maternity fees have been abolished in all public hospitals. A new policy on housing is also under discussion. The State is also required to enact legislation to promote the representation in Parliament of marginalized people within 5 years after the promulgation of the Constitution(2015); other legislation of benefit to indigenous people are the Land Acts, and the *Community Land Bill* , which must be enacted by August 2015.

**i) Adopt appropriate measures to address the rights of indigenous and socially disadvantaged persons and develop policies that will enhance the participation of these persons in their affairs and the governance of the country.**

**Response:** Refer to paragraphs on Vision 2030, Devolution, National Social Protection Policy

## ANNEX 1

### LEGISLATIVE FRAMEWORK FOR THE IMPLEMENTATION OF THE AFRICAN CHARTER ON HUMAN AND PEOPLES RIGHTS

LEGAL FRAMEWORK	INSTITUTION	MANDATE
Kenya National Commission on Human Rights Act, 2011	Kenya National Commission on Human Rights	Promote and protects human rights in the country
The National Commission On Gender And Equality Act 2011	The National Commission on Gender and Equality Commission	Promotes gender equality and freedom from discrimination
The Commission on Administrative Justice Act 2011	The Commission on Administrative Justice	Investigates and reports on any act or omission in public administration in any sphere of government
National Police Service Act	The National Police Service	Part of the mandate of the Service is to ensure staff compliance with constitutional standard of human rights and fundamental freedoms and to staff to respect human rights and fundamental freedoms and dignity
Independent Policing Oversight Authority Act	Independent policing oversight Authority	Provides for civilian oversight over the work of the Police.
Power of Mercy Act 2011	Advisory Committee on the Power of Mercy under the Power of Mercy Act 2011, which	Advises the President on: granting pardon to convicted persons; postponing punishment; substituting a less severe form of punishment; and remission of punishment.
National Police Commission Act	The National Police Commission	
Judges and Magistrates Vetting Board Act 2011.	Vetting of Judges and Magistrates Board	Vets all judges and magistrates ensure their suitability to To ensure that the judicial officers in place comply with the standards professionalism and integrity as required by law.
The Supreme Court Act 2010	Supreme Court	Supreme Court of Kenya has exclusive original jurisdiction to: determine disputes relating to presidential elections; hear and determine appeals; hear appeals relating to interpretation or application of the Constitution
The Independent Ethics and Anti-Corruption Commission Act, 2011	Independent Ethics and Anti-Corruption Commission	Investigates and prosecutes corrupt suspects and asset recovery

		,among other things
Commission For The Implementation Of The Constitution Act 2010	Commission for Implementation of the Constitution	Monitors, facilitates, coordinates and oversees the development of the legislation and administrative procedures required to implement the Constitution
Independent Electoral and Boundaries Commission Act	Independent Electoral and Boundaries Commission	The Commission is responsible for conducting or supervising referenda and elections to any elective body or office established by the Constitution,
Political Parties Act, 2011	Political Parties in Kenya	Provides for the registration, regulation and funding of political parties in Kenya in order to enhance multi party democracy
Environment and Land Court Act, 2011	Environment and Land Court	To hear and determine disputes relating to the environment and the use and occupation of, and title to, land
National Land Commission Act 2012	National Land Commission	The Commission has wide powers in the management and administration of public, private and community lands in Kenya.
The Land Act 2012	Ministry of Lands , Housing and Urban Development	Regulates compulsory acquisition of land in Kenya
Land Registration Act 2012	Ministry of Lands , Housing and Urban Development	Protects the sanctity of title to land.
Matrimonial Property Act, 2013	Ministry of Labour, Social Security and Services	Provides a framework that guarantees equality for married men and women in dealing with matrimonial property
Basic Education Act 2013	Ministry of Education	Regulates the provision of basic education and adult basic education in the country
Universities Act 2012	Ministry of Education	Sets the framework for higher education reforms.
Victims Protection Act 2014	Office of the Attorney General and Department of Justice	A framework for the reparation and compensation of victims of crime and abuse of power.