



# Implementing the Protocol on the Rights of Women in Africa:

Analysing the Compliance of Kenya's Legal Framework



Dechert  
LLP



With thanks to the following lawyers, researchers, technical advisors and reviewing editors from Dechert LLP, The Lawyer's Circle, Oxfam, SOAWR and FIDA Kenya who gave their time pro bono to help produce this document.

Miriam Gonzalez, Dechert LLP  
Chloe Barker, Dechert LLP  
Karen Coppens, Dechert LLP  
Helen Mountfield, QC Matrix Chambers  
Jan Galloway Moore, Blatch LLP  
Jessica Simor, QC Matrix Chambers  
Alexis Campbell, 29 Bedford Row Chambers  
Karen Anderberg Dechert LLP  
Priya Chaudhuri, Travers Smith  
Mary Mullen, DLA Piper  
Zarah Wiles, Nomura International plc  
Rhiannon Lewis, Dawson Cornwell  
Natalie Sheehan, Freshfields Bruckhaus Deringer LLP  
Kathy Hughes, Slaughter & May  
Frances Wachter, Harbour Litigation Funding Elizabeth Kelsey,  
Monckton Chambers  
Abigail Cohen, Henderson Chambers  
Elsa Le Groumellec, Bank of Tokyo Mitsubishi UFJ  
Laura Holden, Addleshaw Goddard LLP  
Lucy Chuo, Stella Maris Solicitors  
Sylviane Kokouendo, Stella Maris Solicitors  
Anna Bugden, Norton Rose Fulbright  
Caroline Yormesor, Independent  
Camilla Haggith, Osborne, Morris & Morgan Solicitors  
Zahra Afshar, Ahmad Tea  
Chiz Nwokonkor, Addleshaw Goddard LLP  
Victoria Fitzpatrick, Dechert LLP  
Joshua Smith, Dechert LLP  
Jennifer Wileman, Dechert LLP  
Nathalie Sadler, Dechert LLP  
Sarah Fidler, Dechert LLP  
Navpreet Jandaur, Dechert LLP  
Tracey Cane Dechert LLP  
Emma Nichols, Dechert LLP  
Tricia Carlin, Dechert LLP  
Carol Waiganjo, FIDA Kenya  
Janah Ncube, Oxfam  
Moreen Majiwa, Oxfam  
Claudia Codsí, Oxfam

For further information please contact:

Moreen Majiwa, Gender Justice Lead, Pan Africa Programme, Oxfam

Tel: +254 202 820 000; email: [mmajiwa@oxfam.org.uk](mailto:mmajiwa@oxfam.org.uk)

Front cover: Helen Ewoton (48) and her granddaughter Kaisa in her compound in the village of Nawoyatir in the Lapur district of Lokitaung in Turkana north, Kenya.  
Photo Kieran Doherty/Oxfam

# INTRODUCTION

---

This report is a joint initiative between the Lawyers Circle and Oxfam and analyses the implementation of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, better known as the Maputo Protocol (the "**Maputo Protocol**" or the "**Protocol**") in Kenya. The Maputo Protocol guarantees comprehensive rights to women.

The Maputo Protocol was adopted by the African Union in the form of a protocol to the African Charter on Human and Peoples' Rights on 11 July 2003 at the second summit of the African Union in Maputo, Mozambique. Kenya signed the Protocol on 17 December 2003. On 25 November 2005, having been ratified by the required 15 member nations of the African Union, the protocol entered into force.

The Maputo Protocol is contained in full in Annex One of this report. The main rights and protections afforded by the Protocol are as follows:

- *Elimination of Discrimination Against Women*
- *Right to Dignity*
- *The Rights to Life, Integrity and Security of the Person*
- *Elimination of Harmful Practice (female genital mutilation and other traditional practices that are harmful to women).*
- *Marriage, including Separation, Divorce and Annulment of Marriage*
- *Access to Justice and Equal Protection before the Law*
- *Right to Participation in the Political and Decision-Making Process*
- *Right to Peace*
- *Protection of Women in Armed Conflicts*
- *Right to Education and Training*
- *Economic and Social Welfare Rights*
- *Health and Reproductive Rights*
- *Right to Food Security*
- *Right to Adequate Housing*
- *Right to Positive Cultural Context*
- *Right to a Healthy and Sustainable Environment*
- *Right to Sustainable Development*
- *Widows' Rights*
- *Right to Inheritance*
- *Special Protection of Elderly Women*
- *Special Protection of Women with Disabilities*
- *Special Protection of Women in Distress*

This report analyses the steps that have been taken in Kenya on a legal, policy and practical level to implement the Maputo Protocol. The report is structured around the following themes: Guarantees of Equality and Elimination of Discrimination, Elimination of Violence Against Women, Marriage, Access to Justice, Education, Inheritance, Economic and Social Welfare Rights and Health and Reproductive Rights.

**March 2014**

# CONTENTS

---

INTRODUCTION	1
CONTENTS	2
EXECUTIVE SUMMARY	3
PREAMBLE: OVERVIEW OF THE KENYAN LEGAL SYSTEM AND THE SOURCES OF LAW	8
CHAPTER ONE: GUARANTEES OF EQUALITY AND ELIMINATION OF DISCRIMINATION	10
CHAPTER TWO: ELIMINATION OF VIOLENCE AGAINST WOMEN	26
CHAPTER THREE: MARRIAGE	59
CHAPTER FOUR: ACCESS TO JUSTICE	61
CHAPTER FIVE: EDUCATION	66
CHAPTER SIX: INHERITANCE	73
CHAPTER SEVEN: ECONOMIC AND SOCIAL WELFARE RIGHTS	92
CHAPTER EIGHT: HEALTH AND REPRODUCTIVE RIGHTS	106
ANNEX ONE: PROTOCOL TO THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS ON THE RIGHTS OF WOMEN IN AFRICA	116

# EXECUTIVE SUMMARY

Each chapter of this report addresses a different theme within the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, better known as the “Maputo Protocol”. A summary of the report is below.

This paper was developed so that its findings – and the analysis on which these are based - can be used by legal, human rights and development actors across Kenya in their efforts to promote women’s rights. We also hope that the paper acts as a practical reference for other organisations seeking to use compliance mapping as a starting point for their own advocacy for legal reform in support of women’s rights.

The Maputo Protocol can be a powerful tool for change. However, it must be recognized as such and embraced by governments and civil society. While legislative and other measures to protect women’s rights should be undertaken once States ratify the Protocol, these actions towards gender equality do not happen automatically. Implementing the Maputo Protocol requires commitment by governments to gender equality as well as strategic efforts by civil society to hold States accountable to their obligations under the Maputo Protocol.

Kenya ratified the Maputo Protocol in 2010, and while the government has taken systematic steps towards addressing gender discrimination and inequality through the enactment of pro-women’s rights legislation, significant challenges and gaps are still a barrier to full implementation of the Protocol. However, it should be noted that while progress in women’s rights has been made in some areas, there have been roll backs in others.

Kenya’s constitution promulgated in 2010 enumerated several specific gains for women in the areas of citizenship, equal rights during and after marriage, elimination of gender discrimination in relation to land matters, gender equity in the political sphere particularly with regard to appointed positions. However significant implementation gaps still exist.

In order to assist with the reading of this report, the “traffic light” analysis below provides an overview of the status of the implementation of the Protocol in the key thematic areas:

## KEY

BASIC	POSITIVE ACTION	GOOD PRACTICE
<p>Little to no legislative compliance, in some instances national law contravenes provisions of the Maputo Protocol.</p> <p>Where legislation exists however no additional efforts have been made to effectively implement the legislation.</p> <p>Few or no systems, processes, structures, resources, procedures and reporting exist with regards to implementation.</p> <p>Reservations exist on Articles of the Maputo Protocol related to this area.</p>	<p>Basic constitution and legislative compliance.</p> <p>Efforts made towards harmonising national laws with requirements of the Maputo Protocol i.e. Bills on the floor of Parliament.</p> <p>There is some evidence of pro-active compliance and implementation efforts.</p> <p>There are government policies, agencies, institutions and/or structures to support implementation.</p> <p>Changes are being made to infrastructure in line with Maputo Protocol obligations.</p>	<p>Continual improvement beyond basic legal compliance.</p> <p>There is a clear, demonstrable commitment to continuous implementation.</p> <p>Financial and physical resources are identified, allocated and are periodically reviewed, to enable the effective implementation</p> <p>There is an ongoing program/system of monitoring and reporting on implementation.</p>

AREA OF THE PROTOCOL	STATUS OF IMPLEMENTATION
Equality and Discrimination	Yellow
Elimination of Violence Against Women	Yellow
Marriage	Red
Access to Justice	Red
Education	Green and Yellow
Inheritance	Yellow and Red
Economic and Social Welfare Rights	Yellow
Health and Reproductive Rights	Red

### CHAPTER 1 – EQUALITY AND DISCRIMINATION

Article 2 of the Maputo Protocol provides for the principles of gender equality and the elimination of discrimination. This chapter indicates that the Kenyan Constitution provides for a commitment to the principles of equality and non-discrimination and is a substantial improvement on equality rights under the previous Constitution.

This chapter also explores the Kenyan National Gender and Equality Commission Act 2011, which was enacted to establish the National Gender and Equality Commission as required by the Constitution. Whilst these show a positive emphasis on gender equality in Kenya, an analysis of the relevant Kenyan case law indicates that the principles of equality and discrimination are not always upheld.

This chapter concludes with an analysis of the implementation of Article 2 of the Protocol showing that there is still work to be done in ensuring equality for women and men and the eradication of discrimination.

### CHAPTER 2 – ELIMINATION OF VIOLENCE AGAINST WOMEN

A number of Articles in the Maputo Protocol aim to ensure that physical abuse and violence against women is eradicated.

This chapter indicates that the Constitution provides for protection for women against violence and abuse and a number of pieces of Kenyan legislation aim to protect women against physical and sexual violence. This chapter notes that Kenya currently has no comprehensive law that deals with domestic violence.

This chapter focuses on female genital mutilation (“FGM”), and notes that the Kenyan Government has sought to address this issue through the implementation of two key pieces of legislation: The Children’s Act 2001 (which made it an offence to perform FGM on a child) and the FGM Act 2011 (which broadened the scope of the offence). Whilst this legislation is a welcome development in the protection of women from violence, the practice of FGM persists in Kenya and more needs to be done to implement the law effectively.

This chapter also considers the issues of pornography, human trafficking, abortion, war crimes and reproductive rights and concludes with a consideration of what Kenyan victims of sexual and gender based violence are entitled to seek.

### CHAPTER 3 – MARRIAGE

Article 6 (b) of the Maputo Protocol provides that the minimum age of marriage for women shall be 18 years old.

This chapter notes that provisions in existing Kenyan legislation are contradictory, with distinctions drawn between religious marriages and civil marriages. However key positive development in this area is the Marriage Act 2014, the Act provides that a person cannot marry unless they are 18 years of age.

### CHAPTER 4 – ACCESS TO JUSTICE

Article 8 of the Maputo Protocol provides that women and men are equal before the law and shall have the right to equal protection and benefit of the law.

Access to justice features in a number of Kenyan legislative provisions and is particularly prevalent throughout the Constitution.

This chapter considers a number of governmental initiatives and other programmes in Kenya giving consideration to issues of access to justice.

This chapter concludes, however, that access to justice is a problem throughout Kenya and women in particular face a number of obstacles, including the physical location of the courts, the financial resources needed to use the formal legal system, the length of the legal process, and the adversarial nature of the litigation process, which together, makes many women give up their rights.

### CHAPTER 5 – EDUCATION

Article 12 of the Maputo Protocol provides for a number of education rights for women and girls, including:

- The guarantee of equal opportunity and access in the sphere of education and training;
- The protection of women and especially girls from all forms of abuse, including sexual harassment in schools and other educational institutions;
- Promoting literacy among women;
- Promoting education and training for women at all levels and in all disciplines, particularly in the fields of science and technology; and
- Promoting the enrolment and retention of girls in schools and other training institutions and the organisation of programmes for women who leave school prematurely.

This chapter describes that there are comprehensive provisions in both the Constitution and national legislation in relation to education and the elimination of gender discrimination. This chapter also considers the issue of sexual harassment of girls in schools and the efforts being made by the Kenyan Government, the Police and NGOs.

Finally this chapter considers available research which suggests that although strides have been taken towards achieving gender parity (and indeed gender parity in primary school enrolment has virtually been achieved in Kenya on a national level) there still exists significant gender parity in enrolment in rural regions, achievement at school, and in completion of primary school education.



## CHAPTER 6 – INHERITANCE

Article 21 of the Maputo Protocol provides for the rights of women to inherit property from their husbands. The Protocol provides that a widow shall have the right to an equitable share in the inheritance of a property of her husband. A widow shall also have the right to continue living in the matrimonial house. In the case of remarriage, she will retain this right if the house belongs to her or she has inherited it.

This chapter also considers an adult daughter's right to inherit from her parents and women's rights to acquire, administer and manage property in Kenya.

The chapter find that whilst the Constitution and national succession legislation provides for a general principle of equality for all, Muslims are excluded from the basic principle of equal treatment in inheritance matters. In addition several gaps exist in the current laws of succession and are identified as follows:

- Women living in some districts are excluded from succession legislation;
- A woman's life interest in the property of her husband lapses on her remarriage;
- Women in polygamous marriages are allocated an extremely small proportion of their husband's property; and
- The succession legislation does not expressly address or prohibit common discriminatory practices that still exist in Kenya today.

## CHAPTER 7 – ECONOMIC AND SOCIAL WELFARE RIGHTS

Article 13 of the Maputo Protocol guarantees women equal opportunities in work and career advancement and other economic opportunities.

This chapter notes that the Kenyan constitution entitles every person the right to fair labour practices and national legislation provides that employers must promote equality of opportunity and eliminate discrimination, it is also noted that Kenya has a number of bodies to facilitate gender equality.

The chapter concludes that despite the existence of legislation and institutions to protect labourers the rights afforded by Kenyan legislation do not always filter down to a grassroots level. There is also a significant gap in the protections for informal workers. The majority of informal workers are female and therefore women are disproportionately affected when informal workers are not afforded the same protection that formal workers are.

## CHAPTER 8 – HEALTH AND REPRODUCTIVE RIGHTS

Article 14 of the Maputo Protocol provides women with the right to health, including sexual and reproductive health.

This chapter notes that there is national legislation in Kenya making rape and sexual assault a criminal offence. The Kenyan Constitution does not permit abortion unless a trained health professional believes the life or health of the mother is in danger.

This chapter also considers the healthcare services offered in Kenya to persons with HIV, access to post rape care, and notes that many face fear of arrest for procuring an abortion and fear abuse and maltreatment at health care centers.

Much is still to be done to support women in Kenya who are victims of sexual violence. Kenya's constitution, promulgated in 2010, and its provisions on equality and gender parity represent significant strides in codifying in law the provisions of the Maputo Protocol on women's rights. The government of Kenya has also taken several steps to create institutions to oversee the implementation and enforcement of women's rights as provided for in the constitution.



It should be noted however that overall, Kenya's legislative compliance with the Maputo Protocol remains mixed. For instance, in areas such as prohibition of female genital mutilation (FGM) (Article 5 b), there appears to be continual improvement beyond legal compliance, with a clear demonstrable commitment to implementation. This is evidenced in the enactment of Anti-FGM legislation the creation of an Anti-FGM Board to monitor and oversee the implementation and enforcement of the Act, and the creation of special prosecutors to prosecute perpetrators.

In other areas however, implementation has been limited and reservations still remain. This is the case with Article 14 (2) (c) of the protocol on reproductive rights on which Kenya still has a reservation.

Where there is legislative compliance and where efforts have been made towards harmonising national laws with requirements of the Maputo Protocol, i.e. in areas of equality, marriage, access to justice, the right to political participation, the right to education, significant knowledge and implementation gaps still exist, and legislative gains have yet to translate to meaningful change – particularly for the lives of Kenya's marginalised women. These gaps represent a major barrier in women's ability to access their rights.

Also noticeable is the enactment of legislation that erodes progress made on women's rights. This is particularly evident with the enactment of the Marriage Act (2014) and Matrimonial Properties Act (2013), two pieces of legislation which significantly compromise women's equal right to own and dispose of property.

In conclusion, significant efforts need to be made **by the Kenyan government, with full support from Kenya's civil society and the international community**, to ensure that the protocol provisions that have been codified in law are fully implemented. It is also critical to ensure that the progressive women's rights provisions in the constitution are not the subject of laws that threaten to roll back important gains made for women's rights in Kenya.

# PREAMBLE

## OVERVIEW OF THE KENYAN LEGAL SYSTEM AND THE SOURCES OF LAW

As a former British colony which gained independence in 1963, Kenya's substantive laws have largely been influenced by English law. Kenya has a unified legal system which is based on the common law, but the country has a complex set of sources of law derived not just from colonial authority but from customary laws including Hindu, Muslim and indigenous African law which sit alongside the statutory law. Harmonisation of these sources of laws remains an ongoing discussion in Kenya despite the adoption of the new Constitution on 4 August 2010.

### 1. SOURCES OF LAW

#### 1.1 The Constitution

- 1.1.1 Kenya's Constitution (the "**Constitution**" or "**Kenya's Constitution**") is the supreme law of the land and until the adoption of the new Constitution on 4 August 2010, customary law prevailed in matters of marriage, property and inheritance and exempt customary principles from the enshrined principles of non-discrimination and equality.
- 1.1.2 The new Constitution replaced the Kenyan Constitution of 1969, which itself replaced the constitution established upon the Independence of Kenya. The new Constitution was, in part, driven by the 2007 post-election violence and the consequent review of the Kenyan National Dialogue and Reconciliation ("**KNDR**").<sup>1</sup> The KNDR review sought to provide resolution to the current instability within Kenya, identifying four critical areas of addressing the causes of the crisis one of which was, "*constitutional legal and institutional reform*".<sup>2</sup>
- 1.1.3 The approach adopted in the new Constitution makes it clear that "*any law, including customary law, that is inconsistent with [the] Constitution is void to the extent of the inconsistency, and any act or omission in contravention of [the] Constitution is invalid*".<sup>3</sup>
- 1.1.4 There are other provisions in the new Constitution which seek to provide economic and political empowerment to women including:
  - (a) a requirement that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender;<sup>4</sup>
  - (b) elimination of gender discrimination in law, custom and practices related to land and property;<sup>5</sup> and
  - (c) revision of the land laws to promote gender equality and protect the interests of wives and widows.<sup>6</sup>

<sup>1</sup> J. Fitzgerald, 'The Road to Equality? The Right to Equality in Kenya's New Constitution', (2010) 5 The Equal Rights Review. Available at: [www.equalrightstrust.org/ertdocumentbank/err\\_issue05.pdf](http://www.equalrightstrust.org/ertdocumentbank/err_issue05.pdf) [page 55, paragraph 4]

<sup>2</sup> Kenyan National Dialogue and Reconciliation, [Annotated Agenda for the Kenyan National Dialogue and Reconciliation, 1 February 2008]. Available at: [www.irinnews.org/pdf/annotated%20agenda%20ver%202.pdf](http://www.irinnews.org/pdf/annotated%20agenda%20ver%202.pdf) [page 2, paragraph 4]

<sup>3</sup> The Constitution of Kenya 2010, Article 2 (4)

<sup>4</sup> Ibid., Article 27 (8)

<sup>5</sup> Ibid., Article 60

<sup>6</sup> Ibid., Article 68

## 1.2 Acts of Parliament

1.2.1 These include those acts passed by Parliament and subsidiary legislation made under the authority of Parliament. It also includes the following specific foreign laws of the United Kingdom:

- (a) The Admiralty Offences (Colonial Act) 1849;
- (b) The Evidence Act 1851 sections 7 and 11;
- (c) The Foreign Tribunals Evidence Act 1856;
- (d) The Evidence by Commission Act 1859;
- (e) The British Law Ascertainment Act 1859;
- (f) The Admiralty Offences Colonial Act) 1860;
- (g) The Foreign Law Ascertainment Act 1861;
- (h) The Conveyancing (Scotland) Act 1874 section 51; and
- (i) The Evidence by Commission Act 1885.

1.2.2 English statutes of general application in force on 12 August 1897 are law in Kenya unless a Kenyan statute (or latter English statute made applicable in Kenya) repeals any such law. Certain Acts of Parliament of India (e.g. The Transfer of Property Act of India 1882) also apply.

## 1.3 Substance of Common Law and Equity

1.3.1 These will only apply insofar as the circumstances of Kenya permit, subject to such qualifications as those circumstances may render necessary.

## 1.4 African Customary Law

1.4.1 Customary law is only applicable “*in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice or morality or inconsistent with any written law*”.<sup>7</sup>

## 1.5 Islamic Law

1.5.1 Whilst Islamic law is a very limited source of law, the Constitution preserves the Kadhis Courts<sup>8</sup>, which are subordinate courts, to determine questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion.

1.6 Given these varying sources of law and cultural practices of its indigenous inhabitants, the Kenyan courts are not always bound to follow the written letter of the law. Instead, courts are permitted the discretion to apply the rules in the context of local circumstances to determine whether to apply, modify or refrain from using them altogether<sup>9</sup>.

1.7 The reforms introduced since the adoption of the new Constitution are encouraging and may be a model for increasing women’s empowerment socially, politically and economically, but as the following report indicates, there is a long road ahead and significant changes required before true equality and empowerment are a mainstay of Kenyan society.

---

<sup>7</sup> The Judicature Act of Kenya 1967 Section 3(2)

<sup>8</sup> Ibid. 1, Article 170

<sup>9</sup> Ibid. 7, Section 3(1) provides “... but the common law, doctrines of equity and statutes of general application shall apply so far only as the circumstances of Kenya and its inhabitants permit and subject to such qualification as those circumstances may render necessary.”

# CHAPTER ONE

---

## GUARANTEES OF EQUALITY AND ELIMINATION OF DISCRIMINATION

### 1. RELEVANT PROVISIONS OF THE MAPUTO PROTOCOL

#### 1.1 Article 2 of the Maputo Protocol – Elimination of Discrimination against Women

1.1.1 Article 2 of the Maputo Protocol<sup>10</sup> explicitly deals with equality and elimination of discrimination. It sets out legislative and policy measures that signatory countries should be taking to combat discrimination against women and contains a commitment from signatories to modify their citizens' conduct through education and information to eliminate discrimination.

1.1.2 Although Article 2 is explicitly concerned with elimination of discrimination, many of the other provisions of the Maputo Protocol touch on equality and discrimination that are examined in further detail throughout other specific sections of the analysis and can be summarised as follows:

- (a) Physical and sexual abuse/violence against women including the elimination of harmful traditional practices (Maputo Protocol Articles 3, 4 and 5);
- (b) Marriage (Maputo Protocol Article 6);
- (c) Access to Justice (Maputo Protocol Article 8);
- (d) Education (Maputo Protocol Article 12);
- (e) Property rights and widows' rights to inheritance (Maputo Protocol Article 7, 16 and 21);
- (f) Economic and social welfare rights (Maputo Protocol Article 13);
- (g) Health and reproductive rights (Maputo Protocol Article 14); and
- (h) Implementation and Monitoring (Maputo Protocol Article 26);

### 2. RELEVANT PROVISIONS OF DOMESTIC KENYAN LEGISLATION

#### 2.1 The Constitution

2.1.1 The Constitution recognises that each individual has the right to live in a society free from discrimination. The Constitution seeks to reflect an understanding that guarantees of equality, equitable distribution of resources and balance of power represent the best way to maintain political stability and thereby secure a peaceful future for Kenya.

---

<sup>10</sup> "States Parties shall combat all forms of discrimination against women through appropriate legislative, institutional and other measures. In this regard they shall: (i) include in their national constitutions and other legislative instruments, if not already done, the principle of equality between women and men and ensure its effective application; (ii) enact and effectively implement appropriate legislative or regulatory measures, including those prohibiting and curbing all forms of discrimination particularly those harmful practices which endanger the health and general well-being of women; (iii) integrate a gender perspective in their policy decisions, legislation, development plans, programmes and activities and in all other spheres of life; (iv) take corrective and positive action in those areas where discrimination against women in law and in fact continues to exist; (v) Support the local, national, regional and continental initiatives directed at eradicating all forms of discrimination against women."

"States Parties shall commit themselves to modify the social and cultural patterns of conduct of women and men through public education, information, education and communication strategies, with a view to achieving the elimination of harmful cultural and traditional practices and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes, or on stereotyped roles for women and men."

- 2.1.2 The underlying principles required to achieve non-discrimination in Kenyan society are recognised throughout the terms of the Constitution. The preamble to the Constitution recognises equality as one of the six essential values<sup>11</sup> upon which governance should be based so as to allow Kenyans “to live in peace and unity”<sup>12</sup>.
- 2.1.3 The main principle of equality is directly addressed in Article 27 of the Constitution:
- (a) **Article 27 – Equality and Freedom from Discrimination** (Maputo Protocol 2(1)(a), (b), (c), (d) and (e))
- a) Article 27(1) – Legal Equality
- “Every person is equal before the law and has the right to equal protection and equal benefit of the law.”*
- b) Article 27(2) – Freedom of Equality
- “Equality includes the full and equal enjoyment of all rights and fundamental freedoms.”*
- (b) Article 27(1) and (2) provide significant additional protections that expand the protection from discrimination discussed below in Article 27(4).
- (c) Article 27(3), (4) – Political, Economic, Cultural and Social Equality (Maputo Protocol Article 2(1)(d))
- “Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres”.*
- “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”.*
- a) The inclusion of this list should underpin an improvement to the previous levels of protection of discrimination against women. This list is not exhaustive and affords the government the opportunity to recognise discrimination in other areas.
- (d) **Article 27(5) – Direct and Indirect Discrimination**
- “A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).”*
- (e) **Article 27(6), (7) – Government Implementation and Affirmative Action (Maputo Protocol 2(1)(c))**
- “To give full effect to the realisation of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.”*
- “Any measure taken under clause (6) shall adequately provide for any benefits to be on the basis of genuine need”.*
- a) This subsection includes a significant reference to the construction of a framework to implement measures in order to address issues of discrimination. While legislation subsequent to 2007 has introduced positive action in certain areas of the law<sup>13</sup>, the inclusion of Article 27 in the Constitution represents

<sup>11</sup> The other essential values are human rights, freedom, democracy, social justice and the rule of law. The Constitution of Kenya: Preamble

<sup>12</sup> The Constitution of Kenya: Preamble

<sup>13</sup> Including the National Cohesion and Integration Act 2008. Available at: [www.twawezacommunications.org/docs/cohesion.pdf](http://www.twawezacommunications.org/docs/cohesion.pdf)

the government's commitment to implementing positive action in order to achieve equality and non-discrimination. Part 3 of the Bill of Rights in the new Constitution takes this further and references specific affirmative action requirements on the state in relation to particularly vulnerable sections of society<sup>14</sup>.

(f) **Article 27(8) – Political Measures (Maputo Protocol 2(1)(e))**

*“In addition to the measures contemplated in clause (6), the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender”.*

- a) The Constitution prohibits either gender from constituting more than two-thirds of any elected body; this means women must make up at least one-third of all elective public bodies within Kenya's political arena. The implementation of this Article should result in an increase in women's representation within all levels of government and, consequently, allow women to increase their influence in the decision making processes that affect equality throughout the country.

(g) **Articles supporting Article 27(8)**

- a) The following Articles of the Constitution assist in implementing Article 27(8) by imposing accountable positions for women in the National Assembly, Senate and County Assemblies as follows:
- (1) Article 81(b) states that not more than two-thirds of the members of elective public bodies shall be of the same gender;
  - (2) Article 97 states that the Kenyan National Assembly shall consist of at least 47 women elected by registered voters of the counties;
  - (3) Article 98 states that the Senate shall consist of 16 women members;
  - (4) Article 100 states that Parliament shall enact legislation to promote the representation of women in Parliament; and
  - (5) Article 177 requires that no more than two-thirds of the membership of the county assembly shall be of the same gender.

## 2.2 Other Relevant Constitutional Articles

### 2.2.1 Article 260 – Interpretation:

- (a) While the term “minority” is not defined by the Constitution, Article 260 defines the term “marginalised group” to mean a group of people who, because of laws or practices before, on, or after the effective date of the Constitution, were, or are, disadvantaged by discrimination on one or more of the grounds considered in Article 24 (*Limitation of Rights and Fundamental Freedoms*).

### 2.2.2 Article 56 – Minorities and Marginalised Groups:

- (a) Article 56 provides additional rights and protections for “Minorities and Marginalised Groups”. It again considers affirmative action programmes as previously referenced to ensure that minority and marginalised groups are afforded the opportunities listed below:
- a) to participate and be represented in governance and other spheres of life;
  - b) to be provided with special opportunities in educational and economic fields;

---

<sup>14</sup> The Constitution of Kenya: Part 3 of the Bill of Rights, Articles 52–57. These rights are discussed in the section “Specific rights for vulnerable groups”.

- c) to be provided with special opportunities for access to employment;
- d) to develop their cultural values, languages and practices; and
- e) to have reasonable access to water, health services and infrastructures.

2.2.3 These Articles endeavour to identify specific sectors of the community impacted by discrimination. Woven throughout the terms of the Constitution are continuous references to affirmative action plans required to meet the objectives of eradicating barriers of discrimination and promoting equitable conditions within communities and the wider country. The proposed measures are designed to ensure the participation of these groups in governance, education and employment and to ensure access to water, health services and infrastructure as well as the opportunity to develop their cultural values, languages and practices.

2.2.4 **Article 19 – Rights and Fundamental Freedoms:**

- (a) This Article explains that the rights and fundamental freedoms of the Kenyan Bill of Rights (see below) apply equally to both men and women.

2.2.5 **Article 2 – Supremacy of the Constitution:**

- (a) Article 2(4) provides that the Constitution shall take precedent over any law, including customary law, which is inconsistent with the Constitution. This provision is particularly relevant to land policy, where customary practices which discriminate against women are still common i.e. the laws of succession. Article 2, together with Article 60, guarantees that land policy must concur with the aim of eliminating gender discrimination<sup>15</sup>. This Article could be particularly useful in extending the right to non-discrimination in a range of areas of law governing personal or family relationships and property rights where customary laws still hold significant influence in local communities (subject to the reservations mentioned below).
- (b) Article 2(6) provides that “*any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution*”. This provision gives the Maputo Protocol the force of law in Kenya without the need to pass any further implementing legislation. The Maputo Protocol first formed part of the laws of Kenya on 27th August 2010. However, several reservations were made against Articles 6 and 7 of the Maputo Protocol concerning marriage, separation, divorce and annulment of marriage, in order not to immediately interfere with the cultural practices of any particular Kenyan community.
- (c) Elsewhere in the Constitution, gender equality features prominently. For example, equal rights for men and women are guaranteed during a marriage and at its dissolution and equality between male and female parents and spouses is guaranteed in the acquisition of citizenship through birth and marriage<sup>16</sup>.

2.2.6 **Article 59 – Kenyan National Human Rights and Equality Commission**

- (a) Article 59 illustrates a support of the intention to implement positive actions in order to achieve the aims of the Constitution and provides parameters for the establishment of a Kenyan National Human Rights and Equality Commission. The functions of the Commission include “*promoting gender equality and equity generally and to coordinate and facilitate gender mainstreaming in national development*” and ensuring “*compliance with obligations under treaties and conventions relating to human rights*”.

---

<sup>15</sup> The Constitution of Kenya: Article 60 (1) (f)

<sup>16</sup> The Constitution of Kenya: Article 45 (3) (f)



## 2.3 Kenyan Legislation

2.4 This section explores the status of Kenyan local legislation relevant to the application of gender equality throughout Kenya and the development of local policy. The human rights commissions referred to below generally do not have an implementation mandate, but have authority to advise on, recommend and review legislation from a gender-based approach.

## 2.5 National Gender And Equality Commission Act 2011

2.5.1 This Act was put in place to establish the National Gender and Equality Commission as a successor to the Kenya National Human Rights and Equality Commission pursuant to Article 59(4) of the Constitution.

## 2.6 National Gender And Equality Commission (“NGEC”)

2.6.1 In fulfilling its mandate, the Commission shall act in accordance with the values and principles set out in the Constitution and the laws of Kenya, and shall observe and respect *“impartiality, gender equality and gender equity, inclusiveness, non-discrimination and protection of the marginalised groups”*, and *“all treaties and conventions which have been ratified in Kenya ... are of equal importance for the dignity of all human beings”*<sup>17</sup>.

## 2.7 The Commission for the Implementation of the Constitution Act 2010

2.7.1 The Commission for the Implementation of the Constitution (“CIC”) was established under Section 5(6) of the sixth Schedule of the Constitution. The mandate of the CIC is stipulated in Section 5 of the same Schedule and in Section 4 of The Commission for the Implementation of the Constitution Act 2010.

## 2.8 The Commission for the Implementation of the Constitution

2.8.1 The CIC mandate is to monitor, facilitate, coordinate and oversee the implementation of the Constitution. In order to enable this mandate, the Commission is developing an implementation guide to provide a framework for key persons who carry out an implementation role within the relevant government ministries<sup>18</sup>.

2.8.2 The objective of the framework is to guide persons in charge of implementing legislation, on the integration of constitutional and human rights principles such as equality, equity and affirmative action.

## 2.9 The Kenya National Commission On Human Rights Act

2.9.1 As well as the National Commission on Gender and Development, The Kenya National Commission on Human Rights Act established the Kenya National Commission on Human Rights (“KNCHR”) which is mandated to monitor the implementation of equality legislation. This Commission was restructured by the 2011 Act pursuant to Article 59(4) of the Constitution<sup>19</sup>.

(a) The Kenya National Commission on Human Rights has both a promotional and enforcement role. It has the mandate to initiate an investigation or follow up on a complaint of any violation of the fundamental rights and freedoms of any individual protected under the Constitution and any human rights provided for in any international instrument to which Kenya is a signatory.

---

<sup>17</sup> National Gender and Equality Commission Act 2011: Article 7. Available at: [www.cickenya.org/index.php/legislation/acts/item/225-the-national-gender-and-equality-commission-act-2011#.Un\\_pU\\_17luc](http://www.cickenya.org/index.php/legislation/acts/item/225-the-national-gender-and-equality-commission-act-2011#.Un_pU_17luc) (pages 6–7)

<sup>18</sup> Available at: [www.cickenya.org/index.php/newsroom/item/286-integration-of-the-human-rights-principles-in-all-sectors-cic-develops-a-human-rights-implementation-guide-for-the-public-service](http://www.cickenya.org/index.php/newsroom/item/286-integration-of-the-human-rights-principles-in-all-sectors-cic-develops-a-human-rights-implementation-guide-for-the-public-service)

<sup>19</sup> The Kenya National Commission on Human Rights Act, Part 2. Available at: [www.kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/KenyaNationalCommissiononHumanRights\\_Act\\_No14of2011.pdf](http://www.kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/KenyaNationalCommissiononHumanRights_Act_No14of2011.pdf)

- (b) The KNCHR recently finalised its 2013–2018 strategic plan. The strategy will focus on education, cohesion, risk mitigation and further tools for implementation of women’s rights taking into account technical, logistical and financial barriers to achieving implementation<sup>20</sup>.

## 2.10 The Kenyan National Policy on Gender and Development (“NPGD”)

2.10.1 The National Policy on Gender and Development was published in 2000. It has a number of general objectives including, to guarantee Kenyan men and women equality before the law, and to enable men and women to have equal access to economic and employment opportunities. The specific objectives of the NPGD include:

- (a) to *“facilitate the review of laws that hinder women’s access to and control over economic resources. Undertake gender sensitisation geared towards changing customs and traditions that perpetuate these hindrances;*
- (b) *enhance measures that guarantee equity and fairness in access to employment opportunities, in both formal and informal sectors;*
- (c) *develop and improve vocational and technical skills of disadvantaged groups, notably unemployed youth, disabled women, poor urban and rural women, and street dwellers, for improved access to employment opportunities;*
- (d) *re-orientate the extension of services to emphasise gender sensitisation and participatory planning, and enhancing the responsiveness of services to the needs of women;*
- (e) *intensify existing programmes aimed at developing and introducing appropriate technologies targeted at the role of women in agriculture, food production, storage, processing, and preparation;*
- (f) *promote gender responsive agricultural research and dissemination of agricultural research findings;*
- (g) *develop indicators to monitor the participation of women in economic development; address areas of Personal Law, Law of Succession (1981) and any other laws that discriminate against women;*
- (h) *ensure protection of men and women against all forms of violence; and*
- (i) *promote gender sensitive research into the laws of Kenya and ensuring legal literacy amongst men and women”*<sup>21</sup>.

## 2.11 The National Gender and Development Act 2003

2.11.1 This Act was put in place to establish the National Commission on Gender and Development (“**NCGD**”) to co-ordinate, implement and facilitate gender mainstreaming in national development. In 2009 the Kenyan Government published a Monitoring and Evaluation Framework for Gender Mainstreaming.

2.11.2 The NCGD plays a strategic role through active influence on the formulation of laws, practices and policies to expand gender equity and equality. The NCGD also exerts an educational influence through the coordination of gender awareness and gender equality support programmes. The NCGD can carry out investigations on purported gender based violations, however it can only influence through recommendations to government on the results of these investigations and does not have authority to enforce adherence to gender based violence legislations or regulations.

<sup>20</sup> The Kenyan National Commission on Human Rights website. Available at: [www.knchr.org](http://www.knchr.org)

<sup>21</sup> The National Policy on Gender and Development, at page 9. Available at: [www.gender.go.ke/index.php/downloads1/finish/9-gender-mainstreaming/10-gender-policy-2000/0](http://www.gender.go.ke/index.php/downloads1/finish/9-gender-mainstreaming/10-gender-policy-2000/0)

## 2.12 The Political Parties Act 2011

### *Extension of the Gender Parity in Politics*

- 2.12.1 The principal point of note here is that The Political Parties Act 2011 extends the two-thirds rule (i.e. that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender, as provided for in Article 27(8) of the Constitution, referred to above) to parties' membership lists and governing bodies. It states that there must not be fewer than one thousand registered voters from each of more than half of the counties and those members must reflect a gender balance. The governing body of the party must have not more than two-thirds of the members from one gender and must reflect "*regional and ethnic diversity, gender balance and representation of minorities and marginalised groups*"<sup>22</sup>. This should assist in trying to expand the requirement for women representatives at all levels of the decision making process impacting policy creating and implementation on gender equality.

### *The Political Parties Act Code of Conduct: First Schedule*

- 2.12.2 The Political Parties Act 2011 includes a Code of Conduct to the Act which states that every political party shall: (a) respect, uphold and defend the Constitution of Kenya; (b) respect and uphold this Act and any other written law relating to elections and political parties; (c) respect, uphold and promote human dignity, equity, social justice, inclusiveness and non-discrimination and protection of the marginalised; and (d) respect, uphold and promote human rights and the rule of law.

## 2.13 The Truth and Justice Reconciliation Act 2008

- 2.13.1 One of the functions of the TRJA is to inquire into and establish the reality or otherwise of perceived economic marginalisation of communities and make recommendations on how to address the marginalisation<sup>23</sup>.

## 2.14 The National Cohesion and Integration Act 2008

- 2.14.1 The National Cohesion and Integration Act of 2008 outlaws direct and indirect discrimination on ethnic grounds including colour, race, religion, nationality or ethnic or national origins in both public and private spheres. The matter of what defines direct or indirect discrimination is more fully considered in the Convention.

## 2.15 Universal Declaration of Human Rights

- 2.15.1 As a member of the UN and a signatory to the Universal Declaration of Human Rights, every Kenyan individual has the right to choose a leader of choice.

## 2.16 Additional Ratified Relevant Treaties

- 2.16.1 Kenya has also ratified key international and regional human rights treaties including:
- (a) the Convention on the Elimination of Discrimination against Women;
  - (b) the International Covenant on Civil and Political Rights; and
  - (c) the International Covenant on Economic, Social and Cultural Rights.

---

<sup>22</sup> The Political Parties Act 2011, Article 7(2)(b). Available at: [www.cickenya.org/index.php/legislation/acts/item/219-political-parties-act#.Un\\_xj\\_l7luc](http://www.cickenya.org/index.php/legislation/acts/item/219-political-parties-act#.Un_xj_l7luc)

<sup>23</sup> The Truth Justice and Reconciliation Act 2008, Article 6(p)

**2.17 Case law**

**2.18 The regional human rights system in Africa is governed by the following instruments and institutions:**

2.18.1 The Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (the "**Charter**");

2.18.2 The African Commission on Human and People's Rights ("**ACHPR**"); and

2.18.3 The African Court on Human and Peoples' Rights (the "**Court**").

**2.19** While the Court's mandate is to "complement and reinforce" the functions of the ACHPR, the Court has been beset by inactivity as well as institutional, jurisdictional and political setbacks since it was first created in 2004.

**2.20** The workload of the Court has been steadily increasing since 2006, but very few cases have thus far considered gender equality or the elimination of discrimination.

**2.21 Application of Gender Representation pursuant to the Constitution**

Kenyan Supreme Court decision on gender representation in the Government (Advisory Opinion No.2 of 2012)

2.21.1 On 11 December 2012 the Kenyan Supreme Court handed down a controversial ruling on the gender principles established pursuant to the Constitution, specifically focusing on the following provisions:

(a) Article 81(b) which requires that not more than two-thirds of the members of elective public bodies are of the same gender; and

(b) Article 27(8) which requires that the Kenyan government will take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.

2.21.2 The Kenyan Supreme Court was requested to issue an advisory opinion as to:

(a) whether Article 81(b), taken in conjunction with other relevant articles, including Article 27(8), required a progressive realisation of the enforcement of the two-thirds gender rule; or

(b) whether the same articles required the rule to be implemented prior to or as part of the Kenyan general elections, which were scheduled for 4 March 2013.

2.21.3 In Advisory Opinion No.2 of 2012<sup>24</sup>, the Kenyan Supreme Court issued a majority decision that the two-thirds rule would not apply in the March 2013 elections because the secondary legislation required by Article 27(8) to implement Article 81(b) had not yet been enacted. The Court held as follows:

*"As article 81(b) of the Constitution ... not having ripened into a specific, enforceable right as far as the composition of the national assembly and senate are concerned, it follows ... that it cannot be enforced immediately. If the measures contemplated to ensure its crystallization into an enforceable right are not taken before the elections of 4 March 2013, then it is our opinion, article 81(b) will not be applicable to the said elections. The effect is that article 81(b) of the constitution is amenable only to progressive realization – even though it is immediately applicable in the case of county assemblies under article 177."*

<sup>24</sup> Kenyan Supreme Court Advisory Opinion No. 2 of 2012. Available at: [www.judiciary.go.ke/portal/assets/files/one-third-rule/Majority%20Decision-One%20Third%20Rule.pdf](http://www.judiciary.go.ke/portal/assets/files/one-third-rule/Majority%20Decision-One%20Third%20Rule.pdf)

- 2.21.4 By holding that Article 81(b) did not apply to the National Assembly or Senate elections in March 2013, the Court did not require the government to ensure that at least one third of elected or appointed posts were filled by women representatives. Instead, the Court held, the “*human rights goal*” contained within Article 81(b) is to be achieved by “*progressive realisation*”, which requires the State to first implement a “*certain set of supportive measures*” (i.e. secondary or implementing legislation) to allow the two third rule to be achieved<sup>25</sup>. The Court went on to hold that such implementing legislation or measures should be in place by 27 August 2015<sup>26</sup>.
- 2.21.5 However, the Court did hold that the two-third rule outlined in Article 81(b) would be immediately applicable to the County Assembly elections which also took place during March 2013. As a result, 680 women were nominated (i.e. appointed) to fill positions at the County Assembly level across all 47 counties<sup>27</sup>.
- 2.21.6 Chief Justice Willy Mutunga dissented, stating that the ruling, “*flew in the face of the struggle by Kenyan women for gender equality*”<sup>28</sup>.
- 2.21.7 This ruling will leave Kenya trailing behind many of its East African neighbours. As of September 2013, only 9.8% of Kenyan parliamentarians were female, compared to Rwanda’s 56.3%, Tanzania’s 36% and Uganda’s 35%<sup>29</sup>.

### 2.22 Nairobi Abuse Case, 2013<sup>30</sup>

- 2.22.1 This case involved 11 girls whose claims represented a larger group of an estimated 240 girls who had been abused at a local care centre in Nairobi. The decision of the Kenyan High Court found that the Kenyan police had failed to conduct prompt, effective, proper and professional investigations into the girls’ complaints of sexual abuse and consequently allowed for continued violations of the law without any perceived threat from legal consequences. The Court held that these failures constituted a violation of the girls’ rights to equality, dignity, security of the person, access to justice, and protection as children under the Kenyan Constitution as well as violations of international human rights laws, including the African Charter<sup>31</sup>.
- 2.22.2 The High Court ordered the police to implement the standards required under Articles 244 (a) to (e) of the Kenya Constitution, which provides that the police must, “*strive for the highest standards of professionalism*” and “*prevent corruption and promote and practice transparency and accountability*”<sup>32</sup>.
- 2.22.3 The decision sets an important legal precedent in Kenya, and internationally, relating to a State’s obligation to use due diligence in investigating and prosecuting cases of gender-based violence and potential gender-based discrimination.

### 2.23 Relevant Discrimination Cases

- 2.23.1 There are several cases in the Kenyan Courts that focus on specific areas of discrimination. The cases referred to below highlight the way in which the principle of equality in Article 27 of the Constitution is implemented in practice.

---

<sup>25</sup> Ibid. at page 40

<sup>26</sup> Ibid. at page 40

<sup>27</sup> Available at: [www.ndi.org/files/Kenya-Gender-Audit-2013-Electoral-Process.pdf](http://www.ndi.org/files/Kenya-Gender-Audit-2013-Electoral-Process.pdf) at page 50

<sup>28</sup> Available at: [www.thinkafricapress.com/kenya/mans-world-gender-equality-frustrated-ahead-elections](http://www.thinkafricapress.com/kenya/mans-world-gender-equality-frustrated-ahead-elections)

<sup>29</sup> Available at: [www.issafrica.org/iss-today/kenyas-new-constitution-political-musical-chairs-and-inertia-taint-implementation](http://www.issafrica.org/iss-today/kenyas-new-constitution-political-musical-chairs-and-inertia-taint-implementation)

<sup>30</sup> The High Court’s decision can be accessed at: <http://theequalityeffect.org/wp-content/uploads/2013/05/KLR-160-Girls-decision.pdf>

<sup>31</sup> Ibid. at page 7

<sup>32</sup> Ibid. at page 8

(a) **Centre for Rights Education and Awareness (CREAW) & 7 Others v The Attorney-General, Petition 16 of 2011, High Court, 3 February 2011**

The court found that a prime facie case had been established that Presidential nomination of the Chief Justice, Attorney-General, Director of Public Prosecutions, and Controller of the Budget were unconstitutional on a number of grounds, including that they discriminated against women due to the fact that all appointees were men.

(b) **In the Matter of the Estate of Mburugu Nkaabu (deceased), Succession Cause 206 of 1995, High Court, 22 October 2010**

The case dealt with the customary laws of succession. Lady Justice Mary Kasango found in favour of a wife and redistributed lands of the deceased to ensure his wife and daughters received a fair share. The judge cited the anti-discrimination provisions in Articles 27(1)-(5) of the Constitution, which include the grounds of race, sex, pregnancy and marital status, and Article 60(f) which specifically aims to eliminate gender discrimination in law, custom and practices related to land and property.

### **3. IMPLEMENTATION OF THE NON-DISCRIMINATION AND EQUALITY REQUIREMENTS OF THE MAPUTO PROTOCOL IN KEN**

#### **3.1 Article 2 of the Maputo Protocol**

3.1.1 Maputo Protocol Article 2(a) requires that State Parties include in their national constitutions and other legislative instruments, if not already done, the principle of equality between women and men and ensure its effective application.

3.1.2 Maputo Protocol Article 2(b) requires that State Parties enact and effectively implement appropriate legislative or regulatory measures, including those prohibiting and curbing all forms of discrimination particularly those harmful practices which endanger the health and general well-being of women.

3.1.3 Theoretically, the Constitution and relevant legislation should have allowed for implementation of the equality and non-discrimination principles considered throughout the Maputo Protocol and as analysed within this paper. However, from a practical point of view, the implementation of the gender parity objectives have simply not been met.

3.1.4 The extent to which Kenyan law and practice comply with the provisions of Article 2 of the Maputo Protocol is analysed below.

#### **3.2 Implementation of Article 2 of the Maputo Protocol**

3.2.1 The Kenyan Supreme Court Judge, Njoki Ndung'u, has condemned the dawdling pace of the implementation of the Maputo Protocol on women rights. During a 2012 workshop with representatives from various African states, Judge Ndung'u commented that, "*without putting in place national laws, structures and processes that popularise, domesticate and implement the protocol, the protocol remains only a paper without power*"<sup>33</sup>. Essentially bringing to the forefront the actuality behind the all positive equality legislation, simply that although the Protocol had been ratified by Kenya, relevant legislation had not been purposefully enacted to ensure that the mechanics of the Protocol could be fully operational:

<sup>33</sup> Available at: <http://allafrica.com/stories/201204241453.html/> and [www.eassi.org/news/268-implementation-of-the-maputo-protocol-is-still-at-snails-pace](http://www.eassi.org/news/268-implementation-of-the-maputo-protocol-is-still-at-snails-pace)



- 3.2.2 Judge Ndung'u further indicated that one of the challenges to realising the rights and freedoms within the Maputo Protocol arose from the overlapping nature of areas of women's rights in reality: "*Freedom from discrimination and violence is meaningless unless women have economic power to provide for themselves and their families*"<sup>34</sup>. Judge Ndung'u concluded that there is need for combined action from social, economic and political sectors to ensure full implementation and operation of the Maputo Protocol<sup>35</sup>.

### 3.3 Issues under Kenyan law to achieving the implementation of the Maputo Protocol equality principle provisions

- 3.3.1 The Supreme Court's Advisory Opinion No.2 of 2012:
- (a) The ruling, as reflected in the dissenting opinions, could be perceived as a backward step away from achieving the objectives under the enlightened gender equality principles established in the Constitution.
- 3.3.2 Structure of the Political System in Kenya
- (a) The Constitution created a devolved government structure, based around 47 Kenyan counties. The counties were created to help promote democratic processes for Kenyan communities and to increase local authority power and accountability.
  - (b) The glaring issue is that the 47 counties have not adhered to the gender appointment rules and there has been no effort to promote or demand enforceability from the national government.
  - (c) There is a need for elected women in local and national governmental positions to become involved in debates on women's issues. However, woman representatives remain very much in the minority and are often elected to meet a quota. This means progress remains slow.
- 3.3.3 Consultation between National and County Governments:
- (a) Articles 189 and 190 set out the parameters for the relationship between national and county governments. Consultation, cooperation and support is proposed, however as this is fairly recently established structure, the practical machinations of these relationships will take time to evolve.
- 3.3.4 The impact of the 2013 Kenyan National Election Results:
- (a) Kenyan women failed to win more elective positions in the general elections in March 2013. Only 6% of directly elected seats were filled by women<sup>36</sup>.
  - (b) No woman candidate won a governor or senator position, consequently, none of Kenya's 47 local governments will be led by a woman in 2013.
  - (c) Only seven women won parliamentary seats in the March 2013 elections compared to 22 in the previous parliament – 290 positions were available<sup>37</sup>.
  - (d) Kenya's only woman presidential candidate in 2013, Martha Karua, a former Minister for Justice and Constitutional Affairs, won 43,881 votes compared to the winning candidate Uhuru Kenyatta, who won 6.1 million votes<sup>38</sup>.
  - (e) The two-thirds gender rule is intended to increase female representation in politics. Based on this rule, at least 117 Kenyan MPs should be female.

---

<sup>34</sup> Ibid.

<sup>35</sup> Ibid.

<sup>36</sup> Available at: <http://allafrica.com/stories/201312091132.html>

<sup>37</sup> Available at: [www.peacewomen.org/news\\_article.php?id=5819&type=news](http://www.peacewomen.org/news_article.php?id=5819&type=news)

<sup>38</sup> Available at: [www.peacewomen.org/news\\_article.php?id=5819&type=news](http://www.peacewomen.org/news_article.php?id=5819&type=news)



- (f) The number of women MPs elected in the eleventh Parliament has remained at 16, the same number as in the previous Parliament. This is despite the number of constituencies increasing from 210 to 290 countrywide.
- (g) While the Constitution gives women the opportunity and guarantee for effective representation through affirmative action with express provisions of gender parity, it fails to provide a mechanism to facilitate the implementation of the principle in Articles 97 and 98 namely National Assembly and Senate. An interpretation of Article 81(b) of the Constitution in the Supreme Court deferred the realisation of the principle to 2015.

### 3.3.5 Education<sup>39</sup>

- (a) Many women do not understand their voting rights and do not have the education in order to challenge cultural practices and create opportunity for individual voting i.e. not voting influenced by family or community decision.
- (b) Another critical issue is the requirement for a higher education in order to qualify as a candidate. To be elected president or governor, a candidate must have a degree from a recognised university in Kenya<sup>40</sup>, while to stand as a member of the National Assembly, senator or women's representative, a candidate must hold "*a diploma, certificate or post-secondary education requiring at least three months study, and is recognised by the relevant ministry and in a manner prescribed by IEBC*"<sup>41</sup>.

The limitations here are apparent, even with a coherent understanding of the issues facing women, those from uneducated backgrounds will have no access to a platform on which to stand and influence<sup>42</sup>.

### 3.3.6 Women and Voting<sup>43</sup>

- (a) Women still fall behind in voter registration within local, particularly rural, communities which have yet to embrace acceptance of female engagement in politics.
- (b) Women's voting choices are often restricted by the cultural practice of being escorted to the polling booth by male relatives or husbands. Those relatives often influence their voting choices. In addition, husbands are generally the custodians of their wives' national identity cards which must be presented when voting<sup>44</sup>.

### 3.3.7 Local Tradition<sup>45</sup>

- (a) Due to local customs, it is often the case that local community leaders choose particular county candidates for the whole county to endorse and again as a consequence of cultural tradition, women are often not involved in these decisions and selection making processes.

### 3.3.8 Social Roles<sup>46</sup>

- (a) A thread in the above considered limitations on gender equality illustrates the impact of social roles of women in the communities. The sphere of women is still perceived as in the home, whereas the political and community action role is undertaken by the men. It is illogical to think that these social practices can change as an immediate consequence of new legislation and are still supported by both men and women.

<sup>39</sup> Available at: [www.theglobalobservatory.org/analysis/467-new-constitution-helps-kenyan-women-gain-traction-in-politics.html](http://www.theglobalobservatory.org/analysis/467-new-constitution-helps-kenyan-women-gain-traction-in-politics.html)

<sup>40</sup> Available at: <http://theforeignpolicyanalyst.wordpress.com/2012/12/28/kenya-general-election-series-is-your-candidate-qualified-for-the-post>

<sup>41</sup> Available at: [www.theglobalobservatory.org/analysis/467-new-constitution-helps-kenyan-women-gain-traction-in-politics.html](http://www.theglobalobservatory.org/analysis/467-new-constitution-helps-kenyan-women-gain-traction-in-politics.html)

<sup>42</sup> Available at: <http://elections.nation.co.ke/news/women-to-run-for-reserved-county-seats/-/1631868/1697966/-/j165knz/-/index.html>

<sup>43</sup> Available at: [www.thinkafricapress.com/kenya/mans-world-gender-equality-frustrated-ahead-elections](http://www.thinkafricapress.com/kenya/mans-world-gender-equality-frustrated-ahead-elections)

<sup>44</sup> Available at: [www.thinkafricapress.com/kenya/mans-world-gender-equality-frustrated-ahead-elections](http://www.thinkafricapress.com/kenya/mans-world-gender-equality-frustrated-ahead-elections)

<sup>45</sup> Available at: [www.thinkafricapress.com/kenya/mans-world-gender-equality-frustrated-ahead-elections](http://www.thinkafricapress.com/kenya/mans-world-gender-equality-frustrated-ahead-elections)

<sup>46</sup> Available at: [www.thinkafricapress.com/kenya/mans-world-gender-equality-frustrated-ahead-elections](http://www.thinkafricapress.com/kenya/mans-world-gender-equality-frustrated-ahead-elections)

### 3.4 Progress with the Implementation Of The Maputo Protocol

3.4.1 There has been some implementation of the equality principles detailed in the Maputo Protocol throughout the attempts to ratify increasingly progressively legislation within Kenya. The attitudes and practices that shape the social, political and cultural still need to be cultivated in the right direction to meet the legislative framework. There has however, been some positive developments during 2013 which can be seen as a building a progressive path toward a full understanding of the benefits of the Maputo Protocol and of the increasing status of women in leadership positions.

#### 3.4.2 Results of the 2013 elections

The Kenyan Parliament is currently made up of the National Assembly and the Senate. A general election was held on 4 March 2013 to elect the members of the National Assembly and the Senate, as well as the President, County Governors and Civic Wards for the 11<sup>th</sup> Kenyan Parliament.

3.4.3 The Kenyan National Assembly consists of 290 directly elected members from 290 constituencies, 47 women members elected to represent women from each individual county and 12 members nominated by political parties. The following is summary of the results reflecting the representation of women during these elections:

- (a) 16 of the 129 women who stood for election as constituency members were directly elected to the National Assembly. 16 is the minimum number required by Article 97(b) of the Constitution and represents only 6% of the total 290 posts available.
- (b) 47 women were elected as County Women Representatives in the National Assembly. This, too, is the minimum number required by Article 97(b) of the Constitution which provides that 1 woman must be elected from each county in this role.
- (c) A further 5 women were nominated as members of the National Assembly by political parties, out of a pool of 12. This figure represents a more promising 40% of the total posts available.
- (d) In total, 68 women were elected or appointed as members of the National Assembly during the March 2013 elections. This figure represents just over 19% of the 349 posts available. This figure is far short of the 33% promised by Articles 27 and 81 of the Constitution which aim to ensure that no more than two thirds of elective public bodies of the same gender<sup>47</sup>.

3.4.4 The Kenyan Senate consists of 47 directly elected members from the 47 counties; 16 woman members nominated from party lists in proportion to the number of seats won by each political party; and four members nominated by political parties – two representing persons with disabilities and two representing the youth.

- (a) 17 women stood for election as senators but none were directly elected in the 2013 general election;
- (b) 16 women were nominated as senators as required by Article 98(b) of the Constitution which reserves 16 seats for women representatives;
- (c) 2 women were nominated to represent the youth and disabled population, as required by Articles 98(c) and (d) of the Constitution;
- (d) There are, therefore, 18 woman members of the Senate, representing 27% of the 67 seats available. This is the minimum number permitted by the Constitution<sup>48</sup>.

<sup>47</sup> Key Gains and Challenges A Gender Audit of Kenya's 2013 Election Process, pages 47 to 51. Available at: [www.ndi.org/files/Kenya-Gender-Audit-2013-Electoral-Process.pdf](http://www.ndi.org/files/Kenya-Gender-Audit-2013-Electoral-Process.pdf)

<sup>48</sup> Ibid.

- 3.4.5 The March 2013 elections created 47 county assemblies, each with a county Governor. Across the 47 counties a total of 1,450 people were directly elected as members.
- (a) 82 women were directly elected as County Assembly Ward Representatives out of a total of 1450 people elected to this post. This figure is also just over 5% of the total posts available;
  - (b) A further 680 women were nominated as Ward Representatives;
  - (c) No women were elected as county Governors, though only 6 ran for the post compared to 231 men<sup>49</sup>.
- 3.4.6 The 2013 elections allowed Kenya to put in place a new system of local government, in the form of 47 counties with elected governors, as required by the Constitution. Several provisions of the Constitution ensure a minimum level of women representatives are nominated to the National Assembly and Senate. These minimum levels, while welcome, do not implement the promises of Articles 27(c) and 81(b) which are designed to right the historical wrong of gender discrimination in politics.
- 3.4.7 However, overall, across the National Assembly, Senate and County Assembly elections, 12% of the women who ran for election were successful, compared with 14% of men who ran. This is an encouraging figure and suggests that Kenyans are not averse to electing women candidates. It also suggests that positive change in the number of women representatives elected could be achieved by higher numbers of women running for elections<sup>50</sup>.
- 3.4.8 While the March 2013 elections resulted in the highest number of women representatives elected to the Kenyan Parliament, the figures still falls woefully short of the threshold of 33% as stipulated under the Constitution<sup>51</sup>.

### 3.5 Benefit of Women in Office: Double Dividend

- 3.5.1 When women hold office, they tend to advocate more strongly not just for women's rights but also for other marginalised group rights, a concept known as the 'double dividend'<sup>52</sup>. Women in office are also more likely to advance the rights of minorities, promote family-friendly legislation, and work on issues related to education, health and nutrition<sup>53</sup>.

### 3.6 Gender Mainstreaming and Government Development Plans

- 3.6.1 Maputo Protocol Article 2(c) requires that States Parties integrate a gender perspective in their policy decisions, legislation, development plans, programmes and activities and in all other spheres of life;
- 3.6.2 Maputo Protocol Article 2(d) requires that States Parties to take corrective and positive action in those areas where discrimination against women in law and in fact continues to exist; and
- 3.6.3 Maputo Protocol Article 2(e) requires that States Parties support the local, national, regional and continental initiatives directed at eradicating all forms of discrimination against women.

---

<sup>49</sup> Ibid.

<sup>50</sup> Ibid.

<sup>51</sup> Ibid.

<sup>52</sup> Unicef Report 2007. Available at [www.unicef.org/sowc07/report/report.php](http://www.unicef.org/sowc07/report/report.php)

<sup>53</sup> Available at: [www.thinkafricapress.com/kenya/mans-world-gender-equality-frustrated-ahead-elections](http://www.thinkafricapress.com/kenya/mans-world-gender-equality-frustrated-ahead-elections)

- 3.6.4 Gender Policy 2011
- (a) The then Ministry of Gender published a Gender Policy in July 2011 which articulates the policy approach of gender mainstreaming and empowerment of women at the ministry level.
- 3.6.5 Economic Development: Women Enterprise Fund (“WEF”)
- 3.6.6 The Government establishment of WEF, an Agency within the Ministry of Devolution and Planning, has the vision to “*socially and economically empower Kenyan women entrepreneurs*” and a mission to provide access to resources, both financial and practical, to support these visions<sup>54</sup>.
- 3.6.7 Reporting obligations under the Maputo Protocol<sup>55</sup>
- (a) Article 62 requires the submission of periodic reports in accordance with the African Charter on Human and Peoples’ Rights. This will help keep accountability of government to implement measures when signing up to treaties. This also allows access to monitor the progress of the Kenyan government on equitable rights.
- 3.6.8 Guidance in Kenya on the Maputo Protocol
- (a) The launch of the how-to guide in Kenya was headed by Elizabeth Muli, Vice-Chairperson of the Commission on the Implementation of the Constitution. The manual aims to provide a step-by-step guide to persons in the positions of implementation influence to facilitate the exercise of the rights of women
- 3.6.9 Discussion of the Equal Opportunity and Affirmative Action bill
- (a) There is a Gender Directorate under the Ministry of Devolution and Planning and though there was lobbying by women’s rights groups, calls for the creation of a Gender Ministry has since been silenced.
- (b) The Office of the Attorney General together with CIC, NGEN and FIDA Kenya has initiated discussions around drafting the Equal Opportunity Bill to beat the 2015 deadline. The process will be opened up to the public to give input on ways or formulas to achieve the two-thirds principle.
- (c) FIDA Kenya has drafted an affirmative action bill and the same has been forwarded to CIC, who will move the process going forward.
- 3.6.10 The two-thirds Rule under Article 27(8) – Appealing to the African Court of Justice
- (a) The political parties, if willing, may be able to appeal to the African Court of Justice for amendment of the Supreme Court’s Advisory Opinion No 2 of 2012 decision on and upholding of the two-thirds gender in politics principle<sup>56</sup>.
- 3.6.11 Potential practices to impact the electoral approach and election of women to the Kenyan Parliament
- 3.6.12 These could include:
- (a) a constitutional amendment requiring political parties to generate a list of nominated women which could be drawn upon if the required elected proportion was not met;
- (b) focus on amendment to rural cultural practices with particular focus on individual female voting e.g. the introduction of segregated polling booths;

---

<sup>54</sup> Women Enterprise Fund. Available at: [www.wef.co.ke/about-wef/mission-vision-mandate-values](http://www.wef.co.ke/about-wef/mission-vision-mandate-values)

<sup>55</sup> Article 62: Maputo Protocol

<sup>56</sup> Available at: <http://allafrica.com/stories/201212150003.html>

- (c) increased interaction of a representative from a body such as the National Council of Women of Kenya, to provide a link between local council and women within the local sphere; and
- (d) improving financing for potential women candidates.

#### 4. KENYAN WOMEN'S NATIONAL CHARTER 2011<sup>57</sup>

- 4.1 This Charter has been developed by governmental and non-governmental organisations and is committed to recognising the importance of women to *“full participation and inclusion of their views in all decision making processes and as an essential element to the development of a sustainable, thriving and equal society”*<sup>58</sup>.
- 4.2 The Charter specifically considers the Maputo protocol and is concerned that *“despite the progressive and women friendly provisions of the Constitution, women in Kenya continue to be victims of discrimination”*<sup>59</sup>.

#### 5. VISION 2030

- 5.1 Vision 2030 is Kenya's national long-term development plan which aims to transform Kenya into a middle-income country providing a high quality of life to all its citizens by 2030. The vision comprises economic, social and political pillars and aims to engender just, cohesive and equitable social development. This vision is being implemented in successive five year plans with the current plan running from 2012 – 2018. The plan specifically references the strategy to include a focus on equity in all areas<sup>60</sup>

---

<sup>57</sup> Available at: [www.cmd-kenya.org/files/Kenya-Womens-National-Charter.pdf](http://www.cmd-kenya.org/files/Kenya-Womens-National-Charter.pdf)

<sup>58</sup> The Kenyan Women's National Charter 2011. Available at [www.cmd-kenya.org/files/Kenya-Womens-National-Charter.pdf](http://www.cmd-kenya.org/files/Kenya-Womens-National-Charter.pdf)

<sup>59</sup> The Kenyan Women's National Charter 2011. Available at: [www.cmd-kenya.org/files/Kenya-Womens-National-Charter.pdf](http://www.cmd-kenya.org/files/Kenya-Womens-National-Charter.pdf)

<sup>60</sup> Available at: [www.vision2030.go.ke](http://www.vision2030.go.ke)

# CHAPTER TWO

## ELIMINATION OF VIOLENCE AGAINST WOMEN

### 1. RELEVANT PROVISIONS OF THE MAPUTO PROTOCOL

**1.2** The Articles of the Protocol which aim to ensure that physical abuse and violence against women is eradicated or protected against are set out below. In some cases, only a subsection of a particular Article is relevant and will apply within a specific environment or context (for example, in schools, in work places, during old age etc).

1.2.1 Article 1 – Definitions – “violence against women”:

(a) Article 1 of the Protocol defines the term “*violence against women*” to mean:

*“... all acts perpetrated against women which cause or could cause them physical, sexual, psychological, and economic harm, including the threat to take such acts; or to undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life in peace time and during situations or armed conflicts or of war.”*

(b) It should be noted that the Protocol uses a very broad definition of “violence” which extends far beyond the traditional understanding of physical or sexual violence and includes even the threat of economic or psychological harm. As such, the States Parties, meaning all State signatories to the Protocol, commit to a very detailed and far reaching list of obligations which permeate almost every aspect of a woman’s life.

1.2.2 Article 2 – Elimination of Discrimination Against Women

(a) Article 2.1 requires States Parties to “*combat all forms of discrimination against women through appropriate legislative, institutional and other measures*”<sup>61</sup>.

(b) Additionally, Article 2.2 obliges States Parties to commit themselves to:

*“... modify the social and cultural patterns of conduct of women and men through public education, information, education and communication strategies, with a view to achieving the elimination of harmful cultural and traditional practices and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes, or on stereotyped roles for women and men.”*

1.2.3 Article 3 – Right to Dignity:

(a) The Protocol provides that:

*“1. Every woman shall have the right to dignity inherent in a human being and to the recognition and protection of her human and legal rights.*

*2. Every woman shall have the right to respect as a person and to the free development of her personality”*<sup>62</sup>.

<sup>61</sup> In doing so, States Parties are required to: (a) include in their national constitutions and other legislative instruments, if not already done, the principle of equality between women and men and ensure its effective application; (b) enact and effectively implement appropriate legislative or regulatory measures, including those prohibiting and curbing all forms of discrimination particularly those harmful practices which endanger the health and general well-being of women; (c) integrate a gender perspective in their policy decisions, legislation, development plans, programmes and activities and in all other spheres of life; (d) take corrective and positive action in those areas where discrimination against women in law and in fact continues to exist; (e) support the local, national, regional and continental initiatives directed at eradicating all forms of discrimination against women.”

<sup>62</sup> To ensure these rights, the Protocol requires States Parties to: “... adopt and implement appropriate measures to prohibit any exploitation or degradation of women ... adopt and implement appropriate measures to ensure the protection of every woman’s right to respect for her dignity and protection of women from all forms of violence, particularly sexual and verbal violence.”

- 1.2.4 Article 4 – The Right to Life, Integrity and Security of the Person:
- (a) Article 4.1 stipulates that, “[e]very woman shall be entitled to respect for her life and the integrity and security of her person. All forms of exploitation, cruel, inhuman or degrading punishment and treatment shall be prohibited”<sup>63</sup>.
- 1.2.5 Article 5 – Elimination of Harmful Practices
- (a) Article 5 requires States Parties to, “prohibit and condemn all forms of harmful practices which negatively affect the human rights of women and which are contrary to recognised international standards. States Parties shall take all necessary legislative and other measures to eliminate such practices”<sup>64</sup>.
- 1.2.6 Article 11(3) – Protection of Women in Armed Conflicts
- (a) Article 11 provides for the protection of all women in war-time, irrespective of the population to which they belong (this presumably includes affiliations with religious, tribal or specific demographic groups). In so far as protecting women from physical or sexual violence, Article 11(3) requires that:
- “States Parties undertake to protect asylum seeking women, refugees, returnees and internally displaced persons, against all forms of violence, rape and other forms of sexual exploitation, and to ensure that such acts are considered war crimes, genocide and/or crimes against humanity and that their perpetrators are brought to justice before a competent criminal jurisdiction.”*
- 1.2.7 Article 12(1)(c) – Right to Education and Training – Sexual Abuse and Harassment
- (a) Article 12 provides for women to have equal rights to education and training (see Article 12(1)(a)). Article 12(1)(c) requires States Parties to “take all appropriate measures to ... protect women, especially the girl-child from all forms of abuse, including sexual harassment in schools and other educational institutions and provide for sanctions against the perpetrators of such practices ...”
- 1.2.8 Article 13(m) – Economic and Social Welfare Rights – Pornography
- (a) Article 13 obliges States Parties to “adopt and enforce legislative and other measures to guarantee women equal opportunities in work and career advancement and other economic opportunities.” With respect to eliminating physical abuse and violence against women, Article 13(m) requires States Parties to, “... take effective legislative and administrative measures to prevent the exploitation and abuse of women in advertising and pornography.”

<sup>63</sup> To ensure this, Article 4.2 requires States Parties to “take appropriate and effective measures to: (a) enact and enforce laws to prohibit all forms of violence against women including unwanted or forced sex whether the violence takes place in private or public; (b) adopt such other legislative, administrative, social and economic measures as may be necessary to ensure the prevention, punishment and eradication of all forms of violence against women; (c) identify the causes and consequences of violence against women and take appropriate measures to prevent and eliminate such violence; (d) actively promote peace education through curricula and social communication in order to eradicate elements in traditional and cultural beliefs, practices and stereotypes which legitimise and exacerbate the persistence and tolerance of violence against women; (e) punish the perpetrators of violence against women and implement programmes for the rehabilitation of women victims; (f) establish mechanisms and accessible services for effective information, rehabilitation and reparation for victims of violence against women; (g) prevent and condemn trafficking in women, prosecute the perpetrators of such trafficking and protect those women most at risk; (h) prohibit all medical or scientific experiments on women without their informed consent; (i) provide adequate budgetary and other resources for the implementation and monitoring of actions aimed at preventing and eradicating violence against women; (j) ensure that, in those countries where the death penalty still exists, not to carry out death sentences on pregnant or nursing women; (k) ensure that women and men enjoy equal rights in terms of access to refugee status determination procedures and that women refugees are accorded the full protection and benefits guaranteed under international refugee law, including their own identity and other documents.”

<sup>64</sup> These include (but are not limited to) the: “(a) creation of public awareness in all sectors of society regarding harmful practices through information, formal and informal education and outreach programmes; (b) prohibition, through legislative measures backed by sanctions, of all forms of female genital mutilation, scarification, medicalisation and para-medicalisation of female genital mutilation and all other practices in order to eradicate them; (c) provision of necessary support to victims of harmful practices through basic services such as health services, legal and judicial support, emotional and psychological counselling as well as vocational training to make them self-supporting; (d) protection of women who are at risk of being subjected to harmful practices or all other forms of violence, abuse and intolerance.”



- 1.2.9 Article 14(2)(c) – Health and Reproductive Rights – Medical Abortion
- (a) Article 14 requires that States Parties ensure that, “... *the right to health of women, including sexual and reproductive health is respected and promoted.*” In doing so, States Parties are obliged to take all appropriate measures to “*protect the reproductive rights of women by authorising medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus.*”
- 1.2.10 Article 22(b) – Special Protection of Elderly Women
- (a) Article 22 requires States Parties to protect elderly women. In particular, Article 22(b) requires States Parties to “*ensure the right of elderly women to freedom from violence, including sexual abuse, discrimination based on age and the right to be treated with dignity.*”
- 1.2.11 Article 23(b) – Special Protection of Women with Disabilities
- 1.2.12 Article 23 provides for the protection of women with disabilities. In particular Article 23(b) requires States Parties to undertake to “*ensure the right of women with disabilities to freedom from violence, including sexual abuse, discrimination based on disability and the right to be treated with dignity.*”
- 1.2.13 Article 25 – Remedies
- (a) The Protocol requires States Parties to “*provide for appropriate remedies to any woman whose rights or freedoms, as herein recognised, have been violated; ensure that such remedies are determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by law.*”

## 2. RELEVANT PROVISIONS OF DOMESTIC KENYAN LEGISLATION

- 2.1 The Constitution of Kenya 2010; the Sexual Offences Act 2006; the HIV Prevention and Control Act 2006; the Children’s Act 2001; the Prohibition of Female Genital Mutilation Act 2011; the Counter-Trafficking in Persons Act 2010; the International Crimes Act 2008; the Truth, Justice and Reconciliation Act 2008; the Witness Protection Act 2006; and the Witness Protection Amendment Act 2010 are the most relevant pieces of legislation which implement the provisions of the Maputo Protocol regarding the elimination of violence against women.

## 3. GENERAL RIGHTS OF WOMEN

### 3.1 Constitution of Kenya 2010

- 3.1.1 The Constitution of Kenya provides protection for women against violence and abuse through the following provisions<sup>65</sup>:
- (a) **Article 2(4) – Supremacy of the Constitution:** any law, including customary law that is inconsistent with the Constitution is void to the extent of the inconsistency, and any act or omission in contravention of the Constitution is invalid (Article 2(4)). This provision protects women against harmful cultural practices such as female genital mutilation.
- (b) **Article 21 – Implementation of rights and fundamental freedoms:** Article 21(3) provides that all State organs and all public officers have the duty to address the needs of vulnerable groups within society, including women, older members of society, persons with disabilities, children, youth, members

<sup>65</sup> The Constitution of Kenya. Available at: [www.kenyalaw.org/klr/index.php?id=741](http://www.kenyalaw.org/klr/index.php?id=741)

of minority or marginalised communities, and members of particular ethnic, religious or cultural communities. Article 21(4) provides that the State shall enact and implement legislation to fulfil its international obligations in respect of human rights and fundamental freedoms.

- (c) **Article 22 – Enforcement of Bill of Rights:** Article 22(1) provides 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.
- (d) **Article 23 – Authority of courts to uphold and enforce the Bill of Rights:** Article 23(1) provides that the High Court has jurisdiction, in accordance with Article 165 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. According to Article 23(3), in any proceedings brought under Article 22, a court may grant appropriate relief, including a) a declaration of rights; b) an injunction; c) a conservatory order; d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24; an order for compensation; and f) an order of judicial review.
- (e) **Article 25 – Fundamental rights and freedoms that may not be limited:** Article 25(a) provides that freedom from torture and cruel, inhuman or degrading treatment or punishment shall not be limited despite any other provision in this Constitution.
- (f) **Article 28 – Human dignity:** Article 28 provides that every person has inherent dignity and the right to have that dignity respected and protected.
- (g) **Article 29 – Freedom and security of the person:** Article 29(c) (d) (e) and (f) provides that every person has the right to freedom and security of the person, which includes the right not to be:
  - a) subjected to any form of violence from either public or private sources;
  - b) subjected to torture in any manner, whether physical or psychological;
  - c) subjected to corporal punishment; or
  - d) treated or punished in a cruel, in human or degrading manner.
- (h) **Article 33 – Freedom of expression:** Article 33(2)(b)(c) and (d) provides that the right to freedom of expression does not extend to
  - a) incitement to violence;
  - b) hate speech;
  - c) advocacy of hatred that is based on any ground of discrimination specified or contemplated in Article 27(4) (which prohibits the State from discriminating against any person).
- (i) **Article 48 – Access to Justice:** Article 48 provides that the State shall ensure access to justice for all persons and, if any fee be required, it shall be reasonable and shall not impede access to justice.
- (j) **Article 50 – Fair Hearing:** Article 50(9) provides that Parliament shall enact legislation for the protection, rights and welfare of victims of offences.
- (k) **Article 53 – Children:** Article 53(d) provides that every child has the right to be protected from abuse, neglect, harmful cultural practices, all forms of violence, in human treatment and punishment, and hazardous or exploitative labour.

- (l) **Article 55 – Youth:** Article 55(d) provides that the State shall take measures, including affirmative action programmes, to ensure that the youth are protected from harmful cultural practices and exploitation.
- (m) **Article 59 – Kenyan National Human Rights and Equality Commission:** Article 59 provides that there is established the Kenyan National Human Rights and Equality Commission. The functions of the Commission are, *inter alia*:
  - a) to receive and investigate complaints about alleged abuses of human rights and to take steps to secure appropriate redress where human rights have been violated (59(2)(e));
  - b) to investigate any conduct in state affairs, or any act or omission in public administration in any sphere of government, that is alleged or suspected to be prejudicial or improper or to result in any impropriety or prejudice (59(2)(h));
  - c) to investigate complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct (59(2)(i)); and
  - d) to report on complaints investigated under paragraphs (h) and (i) and take remedial action (59(2)(j)).

Every person has the right to complain to the Commission, alleging that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened (59(3)).

#### 4. PROTECTION FROM SEXUAL VIOLENCE (MAPUTO PROTOCOL ARTICLES 3, 4, 12, 22, 23 AND 25)

##### 4.1 The Sexual Offences Act 2006

- 4.1.1 The Sexual Offences Act<sup>66</sup> was introduced to address several perceived failings in Kenya's treatment of sexual offenders and to respond to the perceived rise in cases of rape and sexual assault<sup>67</sup>. The Act consolidated and revised provisions relating to sexual and gender-based violence, which were previously contained in separate laws. It also categorised sexual crimes as crimes of violence, rather than crimes against morality. New crimes were introduced, including sexual assault, gang rape, child trafficking, intentional transmission of HIV and other life threatening conditions. The Act is gender-neutral, meaning women and men can be victims and perpetrators. Minimum sentences are established for the most serious sexual offences<sup>68</sup>.
- 4.1.2 Section 29 of the Sexual Offences Act makes it an offence to force a woman to commit a sexual act for a cultural or religious reason. This would include wife inheritance and ritual cleansing, practised by the Luo, Luhya, Teso and MijiKenda communities, in which the male relative of a deceased husband 'inherits' his widow as a wife, who may be forced to have sex with a social outcast to cleanse her of her dead husband's spirit<sup>69</sup>. To date, there has not been any prosecution in respect of widow inheritance pursuant to Section 29 of the Sexual Offences Act.

<sup>66</sup> The Sexual Offences Act. Available at: [www.kenyalaw.org/kenyalaw/klr\\_app/frames.php](http://www.kenyalaw.org/kenyalaw/klr_app/frames.php)

<sup>67</sup> Hon. N Ndungu, 'Legislation for Sexual Violence in Africa: Preparing and Delivering Evidentiary Requirements' (Undated) 2. Available at: [www.svri.org/legislation.pdf](http://www.svri.org/legislation.pdf)

<sup>68</sup> FIDA Kenya, 'Advancing Women's Rights in Kenya' (2013) 28–29. Available at: <http://fidakenya.org/wp-content/uploads/2013/07/Women-Rights-Handbook.pdf>

<sup>69</sup> FIDA Kenya, 'Advancing Women's Rights in Kenya' (2013) 19–20. Available at: <http://fidakenya.org/wp-content/uploads/2013/07/Women-Rights-Handbook.pdf>

- 4.1.3 Thus, the Sexual Offences Act goes some way towards addressing Articles 3, 4, 12, 22, 23 and 25 of the Maputo Protocol. In particular, it criminalises the following:
- (a) rape (Section 3) with a prison term of at least ten years to life imprisonment;
  - (b) attempted rape (Section 4) with a prison term of at least five years to life imprisonment;
  - (c) sexual assault (Section 5) with a prison term of at least ten years to life imprisonment;
  - (d) compelled or induced indecent acts (Section 6) with at least five years imprisonment;
  - (e) rape or indecent acts within view of family member, child or person with mental disabilities (Section 7) with a prison sentence of at least ten years;
  - (f) defilement of a child (Section 8) with life imprisonment for defilement of a child aged eleven or less, and with a minimum prison sentence of 20 years for defilement of a child aged twelve to fifteen years;
  - (g) attempted defilement of a child with a prison term of at least ten years;
  - (h) gang rape (Section 10) with a prison term of at least fifteen years to life imprisonment;
  - (i) indecent act with a child (Section 11) with a prison sentence of at least ten years;
  - (j) indecent act with an adult (Section 11A) with a prison term of at least five years and maximum fine of 50,000 shillings or both;
  - (k) sexual harassment (Section 23) with a prison term of at least three years or a fine of minimum 100,000 shillings or both;
  - (l) sexual offences committed by persons in a position of authority and/or trust (Sections 24 and 25) with a prison term of at least ten years;
  - (m) deliberate transmission of HIV or any other life threatening sexually transmitted disease (Section 26) with a prison term of at least fifteen years;
  - (n) administration/distribution of a substance with intent to engage in sexual activity (Sections 27 and 28) with a prison sentence of at least ten years;
  - (o) forcing a person to take part in a sexual act for cultural or religious reasons (Section 29); and
  - (p) Section 46 provides that the Minister responsible for legal affairs and public prosecutions shall establish a national policy framework to guide the implementation and administration of the act in order to secure acceptable and uniform treatment of all sexual related offences including treatment and care of victims of sexual offences.
- 4.1.4 However, the Sexual Offences Act provides the following defence:
- (a) it is not unlawful to coerce someone into a sexual act where the relevant parties are lawfully married to each other (Section 43(5)).

## 4.2 Concerns with the Sexual Offences Act

- 4.2.1 The Sexual Offences Act needs to go further in the protection of women from violence. In particular, as noted above, marital rape escapes criminalisation pursuant to the caveat set out at Section 43(5).

- 4.2.2 Another concern is that, whilst Section 23 of the Sexual Offences Act makes it an offence for a public official or a person in a position of authority to commit sexual harassment (implementing Article 12 of the Maputo Protocol) it does not provide for an equivalent offence for an ordinary citizen<sup>70</sup>. This has diluted the earlier provisions of Section 144 of the Penal Code (which were repealed by the Sexual Offences Act), pursuant to which *any person “intending to insult the modesty of any woman... [who] utters any word, makes any sound or gesture or exhibits any object, intending that the word or sound shall be heard, or that the gesture or object shall be seen, by the woman or girl, or intrudes upon the privacy of the woman or girl, is guilty of a misdemeanour and is liable to imprisonment for one year”*<sup>71</sup>. The issue is highlighted by the anecdotal evidence of Kiarie Waweru, Senior Principal Magistrate of Kibera Law Courts in Nairobi in respect of a case he was trying in which the accused *“harassed a girl of 12 years by words whereby he constantly nagged her to have sexual intercourse with him until she had to run away from home.”*<sup>72</sup> While previously this offence would have been dealt with under Section 144(3) of the Kenyan Penal Code, since its repeal and the introduction of the Sexual Offences Act, Kenyan law no longer provides for this type of offence. As a result, Mr Waweru *“had no option but to acquit the accused.”*<sup>73</sup>
- 4.2.3 In addition, regional focus groups in Kenya organised by the Federation of Women Lawyers (“**FIDA**”) have criticised the Sexual Offences Act for failing to take into account in sentencing the vulnerability of elderly victims, which is required by Article 22 of the Maputo Protocol<sup>74</sup>. Elderly people have been accused of witchcraft upon the occurrence of unexplained deaths and events such as famine, and have been burnt to death or lynched as a result. For example, in February 2009, five elderly people were burnt to death in Kisii after having been accused of abducting a boy and making him dumb<sup>75</sup>. In May 2013 the United Nations Committee Against Torture urged Kenya to amend the Witchcraft Act of 1925 to conform with the Kenyan constitution and international human rights standards and to abolish the practice of lynching. The Committee also urged Kenya to *“investigate, prosecute and appropriately punish the perpetrators of such acts, in order to ensure the security and safety of all persons”*.<sup>76</sup> (The Sexual Offences Act similarly does not account specifically for the vulnerability of disabled victims as required by Article 23 of the Maputo Protocol.)
- 4.2.4 FIDA regional focus groups in Kenya have also criticised the Sexual Offences Act for not providing sufficiently harsh penalties for teachers who sexually abuse their students; and for allowing sexual offences to be bailable. It is argued that such offences should not be bailable and/or bail conditions should be high<sup>77</sup>.

---

<sup>70</sup> K Waweru, ‘The Sexual Offences Act: Omissions and Ambiguities’ (2007) KLR Journal. Available at: [www.kenyalaw.org/klr/index.php?id=424](http://www.kenyalaw.org/klr/index.php?id=424)

<sup>71</sup> Kenyan Penal Code, repealed s 144(3) (by Sexual Offence Act 2006, Schedule 2, Section 1(2))

<sup>72</sup> K Waweru, ‘The Sexual Offences Act: Omissions and Ambiguities’ (2007) KLR Journal. Available at: [www.kenyalaw.org/klr/index.php?id=424](http://www.kenyalaw.org/klr/index.php?id=424)

<sup>73</sup> Ibid.

<sup>74</sup> Federation of Women Lawyers Kenya, ‘Implementation of the Sexual Offences Act – Justice Sector’ Research Report (2010) 17. Available at: [www.urpn.org/uploads/1/3/1/5/13155817/implementation-of-the-sexual-offences-act\\_in\\_kenya\\_fida-.pdf](http://www.urpn.org/uploads/1/3/1/5/13155817/implementation-of-the-sexual-offences-act_in_kenya_fida-.pdf)

<sup>75</sup> FIDA Kenya, ‘Advancing Women’s Rights in Kenya’ (2013) 20. Available at: <http://fidakenya.org/wp-content/uploads/2013/07/Women-Rights-Handbook.pdf>

<sup>76</sup> UN Committee Against Torture, ‘Concluding observations on the second periodic report of Kenya, adopted by the Committee at its fiftieth session (5–13 May 2013)’ (2013) 5 Available at: [http://www2.ohchr.org/english/bodies/cat/docs/co/CAT.C.KEN.CO.R.2-AUV\\_rev.1\\_en.doc](http://www2.ohchr.org/english/bodies/cat/docs/co/CAT.C.KEN.CO.R.2-AUV_rev.1_en.doc)

<sup>77</sup> Federation of Women Lawyers Kenya, ‘Implementation of the Sexual Offences Act – Justice Sector’ Research Report (2010) 17 [www.urpn.org/uploads/1/3/1/5/13155817/implementation-of-the-sexual-offences-act\\_in\\_kenya\\_fida-.pdf](http://www.urpn.org/uploads/1/3/1/5/13155817/implementation-of-the-sexual-offences-act_in_kenya_fida-.pdf)

- 4.2.5 The Kenyan Parliament did vote in favour of repealing Section 38 of the Sexual Offences Act, which provided for very severe penalties (in the form of punishment equal to that for the offence complained of) for false allegations. This, in theory, meant that a person making a false allegation could be liable to life imprisonment. Recognising that this provision may deter truthful victims from coming forward<sup>78</sup>, and given that Section 129 of the Kenyan Penal Code already criminalises false accusations and imposes a less severe penalty of three years, Section 38 was repealed by the Statute Law Miscellaneous Amendments Act 2012<sup>79</sup>.

### 4.3 Implementation

- 4.3.1 Recognising the importance of effective implementation to ensure the effectiveness of the Sexual Offences Act, the Kenyan Attorney General set up the Task Force on the Implementation of the Sexual Offences Act in 2007 to oversee the application of the Act<sup>80</sup>. The Task Force has clear terms of reference as set out in the Gazette Notice Number 2155 of 16 March 2007<sup>81</sup>. Of particular note, the Task Force was tasked with establishing regulations for the implementation of the Act and therefore drafted the Sexual Offences Regulations 2008 and the Sexual Offences (Dangerous Offenders DNA Databank) Regulations 2008.

- (a) The Sexual Offences Regulations 2008 require the Registrar of the High Court to keep a Register of Convicted Sex Offenders<sup>82</sup>. The Register was launched in April 2012 and the police, the judiciary and the Teachers Service Commission, among other institutions, will have access to the system<sup>83</sup>. Whilst the Register has been launched, there is no further information available on whether it is functional. It is hoped however that the register will play an important role in preventing sex offenders from obtaining positions of authority within a community and having the opportunity to re-offend<sup>84</sup>.
- (b) The Sexual Offences (Dangerous Offenders DNA Databank) Regulations 2008 provide that the Director of Criminal Investigations shall establish a DNA Databank that shall consist of a crime scene index and dangerous offenders index<sup>85</sup>. The Databank has not yet been established. However, again, it is hoped that this will act as a preventative measure, but will also assist the courts in securing convictions for repeat offenders.

- 4.4 In 2014 the Director of Public Prosecutions (DPP) through Gazette Notice No. 14724 created a cadre of special public prosecutors to prosecute offences under the Sexual Offences Act (no. 3 of 2006) and gender-based violence cases under the Penal Code (cap. 63).

<sup>78</sup> See FIDA Kenya and the Global Initiative for Economic, Social and Cultural Rights, 'Joint Submission of Shadow Report to the Human Rights Committee on International Covenant on Civil and Political Rights'(presented for the Kenya 105th Session 9 on 27 July, 2012) 17 [http://www2.ohchr.org/english/bodies/hrc/docs/ngos/GI\\_ESCR\\_FIDA\\_Kenya\\_HRC105.pdf](http://www2.ohchr.org/english/bodies/hrc/docs/ngos/GI_ESCR_FIDA_Kenya_HRC105.pdf)

<sup>79</sup> The Statute Law Miscellaneous Amendments Act 2012, Section 32

<sup>80</sup> Federation of Women Lawyers Kenya, 'Implementation of the Sexual Offences Act – Justice Sector' Research Report (2010) 18. Available at: [www.urpn.org/uploads/1/3/1/5/13155817/implementation-of-the-sexual-offences-act\\_in\\_kenya\\_fida-.pdf](http://www.urpn.org/uploads/1/3/1/5/13155817/implementation-of-the-sexual-offences-act_in_kenya_fida-.pdf)

<sup>81</sup> 'Gazette Notice No. 2155 Task Force on the Implementation of Sexual Offence Act 2006' (16 March 2007) Vol. CIX-No.23 Kenya Gazette. Available at: [www.kenyalaw.org/KenyaGazette/view\\_gazette.php?title=2091](http://www.kenyalaw.org/KenyaGazette/view_gazette.php?title=2091)

<sup>82</sup> Sexual Offences Regulations 2008, regulation 7. Available at: [www.kenyalaw.org/kenyalaw/klr\\_home](http://www.kenyalaw.org/kenyalaw/klr_home)

<sup>83</sup> See R Muthoga, 'Finally...Kenya's Sex Offenders Register Launched' (10 May 2012). Available at: <http://physiciansforhumanrights.org/blog/finally-kenyas-sex-offenders-register-launched.html>

<sup>84</sup> See R Otini, 'Kenya Judiciary unveils new database on sex pests', Africa Review (25 April 2012). Available at: [www.africareview.com/News/Kenyan-Judiciary-unveils-new-database-on-sex-pests/-/979180/1393496/-/s2e8d1z/-/index.html](http://www.africareview.com/News/Kenyan-Judiciary-unveils-new-database-on-sex-pests/-/979180/1393496/-/s2e8d1z/-/index.html)

<sup>85</sup> Sexual Offences (Dangerous Offenders DNA Databank) Regulations 2008, regulation 3.



## 4.5 Public Awareness

- 4.5.1 The Task Force was also tasked with carrying out “*public education, awareness and sensitization programmes or campaigns*” to enhance public awareness about the Sexual Offences Act<sup>86</sup>. To this end, in 2011 the Task Force was, for instance, developing the curriculum and training programme for the law enforcement sector<sup>87</sup>.
- 4.5.2 Several NGOs and charities are also working to promote public awareness. The Centre for Legal Information and Communication in Kenya (“**CLICK**”) organises public forums to educate the public on their rights and obligations under the Sexual Offences Act and has set up the “Big Sister Project”, which aims to sensitise teenage girls to the Sexual Offences Act and offers them self-defence classes<sup>88</sup>. In association with the Kenya Woman Judges Association, it is reported that CLICK is also training judges and magistrates on the provisions of the Sexual Offences Act<sup>89</sup>.
- 4.5.3 “**Wildaf**” is a pan-African NGO that works to promote strategies that connect law and development to promote a culture for the exercise of and respect for women’s human rights in Africa<sup>90</sup>. In collaboration with various stakeholders, including the Office of the Commissioner of Police and the Office of the Attorney General, Wildaf-Kenya has set up training programmes and prepared reference manuals to instruct those in a position of authority as to the proper implementation of the provisions of the Sexual Offences Act. Wildaf-Kenya trains doctors and officials from the Kenyan police who tend to be the first point of contact for victims of sexual violence<sup>91</sup>. It has also developed, in partnership with the Department of Public Prosecutions, a Prosecutors Training Manual on the Sexual Offences Act 2006. This reference manual is intended as a training tool and reference material for those prosecuting sexual offenders. The manual was launched by the Attorney General, Hon. S. Amos Wako, in December 2007 as a key prosecution document. It is now used as point of reference by prosecutors in sexual offences case<sup>92</sup>.
- 4.5.4 Wildaf-Kenya, in joint collaboration with the Kenyan Police and, in particular, the Director of Community Policing, Gender and Children Issues, has also developed a training manual for law enforcement officers on the Sexual Offences Act 2006. The document has been pilot tested in the Kenyan Police College – Kiganjo, the Criminal Investigation Department Training School and the General Service Unit Training School. It is hoped that the training manual will become entrenched into the training syllabi of the police force countrywide<sup>93</sup>.
- 4.5.5 Nairobi’s Women’s Hospital Gender Violence Recovery Center (the “**GVRC**”) annual report for 2011–2012 recorded the following statistics, which give an overview of the number of cases of gender-based violence reported to the GVRC for the years 2001 to 2012, showing an overall increase over time<sup>94</sup>.

<sup>86</sup> ‘Gazette Notice No. 2155 Task Force on the Implementation of Sexual Offence Act 2006’ (16 March 2007) Vol. CIX-No.23 Kenya Gazette. Available at: [www.kenyalaw.org/KenyaGazette/view\\_gazette.php?title=2091](http://www.kenyalaw.org/KenyaGazette/view_gazette.php?title=2091)

<sup>87</sup> Hon. N Ndungu, ‘The Kenyan Experience’ (Presented at Regional Seminar for Asian Parliaments 15–17 September 2011) 4. Available at: [www.ipu.org/splz-e/newdelhi11/ndungu.pdf](http://www.ipu.org/splz-e/newdelhi11/ndungu.pdf)

<sup>88</sup> The Kenyan Sexual Offences Act website, ‘Our Partners’. Available at: <http://thekenyasexualoffencesact.com> (accessed on 27 August 2013).

<sup>89</sup> Ibid.

<sup>90</sup> Wildaf website, ‘Homepage’. Available at: [www.wildafkenya.org](http://www.wildafkenya.org) (accessed on 27 August 2013).

<sup>91</sup> Wildaf website, ‘Reform Agenda’. Available at: [www.wildafkenya.org/reform-agenda](http://www.wildafkenya.org/reform-agenda) (accessed on 27 August 2013).

<sup>92</sup> Ibid.

<sup>93</sup> Wildaf website, ‘Publications’. Available at: [www.wildafkenya.org/law-enforcers-training-manual-on-the-sexual-offences-act-2006](http://www.wildafkenya.org/law-enforcers-training-manual-on-the-sexual-offences-act-2006) (accessed on 27 August 2013).

<sup>94</sup> Gender Violence Recovery Centre – Nairobi Women’s Hospital. ‘Annual Report 2011–2012’ (8 April 2013) 6 Available at: [www.gvrc.or.ke/phocadownload/annual%20report%202011-2012.pdf](http://www.gvrc.or.ke/phocadownload/annual%20report%202011-2012.pdf)



Year	Sexual Violence	Physical Violence	TOTAL
2011–2012	2532	422	2954
2010–2011	2524	385	2909
2009–2010	2100	387	2487
2008–2009	2398	407	2805
2007–2008	2338	412	2750
2006–2007	2039	299	2338
2005–2006	1617	353	1970
2004–2005	1483	273	1756
2003–2004	284	762	1046
2001–2003	186	140	326
TOTAL	17501	3840	21341

4.5.6 The GVRC reports that more remote communities have low levels of knowledge of Kenyan laws relating to human rights and freedoms, as well as the Sexual Offences Act<sup>95</sup>. Some local communities have resisted the efforts of the GVRC to educate them of the scope of the Sexual Offences Act, maintaining that religious laws trumped national laws, including the Constitution<sup>96</sup>, notwithstanding that Article 2(4) of the Constitution provides that it shall override any customary law that is inconsistent with it (see paragraph 2.1.1(a) above).

4.5.7 The implementation of the Sexual Offences Act remains a live issue. In June 2013 it was discussed by the Kenyan Parliament with regards to the need to establish a gender unit in every police station in the country<sup>97</sup>. There are no gender units established yet, there are however gender desks. In 2004, the Kenyan police force established gender desks within police units and stations to facilitate reports of domestic and sexual violence and designated desks were set up in many police stations across Kenya to deal with gender-based violence. The intention was to provide trained personnel and a private area where victims could record statements and discuss their ordeals. But the facilities have never functioned properly due to lack of government funding. The establishment of gender desks is mandated by the National Policy on Gender and Development (2000), The Plan of Action of the National Policy on Gender and Development (2000), the PRSP (2001–2004) in which the government commits to address gender issues.

#### 4.6 HIV and AIDS Prevention and Control Act 2006

4.6.1 The HIV Prevention and Control Act 2006 aims to provide measures for the prevention, management and control of HIV and AIDS, including raising public awareness thereof. It also prohibits discrimination of those affected by HIV/AIDS. Of particular relevance in the context of violence against women are the following provisions:

- (a) Section 19, which provides that the government shall make available to the maximum of its available resources access to essential healthcare services including essential medicines at affordable prices by persons with HIV/AIDS or exposed to the risk of HIV infection; and

<sup>95</sup> Gender Violence Recovery Centre – Nairobi Women’s Hospital. ‘Annual Report 2011–2012’(8 April 2013) 28 Available at: [www.gvrc.or.ke/phocadownload/annual%20report%202011-2012.pdf](http://www.gvrc.or.ke/phocadownload/annual%20report%202011-2012.pdf)

<sup>96</sup> Ibid.

<sup>97</sup> ‘Kenya National Assembly Official Report’ (6 June 2013) 17 Available at: [www.parliament.go.ke/plone/national-assembly/business/hansard/thursday-06th-june-2013/view](http://www.parliament.go.ke/plone/national-assembly/business/hansard/thursday-06th-june-2013/view)

(b) Sections 24(2), (3), which make it an offence for a person with HIV/AIDS to knowingly and recklessly put another person at risk of HIV infection, subject to a penalty of seven years imprisonment and/or a fine of five hundred thousand shillings. To date, there have been no such prosecutions under this section of the Act.

4.6.2 Section 24 of the Act has been criticised by civil society for being too vague and overly broad<sup>98</sup>. In 2011 the Aids Law Project brought a petition before the Nairobi High Court asking the Court to declare Section 24 to be unconstitutional. The Court declined to make such an order but ordered that a hearing be held on the issue. At the time of writing, this case is still ongoing.

4.6.3 It should also be noted that the Act is for the most part gender neutral and therefore makes little to no provision for the gendered impact of HIV/AIDS.

### 4.7 Domestic Violence

4.7.1 At present, Kenya does not have a comprehensive law that deals with the issue of domestic violence. The current legal framework, however, addresses this issue to some degree. As described above, Article 28 of the Constitution provides for the protection of and respect for the dignity of every individual and Article 29 deals with freedom of the individual and his or her security. An individual can bring a claim for infringement of or threat to these constitutional rights through the Kenyan courts. Similarly Section 250 of the Penal Code makes it an offence to assault an individual, which is punishable by imprisonment of up to a year, and Section 251 deals with assault leading to bodily harm, which warrants imprisonment for up to five years.

4.7.2 Kenyan matrimonial laws also offer some degree of protection to those suffering domestic abuse. For instance, Section 8(1)(c) of the Matrimonial Causes Act 1962 (revised in 2008), for instance, provides that a partner can claim divorce on the basis of having been treated cruelly by the spouse. The Subordinate Courts (Separation and Maintenance) Act 1962 (revised in 2010) (Section 3) allows a woman to seek help from the court if she or her children have been treated with cruelty, or have suffered neglect, at the hands of her husband.

4.7.3 Women can, however, suffer domestic abuse in many guises: verbal, violent or passive, that is not expressly provided for by current legislation. There also needs to be a comprehensive legal framework that determines how the victim can be protected on an ongoing basis; duties of police officers; protection of dependents etc.

4.7.4 There have been several bills aimed at protecting the victim of domestic violence, notably the Protection Against Domestic Violence Bill 2012 and the Family Protection (Domestic Violence) Bill 2007<sup>99</sup>. However, neither of these bills has been enacted as of August 2013. Kenya needs to address this in order to fully implement Articles 1, 3 and 4 of the Maputo Protocol.

4.7.5 Should the Protection Against Domestic Violence Bill come into effect, it would make domestic violence “*in all its forms*” unlawful (Section 6(1)(a)) and would empower the courts to make certain orders to protect victims of domestic violence (Section 6(1)(B), (Part II)). It would offer instructions to law enforcement officers and the court on how to apply and enforce such a protection order and it would make it an offence to breach a protection order (Section 25), which would carry a penalty of a fine or 12 months imprisonment.

<sup>98</sup> *Aids Law Project v The Attorney General and Director of Public Prosecutions*, Petition No. 97 of 2010, paragraph 5. Available at: [http://kenyalaw.org/Downloads\\_FreeCases/81517.pdf](http://kenyalaw.org/Downloads_FreeCases/81517.pdf)

<sup>99</sup> The Protection Against Domestic Violence Bill 2012. Available at: [www.cickenya.org/cicoldsite/bills/protection-against-domestic-violence-bill-2012](http://www.cickenya.org/cicoldsite/bills/protection-against-domestic-violence-bill-2012); N Baraza (Kenyan Law Reform Commission), ‘Family Law Reforms in Kenya: An Overview, Presentation at Heinrich Boll Foundation’s Gender Forum in Nairobi’ (30 April 2009). Available at: [www.ke.boell.org/downloads/Nancy\\_Baraza\\_-\\_Family\\_Law\\_Reforms\\_in\\_Kenya.pdf](http://www.ke.boell.org/downloads/Nancy_Baraza_-_Family_Law_Reforms_in_Kenya.pdf)

## 5. FEMALE GENITAL MUTILATION (MAPUTO PROTOCOL ARTICLES 2, 3, 4 AND 5)

**5.1** Female genital mutilation (“**FGM**”) is an acute form of sexual violence that affects a significant proportion of women and girls in Kenya. According to the Kenya Demographic and Health Survey 2008/2009, 27.1% of Kenyan women were circumcised<sup>100</sup>. The prevalence of FGM varies according to ethnicity. According to a 2013 UNICEF report, FGM is now rare among the Kalenjin, Kikuyu and Meru tribes. However, more than 95% of ethnic Somali and Kisii girls are still subjected to FGM as of 2013<sup>101</sup>.

**5.2** The Kenyan Government has sought to address the issue through the implementation of two key pieces of legislation: the Children’s Act 2001 (which made it an offence to perform FGM on a child) and the FGM Act 2011 (which broadened the scope of the offence). While this legislation is a welcome development in the protection of women from violence, the practice of FGM persists in Kenya and more needs to be done to implement the law effectively.

### 5.3 The Children’s Act 2001

5.3.1 In 2001, the Kenyan Parliament enacted the Children’s Act which implements Kenya’s obligations under the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child and prohibits FGM. While the Kenyan Penal Code has for some time made it an offence to inflict grievous bodily harm on another, the Children’s Act was the first time that FGM was addressed directly by the Kenyan legislature. The Children’s Act implements Articles 2 and 5 of the Maputo Protocol.

5.3.2 The relevant provisions of the Children’s Act 2001 are:

- (a) Section 13, which provides that a child shall be protected from physical and psychological abuse, and should not be exploited;
- (b) Section 14, which provides that no person shall subject a child to female circumcision, early marriage or other cultural rites which are likely to harm the child’s wellbeing; and
- (c) Section 20, which provides that if a person infringes any of the rights of a child as specified in Sections 5 to 19 they will be liable to a prison term not exceeding twelve months, or to a fine not exceeding fifty thousand shillings, or to both.

### 5.4 Implementation

5.4.1 While the Children’s Act has addressed FGM, its impact has reportedly been limited due to several factors, including:

- (a) the penalties have been criticised as too lenient, such that they do not act as a sufficient deterrent<sup>102</sup>;
- (b) the Act only applies to children. The United Nations Population Fund (“**UNFPA**”) has observed that some communities subjected adult women to female circumcision to avoid the scope of the Children’s Act, although that loophole should have been closed by the introduction of the FGM Act 2011, referred to below<sup>103</sup>; and

<sup>100</sup> Kenya National Bureau of Statistics, ‘Kenya Demographic and Health Survey’ (June 2010) 265 Table 16.6. Available at: [www.measuredhs.com/pubs/pdf/FR229/FR229.pdf](http://www.measuredhs.com/pubs/pdf/FR229/FR229.pdf). (While this is a 2008/2009 survey, Kenyan lawyers (working through Oxfam) have confirmed that this is most recent national survey as at September 2013. Accurate data on FGM is difficult to obtain due to the sensitive and private nature of the offence.)

<sup>101</sup> UNICEF, ‘Female Genital Mutilation/Cutting, A Statistical Overview and exploration of the dynamics of change’ (2013) 115–116. Available at: [www.unicef.org/media/files/FGCM\\_Lo\\_res.pdf](http://www.unicef.org/media/files/FGCM_Lo_res.pdf)

<sup>102</sup> D Smith, ‘Kenya’s FGM Laws need to be more of a deterrent’ (*Figio.org*, 29 May 2012). Available at: [www.figo.org/news/kenyas-fgm-laws-need-be-more-deterrent-0010097](http://www.figo.org/news/kenyas-fgm-laws-need-be-more-deterrent-0010097)

<sup>103</sup> UNFPA, ‘Legislative Reform in Kenya to Speed Up Abandonment of FGM/C. Strong Government Policy to Support New Law’ (undated), 2. Available at: [www.unfpa.org/gender/docs/fgmc\\_kit/Kenya-1.pdf](http://www.unfpa.org/gender/docs/fgmc_kit/Kenya-1.pdf)

(c) the Act was not widely publicised by the government, so many communities do not know that it exists<sup>104</sup>.

5.4.2 There was a landmark conviction of a father and circumciser by a Narok Court in April 2010, which raised the profile of the Children's Act. In this case a twelve year-old girl, Sasiano Nchoe, bled to death following her circumcision<sup>105</sup>. Upon persistent advocacy from a local organisation, Tasaru Ntomonok Initiative (a local safe house for girls escaping FGM), and Equality Now (an international human rights organisation), Kenyan law enforcement pursued the case and in April 2010, the circumciser and Sasiano's father both pleaded guilty to manslaughter and were each sentenced to ten years' imprisonment<sup>106</sup>.

5.4.3 It is reported in Kenyan media that these convictions and penalties "sent shock waves" through local communities<sup>107</sup>. Nevertheless, a Feed the Minds and Population Council Joint Report study in two Kenyan districts concluded that the Children's Act was not sufficiently implemented<sup>108</sup>.

## 5.5 Prohibition of Female Genital Mutilation Act 2011 ("FGM Act")

5.5.1 The FGM Act addresses the prohibition of FGM more comprehensively and has directly implemented Articles 2 and 5 of the Maputo Protocol. The FGM Act applies to a wide range of perpetrators and imposes relatively severe penalties. The FGM Act also includes an extra-territoriality clause, which closes a legal loophole in preventing girls being taken to or from Kenya for the purpose of performing FGM.

5.5.2 The FGM Act makes it an offence to<sup>109</sup>:

- (a) perform FGM on another person. If a person commits such an offence, and it results in the death of the other person, they could be liable to life imprisonment. Mere consent to the act is not a defence (Section 19);
- (b) aid, abet, counsel or procure another person to perform FGM (Section 20);
- (c) procure a person to perform FGM in another country (Section 21). It is an offence if the person takes another person from Kenya to another country, or arranges for another person to be brought into Kenya from another country, with the intention of having that other person subjected to FGM;
- (d) allow the use of premises to perform FGM (Section 22). A person who knowingly allows any premises, for which that person is in control of, or responsible for, to be used for purposes of performing FGM commits an offence;
- (e) possess tools or equipment to be used for the purpose of FGM (Section 23);
- (f) fail to report the commission of an offence (Section 24). When aware the act has been committed, it is an offence not to report it to a law enforcement officer; and

<sup>104</sup> Feed the Minds and Population Council report, 'Female Genital Mutilation Practices in Kenya: The role of alternative rights of passage, A case study of Kisii and Kuria districts,' 9. Available at: [www.feedtheminds.org/downloads/FGM%20Report\\_March2011.pdf](http://www.feedtheminds.org/downloads/FGM%20Report_March2011.pdf)

<sup>105</sup> UNFPA, 'Legislative Reform in Kenya to Speed Up Abandonment of FGM/C. Strong Government Policy to Support New Law' (undated),3. Available at: [www.unfpa.org/gender/docs/fgmc\\_kit/Kenya-1.pdf](http://www.unfpa.org/gender/docs/fgmc_kit/Kenya-1.pdf)

<sup>106</sup> Ibid., 3

<sup>107</sup> 'A Harsh 10-year lesson for father over female "cut", *Kenyan Daily Nation* (26 June 2010). Available at: [www.nation.co.ke/News/A-harsh-10-year-lesson-for-father-over-female-cut-/1056/947152/-/nkxj00/-/index.html](http://www.nation.co.ke/News/A-harsh-10-year-lesson-for-father-over-female-cut-/1056/947152/-/nkxj00/-/index.html)

<sup>108</sup> Female Genital Mutilation practices in Kenya: The Role of Alternative Rites of Passage – A case study of Kisii and Kuria districts. Feed the Minds and Population Council report, 'Female Genital Mutilation Practices in Kenya: The role of alternative rights of passage, A case study of Kisii and Kuria districts,' 9, [www.feedtheminds.org/downloads/FGM%20Report\\_March2011.pdf](http://www.feedtheminds.org/downloads/FGM%20Report_March2011.pdf)

<sup>109</sup> Prohibition of Female Genital Mutilation Act 2011. Available at: [www.kenyalaw.org/kenyalaw/klr\\_home](http://www.kenyalaw.org/kenyalaw/klr_home)

(g) use derogatory or abusive language to embarrass a woman for having not undergone FGM (Section 25). Any person doing so commits an offence and could face a prison term of not less than six months, or to a fine of not less than fifty thousand shillings, or both.

5.5.3 Unless a penalty has already been specified for a particular offence, a person who commits an offence under the FGM Act could be liable to a prison term of no less than three years, or to a fine of not less than two hundred thousand shillings, or both (Section 29).

## 5.6 Implementation

5.6.1 In recognition of the need to raise public awareness of the FGM Act, the Kenyan government has committed to a comprehensive National Policy for the Abandonment of FGM, which was approved by Kenya's Cabinet in 2010<sup>110</sup>. This National Policy was developed in 2009 by the Ministry of Gender, Children and Social Development with support from civil society. The National Policy's key provisions are incorporated in the FGM Act. For example, Section 27(c) of the FGM Act requires the government to take necessary steps within its available resources to undertake public education and sensitise the people of Kenya on the dangers and adverse effects of FGM.

5.6.2 Similarly, Part II of the FGM Act provides for an Anti-Female Genital Mutilation Board, whose envisaged role includes co-ordinating public awareness programmes on the practice of FGM (Section 5(a)); advising the government on the implementation of the FGM Act (Section 5(b)); designing and formulating a policy on the planning, financing and co-ordinating of all activities relating to FGM (Section 5(c)(d)); designing programmes aimed at the total abandonment of FGM (Section 5(e)). The Board was established in December 2013 and a head was appointed in January 2014.

5.6.3 Civil society is also playing a crucial role in assessing and promoting implementation of the FGM Act. Of particular note is the UNFPA-UNICEF Joint Programme on Female Genital Mutilation. UNFPA-UNICEF Joint Programme operates in 15 African countries (known as "**cooperating countries**") and was established as the main UN instrument to promote acceleration of the abandonment of FGM. Within Kenya, the UNFPA-UNICEF Joint Programme supported the drafting of the National Policy for the Abandonment of Female Genital Mutilation. It has also coordinated with local partners to promote public awareness of the FGM Act. For instance, the Joint Programme reported in 2011 that it supported the NGO Women's Empowerment Link to conduct a training session for 31 primary school teachers on how to work with students and parents to prevent FGM. The teachers then organised forums on FGM, gender-based violence and human rights for 51 parents, 87 teachers and 1,612 students aged 12 to 15<sup>111</sup>.

5.6.4 The Joint-Programme has also been monitoring and assessing the success of public awareness campaigns within the cooperating countries. In 2012, Kenya is reported to have trained 1,200 people on the enforcement of the FGM Act (more than any other cooperating country). However, it was reported to have informed only 15,647 people about the law, which pales in comparison to Burkino Faso and Somalia<sup>112</sup>.

<sup>110</sup> UNFPA-UNICEF Joint-Programme, 'RFP/001/2011-Development of a Sessional Paper to the National Policy on Female Genital Mutilation in Kenya' (undated) 3. Available at: <http://view.officeapps.live.com/op/view.aspx?src=http%3A%2F%2Fcountryoffice.unfpa.org%2Fkenya%2Fdrive%2FTOR-FGMPOLICYSessionalPaper-revJune.doc>

<sup>111</sup> UNICEF-UNFPA Joint Programme on Female Genital Mutilation/Cutting, 'Annual Report 2011' (2012) 12. Available at: [www.unfpa.org/webdav/site/global/shared/documents/publications/2012/Annual\\_report\\_on\\_FGM-C\\_2011\\_low\\_res.pdf](http://www.unfpa.org/webdav/site/global/shared/documents/publications/2012/Annual_report_on_FGM-C_2011_low_res.pdf)

<sup>112</sup> UNICEF-UNFPA Joint Programme on Female Genital Mutilation/Cutting, 'Annual Report 2012' (2013) 12. Available at: [https://www.unfpa.org/webdav/site/global/shared/documents/publications/2013/UNICEF-UNFPA%20Joint%20Programme%20AR\\_final\\_v14.pdf](https://www.unfpa.org/webdav/site/global/shared/documents/publications/2013/UNICEF-UNFPA%20Joint%20Programme%20AR_final_v14.pdf). (It is not clear how the Joint Programme worked out the number of people informed and it may just relate to the number of Joint Programme public awareness campaigns which were carried out in the country)

- 5.6.5 The media plays a crucial role in raising public awareness. By 2012, the Kenya Media Network on Population and Development had trained 23 journalists on the FGM Act. Kenya, however, does not perform well in comparison to other cooperating countries in this area. In 2012, Kenya apparently did not train any media personnel and the number of press releases and TV/radio broadcasts on FGM between 2010 and 2012 was significantly lower than many of the other cooperating countries<sup>113</sup>.
- 5.6.6 As is clear from the high profile given by the media to the case of Sasiano Nchoe, referred to at paragraph 4.4.2 above, convictions also play a central role towards ensuring that the FGM Act is properly implemented and is taken seriously by the public. According to the UNFPA-UNICEF Joint-Programme's 2012 Annual Report, since the FGM Act was enacted in 2011 there have been three arrests made in Kuria and Kisii. However, in the Meru district, the prosecution of parents who performed FGM on their daughter has stalled due to a lack of witnesses<sup>114</sup>.
- 5.6.7 In May 2013 the UN Committee Against Torture commended the enactment of the FGM Act and the work of the Ministry of Gender, Children and Social Development on raising awareness of FGM. However, the Committee stated that it remained concerned about the prevalence of FGM and urged Kenya to "redouble" its efforts to eradicate the practice. The Committee cited further concern with the specific provision of the FGM Act which allows "chiefs and children's officers" to enter premises without a warrant. In light of this concern, the Committee recommended to Kenya that all measures taken to combat the practice of FGM comply with legal safeguards<sup>115</sup>.

## 6. PORNOGRAPHY (MAPUTO PROTOCOL ARTICLE 13(M))

- 6.1 Section 16 of the Sexual Offences Act creates the offence of: (a) selling or publicising child pornography; (b) importing or exporting child pornography; (c) taking part in or receiving profits from child pornography; and (d) advertising child pornography.
- 6.2 The exploitation of adults would be contrary to Article 28 and 29 of the Kenyan Constitution, for which victims should be able to seek redress through the Kenyan courts pursuant to Articles 22–23 of the Constitution. Sections 52(1) and (2) of the Kenyan Penal Code permits the Director of Public Prosecutions to declare any publication to be a prohibited publication in the interests of public order, health, morals to prohibit the importation of any publication.

## 7. HUMAN TRAFFICKING (MAPUTO PROTOCOL ARTICLE 4(2)(G))

### 7.1 Counter-Trafficking in Persons ("CTIP") Act 2010

- 7.1.1 The Maputo Protocol Article 4(2)(g) aims to prevent and condemn the trafficking of women. Kenya has enacted the CTIP Act 2010.
- 7.1.2 The CTIP Act creates a number of offences applicable to those who are either directly or indirectly involved in trafficking<sup>116</sup>.
- (a) A person who traffics another person, for the purpose of exploitation, commits an offence and is liable to imprisonment for a term of not less than thirty years or to a fine of not less than thirty million shillings, or both (Section 3(5)). The same punishment applies to those who finance, control, aid or abet the commission of the offence of trafficking in persons (Section 3(6)). The offence of trafficking

<sup>113</sup> Ibid., 25-26.

<sup>114</sup> UNICEF-UNFPA, Joint Programme on Female Genital Mutilation/Cutting, 'Annual Report 2012' (2013) 11. Available at: [https://www.unfpa.org/webdav/site/global/shared/documents/publications/2013/UNICEF-UNFPA%20Joint%20Programme%20AR\\_final\\_v14.pdf](https://www.unfpa.org/webdav/site/global/shared/documents/publications/2013/UNICEF-UNFPA%20Joint%20Programme%20AR_final_v14.pdf)

<sup>115</sup> UN Committee Against Torture, 'Concluding observations on the second periodic report of Kenya, adopted by the Committee at its fiftieth session (5–13 May 2013)' (2013) 9. Available at: [www2.ohchr.org/english/bodies/cat/docs/co/CAT.C.KEN.CO.R.2-AUV\\_rev.1\\_en.doc](http://www2.ohchr.org/english/bodies/cat/docs/co/CAT.C.KEN.CO.R.2-AUV_rev.1_en.doc)

<sup>116</sup> The overview of offences listed in this report is not an exhaustive list of offences under the Counter-Trafficking in Persons Act 2010.



in persons is wide enough to cover the recruiting, transporting, transferring, harbouring or receiving of another person for the purpose of exploitation by means of:

- a) threat or use of force or other forms of coercion;
  - b) abduction;
  - c) fraud;
  - d) deception;
  - e) abuse of power or of position of vulnerability;
  - f) giving payments or benefits to obtain the consent of the victim of trafficking in persons; or
  - g) giving or receiving payments or benefits to obtain the consent of a person having control over another person<sup>117</sup>.
- (b) The CTIP Act also creates an offence where a person adopts (or offers for adoption), fosters (or offers for fostering) or offers guardianship to a child (or offers a child for guardianship) for the purpose of trafficking in persons (Section 4(1))<sup>118</sup>.
- (c) A person who knowingly leases out their premises for the purpose of promoting trafficking also commits an offence. Such persons, along with those who publish material promoting trafficking, who run or finance a job recruitment agency and who promote trafficking 'by any other means' face a prison term of not less than twenty years, a fine, or both (Section 5).
- (d) Furthermore, the legislation reflects a zero tolerance attitude towards repeat offenders by imposing what can be described as a two-strike rule: any subsequent conviction of an offence under any of the offences in 6.1.2 (a) to (c) above triggers a life sentence.
- (e) Other offences capture those whose involvement in trafficking is more indirect. These may apply to those who misrepresent facts for the acquisition of travel documents, facilitate the entry or exit of trafficked persons at airports or seaports, or confiscate or destroy a victim's travel documents (Section 6 to Section 8). There are also what can be described as aggravated offences attracting life sentences where a trafficking offence leads to a victim dying or suffering permanent or life-threatening bodily harm (Section 9) or where the offender is part of an organised criminal group (Section 10).
- (f) All of the offences under the CTIP Act extend to Kenyan citizens and permanent residents of Kenya who commit an offence under the Act in another country. He or she will be liable for the same penalty as if he or she had committed the offence within Kenyan borders, although there should be no conviction if that person has been acquitted or convicted in the country where the offence was committed (Section 25).

---

<sup>117</sup> See Section 3 of the CTIP Act for the full definition.

<sup>118</sup> The offence under section 4(1) of the CTIP Act is punishable by imprisonment for a term of not less than thirty years or to a fine of not less than twenty million shillings or to both. A person who initiates or attempts to initiate adoption, fostering or guardianship proceedings for the purpose of Section 4(1) also commits an offence under Section 4(2)



- 7.1.3 The CTIP Act also creates protective measures for victims of trafficking. These include the protection of victims' confidentiality during a trial (making it an offence to disclose the name and personal circumstances of a victim)<sup>119</sup> and gives the court the power to order an offender to compensate a victim for costs including, but not limited to, medical or psychological treatment, accommodation and any other relief that the court may consider just<sup>120</sup>. A victim will also be exempt from paying court fees in a civil action and, in an effort to encourage victims to come forward, victims will be immune from prosecution for being in Kenya illegally or for any criminal act that was a direct result of being trafficked (Section 14)<sup>121</sup>
- 7.1.4 Furthermore, the Minister responsible for matters relating to women and children has a duty to participate in formulating plans to assist victims of trafficking which include the provision of appropriate shelter and medical assistance and their re-integration into society<sup>122</sup>. The Minister responsible for immigration matters may also make arrangements for the repatriation of victims back to their place of origin. Sections 18(1) and 18(2) place a duty on the Government to issue Kenyan victims with travel documents needed to re-enter the country.
- 7.1.5 The CTIP Act establishes an Advisory Committee (Section 19) and a Trust Fund for victims of trafficking (Section 22):
- (a) The legislation states that the Counter-Trafficking in Persons Advisory Committee shall consist of:
    - a) the Permanent Secretary, in the Ministry responsible for matters relating to immigration;
    - b) the Permanent Secretary, in the Ministry responsible for matters relating to foreign affairs;
    - c) the Permanent Secretary, in the Ministry responsible for matters relating to gender and children;
    - d) the Permanent Secretary, in the Ministry responsible for matters relating to labour;
    - e) the Attorney General;
    - f) the Commissioner of Police;
    - g) a representative of the Kenya National Commission for Human Rights;
    - h) two representatives from civil society nominated by the respective civil societies dealing with issues relating to women and children with proven record of involvement in the prevention and suppression of trafficking in persons;
    - i) one person nominated by the Central Organisation of Trade Unions;
    - j) one person nominated by the Federation of Kenya Employers; and
    - k) such other members as may be co-opted by the Advisory Committee<sup>123</sup>.

The Committee's role is to advise on measures to combat trafficking and implement preventive, protective and rehabilitative programmes for victims. The Committee's role is varied and includes, by way of example, a duty to advise the Minister responsible for matters relating to women and children in relation to the dissemination of the law through non-governmental organisations and a duty

---

<sup>119</sup> CTIP Act, Section 11(3).

<sup>120</sup> CTIP Act, Act, Section 13.

<sup>121</sup> CTIP Act, Section 14.

<sup>122</sup> CTIP Act, Section 15. The examples given are not exhaustive.

<sup>123</sup> CTIP Act, Section 19(2)

to monitor and evaluate the country's progress in this field<sup>124</sup>. The Committee is also required to produce an annual report of the policies, programmes and activities relating to the implementation of the Act (Section 21).

- (b) The National Assistance Trust Fund for Victims of Trafficking in persons is to hold money deriving from four sources: (i) monies appropriated by Parliament; (ii) proceeds of crime; (iii) investment income generated by the Fund's trustees; and (iv) donations. The Board of Trustees (which includes the Chairman of the Advisory Committee, the Permanent Secretary of the Ministry responsible for gender and children, and a treasurer) shall have discretion to make payments out of the Fund for the assistance of victims and for other purposes recommended by the Advisory Committee (Section 23(2)). The Fund shall also pay damages to victims where there are insufficient funds from the personal and separate property of an offender to pay damages to the victim<sup>125</sup>.

## 7.2 Implementation

- 7.2.1 The CTIP Act received its assent on 13 September 2010 and came into effect on 1 October 2012.
- 7.2.2 FIDA, citing a report conducted by the United States Department of State in 2010, identified Kenya as a country increasingly being used to traffic women from, to and through its borders<sup>126</sup>. It also claims that women are trafficked to the Middle East to work as maids, and that women in these roles often suffer abuse, confinement and their identification documents being taken away from them. It also claims that many of these women have been murdered.
- 7.2.3 The 2013 Trafficking in Persons Report issued by the United States Department of State highlights the plight of women being subjected to forced manual labour and exploited in domestic servitude, massage parlours and brothels<sup>127</sup>. It highlights destinations such as South Sudan (as well as other East African countries), Europe, the United States, and the Middle East (particularly Saudi Arabia but also Qatar, Kuwait, the United Arab Emirates, Lebanon and Oman).
- 7.2.4 The report lists a number of failings in Kenya in tackling trafficking, including the failure to:
  - (a) launch and implement its national plan of action;
  - (b) convene the Counter-Trafficking in Persons Advisory Committee;
  - (c) take tangible action against trafficking complicity among law enforcement officials;
  - (d) provide shelter and other protective services for adult victims;
  - (e) monitor the work of overseas labour recruitment agencies; and
  - (f) provide wide scale anti-trafficking training to Kenyan officials, including police, labour inspectors, and children's officers<sup>128</sup>.

<sup>124</sup> CTIP Act, Section 20(2)

<sup>125</sup> The CTIP Act, Section 17(2).

<sup>126</sup> FIDA Kenya, 'Advancing Women's Rights in Kenya' (2013) 23. Available at: <http://fidakenya.org/wp-content/uploads/2013/07/Women-Rights-Handbook.pdf>

<sup>127</sup> United States Department of State, '2013 Trafficking in Persons Report' (June 2013). Available at: [www.state.gov/j/tip/rls/tiprpt/2013](http://www.state.gov/j/tip/rls/tiprpt/2013)

<sup>128</sup> Ibid., 218.

The report also highlights the plight of Somali women carried in vehicles transporting khat to Somalia “*who often end up in brothels in Nairobi or Mombasa.*”<sup>129</sup>

7.2.5 Notwithstanding these failings, the report acknowledges that the Government of Kenya is making significant efforts to comply with the minimum standards for the elimination of trafficking. By way of example, the report describes the Ministry of Foreign Affairs’ efforts to combat trafficking by placing a ban in June 2012 on recruitment agencies from sending Kenyan workers to the Middle East until all agencies could be vetted. However, the report adds that there has been an increase in agencies avoiding the ban by directly recruiting Kenyan girls from villages and sending them to the Middle East via Tanzania and Uganda.

7.2.6 The report therefore recommended that the Government of Kenya convenes the CTIP Advisory Committee<sup>130</sup> to oversee the full implementation of the CTIP Act and to establish the Board of Trustees to oversee the National Assistance Trust Fund for Victims of Trafficking in persons<sup>131</sup>. It also recommends that the Government of Kenya increases protective services for adult victims, “*particularly those identified in and returned from the Middle East*”<sup>132</sup>.

## 8. ABORTION (MAPUTO PROTOCOL ARTICLE 14)

8.1 The Kenyan government has not enacted any specific legislation that legalises abortion, and it still remains a highly controversial issue. Indeed, Kenya ratified the Maputo Protocol with reservations, including reservations to Article 14<sup>133</sup>.

8.2 Arguably, Kenya has partly implemented Article 14 of the Maputo Protocol by allowing abortion if the life or health of the mother is in danger. Article 26 of the Kenya Constitution provides that life begins at conception (Article 26(2)) and “*abortion is not permitted unless, in the opinion of a trained health professional, there is need for emergency treatment, or the life or health of the mother is in danger, or if permitted by any other written law.*” Kenyan law does not, however, permit abortion in any other circumstances; therefore victims of rape or incest would not be able to legally terminate a pregnancy.

8.3 The Kenyan Penal Code makes it an offence to seek or perform an abortion or supply any substances that may be used to procure an abortion. The penalties remain severe: 14 years imprisonment for performing an abortion; 7 years imprisonment for having an abortion; and 3 years imprisonment for assisting with an abortion<sup>134</sup>.

8.4 Kenya has a high maternal mortality rate. This has been attributed by commentators including CEDAW, in part, to restrictive abortion laws, which mean that women resort to unsafe illegal abortion (see further paragraph 10.6.9 below)<sup>135</sup>. It is estimated that one in fifty-five Kenyan women die from pregnancy related causes. Over one-third of these deaths are from unsafe abortions. This means that over 2,600 women die annually from unsafe abortions<sup>136</sup>. It can thus be argued that Kenya needs to take further action to protect women’s reproductive health.

---

<sup>129</sup> Ibid., 218.

<sup>130</sup> See 5.3.3(a) above.

<sup>131</sup> See 5.3.3(b) above.

<sup>132</sup> United States Department of State, ‘2013 Trafficking in Persons Report’ (June 2013) 218.

<sup>133</sup> Solidarity for African Women’s Rights, ‘Kenya Ratifies the Protocol *Solidarity for African Women’s Rights Publication* (October–December 2010) 1. Available at: [www.soawr.org/resources/SOAWR\\_Bulletin\\_OctDec2010\\_en.pdf](http://www.soawr.org/resources/SOAWR_Bulletin_OctDec2010_en.pdf)

<sup>134</sup> Kenyan Penal Code, Sections 158–160

<sup>135</sup> Centre for Reproductive Rights, ‘In Harm’s Way: The Impact of Kenya’s Restrictive Abortion Law’ (24 February 2010) 1. Available at: [http://reproductiverights.org/sites/crr.civicaactions.net/files/documents/InHarmsWay\\_2010.pdf](http://reproductiverights.org/sites/crr.civicaactions.net/files/documents/InHarmsWay_2010.pdf); webpage of the UN Entity for Gender Equality and the Empowerment of Women, ‘Country Reports’ (accessed 23 August 2013). Available at: [www.un.org/womenwatch/daw/cedaw/reports.htm](http://www.un.org/womenwatch/daw/cedaw/reports.htm), paragraph 38

<sup>136</sup> A Higgins, ‘Kenya offers cautionary tale on abortion’ *Seattle Globalist* (17 December 2012). Available at: [www.seattleglobalist.com/2012/12/17/kenya-abortion-rights/8710](http://www.seattleglobalist.com/2012/12/17/kenya-abortion-rights/8710)

## 9. WAR CRIMES (MAPUTO PROTOCOL ARTICLE 11)

### 9.1 The International Crimes Act 2008

- 9.1.1 Pursuant to Article 2(6) of the Kenyan Constitution, the Rome Statute of the International Criminal Court (“**ICC**”) has formed part of the law of Kenya since its ratification by Kenya on 15 March 2005<sup>137</sup> and Kenya is subject to the jurisdiction of the ICC (Rome Statute Article 12(1)) in respect of crimes committed since ratification. In addition, general rules of international law form part of the law of Kenya pursuant to Article 2(5) of the Constitution. Thus war crimes, including rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation or any other form of sexual violence constituting a grave breach of the Geneva Conventions when committed as part of an international or non-international armed conflict are prohibited under Kenyan law and subject to ICC jurisdiction (Rome Statute, Articles 8(b)(xxii) and (e)(vi)).
- 9.1.2 Crimes against humanity, including rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation or any other form of sexual violence of comparable gravity when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack, are also prohibited under Kenyan law and subject to ICC jurisdiction (Rome Statute, Article 7(1)(g)).
- 9.1.3 The Prosecutor of the ICC initiated an investigation into the post-election violence in Kenya in 2007<sup>138</sup>, in which large numbers of women were reported to have been raped and sexually assaulted. This led to charges being brought and confirmed against, *inter alia*, Mr Uhuru Kenyatta, who was leader of the opposition at the time of the alleged crimes in the wake of the contested 2007 election (and is currently President of Kenya following his controversial election in 2013), for the alleged indirect co-perpetration of the crime against humanity of rape pursuant to Articles 25(3)(a) and 7(1)(g) of the Rome Statute. The trial is scheduled to commence in November 2013<sup>139</sup>.
- 9.1.4 Kenya has sought to challenge the ICC’s jurisdiction in this case pursuant to the principle of complementarity set out in Article 17 of the Rome Statute, which provides that a case at the ICC may be inadmissible where, *inter alia*, it is being investigated or prosecuted by a State which has jurisdiction. Kenya unsuccessfully challenged the ICC’s jurisdiction on this basis in 2011, arguing, *inter alia*, that the enactment of the 2010 Constitution had strengthened the Kenyan legal system and empowered it to address the cases before the ICC<sup>140</sup>. Pre-Trial Chamber II of the ICC rejected the challenge finding that there was no concrete evidence of ongoing investigations or proceedings at the national level as required by Article 17 of the Rome Statute<sup>141</sup>.
- 9.1.5 Kenya enacted the International Crimes Act 2008 with the stated aim of domesticating the Rome Statute and facilitating cooperation with the ICC<sup>142</sup>. The Act came into force on 1 January 2009 and thus does not cover the alleged crimes which took place during the 2007 post-election violence. It does, however, give the Kenyan High Court jurisdiction over war crimes, crimes against humanity and genocide (each of which would include violence against women) committed in Kenya or by Kenyan citizens since 1 January 2009.

<sup>137</sup> See Kenya page of ‘States Parties to the Rome Statute’ (*ICC-CPI.int*, 16 March 2005). Available at: [www.icc-cpi.int/en\\_menus/asp/states%20parties/african%20states/pages/kenya.aspx](http://www.icc-cpi.int/en_menus/asp/states%20parties/african%20states/pages/kenya.aspx)

<sup>138</sup> Pursuant to Article 15 of the Rome Statute

<sup>139</sup> See further: *The Prosecutor v. Uhuru Muigai Kenyatta* ICC-01/09-02/11 Case page (*ICC-CPI.int*, Undated). Available at: [www.icc-cpi.int/en\\_menus/icc/situations%20and%20cases/situations/situation%20icc%200109/related%20cases/icc01090211/pages/icc01090111.aspx](http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200109/related%20cases/icc01090211/pages/icc01090111.aspx) accessed on 27 August 2013

<sup>140</sup> See *The Prosecutor v. Uhuru Muigai Kenyatta* ‘Application on behalf of the Government of the Republic of Kenya pursuant to Article 19 of the ICC Statute’ (31 March 2011) ICC-01/09-02/11. Available at: [www.icc-cpi.int/iccdocs/doc/doc1050028.pdf](http://www.icc-cpi.int/iccdocs/doc/doc1050028.pdf)

<sup>141</sup> See *The Prosecutor v. Uhuru Muigai Kenyatta* ‘Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute’ (30 May 2011) ICC-01/09-02/11-96 [39-66]. Available at: [www.icc-cpi.int/iccdocs/doc/doc1078823.pdf](http://www.icc-cpi.int/iccdocs/doc/doc1078823.pdf)

<sup>142</sup> International Crimes Act 2008, Preamble. Available at: [www.kenyalaw.org/kenyalaw/klr\\_app/frames.php](http://www.kenyalaw.org/kenyalaw/klr_app/frames.php)

## 9.2 The Truth, Justice and Reconciliation Act 2008 (“TJR Act”)

- 9.2.1 Kenya can also be seen to have implemented Article 11 of the Maputo Protocol via the Truth, Justice and Reconciliation Act 2008. The TJR Act establishes a Truth, Justice and Reconciliation Commission (“**TJRC**”), the objective of which is to “*promote peace, justice, national unity, healing, and reconciliation among the people of Kenya.*”<sup>143</sup> The establishment of the TJRC was part of a peace deal and coalition agreement between political parties in the aftermath of the post-election violence in 2007, in which more than 1,100 people died and 3,500 were injured in ethnic and political violence<sup>144</sup>. 600,000 people were also displaced from their homes due to the violence<sup>145</sup>.
- 9.2.2 The function of the TJRC is to, *inter alia*: investigate gross violations of human rights between 1963 (the year of Kenya’s independence) and 2008<sup>146</sup>; recommend prosecution of persecutors and redress for victims<sup>147</sup>; and provide redress in respect of crimes of a sexual nature against female victims<sup>148</sup>.
- 9.2.3 “Gross human rights violations” is defined in Section 2 of the TJR Act to include “crimes against humanity”<sup>149</sup>. In turn, “crimes against humanity” is defined in Section 2 to include rape and sexual violence<sup>150</sup>.
- 9.2.4 Section 42 allows any person who is of the opinion that he or she has suffered harm as a result of a gross violation of human rights to apply to the TJRC for reparation. The definition of “reparation” provided in the TJR Act (Section 2) is “*dignifying the victims by measures that will alleviate their suffering, compensate their social, moral and material losses, [and] restitute their rights.*”
- 9.2.5 “Victims” are also defined in the TJR Act (Section 2) as “*any person who, or group of persons, which, with the occasion or because of the human rights violation, has suffered any individual or collective harm, loss or damage by acts or omissions which violate the rights granted under the Constitution or any written law in Kenya, International Human Rights Law and International Criminal Law.*”
- 9.2.6 Accordingly, if the TJRC is of the opinion that the applicant is a victim, it is then required to make recommendations in its report to the President (see paragraph 9.3 below) in an endeavour to restore the human and civil dignity of such victim<sup>151</sup>.

---

<sup>143</sup> Truth, Justice and Reconciliation Act 2008, Sections 3 and 5

<sup>144</sup> J Wangui, ‘Kenyan Rape Victims Seek Compensation’ (14 August 2013) Issue 358 ACR. Available at: <http://iwpr.net/report-news/kenyan-rape-victims-seek-compensation>

<sup>145</sup> ‘In-depth: Kenya’s post election crisis’ *IRIN* (Nairobi, 7 January 2008). Available at: [www.irinnews.org/in-depth/76116/68/kenya-s-post-election-crisis](http://www.irinnews.org/in-depth/76116/68/kenya-s-post-election-crisis)

<sup>146</sup> Truth, Justice and Reconciliation Act 2008, Section 6(a)

<sup>147</sup> Truth, Justice and Reconciliation Act 2008, Sections 6(c) and (f)

<sup>148</sup> Truth, Justice and Reconciliation Act 2008, Section 6(h)

<sup>149</sup> Truth, Justice and Reconciliation Act 2008, Section 2: “‘gross human rights violations’ means — (a) violations of fundamental human rights, including but not limited to acts of torture, killing, abduction and severe ill-treatment of any person; (b) imprisonment or other severe deprivation of physical liberty; (c) rape or any other form of sexual violence; (d) enforced disappearance of persons; (e) persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious or gender or other grounds universally recognized as impermissible under international law; (f) any attempt, conspiracy, incitement, instigation, command, procurement to commit an act referred to in paragraph (a) and (c), which was committed during the period between 12th December, 1963 and 28th February, 2008, and the commission of which was advised, planned, directed, commanded or ordered by any person acting with a political motive; or (g) crimes against humanity”

<sup>150</sup> Truth, Justice and Reconciliation Act 2008, Section 2: “‘crimes against humanity’ means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack — (a) murder; (b) extermination; (c) enslavement; (d) deportation or forcible transfer of population; (e) imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) torture; (g) rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) persecution against any identifiable group or collectivity on political, racial, ethnic, cultural, religious, gender or other grounds that are universally recognized as impermissible under international law; (i) enforced disappearance of persons; (j) other inhuman acts of a similar character intentionally causing great suffering, or serious injury to the body or to mental or physical health”

<sup>151</sup> In its report, the TJRC sets out its recommendations relating to reparation and how such reparations should be managed and administered: see ‘Chapter 3 – Reparation Framework’ of Report of the Truth, Justice and Reconciliation Commission Volume 4 (3 May 2013) 97.

Available at: [www.tjrckkenya.org/images/documents/TJRC\\_report\\_Volume\\_4.pdf](http://www.tjrckkenya.org/images/documents/TJRC_report_Volume_4.pdf)

Related to this, the TJRC has also determined the eligibility for various types of reparation measures by defining types of violations: see *Ibid.*, [14–15]. See also discussion of the Reparations Framework below at paragraph 8.3.7

Moreover, under Section 42(4) of the TJR Act, the TJRC may make regulations to provide for reparations

### 9.3 The TJRC's Report

- 9.3.1 The TJRC's Report was submitted to the President of Kenya in May 2013 after several delays<sup>152</sup>. It is the result of 5 years of research based on over 40,000 statements and 600 hearings across Kenya<sup>153</sup>. The publication of the Report has, however, been plagued with controversy, including the apparent censoring of a chapter dedicated to land injustices<sup>154</sup> and the questioning of the moral standing of one of its commissioners<sup>155</sup>.
- 9.3.2 Volume 4 of the Report makes numerous recommendations to various organs and individuals in the government, including the investigation and prosecution of high profile politicians and senior government officials<sup>156</sup>. General recommendations include<sup>157</sup>:
- (a) the issuance of a public apology by the President, Police, Defence Forces, National Intelligence Services and Judiciary for all injustices and gross violations of human rights committed during the mandate period within three or six months of the issuance of the Report (as specified in the Report);
  - (b) the negotiating of compensation for victims of atrocities and injustices committed by the British government during the colonial period within twelve months of the issuance of the Report<sup>158</sup>;
  - (c) the establishment of an "International Crimes Division" of the High Court responsible for trial of some of the cases referred to the Director of Public Prosecutions within twelve months;
  - (d) the declaration in terms of Article 34(6)<sup>159</sup> of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights within twelve months, so as to allow individual victims of human rights violations who have exhausted local remedies to directly access the African Court; and
  - (e) that the Ministry of Justice fast-tracks the expansion of the national legal aid scheme to cover the entire country within eighteen months.

#### *TJRC's findings on sexual violence*

- 9.3.3 The TJRC found that despite Kenya having ratified many international human rights laws and having enacted domestic legislation regarding sexual violence, the failure to fully implement such legislation has left many Kenyans exposed to sexual violence and denied access to justice<sup>160</sup>.

<sup>152</sup> The Report was originally due for submission to the President on 3 November 2011: see 'FAQs' (*tjrckeny.org*, undated). Available at: [www.tjrckeny.org/index.php?option=com\\_content&view=article&id=115&Itemid=134](http://www.tjrckeny.org/index.php?option=com_content&view=article&id=115&Itemid=134)

<sup>153</sup> G Joselow, 'Kenya Truth Commission Report Links Leaders to Abuses' *Voice of America* (Nairobi, 22 May 2013). Available at: [www.voanews.com/content/kenya-truth-commission-report-links-leaders-to-abuses/1666110.html](http://www.voanews.com/content/kenya-truth-commission-report-links-leaders-to-abuses/1666110.html)

<sup>154</sup> P Seils, 'Integrity of Kenya's Truth Commission Report must be restored' *Al Jazeera* (9 June 2013). Available at: [www.aljazeera.com/indepth/opinion/2013/06/201369114316134587.html](http://www.aljazeera.com/indepth/opinion/2013/06/201369114316134587.html)

<sup>155</sup> 'The past returns to haunt Kiplagat' *Daily Nation* (22 May 2013). Available at: [www.nation.co.ke/news/politics/The+past+returns+to+haunt+Kiplagat/-/1064/1860186/-/ki6reiz/-/index.html](http://www.nation.co.ke/news/politics/The+past+returns+to+haunt+Kiplagat/-/1064/1860186/-/ki6reiz/-/index.html)

<sup>156</sup> See 'Recommendations and Implementation Matrix' at TJRC Report Volume 4 65: the President, Parliament, Chief Justice, various Ministries and Ministers have been tasked with implementation of the TJRC's numerous recommendations

<sup>157</sup> See 'Recommendations and Implementation Matrix' in the TJRC Report Volume 4 65 and 9. Available at: [www.kenya-today.com/wp-content/uploads/2013/05/TJRC\\_report\\_Volume\\_4.pdf](http://www.kenya-today.com/wp-content/uploads/2013/05/TJRC_report_Volume_4.pdf)

<sup>158</sup> It is not clear why the TJRC has apparently addressed human rights violations in the colonial period as this does not appear to be part of its mandate

<sup>159</sup> Article 34(6) requires the State to make a declaration accepting the competence of the African Court on Human and Peoples' Rights to receive cases under Article 5(3) of this Protocol

<sup>160</sup> 'Chapter 1- Findings and Recommendations' of Report of the Truth, Justice and Reconciliation Commission Volume 4 (3 May 2013) 34 [161]. Available at: [www.tjrckeny.org/images/documents/TJRC\\_report\\_Volume\\_4.pdf](http://www.tjrckeny.org/images/documents/TJRC_report_Volume_4.pdf)



- 9.3.4 The TJRC recommended, *inter alia*, that<sup>161</sup>:
- (a) the President, within three months of the issuance of the Report, offers a public and unconditional apology for acts of sexual violence committed by state security agencies during security operations and other period of generalised violence;
  - (b) the establishment of a gender violence recovery centre in every county for the provision of comprehensive services for victims and survivors of sexual violence, including medical and counselling services<sup>162</sup>;
  - (c) the provision of reparation for victims and survivors of sexual violence as per the Reparation Framework proposed by the TJRC within 36 months (see below at 8.3.7);
  - (d) the setting up of the Office of the Special Rapporteur on Sexual Violence as recommended by the Commission of Inquiry into the Post-Election Violence within twelve months<sup>163</sup>; and
  - (e) fast-tracking of a sexual offenders' registry within twelve months.

*TJRC's findings on women's rights*

9.3.5 Among its findings, the TJRC reported that women were routinely targeted for rape and sexual violence by Sabaoth Land Defence Force members and that they were disproportionately affected by the post-election violence of 2007/2008<sup>164</sup>. It also found that the government's response to the plight and needs of the displaced women during that period was less than satisfactory<sup>165</sup>.

- 9.3.6 It recommended, *inter alia*, that<sup>166</sup>:
- (a) the President, within six months of the issuance of the Report, offers a public and unconditional apology for the state's sanction of discrimination against women during the mandate period;
  - (b) the Gender and Equality Commission steps up measures to raise awareness about harmful cultural practices that adversely affect women's enjoyment of human rights;
  - (c) the Attorney General and Parliament expedites the enactment of the following bills relating to women's rights: Marriage Bill 2007; Matrimonial Property Bill 2007; Family Protection Bill 2007; Equal Opportunities Bill 2007; and
  - (d) within twelve months of the issuance of the Report, the Ministry of Health adopts a Plan of Action outlining measures to be taken to increase and improve maternal health facilities in the country and particularly to reduce the number of cases of delivery at home.

---

<sup>161</sup> Ibid., 36 and 64

<sup>162</sup> No timeframe was given for this recommendation

<sup>163</sup> The Commission of Inquiry into Post-Election Violence was another commission set up by the government as part of the peace deal (referred to in paragraph 8.2.1 above) signed in the aftermath of the post-election violence of 2007–2008. Its mandate was to investigate the facts and circumstances surrounding the violence, the conduct of state security agencies in their handling of it, and to make recommendations concerning these and other matters. See 'Waki to report to be handed over' *Daily Nation* (14 October, 2008). Available at: [www.nation.co.ke/News/politics/-/1064/480490/-/ywbs9iz/-/index.html](http://www.nation.co.ke/News/politics/-/1064/480490/-/ywbs9iz/-/index.html)

<sup>164</sup> 'Chapter 1 – Findings and Recommendations' of Report of the Truth, Justice and Reconciliation Commission Volume 4 (3 May 2013) [189–191]. Available at: [www.tjrkenya.org/images/documents/TJRC\\_report\\_Volume\\_4.pdf](http://www.tjrkenya.org/images/documents/TJRC_report_Volume_4.pdf)

<sup>165</sup> Ibid., [192]

<sup>166</sup> Ibid., 41



## Reparations Framework

- 9.3.7 Section 6(k)(i) of the TJR Act requires the TJRC to make recommendations in relation to reparations to restore the dignity of victims. The Report therefore includes an analysis of forms of reparations as proposed by individuals (which include compensation, prosecution, apologies, counselling, resettlement), by communities (which include promotion of peace, building of school or hospital, repairs of roads and houses, affirmative action, replacement of goods), and for the nation (which include monuments, recovery of stolen funds, prosecutions, reforms, national day of remembrance)<sup>167</sup>.
- 9.3.8 The TJRC then determines the eligibility for certain types of reparations by consideration of the types of violations suffered by the victims, the time of occurrence of the violation and the type of beneficiaries<sup>168</sup>.
- 9.3.9 It recommends that a set of regulations relating to reparation mirroring the provisions of the framework outlined in its Report be enacted<sup>169</sup>.
- 9.3.10 It also recommends that a Reparations Fund be established for the compensation of victims, the rehabilitation of victims, memorialisation and exhumation, identification and reburial of victims<sup>170</sup>. The Reparations Fund will apply, as far as compensation is concerned, in favour of individuals and to establish projects in favour of communities identified through set criteria<sup>171</sup>. The TJRC recommends that eligibility for reparation should be based on loss or injury suffered, even in the absence of an identified perpetrator (a no-liability model)<sup>172</sup>. It recommends that the government set aside an initial Ksh 500 million for reparations<sup>173</sup>. At the time of writing, the fund is yet to be established as the TRJC is still awaiting a parliamentary debate.

## 9.4 Implementation

- 9.4.1 Section 49 of the TJR Act requires the mandatory implementation of the above recommendations (as well as any other recommendation that is made by the TJRC in its Report)<sup>174</sup>. Full implementation of such recommendations would address many of the deficiencies in the implementation of the Maputo Protocol's requirements.
- 9.4.2 The Report includes a draft bill to provide for the establishment of a Committee for the implementation of the Report within six months of its publication<sup>175</sup>. The "Implementation Committee" would be responsible for, *inter alia*, the implementation of certain aspects of the Report; the management and administration of the Reparations Fund; and the monitoring of the implementation of the aspects of the Report assigned to government ministries, departments and commissi9.

<sup>167</sup> The full range of reparations measures proposed by individuals and communities that were polled, as well as their proposals for reparation measures for the nation, is set out in: 'Chapter 3 -Reparation Framework' of Report of the Truth, Justice and Reconciliation Commission Volume 4 (3 May 2013) [9]. Available at: [www.tjrkenya.org/images/documents/TJRC\\_report\\_Volume\\_4.pdf](http://www.tjrkenya.org/images/documents/TJRC_report_Volume_4.pdf).

<sup>168</sup> Ibid., [13 to 52]. Types of violations include violations of the right to life, violations of the right to personal integrity, forcible transfer of populations: Ibid., [14 to 15]

<sup>169</sup> Ibid., [10]

<sup>170</sup> Ibid., Annex 1 – Victims' Reparations Fund Guidelines [3]

<sup>171</sup> Ibid., Annex 1 – Victims' Reparations Fund Guidelines [5]

<sup>172</sup> Ibid., Annex 1 – Victims' Reparations Fund Guidelines [8]

<sup>173</sup> Ibid., Annex 1 – Victims' Reparations Fund Guidelines [11]

<sup>174</sup> Section 49(1) mandates that the Minister responsible for justice and constitutional affairs shall, upon the publication of the report of the TJRC, operationalise the implementation mechanism in accordance with the recommendations of the TJRC (made pursuant to Section 48(2)(f)), to monitor the implementation of the recommendations of the TJRC and to facilitate their implementation. Section 49(2) requires an "implementation committee" to monitor the implementation of the recommendations on a quarterly basis; and Section 49(3) requires that the implementation of the Report shall commence within six months upon its publication. Section 50(1) requires that the Minister is also required to report to the National Assembly as to the progress of implementation of the TJRC's recommendations. Section 50(2) requires that all recommendations shall be implemented and the Minister is required to provide reasons to the National Assembly for any non-implementation

<sup>175</sup> 'Annex 1: Draft Bill' to 'Chapter 2 – Implementation and Monitoring Mechanism' of Report of the Truth, Justice and Reconciliation Commission Volume 4 (3 May 2013) 82. Available at: [www.tjrkenya.org/images/documents/TJRC\\_report\\_Volume\\_4.pdf](http://www.tjrkenya.org/images/documents/TJRC_report_Volume_4.pdf)

9.4.3 However, Kenya's Attorney General proposed a bill for a Truth Justice and Reconciliation (Amendment) Act 2013, which was read in Parliament on 6 August 2013. The bill is controversial as it proposes to change the original TJRC Act 2008 to allow lawmakers to revise the recommendations of the TJRC, which may open the door for them to reject such recommendations<sup>176</sup>. The steps specified in the TJRC Act were specifically designed to avoid the type of interference that is now being proposed by the bill<sup>177</sup>. It is also feared that the Amendment Act will be used to remove the names of top politicians adversely mentioned in the Report.

## 10. SPECIAL PROTECTION FOR WOMEN WITH DISABILITIES & HEALTH AND REPRODUCTIVE RIGHTS (MAPUTO PROTOCOL ARTICLES 14 & 23)

**10.1 In May 2013 the UN Committee on Torture expressed concern about reports of forced and coerced sterilisation of HIV positive women and women with disabilities in Kenya. The Committee urged Kenya to “strengthen its efforts to investigate allegations of involuntary sterilisations or other harmful practices in connection with reproductive health and identify and punish those who [are] involved in such practices”. Further, the Committee recommended the following:**

- (a) the enactment of the Family Protection Bill 2007 in order to create the right to health as guaranteed by Article 43 of the Kenyan Constitution;
- (b) the Kenyan Commission on Administrative Justice (Ombudsman) to publish reports on complaints, follow up and outcomes (on the reports of forced or coerced sterilisation of HIV and disabled women); and
- (c) the National Gender and Equality Commission effectively monitor the conditions in reproductive health facilities by issuing periodic status reports<sup>178</sup>.

## 11. REMEDIES (MAPUTO PROTOCOL ARTICLE 25)

### 11.1 Criminal Cases

11.1.1 Victims of sexual and gender based violence can bring a criminal case against the perpetrator. As seen above, breach of many of the local legislative provisions result in minimum custodial sentences. Unfortunately, prosecutions face many challenges. According to a 2011 report, the outcomes of prosecuted cases of sexual and gender based violence in the Nakuru and Kisumu Law Courts between March 2006 and June 2008 were as follows<sup>179</sup>:

- (a) convictions: 23;
- (b) acquittals: 11;
- (c) pending: 33;
- (d) discharges: 22; and
- (e) dismissal: 1.

<sup>176</sup> R Wanjala, 'Kenya: Concerns Over Bid to Amend Kenya Rights Report'(16 August 2013) Issue 358 ACR. Available at: <http://iwpr.net/report-news/concerns-over-bid-amend-kenya-rights-report>

<sup>177</sup> R Wanjala, 'Kenya: Concerns Over Bid to Amend Kenya Rights Report'(16 August 2013) Issue 358 ACR. Available at: <http://iwpr.net/report-news/concerns-over-bid-amend-kenya-rights-report>

<sup>178</sup> UN Committee Against Torture, 'Concluding observations on the second periodic report of Kenya, adopted by the Committee at its fiftieth session (5–13 May 2013)' (2013) 9. Available at: [www2.ohchr.org/english/bodies/cat/docs/co/CAT.C.KEN.CO.R.2-AUV\\_rev.1\\_en.doc](http://www2.ohchr.org/english/bodies/cat/docs/co/CAT.C.KEN.CO.R.2-AUV_rev.1_en.doc)

<sup>179</sup> Agency for Cooperation and Research in Development, 'Pursuing Justice for Sexual and Gender Based Violence in Kenya' (March 2010) 44. Available at: [www.acordinternational.org/silo/files/pursuing-justice-for-sexual-and-gender-based-violence-in-kenya.pdf](http://www.acordinternational.org/silo/files/pursuing-justice-for-sexual-and-gender-based-violence-in-kenya.pdf)

11.1.2 The obstacles to bringing a case include:

- (a) **Too Expensive:** several of the organisations which assist victims of gender based violence have noted that, while there are increased rates of people reporting sexual violence, victims are not in a position to press charges against their perpetrator<sup>180</sup>. The GVRC records in its annual report 2011-2012 that, despite an increase in women seeking treatment, only 4% of victims press charges. The GVRC notes that “*for many formal justice remains inaccessible despite ongoing judicial reforms in Kenya. Pursuing justice is a long, cumbersome and expensive process that most of the GVRC’s clients cannot afford.*”<sup>181</sup>
- (b) **P-3 Form:** P-3 Form is a government document issued at police stations for recording information on assaults and sexual violence. A medical practitioner is required to fill in this form as it is a key piece of documentary evidence to sustain a conviction in assault or sexual violence cases<sup>182</sup>. There is anecdotal evidence that police officers deny victims these essential forms<sup>183</sup>; that some health professionals charge a fee to conduct the relevant examination and fill out the form<sup>184</sup>; and that some police officers charge victims to issue the forms (which should be free)<sup>185</sup>. There is also a lack of awareness of the existence of this form<sup>186</sup>.
- (c) **Post Rape Care (PRC) Form:** This form required for all sexual offence cases, and is intended to ensure comprehensive information is gathered in the incidences of sexual assault. However it should be noted as is the case with the P3 form survivors of sexual violence face similar challenges in accessing the form, especially in remote and marginalized areas
- (d) **Police incompetence:** There are reports that the police often compromise the evidence and the case at the police station<sup>187</sup>. The pre-dominantly male police officers are also reported not to visit the crime scene, leaving the majority of the relevant evidence undiscovered and weakening the victim’s case<sup>188</sup>.
- (e) **Paucity of specialised prosecutors:** Though the Director of the Public Prosecution has gazetted special prosecutors to deal with sexual offenses, it should be noted that most sexual offences are brought before subordinate courts and are prosecuted by police prosecutors who are not trained lawyers. State counsels, who are trained lawyers, rather tend to try offences such as murder and treason<sup>189</sup>. Police prosecutors also have a very heavy workload and might deal with 25 cases in one day, they are, therefore, unable to hold pre-trial interviews with witnesses or visit the scene of the crime<sup>190</sup>.

<sup>180</sup> Gender Violence Recovery Centre – Nairobi Women’s Hospital, ‘Annual Report 2011–2012’ (8 April 2013) 22. Available at: [www.gvrc.or.ke/phocadownload/annual%20report%202011-2012.pdf](http://www.gvrc.or.ke/phocadownload/annual%20report%202011-2012.pdf)

<sup>181</sup> Ibid.

<sup>182</sup> Agency for Cooperation and Research in Development, ‘Pursuing Justice for Sexual and Gender Based Violence in Kenya’ (March 2010) 40. Available at: [www.acordinternational.org/silo/files/pursuing-justice-for-sexual-and-gender-based-violence-in-kenya.pdf](http://www.acordinternational.org/silo/files/pursuing-justice-for-sexual-and-gender-based-violence-in-kenya.pdf)

<sup>183</sup> Ibid., 41

<sup>184</sup> Agency for Cooperation and Research in Development, ‘Pursuing Justice for Sexual and Gender Based Violence in Kenya’ (March 2010) 40. Available at: [www.acordinternational.org/silo/files/pursuing-justice-for-sexual-and-gender-based-violence-in-kenya.pdf](http://www.acordinternational.org/silo/files/pursuing-justice-for-sexual-and-gender-based-violence-in-kenya.pdf)

<sup>185</sup> Amnesty International, ‘Kenya: Rape – The Invisible Crime’ (2002) 1. Available at: [www.amnesty.org/en/library/asset/AFR32/001/2002/en/ef3bc63d-d8a8-11dd-ad8c-f3d4445c118e/afr320012002en.html](http://www.amnesty.org/en/library/asset/AFR32/001/2002/en/ef3bc63d-d8a8-11dd-ad8c-f3d4445c118e/afr320012002en.html)

<sup>186</sup> World Organisation Against Torture, ‘Violence against women and children in Kenya’, (November 2008) 22. Available at: [www.refworld.org/pdfid/4937a8842.pdf](http://www.refworld.org/pdfid/4937a8842.pdf)

<sup>187</sup> Agency for Cooperation and Research in Development, ‘Pursuing Justice for Sexual and Gender Based Violence in Kenya’ (March 2010) 42. Available at: [www.acordinternational.org/silo/files/pursuing-justice-for-sexual-and-gender-based-violence-in-kenya.pdf](http://www.acordinternational.org/silo/files/pursuing-justice-for-sexual-and-gender-based-violence-in-kenya.pdf)

<sup>188</sup> Agency for Cooperation and Research in Development, ‘Pursuing Justice for Sexual and Gender Based Violence in Kenya’ March 2010, 43. Available at: [www.acordinternational.org/silo/files/pursuing-justice-for-sexual-and-gender-based-violence-in-kenya.pdf](http://www.acordinternational.org/silo/files/pursuing-justice-for-sexual-and-gender-based-violence-in-kenya.pdf)

<sup>189</sup> A Kithaka, ‘Enforcement of the Sexual Offences Act in Kenya’ (5 August 2008). Available at: [www.pambazuka.org/en/category/letters/49923](http://www.pambazuka.org/en/category/letters/49923)

<sup>190</sup> Ibid. 190.

- (f) **Witness Protection:** The Witness Protection Act 2006 and the Witness Protection Amendment Act 2010 provides protection for victims who testify in criminal proceedings. Despite the amendments brought in with the latter Act, however, witness protection in Kenya is still criticised by civil society as not providing enough support for witnesses<sup>191</sup>. While the Witness Protection Amendment Act broadened the definition of “witness”, it does not provide protection for a defence witness or for someone who has evidence against the state. Similarly the Director of the Witness Protection Programme can unilaterally determine whether a witness should be admitted to the Programme<sup>192</sup>. This subjectivity allows for abuse and manipulation<sup>193</sup>.
- (g) **Traditional Justice:** Justice tends to be sought by victims and families of victims through traditional and community courts rather than through the national court system<sup>194</sup>.

## 11.2 Civil Cases

- 11.2.1 A victim can bring a civil claim for assault once there has been a conviction, however convictions are rare. Civil cases for assault were more prevalent in the past however the practice remains rare as it is both expensive and the awards have been minimal.

## 11.3 Kenya National Human Rights Commission

- 11.3.1 Separate from the court system, women can make a complaint to the Kenya National Human Rights Commission (the “**Commission**”).
- 11.3.2 The Commission was established under the Kenya National Human Rights Commission Act 2011, which in turn implemented Article 59 of the Kenyan Constitution. The mandate of the Commission is to further the promotion and protection of human rights in Kenya<sup>195</sup>.
- 11.3.3 One aspect of the Commission’s work is to investigate complaints of alleged violations of human rights and advise on possible options for redress. There are, however, some complaints that fall outside the Commission’s admissibility criteria, such as a case pending before a court of law or tribunal (Section 30 of the National Human Rights Commission Act). Complaints relating to criminal offences were also excluded from the scope of the Commission’s mandate, but this has now been removed from the National Human Rights Commission Act by The Statute Law (Miscellaneous Amendments) Act 2012.
- 11.3.4 The Commission has only been operating for a few years; therefore it is difficult to properly assess its impact. Nevertheless in 2010/2011 the Commission received 3,142 complaints<sup>196</sup>. There is clearly a geographical bias in the public awareness of the Commission as the largest proportion of these complaints was received by the head office in Nairobi (2,439). The Northern Kenya office received 151 complaints and the North Rift office received 347 complaints<sup>197</sup>. The gender divide between complainants is also stark. In Nairobi, women accounted for 22.9% of complaints, whereas men comprised 77.1%. The gender divide is more equally split in the regions<sup>198</sup>.

---

<sup>191</sup> The Kenyan Section of the International Commission of Jurists, ‘Critique of the Witness Protection Act and Amendment Bill’ (2010). Available at: [www.iccnw.org/documents/Critique\\_of\\_the\\_Witness\\_Protection\\_Act\\_and\\_Amendment\\_Bill.pdf](http://www.iccnw.org/documents/Critique_of_the_Witness_Protection_Act_and_Amendment_Bill.pdf)

<sup>192</sup> Witness Protection Act 2006 (as amended), Section 5

<sup>193</sup> The Kenyan Section of the International Commission of Jurists, ‘Critique of the Witness Protection Act and Amendment Bill’ (2010) 7. Available at: [www.iccnw.org/documents/Critique\\_of\\_the\\_Witness\\_Protection\\_Act\\_and\\_Amendment\\_Bill.pdf](http://www.iccnw.org/documents/Critique_of_the_Witness_Protection_Act_and_Amendment_Bill.pdf)

<sup>194</sup> Federation of Women Lawyers Kenya, ‘Implementation of the Sexual Offences Act – Justice Sector’ Research Report (2010) 21. Available at: [www.urpn.org/uploads/1/3/1/5/13155817/implementation-of-the-sexual-offences-act\\_in\\_kenya\\_fida-.pdf](http://www.urpn.org/uploads/1/3/1/5/13155817/implementation-of-the-sexual-offences-act_in_kenya_fida-.pdf)

<sup>195</sup> ‘Establishment’ (*knchr.org*, Undated). Available at: [www.knchr.org/Aboutus/Establishment.aspx](http://www.knchr.org/Aboutus/Establishment.aspx) accessed 27 August 2013

<sup>196</sup> Kenya National Commission on Human Rights, ‘Annual Report for the 2010/2011 Financial Year’ (undated) 10. Available at: [www.knchr.org/Portals/0/AnnualReports/Annual%20Report%202010%20to%202011.pdf](http://www.knchr.org/Portals/0/AnnualReports/Annual%20Report%202010%20to%202011.pdf)

<sup>197</sup> *Ibid.*

<sup>198</sup> *Ibid.* 11

- 11.3.5 In Nairobi, 20 complaints related to the right to personal integrity and dignity<sup>199</sup>. In the North Rift, 12 out of 347 cases related to defilement; in Northern Kenya 8 out of 356 related to rape and defilement<sup>200</sup>.
- 11.3.6 Another aspect of the Commission's work is to promote public awareness of human rights<sup>201</sup>. The Commission therefore runs training workshops for community-based organisations to educate them on human rights enshrined in the Kenyan Constitution. In 2010/2011, for instance, the Commission ran a training workshop for 80 Community-Based Organisations and Faith-Based Organisations in Lower Eastern Province focusing on the Constitution/Bill of Rights, gender and child rights. One organisation, Kitui paralegal, has since the training updated the Commission on progress regarding sensitisation on child rights, in particular on issues of child defilement<sup>202</sup>.
- 11.3.7 The Commission is also training its staff on how best to deal with gender based violence. In 2010/12 the Commission organised training to improve the skills of staff members in investigating complaints about alleged abuses of human rights in order to take steps to secure appropriate redress<sup>203</sup>.

#### 11.4 The African Commission on Human and Peoples' Rights

- 11.4.1 Women also have recourse to more international bodies. The African Commission on Human and Peoples' Rights (the "**ACHPR**") is a quasi-judicial body established by the African Charter on Human and Peoples' Rights in 1987 (the "**Charter**"). The ACHPR derives its power from Article 30 of the Charter, which has been ratified by all African states with the exception of South Sudan<sup>204</sup>. Its role is to promote and protect human rights in Africa as well as overseeing and interpreting the Charter and associated protocols, including the Maputo Protocol.
- 11.4.2 As a quasi-judicial body, the ACHPR is only able to make recommendations to the African Union Assembly of Heads of State and Government (the "**AU Assembly**")<sup>205</sup>. Those recommendations do not become "final" until they are incorporated into the ACHPR's annual Activity Report and are thereafter approved by the AU Assembly. It is unclear whether approval of the ACHPR's recommendations caused them to become legally binding decisions. What is clear is that decisions of the AU Assembly, which amount to "regulations" and "directives", are legally binding on States Parties to the Charter. It seems, therefore, that where the AU Assembly chooses to create regulations or directives flowing from the ACHPR's recommendations, States Parties will be legally bound to follow those instruments.
- 11.4.3 The ACHPR addressed gender based violence in *Egyptian Initiative for Personal Rights and Interights v Egypt* (Communication 323/2006 (2011)). In March 2013 the ACHPR found that Egypt had failed to protect four women journalists from violence while participating in a political protest in May 2005. The protest called for a variation to the Egyptian constitution to allow multi-candidate presidential elections. The ACHPR found that the women were verbally, physically and sexually assaulted by protesters in plain view of riot police and other government officers.
- 11.4.4 The ACHPR held that, in failing to protect the women, the Egyptian state had violated their rights to equality and non-discrimination, right to dignity and protection from cruel, inhuman and degrading treatment, as well as their right to express and disseminate opinions within the law as guaranteed by the African Charter. This is

<sup>199</sup> Ibid. 12

<sup>200</sup> Ibid. 11

<sup>201</sup> Ibid. 33

<sup>202</sup> Ibid.

<sup>203</sup> Ibid. 74

<sup>204</sup> Ibid.

<sup>205</sup> Ibid.

the first decision of the ACHPR to discuss gender specific violence in detail and sends a message to States Parties to the African Charter that they must not use violence against women to exclude them from participating in the political process:

*“... it is clear that the sexual assaults against the victims ... were acts of gender-based violence, perpetrated by state actors, and non-state actors under the control of state actors, that went unpunished. The violations were designed to silence women who were participating in the demonstration and deter their activism in the political affairs of [Egypt] which in turn, failed in its inescapable responsibility to take action against the perpetrators.”*<sup>206</sup>

- 11.4.5 It should be noted that Egypt is a party to the African Charter, but *not* to the Maputo Protocol. However, encouragingly, the ACHPR required in its decision that Egypt amend its laws with respect to violence and the protection of women to bring them into line with the requirements of the African Charter, and urged Egypt to ratify the Maputo Protocol. This decision stands as a message to all African States, whether a signatory to the Maputo Protocol or otherwise, that the ACHPR will not tolerate the use of violence against women as a means to intimidate or exclude them from participating in political processes<sup>207</sup>.
- 11.4.6 There appears to be no mechanism available to the ACHPR to directly enforce its decisions upon States Parties, nor to issue sanctions or cost orders against a State Party who fails to implement the ACHPR’s recommendations. The ACHPR can however refer cases to the African Court on Human and Peoples’ Rights (described below), whose decisions are legally binding on States Parties.

### 11.5 The African Court on Human and Peoples’ Rights

- 11.5.1 The African Court on Human and Peoples’ Rights (the “**Court**”) is a continental court established in 2006 to ensure protection of human and peoples’ rights in Africa. It “*complement[s] and reinforce[s] the functions of the [ACHPR]*”<sup>208</sup>. The Court has jurisdiction over all cases and disputes submitted to it concerning the interpretation and application of the Charter, as well as other African human rights instruments ratified by complainant States, including the Maputo Protocol<sup>209</sup>.
- 11.5.2 The Court derives its power from Article 18 of the Constitutive Act of the African Union and Article 1 of the Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights<sup>210</sup>. Decisions of the Court are legally binding on the 24 states, including Kenya, which have ratified that protocol and acknowledged the jurisdiction of the Court. Article 30 requires States Parties to the protocol to undertake to comply with the judgment of the Court in any case to which they are a party and to guarantee its execution within the time stipulated by the Court.
- 11.5.3 The Court’s first judges were sworn-in in July 2006. As of May 2012 the Court had issued decisions on only 12 cases. As of July 2013 only seven states (Burkina Faso, Ghana, Malawi, Mali, Rwanda, Tanzania and Cote d’Ivoire) had made a declaration allowing direct access for individuals and NGOs to the Court<sup>211</sup>. The lack of direct access for individuals to the Court suggests that individuals who wish to complain

<sup>206</sup> Egyptian Initiative for Personal Rights and Interights v Egypt (Communication 323/2006 (2011)) at 166

<sup>207</sup> See the press release dated 14 March 2013 and published by The International Centre for the Legal Protection of Human Rights in connection with Egyptian Initiative for Personal Rights following the decision. Available at: [www.interights.org/document/264/index.html](http://www.interights.org/document/264/index.html) (accessed 15 August 2013)

<sup>208</sup> The Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights, Preamble, (accessed 27 August 2013). Available at: [www.achpr.org/instruments/court-establishment](http://www.achpr.org/instruments/court-establishment)

<sup>209</sup> Webpage for the African Court on Human and Peoples’ Rights, (accessed 16 August 2013). Available at: [www.african-court.org/en/index.php/about-the-court/brief-history](http://www.african-court.org/en/index.php/about-the-court/brief-history)

<sup>210</sup> The Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights, Article 1. Available at: [www.achpr.org/instruments/court-establishment](http://www.achpr.org/instruments/court-establishment)

<sup>211</sup> Webpage for the African Court on Human and Peoples’ Rights, (accessed 27 August 2013). Available at: [www.african-court.org/en/index.php/about-the-court/brief-history#sthash.Ohowcagq.dpuf](http://www.african-court.org/en/index.php/about-the-court/brief-history#sthash.Ohowcagq.dpuf)



of human rights violations are granted much easier access to the ACHPR than to the Court. A delegation from the Court undertook a sensitisation mission in Kenya in July 2013 with a view to promoting the work and function of the Court within Kenya. The delegation recommended that Kenya allow direct access for individuals to the Court<sup>212</sup>.

11.5.4 Unfortunately, none of the 12 cases decided upon by the Court to date deal directly with the prevention of gender based violence or a violation of rights under the Maputo Protocol.

11.5.5 Judgements of the Court bind only states that are parties to the decision, but can be a persuasive authority in states that are parties for the Protocol establishing the court. However, there have been problems with the enforcement of judgements, as no enforcement mechanisms exist. There is also no mechanism sanctioning states that fail to enforce rulings of the Court. An example of the issues with enforcement is evident in the *African Commission on Human and Peoples Rights v. The Republic of Kenya* which was referred to the African Court in 2012. The Court ordered the Kenyan government to stop the eviction of the Ogiek Community members and other settlers from the Mau Forest on grounds the forest constituted a reserved water catchment area, as well as postpone distribution of land in the contested forest area, pending the decision of the Court on the matter. The Court reached the decision that the government's actions violated the Ogieks' right to enjoyment of their cultural and traditional values, their right to property, as well as their right to economic, social and cultural development, all of which are enshrined in the African Charter on Human and Peoples Rights. The government was ordered to report on execution of the measures in 15 days. The suit was filed by the African Commission on Human and Peoples' Rights. The government is yet to comply with the orders. Whilst not a women's rights case, it is illustrative of the issues that arise with regard to compliance/enforcement of rulings made by the Court.

## 11.6 UN Committee on the Elimination of Discrimination Against Women

11.6.1 The UN Committee on the Elimination of Discrimination Against Women (the "Committee") is an expert body established in 1982 and is composed of 23 experts on women's issues from around the world. The Committee's mandate is to monitor progress for women made in countries which are States Parties to the 1979 Convention on the Elimination of All Forms of Discrimination against Women ("CEDAW"). States Parties to CEDAW, which includes Kenya, are legally obliged to implement its provisions. The Committee monitors the implementation of national measures taken by the States Parties to fulfil their obligations under CEDAW. The provisions of CEDAW are broadly similar to those of the Maputo Protocol.

11.6.2 The Committee potentially offers another international complaints procedure via the Optional Protocol to CEDAW, which allows for individual or groups of women to complain to the Committee about a violation of their rights under the CEDAW, however as of September 2013, Kenya has not signed or ratified the Optional Protocol. The Optional Protocol also creates an enquiry procedure which allows the Committee to investigate complaints and make recommendations to States Parties on structural causes of violations of CEDAW. In May 2013, the UN Committee on Torture urged Kenya to ratify the Optional Protocol, thereby giving individual Kenyan women the right to complain directly to the Committee.

<sup>212</sup> Webpage for the African Court on Human and People's Rights, 'African Court Organizes a Sensitization Mission to Kenya', (accessed 27 August 2013). Available at: [www.african-court.org/en/index.php/news/latest-news/413-african-court-organizes-a-sensitization-mission-to-the-republic-of-kenya](http://www.african-court.org/en/index.php/news/latest-news/413-african-court-organizes-a-sensitization-mission-to-the-republic-of-kenya)



- 11.6.3 The Committee website publishes 10 decisions released by the Committee in response to complaints from individual women in 7 countries, many involving complaints of severe domestic violence. None of the 10 complaints arise from an individual living in an African nation/signatory to the Maputo Protocol.
- 11.6.4 However, as a State Party to CEDAW, Kenya is required to produce a report at least every four years on the measures it has taken to comply with its obligations under the Convention. As of September 2013, Kenya is up-to-date with its reporting obligations under CEDAW and the reports to the Committee provide valuable insight to the Kenya government's perceptions of its success in implementing the provisions of CEDAW. As many of the provisions of CEDAW are similar in many ways to those of the Maputo Protocol, these reports can provide valuable insight into how Kenya views its progress in implementing the Maputo Protocol.
- 11.6.5 The Committee's most recent report on Kenya's level of compliance with CEDAW dates from February 2011. The report outlines numerous recommendations for the improvement of the position of women in Kenya, including recommendations aimed at eliminating violence against women. The key recommendations arising from that report are set out below.

### *Violence against women*

- 11.6.6 As per Section 4 of this Chapter, the Committee report expresses similar concern over the level of violence against women and girls in Kenya, particularly the high level of sexual violence, including rape. Such violence, the report claims, "*appears to [be] socially legitimized and accompanied by a culture of silence and impunity*". As such, "*cases of violence are thus under reported, such under reporting being further encouraged by Section 38 in the Sexual Offences Act which exposes the victims to prosecution in certain circumstances*". The report therefore recommends, *inter alia*, the repeal of Section 38 of the Sexual Offences Act, the enactment of the Family Protection Bill and the criminalisation of marital rape. (As mentioned above at paragraph 4.2.5, Section 38 has now been repealed).

### *Absence of holistic approach*

- 11.6.7 Of greatest concern to the Committee was the "*absence of a holistic approach to the prevention and elimination of all forms of violence against women*". To combat this, the report recommends a system of training for the judiciary, law enforcement and health service providers to increase awareness amongst these groups of the types of violence perpetrated against women and to ensure gender-sensitive support for victims. Further, counselling services and shelters should be made available for victims of violence. In light of these concerns, the Committee has requested that Kenya provide detailed information on its plan to address all forms of violence against women and what measures have been implemented to ensure proper support, justice and compensation for victims of violence<sup>213</sup>.

### *Trafficking and the exploitation of prostitution*

- 11.6.8 The report acknowledges and welcomes Kenya's Trafficking in Persons Act (see paragraph 7.1) and Kenya's efforts in raising awareness of sex tourism and child prostitution but expresses concern at the absence of a national plan of action to address trafficking and sexual exploitation<sup>214</sup>. Further, the report expresses concern that women and girls are entering prostitution as a means to support their families. The Committee urges Kenya to criminalise the perpetrators of prostitution and sex tourism, rather than its victims, who should be protected and assisted. The

---

<sup>213</sup> Ibid. at paragraphs 21 to 24

<sup>214</sup> Ibid. at paragraph 27

Committee recommends, *inter alia*, that Kenya increases its efforts to cooperate with other countries, through the exchange of information, to prevent trafficking and create procedures aimed at prosecuting traffickers<sup>215</sup>.

#### *Reproductive Health*

11.6.9 The report expresses concern over the “*inadequate recognition and protection of the reproductive health and rights of woman in the State party*” (see paragraph 8.1) and also in relation to the fact that the Reproductive Rights Bill had not yet been enacted. The Committee expressed particular concern over the level of maternal mortality rates (which increased from 414 per 100,000 in 2003 to 488 per 100,000 in 2008, and from 1,000 per 100,000 to 1,300 per 100,000 in the same period in Northern Kenya), as a result of 95% of deliveries taking place within homes with no skilled attendants<sup>216</sup>. The report states that Kenya’s restrictive abortion laws lead women to seek out an illegal abortion, which contributes significantly to the high maternal mortality rate. To combat these problems, the Committee urges Kenya to improve access to reproductive health care generally, including contraception and education on disease, and specifically to provide services for managing complications arising during unsafe abortions. Further, the Committee urges Kenya to review the law on abortion with a view to removing the provisions imposing punishment on women who undergo abortions<sup>217</sup>.

11.6.10 Kenya’s next report to the Committee is due in February 2015.

### **11.7 Kenya’s Reporting Obligations Under the African Charter and the Maputo Protocol**

11.7.1 The 108th Resolution of the ACHPR, arising from the 41st Ordinary session meeting in Accra, Ghana, from 16 to 30 May 2007, encourages States Parties to comply with Article 62 of the Charter, which requires States Parties to submit every two years, from the date the Charter came into force in 1986, “*a report on the legislative or other measures taken with a view to giving effect to the rights and freedoms recognised and guaranteed by the African Charter.*” The resolution acknowledges that, as of May 2007, Kenya had complied with and was up to date with its reporting obligation under Article 62<sup>218</sup>.

11.7.2 Article 26 of the Maputo Protocol places a similar obligation on States Parties. In May 2010 the ACHPR issued guidelines for state reporting under the Protocol. These guidelines offer advice on the content and scope of the report which should focus on the steps taken by the States Parties to implement the specific provisions of the Charter insofar as they relate to women’s rights, and the Maputo Protocol as a whole, taking each Article in turn<sup>219</sup>.

### **11.8 Compensation**

11.8.1 Compensation for victims is, in theory, provided for in the Kenyan legal system. Section 31 of the Kenyan Penal Code provides that “*any person who is convicted of an offence may be adjudged to make compensation to any person injured by his offence, and the compensation may be either in addition to or in substitution for any other punishment.*”

---

<sup>215</sup> Ibid. at paragraph 28

<sup>216</sup> Ibid. at paragraph 37

<sup>217</sup> Ibid. at paragraph 38

<sup>218</sup> African Commission on Human and Peoples’ Rights, ‘108: Resolution Reiterating the Importance of Compliance with Reporting Obligations under the African Charter’ (accessed 30 July 2013). Available at: [www.achpr.org/sessions/41st/resolutions/108](http://www.achpr.org/sessions/41st/resolutions/108)

<sup>219</sup> African Commission on Human and Peoples’ Rights, Guidelines for state reporting under the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, May 2010. Available at: [www.pulp.up.ac.za/pdf/2013\\_05/2013\\_05.pdf](http://www.pulp.up.ac.za/pdf/2013_05/2013_05.pdf) pp. 214-216

- 11.8.2 Article 50(9) of the Constitution provides that “*Parliament shall enact legislation providing for the protection, rights and welfare of victims of offences*”<sup>220</sup>. Under the Fifth Schedule to the Constitution, it is estimated that legislation to implement Article 50 would take 4 years. In 2012 the Victim Protection Bill was reviewed by the Kenyan parliament. The bill provided that an offender may be ordered to make restitution or pay compensation to the victim for the cost of any property damage or for medical or psychological treatment etc., in addition to any custodial sentence<sup>221</sup>. The Bill has not, however, been approved and enacted by Parliament. At the time of writing, it is undergoing internal review and stakeholder consultations.
- 11.8.3 Section 31(1) of the Witness Protection (Amendment) Act 2010 (the “**WPAA**”) provides for the establishment of the Victims Compensation Fund (the “**Fund**”). The Fund was established, according to Section 31(4) of the WPAA, to cater for restitution and compensation of a victim (or their family) for a crime committed by any person during a period when such victim is provided protection under the WPAA. However, the Fund does not apply to all victims of crimes; only to those provided protection under the WPAA. At the time of writing, the Fund has not been established.
- 11.8.4 As described at paragraph 7.1.5, Sections 22-24 of the Counter-Trafficking in Persons Act provides for a Trust Fund for victims of trafficking. This trust fund allows for payments to victims, at the discretion of the Minister, to assist them or to pay damages where the offender has insufficient funds to pay to the victims. Again, at the time of writing, the trust fund has not been established.
- 11.8.5 Finally, as described above at paragraph 9.3.10, the TJRC has recommended that a Reparations Fund be established to compensate victims of historic violence.
- 11.8.6 Despite the above-mentioned provisions, commentators have noted that in Kenya the punishment of offenders has been focused more on attempting to achieve deterrence as opposed to addressing victim’s need for compensation, with the result being that the death penalty, jail sentences and fines are the most preferred forms of punishment for convicted criminals in Kenya. Compensation for victims of crime is rarely considered<sup>222</sup>.

### 11.9 Psycho-Social Assistance Schemes

- 11.9.1 There are several NGOs operating within Kenya that provide psycho-social support to victims of gender-based violence (“**GBV**”). In particular, Nairobi’s GVRC provides free medical treatment and psychological support to victims of GBV<sup>223</sup>. Until recently, this used to be the only such centre to provide free treatment in East and Central Africa. As of August 2013, however, several other centres have been set up under the auspices of GVRC<sup>224</sup>. The GVRC remains a referral centre for specialised management of GBV cases from all over Kenya. The Kenya Red Cross has been a key partner in assisting survivors from the hard to reach areas unreached by GVRC<sup>225</sup>.

<sup>220</sup> P Bowry, ‘Compensation for victims of crime necessary’ (13 June 2012). Available at: [www.standardmedia.co.ke/?articleID=2000059728&story\\_title=compensation-for-victims-of-crime-necessary&pageNo=1](http://www.standardmedia.co.ke/?articleID=2000059728&story_title=compensation-for-victims-of-crime-necessary&pageNo=1)

<sup>221</sup> Section 14 The Victim Protection Bill 2012

<sup>222</sup> P Bowry, ‘Compensation for victims of crime necessary’ (13 June 2012). Available at: [www.standardmedia.co.ke/?articleID=2000059728&story\\_title=compensation-for-victims-of-crime-necessary&pageNo=1](http://www.standardmedia.co.ke/?articleID=2000059728&story_title=compensation-for-victims-of-crime-necessary&pageNo=1)

<sup>223</sup> ‘GVRC Achievements’ ([gvr.or.ke](http://gvr.or.ke), undated). Available at: [www.gvr.or.ke/index.php/about-us/achievements](http://www.gvr.or.ke/index.php/about-us/achievements)

<sup>224</sup> These include: the Centre for Assault and Recovery Centre in Eldoret (CARE) situated in Moi Teaching and Referral Centre (GBVRC) at Kenyatta National Hospital, Taita Taveta District Hospital, Biafra Clinic in Easleigh Nairobi, Jinja District Hospital and Kamoja Hospital in Kampala Uganda

<sup>225</sup> ‘GVRC Achievements’ ([gvr.or.ke](http://gvr.or.ke), undated). Available at: [www.gvr.or.ke/index.php/about-us/achievements](http://www.gvr.or.ke/index.php/about-us/achievements)

# CHAPTER THREE

---

## MARRIAGE

### 1. RELEVANT PROVISIONS OF THE MAPUTO PROTOCOL

- 1.10** Article 6(b) of the Maputo Protocol provides that “*the minimum age of marriage for women shall be 18 years*”.
- 1.11** The remaining sub-sections of Article 6 are also relevant to the subject of marriage and other provisions of the Protocol may overlap with this issue, such as the Article 5 prohibition on harmful practices. For the purposes of this Chapter, however, the focus is on Article 6(b).

### 2. RELEVANT PROVISIONS OF DOMESTIC KENYAN LEGISLATION

- 2.1** The minimum age of marriage features in a number of Kenyan legislative provisions and is also the subject of a Bill which appears to be currently making its way through Kenyan parliament.
- 2.2** Even within the current legislative framework, the provisions which concern the minimum age of marriage appear to be contradictory and there seems to be a distinction between religious marriages and civil marriages. The following specific provisions demonstrate this distinction:
- 2.2.1** The Constitution is silent on the issue of early marriage but Article 24(4) does state that the provisions relating to equality in the Bill of Rights section of the Constitution “*shall be qualified to the extent strictly necessary for the application of Muslim law before the Kadhis’ courts, to persons who profess the Muslim religion, in matters relating to ... marriage.*” This seems to indicate that those provisions which limit marriage in any way (including by age) would not apply to a Muslim wedding ceremony.
- 2.2.2** Similarly, Section 3 of the Hindu Marriage and Divorce Act 1960 provides that the bride in a Hindu marriage may wed at sixteen provided that the consent of her ‘guardian in marriage’ has been obtained and Section 19 of the Marriage Act 1902 allows marriage for any person under 18 only where written consent is obtained from the child’s lawful custodian.
- 2.2.3** The foregoing provisions contradict the limitation set out in Sections 2 and 14 of the Children Act 2001, which provides that no person shall subject any child under the age of 18 to early marriage. This is also reflected to a lesser extent in Section 35(2) of the afore-mentioned Marriage Act, which states that: “*A marriage shall be null and void if either party thereto is under the age of sixteen years at the time of the celebration of such marriage*”.
- 2.3** A potential key development in this area may be forthcoming. Section 4 of the Marriage Act 2014 contains a blanket restriction that: “*A person shall not marry unless that person has attained the age of eighteen years.*” Whether this law will actually be passed, and, if it is, whether it will supersede the other provisions of Kenyan law that relate to the minimum age for marriage, remains to be seen.

### 3. POSITION UNDER KENYAN CUSTOMARY LAW & SHARIA LAW

**3.1** Although some of the legislation above refers to religious ceremonies, the laws all govern statutory marriages. It appears marriages under customary or Sharia law can be registered without any minimum age requirement (see the Mohammedan Marriage Registration Act and the Mohammedan Marriage, Divorce and Succession Act.)

**3.2** **Additionally, as one source notes:**

*“Although there are provisions for marriage registration, registration does not define validity and marriages conducted under statutory (includes the Marriage Act as well as the African Christian Marriage Act), customary, Muslim and Hindu law are all recognized”.*<sup>226</sup>

### 4. IMPLEMENTATION OF THE RELEVANT PROVISIONS IN PRACTICE

**4.1** Despite the general prohibition in the Children Act 2001, a number of reports suggest under-age marriage is still relatively commonplace in Kenya. In a 2012 study, 43.3% of the female respondents interviewed were found to have been married below the age of 18<sup>227</sup>. The same study revealed that cultural, religious and economic arguments are often used to justify child marriage. Poverty and the lack of economic opportunities for girls in rural areas were cited by parents and guardians of respondents as major factors leading to child marriage.

**4.2** One article from 2012 refers to children as young as seven being forced into marriage<sup>228</sup>. The same article notes, however, that, despite this fact, the provisions under the Sexual Offences Act which prohibit sexual acts with minors do not distinguish such acts taking place in the context of marriage and also remarks that *“the ... provisions, as regards child marriages focus on adults who get married to children prescribe punishments which are very severe”*.

**4.3** There are also reports of young girls being sold into marriage by their families for as little as 15,000 Kenyan shillings (£109), such practice being on the rise due to the increased hardship caused by the Kenyan droughts – hence, the term ‘drought brides’<sup>229</sup>.

**4.4** These offences tend to be termed as defilement/attempted defilement cases under Section 8 and 9 of the Sexual Offences Act 2006. Section 14 of the Children Act 2001 also provides that no person shall subject a child to early marriage. There have been successful prosecutions but these are few and far between.

---

<sup>226</sup> Available at: [www.law.emory.edu/ifl/legal/kenya.htm](http://www.law.emory.edu/ifl/legal/kenya.htm)

<sup>227</sup> Because I am a Girl – Kenya Country Report 2012. Available at: <http://plan-international.org/files/Africa/RESA/kenya/biaag-kenya-country-report-2012>, page 6

<sup>228</sup> Available at: <http://allafrica.com/stories/201210250088.html?viewall=1>

<sup>229</sup> Available at: [www.trust.org/item/20110804080000-p3oxi/?source=search](http://www.trust.org/item/20110804080000-p3oxi/?source=search)

# CHAPTER FOUR

## ACCESS TO JUSTICE

### 1. RELEVANT PROVISIONS OF THE MAPUTO PROTOCOL

- 1.5** Article 2 of the Maputo Protocol calls for States Parties to “*enact and effectively implement appropriate legislative or regulatory measures, including those prohibiting and curbing all forms of discrimination*”.
- 1.6** Specifically, Article 8 states that women and men are equal before the law and shall have the right to equal protection and benefit of the law. It also prescribes a number of measures that state parties are to implement in accordance with this principle<sup>230</sup>.

### 2. BACKGROUND

- 2.1** Access to justice is a problem throughout Kenya. For example, the International Commission of Jurists (the “ICJ”) has criticised the significantly small number of judges in Kenya compared with the population (332 for 38 million people) and has advocated for this number to be raised<sup>231</sup>.
- 2.2** In Kenya there is a drive to increase the numbers of the judicial staff, which is part of the Judiciary Transformation Framework 2012-2016<sup>232</sup>.
- 2.3** The ICJ also notes that: “*many years of frustration with the Kenyan justice system were attributed to a number of factors, including: a lack of faith and public confidence in the judiciary based on lengthy, complicated judicial processes; perceptions of comprised judicial officers; and a sense of mystery that shrouded the administration of justice.*”<sup>233</sup>
- 2.4 Women in particular face a number of obstacles, including that:**<sup>234</sup>
- 2.4.1 the physical location of courts and lawyers is beyond the reach of most Kenyans who are situated in rural areas;
  - 2.4.2 financial resources are needed to use the formal legal system, in order to pay court and legal fees; most women (especially widows facing legal disputes about inheritance and property) cannot afford this;
  - 2.4.3 although there are legal aid services, these have only reached some of those who require assistance; most of the legal aid programmes are situated in urban areas and are therefore not accessible to many people in rural areas;
  - 2.4.4 for those that have obtained legal aid, the length of the legal process can act as a deterrent. Claims can run for up to 6 years or more, which can lead poorer litigants to give up because justice is so delayed as to not be of any use to them<sup>235</sup>;

<sup>230</sup> “States Parties shall take all appropriate measures to ensure: (a) effective access by women to judicial and legal services, including legal aid; (b) support to local, national, regional and continental initiatives directed at providing women access to legal services, including legal aid; (c) the establishment of adequate educational and other appropriate structures with particular attention to women and to sensitise everyone to the rights of women; (d) that law enforcement organs at all levels are equipped to effectively interpret and enforce gender equality rights; (e) that women are represented equally in the judiciary and law enforcement organs; (f) reform of existing discriminatory laws and practices in order to promote and protect the rights of women”

<sup>231</sup> Available at: [www.icj-kenya.org/index.php/icj-programmes/access-to-justice6](http://www.icj-kenya.org/index.php/icj-programmes/access-to-justice6)

<sup>232</sup> See [http://csis.org/files/attachments/120907\\_JudiciaryTransformationFramework.pdf](http://csis.org/files/attachments/120907_JudiciaryTransformationFramework.pdf)

<sup>233</sup> ICJ Kenya, Access to Justice and Public Participation in the Judicial Process: An Analysis of Court User Committees in Kenya

<sup>234</sup> Accessing Justice and Protecting the Rights of the Vulnerable through Cultural Structures (Kenyan Legal and Ethical Issues Network on HIV & AIDS (KELIN))

<sup>235</sup> For example, a woman whose property has been illegally appropriated following the death of her husband will often have migrated from the area to an informal settlement in a bigger town or city by the time the case is finalised



2.4.5 the adversarial nature of the litigation process makes many women give up their rights<sup>236</sup>; and

2.4.6 although the Constitution and the Protocol provide for access to justice for women in Kenya, the power of customary law and practices cannot be underestimated. Custom and practice may vary from community to community and even family to family. There is therefore invisible power within communities, which will often dictate a woman's standing and how her rights will be determined, which may not accord with the formal written law.<sup>237 238</sup>

### **2.5 Such issues with access to justice for women is perhaps unsurprising given that, in Kenya:**

*“gender inequality is manifest in differential treatment and outcomes that deny women the full enjoyment of the social, political, economic and cultural rights and development. This runs afoul the principle of non-discrimination which is a fundamental tenet of the International Convention on Economic, Social and Cultural Rights.”<sup>239</sup>*

## **3. RELEVANT PROVISIONS OF DOMESTIC KENYAN LEGISLATION**

**3.1** Access to justice features in a number of Kenyan legislative provisions and is particularly prevalent throughout the Constitution. Most notably, Article 22(1) of the Constitution provides 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 are threatened”* and Article 48 states that *“the State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice”*.<sup>240</sup>

**3.2** There is also some overlap between this topic and the pursuit of equality within the judiciary and related bodies under Kenyan law<sup>241</sup>. Although not directly related, the representation of women in such bodies is likely to be linked to the level of awareness of women's issues within the justice system.

### **3.3 In addition to the various constitutional provisions, the Judicial Service Act aims to ensure that the Judicial Service Commission and the judiciary:**

3.3.1 *“facilitate accessibility of judicial services to all Kenyans”*; and

3.3.2 *“be guided in their internal affairs, and in the discharge of their mandates by considerations of social and gender equity and the need to remove any historical factors of discrimination”*.<sup>242</sup>

**3.4** Equally, the Civil Procedure Rules provide that any person, irrespective of their sex, is able to bring a claim, provided that claim fulfils the required conditions.<sup>243</sup>

<sup>236</sup> For example, women's' attempts to enforce their rights to property are often frustrated by relatives who consider challenging other family members in court as unacceptable. Those women who do seek to enforce their property rights are likely to be ostracised or subjected to violence. Filing a law suit is therefore not considered an option by many women who lose their home when widowed

<sup>237</sup> For example, it appears that women who decide to bring their claim to justice are not often well received by police officers, some of them trying to deter women from claiming their rights

<sup>238</sup> See also “The Illusion of Inclusion, Women's access to Rights in Northern Kenya”, Bonita Ayuko and Tanja Chopra, Research report, December 2008, supported by the World Bank and implemented by Justice for the Poor program

<sup>239</sup> S Ouma1 and J Ambani, “Taking these rights seriously: Civil Society Organisations' Parallel Report to the Initial State Report of the Republic of Kenya on the implementation of the International Covenant on Economic, Social and Cultural Rights” (2008) page 9. Available at: [www.rtfn-watch.org/uploads/media/Report\\_Kenya.pdf](http://www.rtfn-watch.org/uploads/media/Report_Kenya.pdf)

<sup>240</sup> See also Articles 32(1), 50, 159, 161, 172 and 232 of the Constitution in connection with this topic

<sup>241</sup> For example, Article 27 of the Constitution provides that not more than two-thirds of the members of the elective or appointive bodies shall be of the same gender. There are currently 7 judges of the Supreme Court, of which 2 are female and 35 judges of appeal listed ([www.kenyalaw.org/klr/index.php?id=118](http://www.kenyalaw.org/klr/index.php?id=118)), of which 9 are female Also, Section 10(2) of the Judicial Service Act states that, when considering candidates for promotion, gender (inter alia shall be taken into account and Section 34(5) provides that no more than two thirds of the members of the National Council on the Administration of Justice (whose purpose under Section 35(2) Judicial Services Act is to ensure a “co-ordinated, efficient, effective and consultative approach in the administration of justice and reform to the justice system”) shall be of one gender, which secure a minimum number of women in a body which shall, inter alia, formulate policies in relation to the service of justice

<sup>242</sup> Section 3 Judicial Service Act, N°1 of 2011

<sup>243</sup> Order 1, Civil Procedure Rules, Rules under Section 81

**3.5 There are also a number of tangential provisions, including:**

- 3.5.1 The Magistrates' Courts Act 1967, which provides that a magistrate's court "*shall, so far as practicable, be held at the place or places where it is regularly or customary held.*" This provision may be important for women in isolated parts of the country.
- 3.5.2 Section 82 of the Civil Procedure Act states that "*women who according to the customs and manners of their communities ought not to be compelled to appear in public shall be exempted from personal appearance in court*".
- 3.5.3 Section 86 of the Civil Procedure Act states that the language of the High Court and Court of Appeal is English and language of subordinated courts is English or Swahili. Translators are available to translate legal proceedings into all of Kenya's indigenous languages for those who do not speak either English or Swahili (the data of how many women do not speak Swahili is not available as while English and Swahili are the mandated national language, in the rural areas indigenous language is more frequently used).

**4. GOVERNMENTAL INITIATIVES AND OTHER PROGRAMMES**

**4.1 National Legal Awareness Program ("NALEAP")**

- 4.1.1 According to the UN's Office of the High Commissioner for Human Rights, NALEAP was launched in 2008 and established six pilot projects based in organisations which traditionally provide legal aid services with a mandate to assess the provision of legal aid services<sup>244</sup>.
- 4.1.2 Although a government initiative by name<sup>245</sup>, NALEAP was funded by private donors, leaving some doubt as to how many resources the government is actually directing towards the issue of access to justice.
- 4.1.3 Of particular note is the Nairobi Court Family Division Pilot Project, which "*is facilitated by LSK and the Federation of Women Lawyers (FIDA) Kenya. It handles cases of family nature relating to divorce, disputes over matrimonial property, administration of estates of the deceased and interdicts to stop or prevent family violence*".<sup>246</sup>

**4.2 Court Users Committees**

- 4.2.1 In 2007, the Kenya Magistrates and Judges Association established Court Users Committees ("**CUCs**") in most Kenyan court stations with the intention of enhancing public accessibility to judicial institutions (as mandated by the Constitution), as well as mitigating pervasive frustrations with the shortcomings of the current system.
- 4.2.2 According to the ICJ, "*CUCs offer an opportunity to find all relevant actors in the justice system in one place*", which means that disputes can be resolved in a way which is appropriate and accessible in any given case e.g. through the use of faith leaders, provincial administration and paralegals working within their localities<sup>247</sup>.

<sup>244</sup> Available at: [www2.ohchr.org/english/bodies/hrc/docs/ngos/FIDA\\_Kenya103.doc](http://www2.ohchr.org/english/bodies/hrc/docs/ngos/FIDA_Kenya103.doc)

<sup>245</sup> Available at: [www.justice.go.ke/index.php/programs-commissions/national-legal-awareness-program-naleap](http://www.justice.go.ke/index.php/programs-commissions/national-legal-awareness-program-naleap)

<sup>246</sup> Available at: [www.justice.go.ke/index.php/programs-commissions/national-legal-awareness-program-naleap](http://www.justice.go.ke/index.php/programs-commissions/national-legal-awareness-program-naleap)

<sup>247</sup> ICJ Kenya, Access to Justice and Public Participation in the Judicial Process: An Analysis of Court User Committees in Kenya

### 4.2.3 The ICJ also notes that:

*“It has often been said that those who apply ADR overstep the legal boundaries and at times flout accepted human rights principles in the execution of their tasks. Inclusion of all these players into a system that will allow them to get training and understanding of human rights principles and legal parameters within which they can work will allow for improved access to justice”.*<sup>248</sup>

## 4.3 Non-Governmental Organisations

### 4.3.1 There are number of organisations promoting access to justice rights in Kenya, particularly in respect of women. These include:

- (a) Women’s Rights Awareness Programme (“**WRAP Kenya**”);<sup>249</sup>
- (b) African Women’s Development and Communications Network;<sup>250</sup>
- (c) International Federation of Women Lawyers (Kenya Chapter) (see further paragraph 4.2.3 above);<sup>251</sup>
- (d) Centre for Rights and Education and Awareness for Women;<sup>252</sup> and
- (e) ICJ Kenya. This NGO is a national segment of the ICJ headquartered in Geneva, but it is autonomous of that organisation. The ICJ Kenya has a specific programme on access to justice,<sup>253</sup> which engages with the judiciary regarding issues relating to the rule of law and human rights.

### 4.3.2 The above organisations are non-governmental and/or not-for-profit and/or non-political and concentrate on lobbying to change policy and guidelines for women’s rights, including the right to access to justice, as well as seeking to educate women about their rights.

### 4.3.3 In particular, WRAP Kenya operates a legal aid programme which litigates on behalf of women who are GBV (gender-based violence) survivors who wish to prosecute the perpetrators and/or get out of abusive marriages. Assistance is also available for matters relating to child maintenance and custody. In addition, WRAP Kenya states that the programme also *“carries out extensive research on social and legal issues affecting the Human Rights of Women and Children in Kenya, and provides legal advice and rights education within schools and in communities”*<sup>254</sup>

### 4.3.4 KELIN, a not-for-profit NGO,<sup>255</sup> has developed “Cultural Structures”<sup>256</sup> in order to try and deliver access to justice by community-based alternative dispute resolution outside of the formal legal framework, as a response to the difficulties faced by women in accessing justice. This project involves helping the community to take charge of the protection of the rights of its members by resolving disputes by mediation or, if necessary, arbitration. Elders<sup>257</sup> are trained in order to be able to mediate or arbitrate cases of human rights violations within their community. KELIN reports success in the communities where it has piloted this programme and sets out a tool for use in developing these structures.

---

<sup>248</sup> ICJ Kenya, Access to Justice and Public Participation in the Judicial Process: An Analysis of Court User Committees in Kenya

<sup>249</sup> Available at: [www.wrapkenya.or.ke](http://www.wrapkenya.or.ke)

<sup>250</sup> Available at: <http://femnet.co/index.php/en>

<sup>251</sup> Available at: <http://fidakenya.org>

<sup>252</sup> Available at: [www.womankind.org.uk/where-we-work/kenya/womankind-in-kenya/centre-for-rights-education-and-awareness-creaw](http://www.womankind.org.uk/where-we-work/kenya/womankind-in-kenya/centre-for-rights-education-and-awareness-creaw)

<sup>253</sup> Available at: [www.icj-kenya.org/index.php/icj-programmes/access-to-justice6](http://www.icj-kenya.org/index.php/icj-programmes/access-to-justice6)

<sup>254</sup> Available at: [www.wrapkenya.or.ke/our-programs/legal-aid-programme](http://www.wrapkenya.or.ke/our-programs/legal-aid-programme)

<sup>255</sup> Available at: <http://kelinkenya.org>

<sup>256</sup> Available at: Available at: <http://kelinkenya.org/wp-content/uploads/2010/10/Working-with-Cultural-Structures-A4FINAL.pdf>

<sup>257</sup> Not necessarily the oldest in the community, but people who are ‘accepted opinion leaders’ within it

## 5. PROBLEMS REMAINING

- 5.1 Government provided legal aid has been previously unavailable, consequently legal aid in Kenya has primarily been provided by NGOs, whose reach is limited. A significant issue is therefore the absence of a framework and institutional structures for government provided legal aid.
- 5.2 Following the promulgation of the constitution and the requirement for government to ensure that Kenyans can access justice i.e. Article 48, 50 (2) (g) of the Constitution, a Legal Aid Bill is currently undergoing internal review and stakeholder consultations.
- 5.3 The Legal Aid Bill sets out the parameters for a government legal aid scheme. The Bill establishes a National Legal Aid Service and provides for a government funded Legal Aid Fund as well as the establishment of legal aid clinics.
- 5.4 Though the Bill is for the large part gender neutral, the Bill requires that in the implementation of it principles of gender equity and gender equality are taken into account. As the Bill is still in its very initial stages it is difficult to say how this aspect will translate in implementation.
- 5.5 Finally, despite the constitutional and legal changes being made in Kenya, a huge number of Kenyans (particularly women) remain uneducated and unaware of these changes and their purported implications and the government appears to be doing little to improve the situation.<sup>258</sup>

---

<sup>258</sup> D Espinosa "Kenya: New Constitution promises unprecedented rights for women" Global Post (America's worlds news website, 13 March 2012) [www.globalpost.com/dispatches/globalpost-blogs/commentary/commentary-the-promise-kenya-constitution](http://www.globalpost.com/dispatches/globalpost-blogs/commentary/commentary-the-promise-kenya-constitution) accessed on 3 July 2013

# CHAPTER FIVE

---

## EDUCATION

### 1. ATTENDANCE OF GIRLS AT SCHOOL

#### 1.6 Relevant Provisions of the Maputo Protocol

1.6.1 Article 12 – Right to Education and Training requires States Parties to **take all appropriate measures** to:

- (a) Eliminate all forms of discrimination against women and guarantee equal opportunity and access in the sphere of education and training;
- (b) Eliminate all stereotypes in textbooks, syllabuses and the media, that perpetuate such discrimination;
- (c) Protect women, especially the girl-child, from all forms of abuse, including sexual harassment in schools and other educational institutions and provide for sanctions against the perpetrators of such practices (this topic is dealt with separately in the section entitled “*Sexual Harassment of Girls in Schools*” at Paragraph 2 below);
- (d) Provide access to counselling and rehabilitation services to women who suffer abuses and sexual harassment;
- (e) Integrate gender sensitisation and human rights education at all levels of education curricula including teacher training;

and to take specific positive action to:

- (f) Promote literacy among women;
- (g) Promote education and training for women at all levels and in all disciplines, particularly in the fields of science and technology; and
- (h) Promote the enrolment and retention of girls in schools and other training institutions and the organisation of programmes for women who leave school prematurely.

#### 1.7 Relevant Provisions of Domestic Kenyan Legislation

1.7.1 Directly relevant legal requirements:

- (a) The Constitution of Kenya 2010; the Basic Education Act 2013; and the Children Act 2001 are the most relevant pieces of legislation to this section (see also the section entitled “*Sexual Harassment of Girls in Schools*” at Paragraph 2 below).
- (b) The Constitution provides that:
  - a) Every person has the right to education (Article 43(1)(f));
  - b) Every child has the right to free and compulsory basic education (Article 53(1)(b)) and to be protected from harmful cultural practices (Article 53(1)(f));
  - c) The State shall take measures, including affirmative action programmes, to ensure that the youth access relevant education and training and are protected from harmful cultural practices and exploitation (Article 55(a) and (d)).

- (c) In order to give effect to Article 53 of the Constitution, the Basic Education Act 2013 came into force earlier this year. The Basic Education Act states (at Section 4) that the provision of basic education shall be guided by values and principles which include (a) the right of every child to free and compulsory basic education; and (b) the elimination of gender discrimination (amongst others).
- (d) A child is defined as an individual who has not attained the age of 18 years.
- (e) Section 28 of the Basic Education Act provides that the Cabinet Secretary shall implement the right of every child to free and compulsory basic education and provide for the establishment of reasonably accessible schools, appropriate boarding primary schools in arid/semi-arid and hard to reach areas.<sup>259</sup>
- (f) Further, under Section 30, every parent must ensure that its child attends regularly as a pupil at school or risks a fine of up to 100,000 shillings and/or imprisonment for up to a year. Section 38 makes it an offence for anyone to employ a child of compulsory school age in any occupation that prevents the child from attending school. An offence under that section could result in a fine of up to 5 million shillings and or up to 5 years imprisonment.
- (g) Section 40 provides that where a child fails to attend school, the head teacher shall initiate an investigation into the reasons; should it be found that there are no reasonable grounds for the child's lack of attendance, the head teacher shall issue a written notice to the parent and submit a report to the County Education Board.
- (h) The Children Act of 2001 is also relevant, Section 5 of which provides that no child shall be subjected to discrimination on the ground of origin, sex, religion, creed, custom, language, opinion, conscience, colour, birth, social, political, economic or other status, race, disability, tribe, residence or local connection. Further:
  - a) Section 7 provides that every child shall be entitled to education the provision of which shall be the responsibility of the government and the parents and that every child shall be entitled to free basic education which shall be compulsory in accordance with Article 28 of the United Nations Convention on the Rights of the Child (which requires that primary education only is compulsory).
  - b) Section 10 provides that every child shall be protected from economic exploitation and any work that is likely to be hazardous or to interfere with the child's education.
  - c) Section 14 provides that no person shall subject a child to female circumcision, early marriage or other cultural rites, customs or traditional practices that are likely to negatively affect the child's life, health, social welfare, dignity or physical or psychological development.
- (i) In 2003 the government of Kenya implemented a free primary education policy. From 2008 onwards, the government started to subsidise secondary education.

---

<sup>259</sup> Basic education is defined in the Basic Education Act 2013 as "the educational programmes offered and imparted to a person in an institution of basic education and includes Adult basic education and education offered in pre-primary educational institutions and centres." It is therefore not clear from the Act itself what basic education comprises, but various sources suggest that it comprises two years of pre-school, 8 years of primary education and 4 years of secondary education. For example, the University of Sussex paper 'Learning To Teach Reading And Mathematics And Influences On Practice In Kenya, Country Report July 2011' states that "the 1999 education commission expanded the scope of basic education to include pre-primary, primary and secondary education."



### 1.7.2 Indirectly relevant legal requirements

- (a) As well as the legislation which is relevant to anti-sexual harassment of girls in school (which, of course, is highly (albeit indirectly) relevant to their attendance), Kenyan legislation in relation to marriage is also of relevance, as girls who marry before the upper age limit for compulsory education are much less likely to complete their compulsory education.<sup>260</sup> See Chapter Three for further information.

## 1.8 Implementation

- 1.8.1 The Kenyan government's Gender Policy in Education, published in 2007, highlights key gender concerns in education, including disparities in enrolment and retention rates, negative cultural practices and attitudes which inhibit especially girls' attendance at school and drop out of girls due to pregnancy and early marriages.<sup>261</sup> Its Kenya Vision 2030 development strategy, which aims to achieve the industrialisation of the country by 2030, also recognises the importance of exploring the link between gender and education and overall national development, and the Government has allocated increased budget and initiated various intervention strategies (for example, free primary education, the provision of free sanitary towels to school girls).<sup>262</sup>
- 1.8.2 Available research suggests that although strides have been taken towards achieving "gender parity", and indeed gender parity in primary school enrolment has virtually been achieved in Kenya on a national level,<sup>263</sup> there still exists significant parity in enrolment in the rural regions, gender parity in achievement at school and gender parity in completion of primary school education. Some research even goes so far as to suggest that there is now greater parity in the number of girls and boys who complete primary school education,<sup>264</sup> the number of boys completing primary education having increased by over 17,600 more than the increase in the number of girls following the introduction of free primary education.
- 1.8.3 The enactment of the Constitution in 2010 is widely considered to be a significant step in the empowerment of women generally and enshrined their right to equal treatment and to a free and compulsory education. This was commended by a Committee on the Elimination of Discrimination against Women,<sup>265</sup> but the Committee also iterated concern at "*the persistence of structural and other barriers to good-quality education, which constitute particular obstacles to the education of young women*" and "*the high prevalence of sexual abuse and harassment of girls by male teachers and students, the negative impact of harmful traditional practices, such as early and forced marriage, on girls' education and the persistent barriers to the ability of pregnant girls to exercise their right to education.*"
- 1.8.4 A report from 2012 by an organisation named Plan International on the factors influencing girls' access, retention and completion of primary and secondary school education<sup>266</sup> found that incidences of child marriage were very high: 43.4% of females interviewed were married as children (11.6% of males were married as children). The Marriage Act 2014 (referred to above) outlaws marriage of under 18s however the practical impact of such a law is difficult to determine. Many marriages

<sup>260</sup> According to a report carried out by Plan International in 2012 (referred to below at footnote 11), 70% of children (male and female) who marry as children only have primary level education

<sup>261</sup> Wango, Musomi and Akinyi (2012) *Gender and Education in Kenya and Re-Alignment of Education to the Constitution*. Nairobi: ITP Human Rights Towards Gender Equality Seminar

<sup>262</sup> Guardian, Kenya: Government funds free sanitary pads for schoolgirls, 29 July 2011

<sup>263</sup> African Women's Decade 2010–2020: 2012 Annual Review states that, according to the Ministry of Education, "in 2010 the net Enrolment Rate for primary school dipped slightly to 91.4% with 90.6% for boys and 92.3% for girls"

<sup>264</sup> Lucas and Mbiti (2012) *Does Free Primary Education Narrow Gender Differences in Schooling? Evidence from Kenya*. Journal of African Economies, Vol. 21, Number 5, pages 691–722. September 2012

<sup>265</sup> Committee on the Elimination of Discrimination against Women, Concluding Observations of the Committee on the Elimination of Discrimination against Women, 5 April 2011

<sup>266</sup> Plan International, Because I am a Girl – Kenya Country Report 2012

are not registered/solemnized for example and the civil law position on the legality of the marriage may well be ignored or the ages of the girls may be falsified.<sup>267</sup> The provisions in the Basic Education Act 2013 may go some way in ensuring that pupils do not drop out of school without investigation, but again, the level of take up of the investigatory duties of head teachers and the number of successful prosecutions of guardians who prevent their children from attending school, remains to be seen. Further statistics are required.

## **2. SEXUAL HARASSMENT OF GIRLS IN SCHOOLS**

**2.1** Girls are vulnerable to various forms of sexual abuse in schools and may be targeted both by their teachers and their fellow pupils. Such incidents range from more minor violations to mass rape (such as those committed at St Kizito and Nyeri).<sup>268</sup>

**2.2** Abuse by teachers is particularly problematic as pupils inherently occupy the inferior power position. On top of this, girls are particularly susceptible to sexual harassment in the school environment as the abuse can have life changing consequences such as pregnancy or even marriage to their abuser.

**2.3** When children were interviewed in a 2009 sexual harassment study, it transpired that 24% of cases of sexual harassment occurred at school (with 15% occurring on the way home from school).<sup>269</sup> In the same study, 16.1% of girls confirmed that they had been propositioned by a teacher.

### **2.4 Relevant Provisions of the Maputo Protocol**

2.4.1 Article 12 of the Protocol is the main relevant provision, especially Article 12(1)(c), which requires State Parties to take all appropriate measures to protect women, especially the girl-child from all forms of abuse, including sexual harassment in schools and other educational institutions and provide for sanctions against the perpetrators of such practices.

2.4.2 Other applicable provisions in the Protocol are:

- (a) Article 3(4), which requires State Parties to adopt and implement measures to ensure the protection of every woman's right to respect for her dignity and protection of women from all forms of violence, particularly sexual and verbal violence; and
- (b) Article 4(2)(a), which requires State Parties to take appropriate and effective measures to enact and enforce laws to prohibit all forms of violence against women including unwanted or forced sex whether the violence takes place in private or public.

### **2.5 Relevant Provisions of Domestic Kenyan Legislation**

2.5.1 Kenya has passed a series of statutes prohibiting sexual abuse, including legislation which specifically relates to protecting children. The statutes discussed below do not differentiate between the genders but provide legislative protection to girls in schools.

2.5.2 As considered above, the Children Act 2001 is important:

- (a) Section 13 provides that children shall be entitled to protection from physical and psychological abuse, neglect and any other form of exploitation including sale, trafficking or abduction by any person.

---

<sup>267</sup> Plan International, *Because I am a Girl – Kenya Country Report 2012*

<sup>268</sup> George Anang'a, "Kenya's schoolgirls need to be protected", *The Guardian* (6 December 2010)

<sup>269</sup> Sara Jerop Ruto, "Sexual Abuse of School Age Children: Evidence from Kenya", (2009) 12 *Journal of International Cooperation in Education* pages 180 and 181. Note that the data was collected in 2006, prior to ratification of the protocol but after Kenya signed the Protocol

- (b) Section 15 provides that children shall be protected from sexual exploitation and use in prostitution, inducement or coercion to engage in any sexual activity and exposure to obscene materials.

2.5.3 Public Officer Ethics Act 2003

- (a) Section 21 provides that a public officer shall not sexually harass a member of the public... including making a request or exerting pressure for sexual activity or favours.
- (b) Section 38 provides that if following an investigation under the Act, the Commission is of the view that civil or criminal proceedings ought to be considered, the Commission shall refer the matter to the Attorney-General or other appropriate authority.

2.5.4 Sexual Offences Act 2006

- (a) Section 11 provides that any person who commits an indecent act with a child is liable upon conviction to imprisonment for a term of not less than ten years.
- (b) Section 15 provides that those who take advantage of influence over, or relationship to a child, to procure the child for sexual intercourse or any form of sexual abuse; threaten or use violence towards a child to procure the child for sexual intercourse or any form of sexual abuse...; give monetary consideration, goods other benefits or any other form of inducement to a child or his parents with intent to procure the child for sexual intercourse or any form of sexual abuse...; are liable upon conviction to imprisonment for a term of not less than ten years.

2.5.5 The Teachers Service Commission Act 2012 (“TSCA”)

- (a) Section 11(f) provides for an obligation of the Teachers Service Commission (the “TSC”) to monitor the conduct and performance of teachers;
- (b) Section 23(2) provides that a person shall not engage in the teaching service unless such person is registered as a teacher;
- (c) Section 30 provides for the TSC’s ability to remove teachers from the register, including for the following reasons: Section 30(c): teacher convicted of a sexual offence or an offence against a pupil or student; or Section 30(d) teacher convicted of a criminal offence which, in the opinion of the Commission, renders the person unfit to be a teacher; and
- (d) Section 33 provides that the TSC may take disciplinary action against any person registered as a teacher. Disciplinary offences set out in Schedule 3 of the act include sexual harassment or flirtation.

2.5.6 The Children Act 2001, Public Officer Ethics Act 2003, Sexual Offences Act 2006 were in place prior to ratification of the Protocol by Kenya.

## 2.6 Implementation

2.6.1 In 2010, Kenyan government authorities stated that more than 1,000 teachers (out of a workforce of 240,000 countrywide) had been sacked over a two year period for sexually abusing girls.<sup>270</sup> This figure does not however equate to equivalent convictions.

2.6.2 There are many potential barriers to implementation of the Protocol, associated legislation and measures:

---

<sup>270</sup> “Hundreds of Kenyan teachers sacked over sex abuse”, *The Times*, (London, 7 October, 2010)

- (a) **Reputational damage.** Accusations of abuse may cause damage the reputation of a girl and her family, and are likely to bring the school into disrepute (especially if it is a religious institution). This threat may encourage the family or the school to suppress any matters from being reported.
- (b) **Incentives from the abuser.** The abuser, particularly a teacher, may provide incentives such as money or good grades. Such incentives may be welcomed and discourage the reporting of abuse. For example, parents may deliberately ignore the source of such incentives.
- (c) **Imbalance of power.** The abuser, particularly if they are a teacher, is likely to be in a superior power position to the girl. Fear of repeated abuse, intimidation or pregnancy can encourage girls to not report the abuse, play truant or to drop out of school.
- (d) **Lack of Reporting.** Effective implementation of the Protocol and Kenyan legislation relies on effective reporting at the local authority and school level. If the local authorities are not enthusiastic about reporting incidents of abuse there is little point in having the legislation. In some cases district education officers have been accused of not reporting matters to the police.<sup>271</sup> This in turn decreases the likelihood that girls will report abuse as they may feel that there is no point in doing so if nothing will be done. To illustrate this, a survey by Kenyatta University found that in cases where a girl had become pregnant by a teacher, it was perceived that 32% of the time “nothing” had happened to the teacher as a consequence.<sup>272</sup>

### 2.6.3 Implementation by the judiciary

- (a) It is rare to cite instruments such as the African Charter or the Protocol in legal arguments<sup>273</sup> –the Protocol is likely to be implemented by the judiciary by Kenyan legislation as set out above.

### 2.6.4 Measures in schools

#### (a) The TSC

- a) Under TSCA, the TSC must maintain a register of teachers permitted to teach in Kenyan schools. A teacher may not teach in Kenya unless they are registered with the TSC. Upon their removal from the register they must cease teaching.

Teachers are subject to the Teachers Service Commission Code of Conduct and Ethics (the “**Code**”). This explicitly states at Paragraph 9(1) that a “*public officer shall not engage in any sexual activity with a student regardless of whether the student consents*”. Paragraph 9(2) of the Code additionally states that a “*public officer shall not make a request to, or exert pressure on, a student for sexual activity or favours*”.

If the Code is breached, the TSC should take appropriate action in accordance with the Act and other applicable laws. Pursuant to TSCA Section 34(3), the TSC may discipline a teacher in various ways, the most severe being the cancellation of the teacher’s registration certificate and the removal of the teacher from the TSC’s register. If the teacher is convicted under “other applicable laws” such as those discussed under “Legal Requirements” above, the teacher could be given other punishments such as a prison sentence.

<sup>271</sup> “Hundreds of Kenyan teachers sacked over sex abuse”, *The Times*, (London, 7 October, 2010)

<sup>272</sup> Sara Jerop Ruto, “Sexual Abuse of School Age Children: Evidence from Kenya”, (2009) 12 *Journal of International Cooperation in Education*, page 183

<sup>273</sup> The impact of the African Charter and Women’s Protocol in selected African States, (Pretoria University Law Press 2012)

2.6.5 Aiding Implementation

(a) Examples of Non-Governmental Organisations

- a) The dismissal of over 1,000 teachers referred to above was aided by the introduction of helplines such as Childline Kenya. This organisation operates a 24-hour toll-free telephone and web-based helpline for children seeking help against child abuse and violence against children. Childline Kenya also works to create awareness of children's rights.
- b) CRADLE (Child Rights Advisory, Documentation and Legal Centre) is a charity that offers legal services for children and campaigns for children's rights.

(b) Efforts by the Police

- a) Despite reference to a lack of reporting above, Kenyan police have introduced measures to help children report crimes perpetrated against them. For example, children's help desks have been established in police stations to receive and investigate complaints of child abuse and police officers now receive training so that they interact with children appropriately.<sup>274</sup>

---

<sup>274</sup> Republic of Kenya, Report on the African Charter on Human and People's Rights, June 2006

# CHAPTER SIX

## INHERITANCE

### 1. WOMEN'S RIGHTS TO INHERIT PROPERTY FROM HER HUSBAND

#### 1.1 Relevant Provisions of the Maputo Protocol

- 1.1.1 A woman's rights to inherit property from her husband are set out in Article 21(1) of the Protocol, which sets out two main rights that will arise after her husband's death: *"A widow shall have the right to an equitable share in the inheritance of the property of her husband. A widow shall have the right to continue to live in the matrimonial house. In case of remarriage, she shall retain this right if the house belongs to her or she has inherited it."*
- 1.1.2 Put simply, on the death of her husband, a woman shall have the right to her share in equity of her husband's property and may continue residing within the matrimonial home, notwithstanding her later re-marriage. Whilst such requirements appear, at first sight, to be a relatively straightforward statement on the rules of succession, we will see later on that complications within local Kenyan law arise from the inherent entanglement of the four Kenyan institutions of marriage and succession (African, Christian, Muslim and Hindu).<sup>275</sup>
- 1.1.3 The Protocol does not provide a definition of property, but given the separate references to both "property" and the "matrimonial home" within Article 21, it can be inferred that the intention of the Protocol is for women to have the right to inherit an equitable share of all types of her deceased husband's property (land, real estate, buildings, chattels, etc.), not simply the marital home.

#### 1.2 Relevant Provisions of Domestic Kenyan Legislation

- 1.2.1 There are three main sources of Kenyan law that are relevant in the context of widows' inheritance rights, which are listed and discussed in further detail below.
- (a) The Constitution
- (i) Section 27 of the Constitution sets out the basic right to equality before the law, stating that *"every person is equal before the law and has the right to equal protection and equal benefit of the law"*,<sup>276</sup> *"equality includes the full and equal enjoyment of all rights and fundamental freedoms"*<sup>277</sup> and *"Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres"*.<sup>278</sup>
- (ii) In addition, the Constitution states that neither the State nor any person may discriminate either directly or indirectly 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. To give full effect to the realisation of such rights, the State is obliged by Section 27(6) of the Constitution to take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.

<sup>275</sup> Kameri-Mbote P. (1995), 'The Law of Succession in Kenya: Gender Perspectives in Property Management and Control'. *Nairobi: Women & Law in East Africa*. page 1.

<sup>276</sup> Section 27(1) Constitution of Kenya 2010

<sup>277</sup> Section 27(2) Constitution of Kenya 2010

<sup>278</sup> Section 27(3) Constitution of Kenya 2010



- (iii) However, in matters relating to personal status, marriage, divorce and inheritance, Muslims are not afforded the protection of Section 27. Instead, such matters are subject to the jurisdiction of the Kadhis courts.<sup>279</sup>
  - (iv) It is clear therefore that whilst the Constitution attempts to provide for a general principle of equality for all, a large section of the population (Muslims) are excluded from the basic principle of equal treatment in inheritance matters. This is, as we explore further below, followed through in the dis-application of the Succession Act to Muslims and represents the first significant derogation from the principles of equal treatment required by the Protocol found by this report.
- (b) Law of Succession Act, Cap 160, Laws of Kenya, 1 July 1981
- (i) The most directly relevant Kenyan legislation to the question of gender equality in Kenyan succession law is found in the Law of Succession Act (Cap 160 Laws of Kenya), 1 July 1981 (the “**Succession Act**”), which now applies (Muslims apart) to all cases of testate and intestate succession in Kenya.
  - (ii) The Succession Act was written with the intent of providing a comprehensive and uniform code applicable to all persons in Kenya, replacing four separate systems of succession law that existed for traditional Africans, Christians, Muslims and Hindus and superseding any customary law on the theme of succession.

(1) Non-application to Muslims

Despite the original intentions of the lawmakers to implement a succession act of “*universal application to all cases of intestate and testamentary succession*”,<sup>280</sup> on 1 January 1991, Kenya introduced Act 120 of 1990, which amended the Succession Act to so as to dis-apply application of the Act to anyone, who at their death, is a Muslim. Instead, succession cases involving the estate of any Muslim person, are subject to Islamic law,<sup>281</sup> which is overseen by the Khadis Courts. As a result, there are currently two separate systems of inheritance law that exist in Kenya today.<sup>282</sup>

Whilst, on the face of it, the dis-application of the Succession Act affects both Muslim men and women equally, the resultant effect is that Muslim women do not benefit from equal inheritance rights, because Muslim inheritance laws favour men. Specifically, Muslim inheritance laws state that women should receive only half the share of inheritance that similarly situated men would receive. Whereas a Muslim widower would receive 50% of his wife’s estate if there were no children, or 25% if there were children, a Muslim widow would be entitled to 25% of her husband’s estate if there were no children, 12.5% if there were any.<sup>283</sup>

To summarise, Muslim women are not being treated equally to Muslim men in matters of inheritance in Kenya. As such, the dis-application of the Succession Act to Muslims represents a significant derogation from the Article 21 Protocol requirement to ensure the equal treatment of all

---

<sup>279</sup> Sections 24(4) and 170(5) Constitution of Kenya 2010

<sup>280</sup> No. 13 of 1978 (1987) Schedule m (codified as Section 2(1) of the Law of Succession Act, Section 2(1) (requiring the Act’s universal application to all Kenyans)

<sup>281</sup> Law of Succession Act, Part 1 Section 3

<sup>282</sup> Kameri-Mbote P. (1995). The Law of Succession in Kenya: Gender Perspectives in Property Management and Control. *Nairobi: Women & Law in East Africa*. page 12

<sup>283</sup> Gallaway, D et al. (2009). Empowering Women With Rights to Inheritance – A Report on Amendments to the Law of Succession Act Necessary to Ensure Women’s Human Rights: A Human Rights Report and Proposed Legislation. *Georgetown Journal of International Law*. 40 (1), 177

women in succession matters, leaving the question of inheritance rights of the widows of Muslim men to Muslim law, whose succession laws do not provide equal rights to property to women.

#### (2) Testate succession

In respect of non-Muslims, the Succession Act provides for the rules and rights that apply in cases of testate and intestate succession. Part 5 of the Succession Act sets out the rules applicable to testate succession, which are more straightforward than those that apply in intestacy cases.

Section 5(1) of the Succession Act states that “*any person who is of sound mind and not a minor*”<sup>284</sup> (whether male or female) may dispose of property in a will. There is nothing in the legislation preventing a married/unmarried woman from making a will or indeed being named as the beneficiary of anyone else’s will. In this respect, the laws in Kenya appear to provide for an equal system of inheritance in testate succession cases.

In practical terms however, issues still exist. For example, it is still common practice for family property to be registered in the sole name of the husband (notwithstanding any financial or non financial contributions made by the wife), leaving women exposed to the decisions of her husband. It has also been reported that there remains a tendency for men to favour male heirs, leaving women more exposed to the risk of losing her home in the event of her husband’s death.<sup>285</sup>

#### (3) Intestate succession

Part V of the Succession Act sets out the rights of a widow to inherit her husband’s property. However, it does not provide for a “one-size” fits all approach; different rules apply depending on where the relevant property is located, whether a widow has children, and whether she is part of a monogamous or polygamous marriage. Certain Kenyan districts are wholly excluded from Part V of the Act.

#### (4) Excluded districts

It is particularly notable that Section 32 of the Succession Act exempts twelve rural districts,<sup>286</sup> from the intestacy provisions of the Act, where the property concerned is agricultural land or livestock. Where a person dies intestate in such districts and agricultural land or livestock is concerned, customary law will apply to such property.

This exception is unfortunate, given the recognition by the government of Kenya itself that “*the area in which most customary laws disadvantage women is in respect of property rights and inheritance*”.<sup>287</sup> Under the customary laws of most ethnic groups in Kenya, women are not capable of inheriting or owning land and are simply entitled to live on the land as a guest of male relatives by blood or marriage. As such, the Succession Act clearly fails to provide for equal rights to women in such districts, in contravention of the requirements of Article 21 of the Protocol for all women to be treated equally.

---

<sup>284</sup> Law of Succession Act 1981, Section 5(1)

<sup>285</sup> Kameri-Mbote P. (1995). *The Law of Succession in Kenya: Gender Perspectives in Property Management and Control*. Nairobi: *Women & Law in East Africa*, page 13

<sup>286</sup> The following districts have been excluded from Part V of the Succession Act, in accordance with orders set out by the Attorney General in the Gazette: West Pokot, Wajir, Turkana, Garissa, Marsabit, Tana River, Samburu, Lamu, Isiolo, Kajjiado, Mandera and Narok

<sup>287</sup> Republic of Kenya, *Combined fifth and sixth periodic reports to the Committee on the Elimination of Discrimination Against Women* (39th Session, 2007), Paragraph 81, U.N. Doc. CEDAW/C/KEN/6 (16 October, 2006), available at [www.un.org/womenwatch/daw/cedaw/39sess.htm](http://www.un.org/womenwatch/daw/cedaw/39sess.htm)

It is notable here that Section 32 of the Succession Act appears directly incompatible with Article 27(1) of the Constitution (which states that every person is equal before the law and has the right to equal protection and equal benefit of the law). According to Article 2(4) of the Constitution, any law that is inconsistent with the Constitution is void to the extent of the inconsistency and as such it is arguable that Section 32 is void for incompatibility with the Constitution. However, this has not been tested and the law of succession is yet to be brought in line with the Constitution.

(5) Rights of a widow with children

For widows/widowers with children residing in a district not excluded by Section 32, section 35(1) of the Succession Act provides the following rights to inherit property where the spouse dies intestate:

*“35. (1) Subject to the provisions of Section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to –*

*(a) the personal and household effects of the deceased absolutely; and*

*(b) a life interest in the whole residue of the net intestate estate”*

On first glance this appears to provide for equal rights for both widows and widowers. However, Section 35(1) goes on to state:

*“Provided that, if the surviving spouse is a widow, that interest shall determine upon her re-marriage to any person.”*

Two points are worth discussing here. First, Section 35(1) only provides for a “life interest” in the residue of the net intestate estate (i.e. property, land). A life interest will grant a person the right to reside in the property of the deceased’s property until his/her own death, but the remaining spouse does not legally own the land, so cannot, without consent of the court, sell the land. Whilst on first glance the “life interest” provisions are written in gender neutral language, in reality widowed men are far more likely to own the marital property or have inherited property from his parents, in contrast to women who often own no property.<sup>288</sup> The difficulties associated with gaining only a life interest in property are therefore likely to be far more strongly felt by women. A commonly reported difficulty for some widows is the pressure they receive from the husband’s family to leave the marital home on the husband’s death, or to have sexual intercourse with and/or marry one of her deceased husband’s relatives in order to be allowed to stay in the property.<sup>289</sup> As the widow does not legally own the land, but instead has a mere life interest, a report by Georgetown University suggests that such women are far less likely to fight for their right to stay<sup>290</sup>. This report has come to the conclusion that the grant of a mere life interest in the property of the deceased is indirectly discriminatory against women, in contravention of Article 21 of the Protocol.

---

<sup>288</sup> Gallaway, D et al. (2009). Empowering Women With Rights to Inheritance – A Report on Amendments to the Law of Succession Act Necessary to Ensure Women’s Human Rights: A Human Rights Report and Proposed Legislation. *Georgetown Journal of International Law*, 40 (1), 179

<sup>289</sup> Gallaway, D et al. (2009). Empowering Women With Rights to Inheritance – A Report on Amendments to the Law of Succession Act Necessary to Ensure Women’s Human Rights: A Human Rights Report and Proposed Legislation. *Georgetown Journal of International Law*, 40 (1), 136

<sup>290</sup> Gallaway, D et al. (2009). Empowering Women With Rights to Inheritance – A Report on Amendments to the Law of Succession Act Necessary to Ensure Women’s Human Rights: A Human Rights Report and Proposed Legislation. *Georgetown Journal of International Law*, 40 (1), 180

The second point concerns the clearly discriminatory provisions at the end of Section 35(1), that differentiate between widows and widowers (women and men) around when the life interest will lapse. Where the surviving spouse is a widow (a woman) such interest “*shall determine on her remarriage to any person*” (Section 35(1)). On a widow’s remarriage, her life interest is lost and it is instead devolved upon any surviving children in equal shares (Section 35(5)). This provision is not extended to men. This is a clearly discriminatory provision that leaves women who remarry with little or no economic independence and is in direct violation of Article 21 of the Protocol that requires equal treatment of men and women in succession matters. This is a significant shortcoming of the Succession Act.

(6) The rights of a widow – no children

The right of a widow to inherit where there is one surviving spouse and no children is set out in Section 36. The provisions are largely the same as in Section 35, save that the surviving spouse is also entitled to the first ten thousand shillings out of the residue of the net estate and a life interest in the remainder.

(7) The rights of a widow where husband was polygamous

Section 40 of the Succession Act sets out the right of widows to inherit where the deceased has more than one spouse. In such cases, where a husband dies, his property is shared between his children and wives:

*“40. (1) Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.*

*(2) The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in Sections 35 to 38”.*

The result of these provisions is that, the more wives a man has, the less each wife will receive on his death, but the more the man will receive (as the man will take a life interest in the whole of each of his deceased wives’ estates). This section of the Act clearly does not provide equality to women in inheritance matters. While polygamy is still lawful in Kenya, the Act should provide for a fairer system of inheritance to women in polygamous relationships that recognises a woman’s rights (above his children’s) to take ownership of her husband’s property on his death, so that each wife has a permanent place to live.

(c) Customary practices

(i) No express prohibitions on common discriminatory practices

(1) In Section 1.4 we will explore some of the common discriminatory practices still suffered by Kenyan women in relation to inheritance matters, often based on customary practices. These include widow cleansing, widow adoption and widow eviction. In failing to include all the districts of Kenya within the remit of the Act, or to set out express prohibitions on such common discriminatory and harmful practices, the Succession Act fails to meet the equality requirements of the Protocol.

### 1.3 Summary Of Gaps Identified in the Current Law/Practice

#### 1.3.1 Gaps in the Law

- (a) It is clear from the above analysis that there are a number of key gaps in the current law of succession in Kenya that render it in contravention of the Protocol. To summarise, we have identified the following key gaps:
  - (i) Women living in gazetted districts are excluded from the Succession Act;
  - (ii) Muslim women are excluded from the Succession Act;
  - (iii) A woman's life interest in the property of her husband lapses on her remarriage;
  - (iv) Women in polygamous marriages are allocated an extremely small proportion of their husband's property; and
  - (v) The Succession Act does not expressly address/prohibit common discriminatory practices that still exist in Kenya today.
- (b) The fact that women living in exempted districts are still subject to customary law that does not recognise a woman's right to own property, and that women married to Muslim men are excluded from the latest Succession Act means that equality of law for all women in inheritance matters is still far from a reality. In addition, the provisions of Sections 32 and 35 that revoke a woman's life interest on her remarriage (but not a man's on his remarriage) are clearly discriminatory. Finally, the provisions dealing with polygamous marriages and the failure to address/prohibit specific harmful practices demonstrate a failure by the lawmakers to achieve equality for all. Arguably these gaps are straight forward to rectify; all that would be required is a relatively simple piece of legislation, which draws no distinction between the treatment of any person (whether male or female, Muslim or non Muslim, rural or urban) in matters of succession.

### 1.4 Practice

- 1.4.1 We have identified the law of succession as set out in the Kenyan Constitution and the Succession Act and have identified gaps in the law. We now explore how the law (imperfect as it might still be) is applied in practice and explore the inconsistencies in the application of the law in Kenya.
- 1.4.2 A great deal of evidence points to the conclusion that customary practice still prevails. The government of Kenya's response in 2007 to the CEDAW Committee's questions paints a pessimistic picture of the state of implementation of the Succession Act. In that report, the Kenyan Government stated: "*As much as the Kenya Law of Succession Act is meant to harmonize inheritance laws, in practice the transmission of land rights is largely done within customary laws which discriminate against women and children*".<sup>291</sup> That the government recognises that discrimination is still rife is in some ways a positive sign. However, it remains the responsibility to understand why the introduction of the Succession Act has not put an end to gender discrimination and to address such problems.
- 1.4.3 This report finds that there are a number of reasons that appear to be contributing to the failure of the Succession Act in many cases, which include the public's lack of education and understanding of the law, the prohibitive cost and timescales involved in bringing a case to court and the failure of some Judges to properly apply the law:

---

<sup>291</sup> Gallaway, D et al. (2009). Empowering Women With Rights to Inheritance – A Report on Amendments to the Law of Succession Act Necessary to Ensure Women's Human Rights: A Human Rights Report and Proposed Legislation. Georgetown Journal of International Law. 40 (1), 131

- (a) Lack of awareness of the law
  - (i) Statistics indicate that the majority of Kenyans are unaware of their rights, so that whilst there are still gaps in the Succession Act itself, the main issue is one of administration and enforcement<sup>292</sup> and that, whilst the law exists “*People don’t know it or make use of it*”.<sup>293</sup> One study by USAID found that 90% of poor people in Kenya are not aware of Kenya’s formal inheritance laws.<sup>294</sup>
- (b) Procedural and administrative hurdles
  - (i) A key issue facing Kenyans is the difficulties faced when trying to redeem their rights in law. Succession claims can be cumbersome and expensive. Court fees alone can add up to 8000 Kenyan Shillings. Additional issues include obtaining access to an attorney and how to pay for travel fees to the courts. There is also an automatic 6 month hold put on all succession cases after filing the claim in Court whilst the applicant investigates all assets and liabilities of the estate and a list of everyone with a claim thereto. So even with no objections, the process takes around a year, during which the widow will have only limited access to her husband’s property.
  - (ii) Even if a claimant can make it to court, she will face numerous procedural/ administrative hurdles: The following forms have to be completed/provided:
    - (1) Form P&A 80 (petition);
    - (2) P&A 5 (affidavit);
    - (3) P&A 12 (affidavit of means);
    - (4) death certificate; and
    - (5) P&A 38 required from adult children to grant consent.
  - (iii) The following timetable applies to succession claims, which in total, for a case with no complexities/objections from other family members, it will take over 12 months before the property is granted to the widow:
    - (1) Death of husband.
    - (2) Widow must submit a notice of intent to administer estate then wait 30 days.
    - (3) After 30 days, file application for grant of administration with High Court.
    - (4) Once admitted, the High Court will put a 6 month hold on the case to allow the applicant to investigate all assets and liabilities of the estate and a list of everyone with a claim thereto.
    - (5) After 6 months, the case may be heard in Court.<sup>295</sup>
  - (iv) Such a lengthy and complex court process leaves access to justice for the majority of Kenyan widows out of reach. Despite the good work of

<sup>292</sup> Gallaway, D et al. (2009). Empowering Women With Rights to Inheritance – A Report on Amendments to the Law of Succession Act Necessary to Ensure Women’s Human Rights: A Human Rights Report and Proposed Legislation. *Georgetown Journal of International Law*. 40 (1), 145

<sup>293</sup> Gallaway, D et al. (2009). Empowering Women With Rights to Inheritance – A Report on Amendments to the Law of Succession Act Necessary to Ensure Women’s Human Rights: A Human Rights Report and Proposed Legislation. *Georgetown Journal of International Law*. 40 (1), 154

<sup>294</sup> Gallaway, D et al. (2009). Empowering Women With Rights to Inheritance – A Report on Amendments to the Law of Succession Act Necessary to Ensure Women’s Human Rights: A Human Rights Report and Proposed Legislation. *Georgetown Journal of International Law*. 40 (1), 154

<sup>295</sup> Ang’Awa M.A. (2005). Procedure in the Laws of Succession CAP 160. Laws of Kenya. Accessing Justice through the Courts: The training of magistrates and judges in Kenya. 1 (1), 1–18



many equal rights bodies and lawyers in the country, the reality is that most widows facing discrimination in inheritance matters are denied the opportunity to have their case heard in open court.

- (c) Courts ignoring the law
- (i) There is widespread evidence that, despite the good intentions of the lawmakers behind the Succession Act, in practice its provisions are still being ignored, even in cases where they apply. In the words of Gallaway D. et al: *“In practice, the transmission of land rights is largely done within customary laws which discriminate against women and children.”*<sup>296</sup> Such misapplication of customary law is not limited to the uneducated/uninformed. A justice on Kenya’s highest court, the Court of Appeal, stated in an interview with Human Rights Watch in 2002 that *“The Law of Succession Act can’t apply to rural land in general because women are supposed to be married and go away.”*<sup>297</sup>
  - (ii) There is further evidence that the Courts are failing to apply the Succession Act in cases where it is clearly applicable. A recent appeal case in 2011 found that the High Court of Kenya failed to apply the provisions of the Succession Act in a property dispute involving the sale of a deceased man’s matrimonial home, despite it being inhabited by his widow.<sup>298</sup> The appeal court subsequently did apply the Succession Act to the case, but the widow had to take the case to appeal for that to happen. Many women would not have the resource to do this. This case demonstrates that some Courts are either (i) unaware of the applicability of the Succession Act in the cases it hears or (ii) remain unwilling to apply it. Either way, issues clearly remain in the way that it is being applied in the Kenyan Courts.
- (d) Continuing prevalence of customary practices
- (i) Customary practice, which dictates that a woman is the property of her husband and therefore has no stake to his property on death, remains prevalent. Harmful practices such as widow eviction, widow inheritance and widow cleansing still take place, denying women equal rights to property under the law.

#### Widow eviction

- (ii) Despite the clear provisions of the Succession Act that provide for the wife’s life interest in the marital home after her husband’s death, the customary practice of widow eviction still prevails. Widow eviction is a practice whereby the deceased’s family pressures the woman and her children to leave the marital home so that the family can reclaim the property for themselves. Gallaway et al report one example of widow eviction taking place where a woman who was married to her husband for twelve years (with four children), found her mother in law had come to the house with a lorry to remove all the possessions.<sup>299</sup>

<sup>296</sup> Republic of Kenya, *Responses to the list of issues and questions to the Committee on the Elimination of Discrimination Against Women*, paragraph 22, U.N. Doc. CEDAW/C/KEN/Q/6/Add.1 (27 April, 2007), available at [www.un.org/womenwatch/daw/cedaw/39sess.htm](http://www.un.org/womenwatch/daw/cedaw/39sess.htm) (scroll to Kenya, then click on Responses: English hyperlink) [hereinafter Kenya 2007 CEDAW Responses]

<sup>297</sup> Human Rights Watch interview with Justice Richard Otieno Kwach, Justice, Kenya Court of Appeal, in Nairobi, Kenya (7 November, 2002)

<sup>298</sup> In the case of Beth Kaari & another v M’nyeri M’rimunya (2009), the appellants appealed against the judgment of the High Court of Kenya at Meru, (Kasango, J.). In this appeal, the appeal Judge found that the Kasango J. had, in totality *“erred in law and fact in ignoring the critical issues that are on record and ignored the possible application of the Succession Act to the dispute between the parties”* in upholding the sale of a deceased’s property when it was being inhabited by his widow. The fact that the Judge in the High Court had failed even to consider the application of the Succession Act is a clear indicator that the legislation is not being followed by all Kenyan Judges that are supposed to understand and apply it

<sup>299</sup> Gallaway, D et al. (2009). Empowering Women With Rights to Inheritance – A Report on Amendments to the Law of Succession Act Necessary to Ensure Women’s Human Rights: A Human Rights Report and Proposed Legislation. *Georgetown Journal of International Law*. 40 (1), 141

- (iii) Widow eviction is not specifically prohibited under the Succession Act (unlike in other African countries such as Ghana),<sup>300</sup> and, it is arguable that by giving the wife only a life interest in the husband's property on his death that forfeits on her remarriage, the Succession Act perpetuates the belief that a wife is merely the deceased man's property.

#### Widow inheritance

- (iv) Widow inheritance is the customary practice whereby a widow is pressured into marrying her deceased husband's brother (or other male relative) in order for her be able to remain in the marital home. Over time this custom has distorted from one which sought to protect the widow and her children after her husband's death under the care of her husband's family, to a requirement to engage in sexual intercourse with a deceased's male relative in order to cleanse the death of her husband and to benefit from protection of the family.<sup>301</sup> Forcing a woman to have sex with another family member not only is discriminatory and harmful to the physical mental health of the woman, it also increases the risk of HIV/AIDs infection (often the husband has died of HIV/AIDs, the wife is infected and, in being forced to engage in sexual intercourse, goes on to infect the brother or relative and thus the spread of the disease accelerates).
- (v) Widows who resist inheritance, face eviction or intimidation from the family of the deceased and often are left with little choice but to marry the deceased's brother/relative.<sup>302</sup> Yet widow inheritance is not specifically addressed or prohibited under the Constitution or the Succession Act, unlike in other African Countries such as Liberia,<sup>303</sup> Ethiopia<sup>304</sup> and Uganda.<sup>305</sup>

#### Widow "cleansing"

- (vi) Widow cleansing is the practice whereby a woman is "cleansed" of her deceased husband's spirit by having sexual intercourse with a man who is paid to perform such cleansing. It is not uncommon for a village to have a "commercial cleanser" who undertakes this task in exchange for payment for all widows in the village. The theory is that the woman's dignity is redeemed once she is cleansed of her dead husband's soul. Such practices are harmful to women, who face being ostracised from their community if they refuse, and again, perpetuate the spread of sexually transmitted infections.
- (vii) Whilst noting that forced widow inheritance/cleansing is already a crime under the Sexual Offences Bill, Gallaway et al argue that the "*pervasive and insidious nature*" of such practices necessitates directly addressing in Kenyan Law.<sup>306</sup> This could be through an amendment to the Succession Act, specifically criminalising widow inheritance practices.

<sup>300</sup> Intestate Succession Law (1985) P.N.D.C.L III (paragraph 16A(1) (Ghana) as inserted by Intestate Succession (Amendment) Law (1991). Ghana's Intestate Succession Law forbids any person from ejecting a surviving spouse or child from the matrimonial home

<sup>301</sup> Gallaway, D et al. (2009). Empowering Women With Rights to Inheritance – A Report on Amendments to the Law of Succession Act Necessary to Ensure Women's Human Rights: A Human Rights Report and Proposed Legislation. *Georgetown Journal of International Law*. 40 (1), 137

<sup>302</sup> Gallaway, D et al. (2009). Empowering Women With Rights to Inheritance – A Report on Amendments to the Law of Succession Act Necessary to Ensure Women's Human Rights: A Human Rights Report and Proposed Legislation. *Georgetown Journal of International Law*. 40 (1), 146

<sup>303</sup> Equal Rights of the Customary Marriage Laws (1998), ss 3.4 (Liberia) – "Any family member who shall compel [a] widow to marry one of her last husband's relatives against her will in order for said widow to be able to subsist or earn a livelihood has committed a felony of the first degree"

<sup>304</sup> Constitution of the Federal Democratic Republic of Ethiopia, Art 35(4), 1994 "Laws, customs and practices that oppress women or cause bodily or mental harm to them are prohibited"

<sup>305</sup> Constitution of Uganda, Art 32(2) 1995 (Amended 2005) – "Laws, cultures, customs or traditions which are against the dignity, welfare or interest of women or which undermine their status are prohibited by this Constitution"

<sup>306</sup> Gallaway, D et al. (2009). Empowering Women With Rights to Inheritance – A Report on Amendments to the Law of Succession Act Necessary to Ensure Women's Human Rights: A Human Rights Report and Proposed Legislation. *Georgetown Journal of International Law*. 40 (1), page 153

## 1.5 Conclusion

- 1.5.1 The arguments for amending the existing Succession Act, such that every Kenyan woman is afforded equal rights to property by law are compelling. The existing Succession Act gives inadequate protection to women by excluding broad categories, including Muslims and those residing in gazetted areas from its protection and fails to protect women from harmful customary practices. It does not apply the law equally to men and women, giving widows only a life interest in her husband's property that lapses on her remarriage, a rule that does not apply to widowers.
- 1.5.2 These inequalities must be addressed by an amendment to the existing law, in order to bring Kenya in line with the Protocol requirements to treat women equally to men in matters of inheritance. Finally, the government must do much more to educate Kenyans (including judges and civilians) on the rights afforded by the Succession Act, reduce the bureaucracy and red-tape involved in bringing a claim under the Succession Act and invest in access to justice programmes so that everyone in the country can claim protection under the law.

## 2. AN ADULT DAUGHTER'S RIGHT TO INHERIT FROM PARENTS

### 2.1 Relevant Provisions of the Maputo Protocol

- 2.1.1 Article 21(2) (Right to Inheritance) provides that "*Women and men shall have the right to inherit, in equitable shares, their parents' properties.*"
- 2.1.2 Article 25 (Remedies) provides that "*States Parties shall undertake to: a) provide for appropriate remedies to any woman whose rights or freedoms, as herein recognised, have been violated; and b) ensure that such remedies are determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by law.*"

### 2.2 Relevant Provisions of Domestic Kenyan Legislation

The law of Kenya recognises four systems of succession: statutory law, Islamic law, Hindu law and customary law.

#### 2.2.1 Statutory law

- (a) The Constitution of Kenya provides for equality between the sexes in Article 27(3) and for affirmative action to be taken by the State where men and women are not being treated equally (Article 27(6)). The Constitution of Kenya is directly relevant to an adult daughter's right to inherit under the Protocol in that it calls for the end of gender discrimination in relation to land (Article 60(1)(f)) and states specifically that everyone has a right to acquire (Article 60(1)).
- (b) The Law of Succession Act (Cap 160 Laws of Kenya), 1 July 1981 (the "**Succession Act**") was an attempt at promulgating a unified law in Kenya relating to testate and intestate succession and under which men and women would be treated equally. The provisions relating to the ability to make wills are gender neutral under the Succession Act; Section 5(2) provides that "a female person, whether married or unmarried, has the same capacity to make a will as does a male person". However, the Succession Act is limited in its scope as it excludes Muslims and those living in certain rural agricultural lands as set out above in Section 1.2.1(b). In the case of the latter, if a person dies intestate, customary law applies to agricultural land and livestock. The Succession Act also fails to provide for inheritance rights of the children of unwed fathers.

2.2.2 Islamic law

- (a) Article 170(5) of the Constitution of Kenya provides that the Khadis Court has jurisdiction in matters of Islamic law relating to inheritance. The Islamic law of succession applies to the estates of certain deceased Muslims who were married in accordance with Mohammedan law by virtue of Section 4 of the Mohammedan Marriage, Divorce and Succession Act. Technically, Mohammedan law is only applicable where (a) the deceased had contracted a marriage in accordance with Islamic law or (b) the child is of a Muslim marriage. In practice however the requirement of an Islamic marriage is ignored in some Muslim areas. For succession purposes, the estate of a deceased Muslim will comprise all of the property that he owns including both moveable and immoveable property.
- (b) The Koran recognises both testate and intestate succession. In accordance with the Koran, only a third of a deceased's estate can be dealt with by will; the remaining two thirds is distributed under intestacy rules which fix shares allocated to persons recognised as heirs such as the widow or widower, father, mother and children. A person cannot by a will reduce or enlarge the shares of those who are entitled by law to inherit (*Ranee Khajoorunnissa v Mussamut Roushan Jehan* (1876) L.R. 31.A.291).
- (c) In general, a male under the Koran is entitled to double the share of the female which means that daughters usually receive half as much as sons by way of inheritance. The disproportionate shares to be allotted to sons and daughters is founded on Sura 4 Verse 11 of the Koran which provides "*Allah ordains concerning your children that the male shall have a share equivalent to that of two females. If the children are females numbering two or more, their proportion is two thirds of the inheritance.*"
- (d) In relation to testate succession, the Koran provides that testamentary power is exercisable by any Muslim who is sane and rational and above the age of 15 which means that women are permitted to make wills and transfer property. To bequeath more than a third of one's estate, the testator needs the consent of the heirs and if such consent is refused, his bequest will only extend to a third of his estate. Such third can only be bequeathed to outsiders and heirs cannot inherit this portion.
- (e) Accordingly, a woman would be protected under Islamic law to the extent that she is entitled to a certain amount of the two-thirds of the estate which passes in accordance with Islamic law notwithstanding her agreement to a testator transferring more than one third of his/her estate under his/her will. A testator may also choose to favour an adult daughter and in his/her will may extend to one third of his/her estate. However, given that under Islamic law an adult daughter's share would be half of that of a son, she is by no means treated as an equal in relation to matters of succession.
- (f) The Islamic law of succession in Kenya does not take into account the modern reforms that have been introduced in several Islamic countries in the Middle East, North Africa and Asia.
- (g) There may be a conflict arising as to whether customary law or Islamic law should prevail where the proposed beneficiary of land is a convert to Islam. The rule in Islamic law that a non-Muslim cannot inherit from a Muslim may incentivise an individual to convert to Islam if they stood fit to benefit more under Islamic law.

2.2.3 Hindu law

- (a) The Hindu Law of Succession Act (“**Hindu Law of Succession**”) is applied to deceased Hindus by virtue of Section 3(1) which provides that “*the succession to the moveable property in Kenya of a deceased Hindu who at his death is domiciled in Kenya, and to the immoveable property in Kenya of a deceased Hindu, whether domiciled in Kenya at his death or not, shall be regulated by Hindu law.*” Under the Hindu Law of Succession, all the property which a Hindu owns at death passes to his/her heir unless he/she has made a valid will (Durga Nath Pramanik v Chinta Moni Dassi (1903) 31 Calc 214). Inheritance as prescribed by Hindu law can neither be altered by a private arrangement (Balkristina T. Tendulkar v Savitribai (1878) 3 Born 54) nor a will (Juttendromohun Tagore v Gamendromolun Tagore (1872) I. A. Supp. Vol. 47, page 64).
- (b) In certain schools of Hindu law such as Bengal, Benares and Madras, women inherit only by virtue of express texts however in Madras certain female heirs may inherit in default of all male heirs.
- (c) Hindu law often operates to the disadvantage of women. The Crown is entitled to succeed by escheat in preference to women not expressly named in a text (Jogdamba Koer v Secretary of State (1889) 16 Calc. 367). According to the Bengal School such exclusion extends to any female heir by virtue of her unchastity antecedent to the vesting.
- (d) Hindus can make wills by virtue of the Hindu Wills Act of 1870 of India. As the provisions of the act are gender neutral, women should technically be on an even footing with men.
- (e) The Hindu law of succession does not include the modern reforms to the Hindu law contained in recent Indian legislation, notably the Hindu Succession Act, 1956.

**2.3 Status of local practice**

2.3.1 Customary law

- (a) As mentioned in Section 2.2.1(b) above, certain areas are excluded from the remit of the Succession Act, and even if not expressly excluded, customary law may nonetheless be applied to succession matters. Inheritance rights of adult daughters are limited or non-existent under customary law. Underpinning the bias in favour of men present in customary law in certain communities is the notion that males remain within the families, whereas women leave the family on marriage.
- (b) Accordingly, customary law of several communities discriminates against married daughters. Under a patrilineal system of inheritance, married daughters are not considered to be part of the family line and therefore do not have rights to their father’s property. In some communities, such as the Pokot and Masai, daughters may be entitled to a very small share (such as a cow) on marriage.
- (c) Customary law in most communities also discriminates against unmarried daughters, who typically receive less than unmarried sons, and sometimes nothing at all. Under the customary law of the Kikuyu and Kamba, daughters are usually excluded from inheritance, but may receive a share if they remain unmarried for use during their lifetime. Under the customary law of the Meru, Kisii (or Gusii), Kuria, Giriama, Taita, Taveta, Nandi and Kipsigis, Elgeyo, daughters receive no share of the estate under any circumstances.
- (d) Effect of polygamy on a daughter’s inheritance rights.
- (e) Male to act acts as trustee or administrator of the property for the rest of the family on the father’s death.

- (f) Women are often considered part of a man's property in certain communities and on that basis have no rights of themselves to own property.

#### 2.3.2 Knowledge of the law

- (a) Widespread ignorance of the law renders the critical provisions of the Law of Succession Act meaningless, and allows for the continued use of cultural practices and customary law to determine succession matters.
- (b) Women generally attain a much lower level of education than their male counterparts, and are consequently less able to understand their inheritance rights.

#### 2.3.3 Application of the law and access to justice

- (a) Although it has made significant progress in redressing the inequality in gender relations in succession matters, the Succession Act is not always followed in practice. For example, in the case of the Estate of Njeru Kamanga (Deceased) Succession case No. 93 of 1991 (Unreported) Maina: 1992 the daughters of the deceased were disinherited by the magistrate who felt that the daughters, being married, had no right to the father's property, notwithstanding the provisions of the Succession Act.
- (b) Even where women have the knowledge necessary to pursue their claims, the process of filing a succession claim can be too expensive for women to pursue.
- (c) Women do not have the option of using their inheritance as collateral for loans, and have difficulty even accessing property for basic maintenance.

#### 2.3.4 Application of Islamic law

- (a) The requirement of marriage according to Islamic law is ignored in some Muslim areas (especially in the Coast Province) and that the courts of Kadhis may apply Islamic law to the estate of a deceased Muslim irrespective of the form of his marriage.

#### 2.3.5 Conclusion

- (a) Notwithstanding the Succession Act, the Constitution of Kenya and the Maputo Protocol, which all promulgate gender equality in relation to succession, adult women daughters are not consistently treated as equals with adult sons on the death of their parents. Not only are Muslims and individuals residing in certain gazetted areas excluded from the operation of the Succession Act, but it may not be applied in other circumstances, mainly where customary law and practice continues to be strong.

### 3. WOMEN'S RIGHTS TO ACQUIRE, ADMINISTER AND MANAGE PROPERTY IN KENYA

#### 3.1 Protocol Requirements

- 3.1.1 Article 2(1)(c) (Elimination of Discrimination Against Women) of the Maputo Protocol provides that "*States Parties shall combat all forms of discrimination against women through appropriate legislative, institutional and other measures. In this regard they shall integrate a gender perspective in their policy decisions, legislation, development plans, programmes and activities and in all other spheres of life*".<sup>307</sup> This article calls for women to be taken into consideration in every decision made. Therefore all laws, policy decisions and development plans should be changed and amended taking into consideration women.

- 3.1.2 Article 5(a) (Elimination of Harmful Practices) provides that "*States Parties shall prohibit*

---

<sup>307</sup> Maputo Protocol Article 2(1)(c)



*and condemn all forms of harmful practices which negatively affect the human rights of women and which are contrary to recognised international standards. States Parties shall take all necessary legislative and other measures to eliminate such practices, including creation of public awareness in all sectors of society regarding harmful practices through information, formal and informal education and outreach programmes.*<sup>308</sup>

- 3.1.3 Kenya is compelled to provide awareness of all harmful practices hindering the countries progression and women must be educated and informed of the property rights they are entitled to under the law.
- 3.1.4 Article 7(d) (Separation, Divorce and Annulment of Marriage) provides that “*States Parties shall enact appropriate legislation to ensure that women and men enjoy the same rights in case of separation, divorce or annulment of marriage. In this regard, they shall ensure that in case of separation, divorce or annulment of marriage, women and men shall have the right to an equitable sharing of the joint property deriving from the marriage.*”<sup>309</sup> Upon divorce, separation or annulment of marriage women are entitled to an equitable share of the property which offers women rights over the matrimonial property.
- 3.1.5 Article 8(a) (Access to Justice and Equal Protection before the Law) provides that “*Women and men are equal before the law and shall have the right to equal protection and benefit of the law. States Parties shall take all appropriate measures to ensure effective access by women to judicial and legal services, including legal aid*”.<sup>310</sup> It is essential that it is made easier for women to pursue a court case regarding property and those women are given support when accessing the judicial and legal services.
- 3.1.6 Article 19 (Right to Sustainable Development) provides that “*Women shall have the right to fully enjoy their right to sustainable development. In this connection, the States Parties shall take all appropriate measures to promote women’s access to and control over productive resources such as land and guarantee their right to property*”.<sup>311</sup> The Kenyan state is compelled to promote women acquiring, managing and administering land
- 3.1.7 Article 21 (Right to Inheritance) provides that “*(1) A widow shall have the right to an equitable share in the inheritance of the property of her husband. A widow shall have the right to continue to live in the matrimonial house. In case of remarriage, she shall retain this right if the house belongs to her or she has inherited it. (2) Women and men shall have the right to inherit, in equitable shares, their parents’ properties*”<sup>312</sup>
- 3.1.8 Therefore women are now entitled by law to continue to live in the matrimonial house after the death of their husbands. It is essential women are aware of the rights to inheritance they hold under the Maputo Protocol.
- 3.1.9 The Maputo Protocol has introduced great reforms for women. It is essential that the Protocol is followed in Kenya. However there have been criticisms since Kenya’s ratification of the Protocol. A judge from the Supreme Court of Kenya, Njoki Ndung’u, has criticised the length of time it has taken to operate the Maputo Protocol. Although the Protocol has been approved, Kenya is still to establish laws to allow it to be completely operational. Ndung’u stated “*without putting in place national laws, structures and processes that popularise, domesticate and implement the Protocol, the Protocol remains only a paper without power*”.<sup>313</sup> It is important that the Kenyan state attempt to introduce laws implementing the Maputo Protocol.

### 3.2 Status of Local Legislation

---

<sup>308</sup> Maputo Protocol Article 5(a)

<sup>309</sup> Maputo Protocol Article 7(d)

<sup>310</sup> Maputo Protocol Article 8(a)

<sup>311</sup> Maputo Protocol Article 19

<sup>312</sup> Maputo Protocol Article 21

<sup>313</sup> EASSI, ‘Implementation of the Maputo Protocol is still at snail’s pace’, [www.eassi.org](http://www.eassi.org)

3.2.1 The Constitution of Kenya states that there is “*elimination of gender discrimination in law, customs and practices related to land and property in land*”.<sup>314</sup> The Constitution has taken huge steps in issuing women equal rights as the old Constitution held a number of laws which were exempt from excluding discrimination, including the devolution of property at death<sup>315</sup>. This meant that often discriminatory behaviour was justified. Under the old Constitution, customary laws were formally recognised as part of the legal system. The restrictions that women of Kenya face in acquiring, managing and administering property are a result of patriarchy, traditions and customs which have continued within the Kenyan communities. Customary laws and traditional practices which had come to be accepted over the years now contradict the new Constitution. Despite the recent changes the Constitution of Kenya 2010 has granted women, they still face a constant struggle. A report published in 2007 stated that gender inequality in Kenya’s laws on land is destroying Kenya’s economy<sup>316</sup>. Agenda item No. 4 of the National Accord to the National Dialogue and Reconciliation process<sup>317</sup> also identified land reforms as one of the main issues in need of development in Kenya.

### 3.2.2 Acquiring

- (a) Under the Constitution every person has the right, either individually or in association with others, to acquire and own property of any description; and in any part of Kenya.<sup>318</sup>
- (b) Under the Constitution “*A person who is not a citizen may hold land on the basis of leasehold tenure only, and any such lease, however granted, shall not exceed ninety-nine years*”.<sup>319</sup> Therefore a woman will not be allowed to purchase freehold land and a lease will not last them more than 99 years.<sup>320</sup>
- (c) Land may be classified as public, community or private.<sup>321</sup>

### 3.2.3 Managing

- (a) The Constitution requires that land is held, used and managed in a manner that is equitable, efficient, productive and sustainable.<sup>322</sup>
- (b) Land must be managed following the below principles.
  - (i) Public land
    - (1) The Constitution of Kenya 2010 states that public land “*shall not be disposed of or otherwise used except in terms of an Act of Parliament specifying the nature and terms of that disposal or use.*”<sup>323</sup>

<sup>314</sup> Constitution, Section 60(1)(g)

<sup>315</sup> Section 82(4) of the old constitution made exemptions for discrimination. The old constitution allowed discrimination “... with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law ...” and with respect to “... the application in the case of members of a particular race or tribe of customary law with respect to any matter to the exclusion of any law with respect to that matter which is applicable in the case of other persons.”

<sup>316</sup> E Bardasi, CM Blackden, JC Guzman. Gender Entrepreneurship and Competitiveness in Africa. In: World Economic Forum, World Bank and African Development Bank, The African Competitiveness Report 2007. page 70

<sup>317</sup> The National Accord to the National Dialogue and Reconciliation process which ended the post-election violence in February 2008

<sup>318</sup> Constitution, Section 40(1)

<sup>319</sup> Constitution, Section 65(1)

<sup>320</sup> Citizenship may be acquired through birth, registration, marriage to a Kenyan citizen for 7 years or residence for a continuous period of 7 years, adoption by Kenyan citizens or through parents, where a non-Kenyan citizen has a Kenyan mother or father. The old constitution held that only a husband could pass on citizenship to his spouse however under Section 15 of the new Constitution women can also pass on citizenship to their spouses and children.

<sup>321</sup> Constitution, Section 60(1)(2)

<sup>322</sup> Constitution, Section 60

<sup>323</sup> Constitution, Section 62(4)

- (ii) Community Land
  - (1) Restrictions are placed on those owning community land: “*Community land shall not be disposed of or otherwise used except in terms of legislation specifying the nature and extent of the rights of members of each community individually and collectively.*”<sup>324</sup>
- (iii) Private land
  - (1) There are no express restrictions placed on those possessing private land in the Constitution.

#### 3.2.4 Administration

##### (a) Public Land, Community Land & Private Land

- (i) The National Land Policy<sup>325</sup> was introduced in 2009. The National Land Policy recognises it is imperative for Kenya to have a stable land administration system. “*The policy calls for the recognition of accountable system of land administration, and ensuring the effective protection of women’s rights to land and related resources, including the provision for joint spousal registration and documentation of land rights.*”<sup>326</sup> If properly enforced it the National Land Policy would go a long way in securing land rights. The National Land Policy would help prevent the traditional confinement of women and would help preserve the the Constitution’s provisions of women’s land rights.
- (ii) Regarding the division of the matrimonial property, the old law was based on the Married Women’s Property Act 1882 which mainly leaves the division of matrimonial assets at the discretion of the court. This is widely considered to discriminate against women. However, pursuant to the Constitution it has been held that “*Parliament shall enact legislation to regulate the recognition and protection of matrimonial property and in particular the matrimonial home during and on the termination of marriage.*”<sup>327</sup> This means that Parliament is compelled to enact legislation which fairly divides the matrimonial assets. Therefore the Married Women’s Property Act 1882 is no longer followed and women have a greater chance of receiving a fair division of the matrimonial assets. The Matrimonial Property Bill 2012 states that “*Where matrimonial property is acquired during marriage – (a) in the name of one spouse, there shall be a rebuttable presumption that the property is held in trust for the other spouse; and (b) in the names of the spouses jointly, there shall be a rebuttable presumption that there beneficial interests in the matrimonial property are equal.*”<sup>328</sup> If the bill is implemented, women will be entitled to a just share of the property on the death of their husbands and on divorce.

---

<sup>324</sup> Constitution, Section 63(4)

<sup>325</sup> GROOTS, ‘Opportunities for women’s land rights in the new Kenyan Constitution’, [www.grootskenya.org](http://www.grootskenya.org)

<sup>326</sup> Ibid.

<sup>327</sup> Constitution, Section 68(c)(iii)

<sup>328</sup> Matrimonial Property Bill 2012, Section 14

### 3.3 The status of local practice

#### 3.3.1 Acquiring

- (a) In Kenya, agriculture is extremely important and is a huge contributor towards Kenya's economy. In the Research Report provided by GROOTS<sup>329</sup> it was found that 75% of the workforce ploughing and cultivating lands are women. This means that women make a huge contribution towards the economy. Following this statistic it is surprising that only 1% of women in Kenya work on land which they themselves own<sup>330</sup>. This indicates the severity of the inequality that exists with regards to women's land rights. If Kenya hopes to progress it is vital that women are helped and encouraged in acquiring land. Without land ownership, women are unable to take advantage of the wide range of benefits associated with ownership and control of property<sup>331</sup>.

#### 3.3.2 Managing

- (a) In order to manage land, a woman must first own the land. "According to UNAIDS (*Women, Property and Inheritance Rights in Kenya Report: 2006*), women who own property ... have higher incomes, secure place to live, greater bargaining power within their households, and can better protect themselves against domestic violence".<sup>332</sup> This indicates a positive correlation between those who own their properties, therefore being able to manage them, and those who have control over their households, greater earnings and general stability. Women having control over the management of their land are empowered and are less likely to turn to prostitution for money, shelter and food.<sup>333</sup>

#### 3.3.3 Administration

- (a) Women are often denied their entitlement to a piece of land which they own under the law and most women are unaware of the rights they hold. There is a social stigma attributed to women who attempt to pursue property claims. These women are often labelled "greedy".<sup>334</sup> Often these women are subject to violent attacks and therefore most women are deterred from pursuing property claims. GROOTS compiled research and came up with the most challenging aspects which women face when attempting to pursue a case for land. They found many potential barriers in accessing justice:
- (i) **Distance.** One of the woman leaders stated she would have to walk three hours to court to follow up a case and often the case didn't even proceed.
  - (ii) **Fees.** In order to the freeze land with a caution, the women are subject to a fee. Additionally there is a renewal fee every three months. Most women don't have the money to pay this.
  - (iii) **Corruption.** Administrators will often give the documents which they are ordered to give to the beneficiary who is entitled to possess the property, to distant relatives.<sup>335</sup>

<sup>329</sup> GROOTS, 'Complementing the state: the contribution of the "watchdog groups" in protecting women's land rights in Gatundu District, Kenya' (2011)

<sup>330</sup> Oduol, 2002

<sup>331</sup> Steinzor, 2003

<sup>332</sup> GROOTS, 'Assisting Kayole widows in gaining control to family land, Kenya' (2011)1

<sup>333</sup> Global Coalition on Women and AIDS, 2006

<sup>334</sup> GROOTS, 'Complementing the state: the contribution of the "watchdog groups" in protecting women's land rights in Gatundu District , Kenya' (2011)3

<sup>335</sup> GROOTS, 2011, POLICY BRIEF Complementing the state: the contribution of the "watchdog groups" in protecting women's land rights in Gatundu District, Kenya

- (b) Although most Kenyans are aware that laws relating to land exist, most are unsure of the content of the law and what the law states<sup>336</sup>. A recent USAID study found that 90% of poor people are not aware of Kenya’s formal inheritance laws<sup>337</sup>. This means most women are unaware of land which they are entitled to through inheritance. Additionally most women don’t retain the legal documents to proceed with court cases and therefore the ability of widows and orphans to control land in many Kenyan districts is threatened. Most women are unable to gather the money required for the legal fees to pursue a case. Pursuing a property case can be expensive<sup>338</sup>.

### 3.4 Statistics

3.4.1 In Kenya less than 5% of women have land titles in their names, yet women constitute about 50.5% of the population .

3.4.2 The Research Report issued in 2011 by GROOTS has compiled data from the Gatundu district in Kenya.

Table: Land-related cases 2007–2009<sup>339</sup>

Sub location	2007		2008		2009		Current cases		
	Total No. of cases	Widows/ OVC cases	Total No. of cases	Widows/ OVC cases	Total No. of cases	Widows/ OVC cases	Total No. of cases	Widows/ OVC cases	Forwarded by WDG
Kiamwangi	15	6	13	7	19	5	7	0	0
Kigongo	8	3	7	4	9	2	12	4	3
Nembu	23	14	18	6	4	1	0	0	0
Kiamworia	27	5	11	5	0	0	1	0	2
Gachika	28	4	18	3	16	2	11	4	2
Mundoro	24	4	18	2	15	1	2	2	2
Ndundu	2	1	1	3	5	2	0	2	0
Ituru	61	1	53	0	31	0	3	0	0
Kiganjo	5	3	8	2	3	1	2	1	2
Karanga	28	2	24	4	36	9	5	4	3
<b>Total</b>	<b>221</b>	<b>43</b>	<b>171</b>	<b>36</b>	<b>138</b>	<b>23</b>	<b>43</b>	<b>17</b>	<b>14</b>

3.4.3 It shows that 39.5% of land cases around 2010/2011 involved widows and orphaned or vulnerable children. This shows the vulnerability of women and the substantial amount of widows being left homeless. Parallels may be drawn between the amount of women owning land and land-related cases dealing with orphans and vulnerable children. It must be understood that women’s rights to own property can have a great affect on children as often the children of widows are also left without property. The table shows the decrease in women’s land related cases after 2010 which suggests that the Constitution of Kenya 2010 has had some influence over women’s rights.

3.4.4 The Research Report also found an outstanding 61% of women reported land and property violations compared to only 39% men.

<sup>336</sup> GROOTS, 2011, The Research Report titled ‘Complementing the state: the contribution of the “watchdog groups” in protecting women’s land rights in Gatundu District , Kenya,’ Page 3

<sup>337</sup> Empowering Women with Rights to Inheritance, A Report on Amendments to the Law of Succession Act Necessary to Ensure Women’s Human Rights. (2008) International Women’s Human Rights Clinic, FIDA Kenya and Georgetown University Law Centre. Page 32.

<sup>338</sup> GROOTS, 2011, The Research Report titled ‘Complementing the state: the contribution of the “watchdog groups” in protecting women’s land rights in Gatundu District , Kenya,’ Page 3

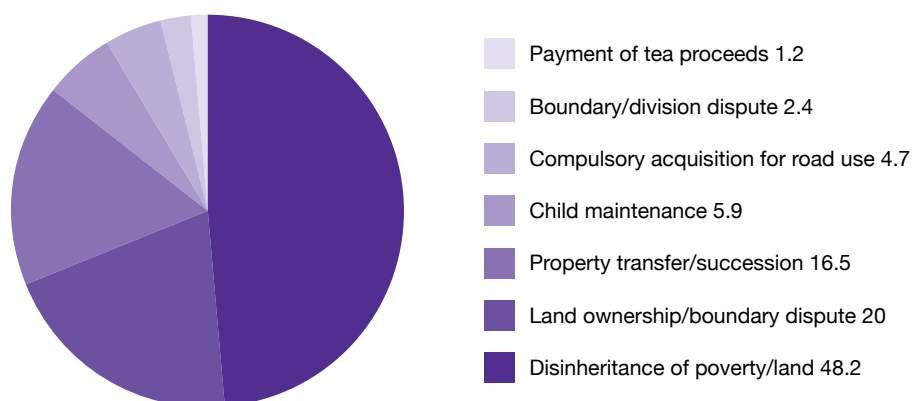
<sup>339</sup> GROOTS, 2011

Figure: Percentage of women vs. men reporting cases of land and property violations<sup>340</sup>



3.4.5 Out of all cases reviewed it was found that 48.2% of cases were reported because of disinheritance of properties.

Figure: Reasons for cases being reported<sup>341</sup>

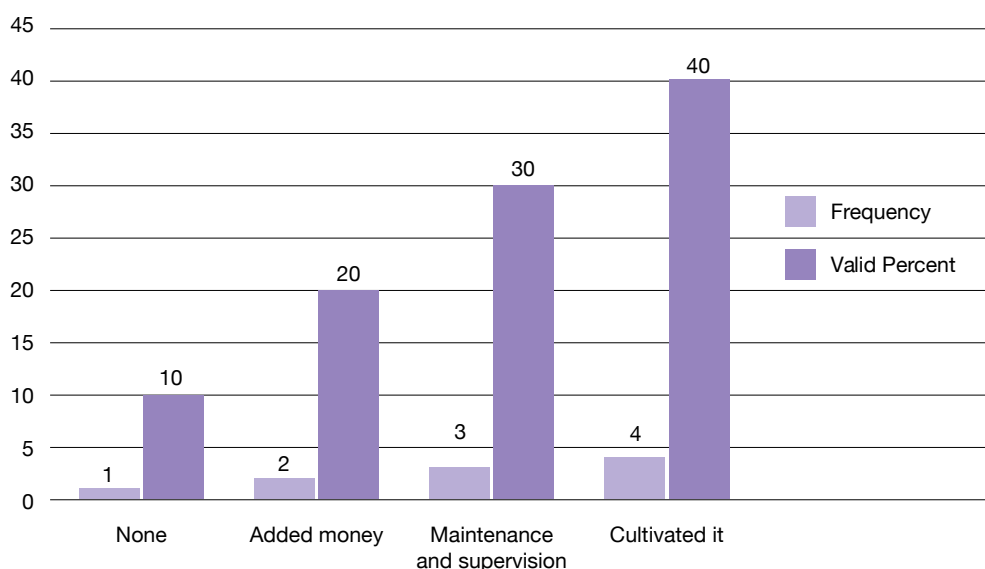


3.4.6 Therefore it is important that there are clearer laws on the inheritance of land so that there are fewer disputes.

3.4.7 GROOTS conducted research on contribution to property and concluded that only 10% of women had not contributed at all to property.

3.4.8 This shows most women contribute to land by cultivating as opposed to financial contributions.

Figure: Contribution to the property



<sup>340</sup> GROOTS, 2011

<sup>341</sup> GROOTS, 2011



# CHAPTER SEVEN

## ECONOMIC AND SOCIAL WELFARE RIGHTS

### 1. RECRUITMENT, PROMOTION AND DISMISSAL

#### 1.1 Relevant Provisions of the Maputo Protocol

1.1.1 Article 13 of the Maputo Protocol<sup>342</sup> provides Economic and Social Rights and requires the State Parties to adopt and enforce legislative and other measures to guarantee women equal opportunities in work and career advancement and other economic opportunities.

#### 1.2 Relevant Provisions of Domestic Kenyan Legislation

1.2.1 Although the Kenyan Constitution has no specific clauses relating to women, Article 41 entitles every person to the right to fair labour practices<sup>343</sup>.

1.2.2 In 2001 Kenya embarked on a review of its labour legislation in order to domesticate the International Labour Organisation's (the "ILO") conventions ratified by Kenya in fulfilment of the country's obligation as a member of the ILO. The new legislation consisting of five pieces of statute were enacted by Parliament in 2007. The Employment Act 2007 being the most relevant for the purposes of this report.

1.2.3 The Employment Act 2007

- (a) The Employment Act 2007 provides the basic terms applicable to all employment contracts<sup>344</sup>.
- (b) The Act provides that employers must promote equality of opportunity and eliminate discrimination<sup>345</sup>. Further, employers must not, directly or indirectly, discriminate against an employee or prospective employee on the grounds of, for example, sex and pregnancy<sup>346</sup>. An employer cannot discriminate in respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of employment either.
- (c) The Act makes provision for maternity leave (women are entitled to three months leave at full pay).<sup>347</sup> Moreover, an employee has the right to return to the job she had immediately prior to leave or to a reasonably suitable job on no less favourable terms and conditions<sup>348</sup>. The taking of maternity leave does not forfeit an employee's entitlement to annual leave<sup>349</sup>.

1.2.4 The remaining four pieces of legislation are gender neutral, yet are still of importance in furthering the rights of workers. The Labour Institution Act 2007 provides for the creation and management of all institutions dealing with labour. The Labour Relations Act 2007 provides for freedom of association for both employers and workers. The Work Injury Benefits Act 2007 provides for compensation for all employees for work

<sup>342</sup> "State Parties shall (a) promote equality of access to employment; (b) promote the right to equal remuneration for jobs of equal value for women and men; (c) ensure transparency in recruitment, promotion and dismissal of women and combat and punish sexual harassment in the workplace; (d) create conditions to promote and support the occupations and economic activities of women, in particular, within the informal sector; and (e) guarantee adequate and paid pre- and post-natal maternity leave in both the private and public sectors."

<sup>343</sup> "Every worker has the right to: (a) fair remuneration; (b) reasonable working conditions; (c) to form, join or participate in the activities and programmes of a trade union; and (d) to go on strike."

<sup>344</sup> The Employment Act 2007, Section 9

<sup>345</sup> The Employment Act 2007, Section 5(2)

<sup>346</sup> The Employment Act 2007, Section 5(3)(a)

<sup>347</sup> The Employment Act 2007, Section 29(1)

<sup>348</sup> The Employment Act 2007, Section 29(2)

<sup>349</sup> The Employment Act 2007, Section 29(7)

related injuries or occupational diseases. The Occupational Safety and Health Act 2007 secures the safety, health and welfare of persons at work.

### 1.3 Implementation in Practice

1.3.1 It is evident that Kenya has implemented legislation and set up bodies to facilitate gender equality in the work place. A major gap in Kenyan legislation is protections for informal workers. The majority of informal workers are female and therefore women are disproportionately affected when informal workers are not afforded the same protections as formal workers.

1.3.2 Evidence suggests that the rights afforded by the legislation do not always filter down to a grass roots level.

#### 1.3.3 Economic Participation and Opportunity

(a) The Global Gender Gap Report 2012 ranked Kenya 35th out of 135 countries in the global gender gap index for economic participation and opportunity<sup>350</sup>.

(b) The economic participation and opportunity sub-index is captured using three concepts: (1) the participation gap (difference in labour force participation rates); (2) the remuneration gap (ratio of estimated female-to-male earned income); and (3) the advancement gap (ratio of women to men among legislators, senior officials and managers and ratio of women to men among technical and professional workers)<sup>351</sup>.

(c) Kenya's overall ranking within the global gender gap index, taking into account all of the sub-indexes, is 72<sup>352</sup>.

(d) The report uses a ranking system of 1 for equality and 0 for inequality. Kenya's equality score for economic participation and opportunity is 0.72. Its equality score for educational attainment however is 0.94, which suggests that there is an issue in converting the equality in educational attainment into equality in economic participation<sup>353</sup>.

(e) The report places Kenya in the category of countries that *"are generally closing education gaps but show low levels of women's economic participation"*. Countries in this category *"have made the key investments in women's education but have generally not removed barriers to women's participation in the workforce and are thus not seeing returns on their investments"*.<sup>354</sup>

(f) Since 2011, Kenya has gained 27 places in the overall gender gap index, however the report suggests that this is partially due to the fact there is no data for the advancement gap indicator<sup>355</sup>.

(g) The wage equality survey shows Kenya as having a 0.68 female-to-male ratio. This ranks Kenya as 56th in terms of wage equality, which is one point higher than the UK at 57th.<sup>356</sup>

#### 1.3.4 Women in Agriculture

(a) Agriculture creates over 80% of Kenya's jobs and 60% of income. Currently, women in Kenya do the vast majority of agricultural work and produce/market the majority of food.<sup>357</sup> In October 2007, Rachel English published a report

<sup>350</sup> The Global Gender Gap Report 2012, page 11

<sup>351</sup> The Global Gender Gap Report 2012, page 4

<sup>352</sup> The Global Gender Gap Report 2012, page 9

<sup>353</sup> The Global Gender Gap Report 2012, page 11

<sup>354</sup> The Global Gender Gap Report 2012, page 29

<sup>355</sup> The Global Gender Gap Report 2012, page 28

<sup>356</sup> The Global Gender Gap Report 2012, page 45

<sup>357</sup> *"Gender Equity Issues in Kenya"* (Fsd Foundation for Sustainable Development, March 2014) [www.fsdinternational.org/country/kenya/weissues](http://www.fsdinternational.org/country/kenya/weissues)

looking at women's working rights in African horticulture. According to this report, the majority of workers on the farms in Kenya (approximately 56% workforce) are young females under the age of 35 who are categorised as being 'alone' (single, widowed, divorced or separated) and are educated to a primary level only.<sup>358</sup> Further, these women tend to occupy low/un-skilled jobs, such as grading, packing, harvesting, batching and watering sweeping, which are poorly remunerated.<sup>359</sup>

### (b) Maternity

a) The report found that employers do not recognise the dual role that women must play, in terms of work and family life.<sup>360</sup> For example, where women do not have access to adequate maternity rights, their family lives are put under great stress, forcing many women to choose between earning a wage and raising a family. One reason for this is that women working on farms are often classified as informal workers, meaning that they generally do not have a contract and consequently are not afforded certain rights.<sup>361</sup>

b) Most Kenyan farms in this report did provide maternity leave to pregnant workers. However in some farms, workers, especially non-permanent workers, were dismissed if they became pregnant.<sup>362</sup>

### (c) Working Hours

a) Working hours on farms in Kenya are much longer than stipulated by national law.<sup>363</sup>

b) The report found that workers often had targets to meet, which were set by their supervisors. Many workers would not leave work until such targets had been met. This was said to be '*almost forced labour*'.<sup>364</sup>

c) The danger of women travelling alone late at night was also highlighted.<sup>365</sup>

### (d) Promotion and Advancement

a) The report found that, other than in a vast minority of farms, women were underrepresented at supervisory and managerial levels. This was often due to the fact that there were no formalised guidelines on promotion, which largely depended on personal relationships with management.<sup>366</sup>

### (e) Salary

a) Due to the poor opportunities for promotion and advancement, women are often trapped in low grade jobs. It has been reported that the pay levels for such jobs are insufficient to the point that women are unable to meet their basic family needs.<sup>367</sup>

b) It has been reported that nearly 40% of households are run solely by women, and, due to their low wages, nearly all of these households suffer from poverty/extreme poverty.<sup>368</sup>

---

<sup>358</sup> Rachel English, "Promoting Women Workers' Rights in African Horticulture" (2007), page 12, available at [www.women-ww.org/documents/www\\_research\\_overview\\_final.pdf](http://www.women-ww.org/documents/www_research_overview_final.pdf)

<sup>359</sup> Rachel English, "Promoting Women Workers' Rights in African Horticulture" (2007), pages 12–13

<sup>360</sup> Rachel English, "Promoting Women Workers' Rights in African Horticulture" (2007), page 13

<sup>361</sup> Rachel English, "Promoting Women Workers' Rights in African Horticulture" (2007), page 13

<sup>362</sup> Rachel English, "Promoting Women Workers' Rights in African Horticulture" (2007), page 20

<sup>363</sup> Rachel English, "Promoting Women Workers' Rights in African Horticulture" (2007), page 20

<sup>364</sup> Rachel English, "Promoting Women Workers' Rights in African Horticulture" (2007), page 20

<sup>365</sup> Rachel English, "Promoting Women Workers' Rights in African Horticulture" (2007), page 20

<sup>366</sup> Rachel English, "Promoting Women Workers' Rights in African Horticulture" (2007), page 18

<sup>367</sup> Rachel English, "Promoting Women Workers' Rights in African Horticulture" (2007), page 13

<sup>368</sup> "Gender Equity Issues in Kenya" (Fsd Foundation for Sustainable Development, March 2014). Available at: [www.fsdinternational.org/country/kenya/weissues](http://www.fsdinternational.org/country/kenya/weissues)

- (f) Health and Safety
  - a) Some farms had unisex toilet facilities, which were of poor quality and provided nowhere to discard sanitary towels.<sup>369</sup>
  - b) Further, although protective clothing was available, not all workers had access to it. The reported effects of contact from chemicals without adequate protection included miscarriages and irregular menstrual flows.<sup>370</sup>

### 1.3.5 Informal Workers

- (a) The informal economy refers to activities and income that are partially or fully outside government regulation, taxation and observation.
- (b) Even though, according to 2011 statistics collected by the Women in Informal Employment Globalising and Organising (the “**WIEGO**”), nearly half of all those employed in Kenya are women, only 18% of these women are paid employees earning a wage/salary (this is compared to 39% of men). Further, 77% of employed women are self-employed, but not employers (compared to 57% of men).<sup>371</sup>
- (c) WIEGO defines non-agricultural own-account workers and employers as informal if their enterprise is not registered. It appears, however, that non-agricultural own-account workers and employers cannot be defined in this way, as they are not asked if their enterprise is registered. It is assumed that the majority are informal, however.<sup>372</sup>
- (d) Further the WIEGO categorises a worker as formal if they work for a formal institution. This, however, over-estimates the actual number of formal workers, as some of those employed by formal institutions will lack social protection.<sup>373</sup>
- (e) In non-agricultural urban work, 34% of the workers are formal and 61% are informal (4% cannot be classified). This average hides marked gender differences, however 40% of men are formal workers, compared to only 26% of women. Moreover, 58% of men are informal workers, compared to 66% of women.<sup>374</sup>
- (f) Informal urban non-agricultural workers are paid less than half the average salary for urban non-agricultural workers. Within this category of workers, men earn 1.7 times more than the average for women.<sup>375</sup>
- (g) A large proportion of informal non-agricultural urban workers include domestic workers and street traders. 82% of domestic workers are women. This type of work records extremely low wages, equivalent to roughly one third of the average earning of informal urban non-agricultural workers. 63% of street traders are women; whilst these workers earn more than domestic workers, their wages are only just over three quarters of the average for all informal urban non-agricultural workers.<sup>376</sup>

<sup>369</sup> Rachel English, “Promoting Women Workers’ Rights in African Horticulture” (2007), page 21

<sup>370</sup> Rachel English, “Promoting Women Workers’ Rights in African Horticulture” (2007), page 21

<sup>371</sup> Debbie Bundlender, “Statistics on Informal Employment in Kenya” (May 2011). Available at: [http://wiego.org/sites/wiego.org/files/publications/files/Budlender\\_WIEGO\\_SB5.pdf](http://wiego.org/sites/wiego.org/files/publications/files/Budlender_WIEGO_SB5.pdf), page 2

<sup>372</sup> Debbie Bundlender, “Statistics on Informal Employment in Kenya” (May 2011), page 2

<sup>373</sup> Debbie Bundlender, “Statistics on Informal Employment in Kenya” (May 2011), page 2

<sup>374</sup> Debbie Bundlender, “Statistics on Informal Employment in Kenya” (May 2011), page 2

<sup>375</sup> Debbie Bundlender, “Statistics on Informal Employment in Kenya” (May 2011), page 3

<sup>376</sup> Debbie Bundlender, “Statistics on Informal Employment in Kenya” (May 2011), page 3

### 1.3.6 Women as Entrepreneurs

- (a) A 2011 article from the Telegraph has noted that women in Kenya are spearheading micro finance projects.<sup>377</sup>
- (b) Village associations have been established throughout Kenya, enabling people to save and borrow money. Even though roughly a quarter of those taking part in these schemes are now men, they are almost without exception dominated and run by women who are more effective in managing family and village finances and in making decisions about the best way to use funds in order to improve standards of living.
- (c) Financial institutions have also been keenly monitoring these developments, for example Barclays, which has invested in a £10 million programme over three years in 10 countries.<sup>378</sup>
- (d) The ILO is also involved in encouraging co-operatives<sup>379</sup> which have been proved to empower female workers.
- (e) One example of this is the Kabnetuny Farmers' Cooperative Society, which is one of the first cooperatives to embrace gender mainstreaming in its production of fair trade coffee, a campaign that has interested other East African Fairtrade cooperatives.<sup>380</sup>

### 1.3.7 The Women Enterprise Fund

- (a) The Women Enterprise fund established in 2006 is a Semi-Autonomous Government Agency in the Ministry of Gender, Children & Social Development.<sup>381</sup>
- (b) Its aim is to facilitate women's access to micro-finance credit and other financial services. The fund provides loans where women will access funds directly either as individuals, women owned enterprises or other organised entities such as women groups and women owned companies.<sup>382</sup>
- (c) The fund also provides capacity building for women entrepreneurs, access to local and international marketing exhibitions and trade fairs, linkages and business incubation.<sup>383</sup>

## 2. ANTI-SEXUAL HARASSMENT IN THE WORKPLACE

**2.1** A definition of sexual harassment can be read from Article 11 of the Convention on the Elimination of Discrimination Against Women: state parties are obliged to *"take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure on a basis of equality of men and women, the same rights"...*<sup>384</sup>

**2.2** Article 11 of General Recommendation 19 noted the consequences of violence against women and observed that *'equality in employment can be seriously impaired when women are subjected to gender-specific violence, such as sexual harassment in the work place'*. Sexual harassment includes such unwelcome sexually determined behaviour as physical

<sup>377</sup> Damian Reece, 'Kenya's Women Spearheading Micro Finance Projects' The Telegraph (London March 2011). Available at: [www.telegraph.co.uk/finance/newsbysector/banksandfinance/8360803/Kenyas-women-spearheading-micro-finance-projects.html](http://www.telegraph.co.uk/finance/newsbysector/banksandfinance/8360803/Kenyas-women-spearheading-micro-finance-projects.html)

<sup>378</sup> Damian Reece, 'Kenya's Women Spearheading Micro Finance Projects' The Telegraph (London March 2011). Available at: [www.telegraph.co.uk/finance/newsbysector/banksandfinance/8360803/Kenyas-women-spearheading-micro-finance-projects.html](http://www.telegraph.co.uk/finance/newsbysector/banksandfinance/8360803/Kenyas-women-spearheading-micro-finance-projects.html)

<sup>379</sup> Francis A. Munan, "Kenya" (International Labor Organisation, 13 August, 2009). Available at: [www.ilo.org/public/english/employment/ent/coop/africa/countries/eastafrica/kenya.htm](http://www.ilo.org/public/english/employment/ent/coop/africa/countries/eastafrica/kenya.htm)

<sup>380</sup> All Africa "Keyna: Coffee Cooperative Empowers Women Farmers" (4 July, 2013). Available at: <http://allafrica.com/stories/201307051510.html>

<sup>381</sup> Women Enterprise Fund. Available at: [www.wef.co.ke](http://www.wef.co.ke)

<sup>382</sup> "African Women's Decade 2010–2020, 2012 Annual Review". Available at: [http://makeeverywomancount.org/images/stories/documents/MEWC\\_AWD2012AnnualReview.pdf](http://makeeverywomancount.org/images/stories/documents/MEWC_AWD2012AnnualReview.pdf)

<sup>383</sup> "African Women's Decade 2010–2020, 2012 Annual Review". Available at: [http://makeeverywomancount.org/images/stories/documents/MEWC\\_AWD2012AnnualReview.pdf](http://makeeverywomancount.org/images/stories/documents/MEWC_AWD2012AnnualReview.pdf)

<sup>384</sup> Convention on the Elimination of Discrimination Against Women, Article 11

contact and advances, sexually coloured remarks, showing pornography and sexual demand, whether by words or actions. Such conduct can be humiliating and may constitute health and safety problem; it is discriminatory when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment, including recruitment or promotion, or when it creates a hostile working environment.<sup>385</sup>

**2.3** In light of these comments, the Committee on the Elimination of Discrimination against Women recommended that States take a number of steps/measures, the key recommendation being that:

2.3.1 States parties should take appropriate and effective measures to overcome all forms of gender-based violence, whether by public or private act.<sup>386</sup>

## **2.4 Relevant Provisions of the Maputo Protocol**

2.4.1 Article 13(c) provides that State Parties shall combat and punish sexual harassment in the workplace.<sup>387</sup>

2.4.2 The duties of State Parties regarding sexual harassment can also be read into the followings rights/articles:

- (a) The right to Dignity requires State Parties to implement measures ensuring that women are protected from all forms of violence, in particular sexual and verbal violence.<sup>388</sup>
- (b) The rights to Life, Integrity and Security of the Person requires State Parties to take appropriate measures to, for example:
  - a) enact and enforce laws prohibiting all forms of violence against women including unwanted or forced sex whether the violence takes place in private or public;<sup>389</sup> and
  - b) adopt measures necessary to prevent, punish and eradicate all forms of violence against women.<sup>390</sup>
- (c) The right to Access to Justice and Equal Protection before the Law requires State Parties to ensure that, for example:
  - a) women have effective access to judicial and legal services (including, for example legal aid);<sup>391</sup> and
  - b) existing discriminatory laws and practices are reformed in order to promote and protect the rights of women.<sup>392</sup>
- (d) The right to Peace requires State Parties to ensure women have the right to a peaceful existence and the right to participate in the promotion and maintenance of peace.<sup>393</sup>
- (e) The Right to Special Protection for Women in Distress requires State Parties to ensure that poor women and women heads of families are protected and provided with an environment suitable to their condition and special physical, economic and social needs.<sup>394</sup>

---

<sup>385</sup> General Recommendation No 19 (11th Session, 1992) Comment on Article 11, paragraph 17–18

<sup>386</sup> General Recommendation No 19 (11th Session, 1992) Comment on Article 11, paragraph 24(a)

<sup>387</sup> African Charter on Human and Peoples' Rights on the Rights of Women in Africa 2003, Article 13(c)

<sup>388</sup> African Charter on Human and Peoples' Rights on the Rights of Women in Africa 2003, Article 3(4)

<sup>389</sup> African Charter on Human and Peoples' Rights on the Rights of Women in Africa 2003, Article 4(2)(a)

<sup>390</sup> African Charter on Human and Peoples' Rights on the Rights of Women in Africa 2003, Article 4(2)(b)

<sup>391</sup> African Charter on Human and Peoples' Rights on the Rights of Women in Africa 2003, Article 8(a)

<sup>392</sup> African Charter on Human and Peoples' Rights on the Rights of Women in Africa 2003, Article 8(f)

<sup>393</sup> African Charter on Human and Peoples' Rights on the Rights of Women in Africa 2003, Article 10(1)

<sup>394</sup> African Charter on Human and Peoples' Rights on the Rights of Women in Africa 2003, Article 24(a)



## 2.5 Relevant Provisions of Domestic Kenyan Legislation

### 2.5.1 The Constitution

- (a) The Constitution prohibits direct or indirect discrimination, *inter alia*, on the basis of sex, pregnancy and marital status.<sup>395</sup>

### 2.5.2 The Kenyan National Commission on Human Rights Act (the “KNCHRA”)

- (a) It is reasonably clear that Section 3 of the KNCHRA is intended to implement rights in the Constitution as well as those contained in international instruments to ‘which Kenya is signatory’. This therefore enables the jurisprudence of CEDAW to be brought into domestic laws.<sup>396</sup>

### 2.5.3 The Sexual Offences Act 2006

- (a) Section 23 makes sexual harassment by a person in a position of authority or holding a public office an offence. A person guilty of such an offence is liable to imprisonment and/or a fine.<sup>397</sup>
- (b) Section 24 creates five offences which are committed by those in positions of power/trust who take advantage of their positions in order to induce someone into having sexual intercourse with them. All such offences carry a prison sentence of not less than 10 years.<sup>398</sup>
- (c) Section 46 empowers the Minister of Labour to prepare a national policy framework to act as a guideline in the implementation and administration of the Sexual Offences Act and to review and amend the policy regularly.<sup>399</sup> This National Policy Framework is to be implemented and monitored by the National Task Force.

### 2.5.4 The Public Officer Ethics Act 2003

- (a) Section 21 prohibits a public officer from sexually harassing a member of the public or a fellow public officer.<sup>400</sup> This section also provides a definition of sexual harassment, which includes doing any of the following acts, if the person doing it knows or ought to know that it is unwelcome:
  - a) making a request or exerting pressure of sexual activity or favours;
  - b) making intentional or careless physical contact that is sexual in nature; and
  - c) making gestures, noises or jokes or comments, including innuendos, regarding another person’s sexuality.<sup>401</sup>

---

<sup>395</sup> The Bill of Rights, Article 27(4).

<sup>396</sup> W. Maina and J. Thongori, “Whether Sexual harassment amounts to Sex Discrimination under International Law and the Kenyan Constitution”, case 154, Kenya 3, September 2004: Recommends that the High Courts in Kenya should follow the example of the Indian Court in the Case of Vishaka and others v. State of Rajasthan and others (1997) 6 SCC 241, AIR 1997 SC, where the Indian Supreme Court issued Guidelines on Sexual Harassment in the Work-place to the Indian Parliament passing the Sexual Harassment of Women at the Work Place (Prevention, Prohibition and Redressal) (2013) which creates mechanisms to redress complaints. It also provides for a wide definition of the ‘Aggrieved Woman’ and this covers all women irrespective of her age, or employment status, whether in the organised or unorganised sectors, public or private and covers clients, customers and domestic workers as well. This is an excellent piece of anti sexual harassment legislation which specifically protects the rights of women and identifies the risks of vulnerable women within Indian society.

<sup>397</sup> The Sexual Offences Act 2006, Article 23(1)

<sup>398</sup> The Sexual Offences Act 2006, Article 24

<sup>399</sup> The Sexual Offences Act 2006, Article 46

<sup>400</sup> The Public Officer Ethics Act 2003, Section 21(1)

<sup>401</sup> The Public Officer Ethics Act 2003, Section 21(2)

### 2.5.5 The Employment Act 2007

- (a) Section 6 lists the circumstances in which it will be considered that an employee has been sexually harassed by an employer or a co-worker, which includes, for example:
- a) directly or indirectly requesting that employee for sexual intercourse, sexual contact or any other form of sexual activity that contains an implied or express promise preferential treatment in employment, threat of detrimental treatment in employment or threat about the present or future employment status of the employee;<sup>402</sup>
  - b) using language whether written or spoken of a sexual nature;<sup>403</sup>
  - c) using visual material of a sexual nature;<sup>404</sup> or
  - d) showing physical behaviour of a sexual nature which directly or indirectly subjects the employee to behaviour that is unwelcome or offensive to that employee and that by its nature has a detrimental effect on that employee's employment, job performance, or job satisfaction.<sup>405</sup>
- (b) The Act further requires an employer who employs twenty or more employees to issue a policy statement on sexual harassment, after consulting with the employees or their representatives if any.<sup>406</sup> This policy statement must be brought to the attention of all workers under the employer's direction.<sup>407</sup> The policy statement may contain any term the employer considers appropriate and shall contain the definition of sexual harassment in Section 6(1),<sup>408</sup> along with a statement that:
- a) every employee is entitled to employment that is free of sexual harassment;<sup>409</sup>
  - b) the employer shall take steps to ensure that no employee is subjected to sexual harassment;<sup>410</sup>
  - c) the employer shall take such disciplinary measures as the employer deems appropriate against any person under the employer's direction, who subjects any employee to sexual harassment;<sup>411</sup>
  - d) explaining how complaints of sexual harassment may be brought to the attention of the employer;<sup>412</sup> and
  - e) the employer will not disclose the name of a complainant or the circumstances related to the complaint to any person except where disclosure is necessary for the purpose of investigating the complaint or taking disciplinary measures in relation thereto.<sup>413</sup>

---

<sup>402</sup> The Employment Act 2007, Section 6(1)(a)

<sup>403</sup> The Employment Act 2007, Section 6(1)(b)

<sup>404</sup> The Employment Act 2007, Section 6(1)(c)

<sup>405</sup> The Employment Act 2007, Section 6(1)(d)

<sup>406</sup> The Employment Act 2007, Section 6(2)

<sup>407</sup> The Employment Act 2007, Section 6(4)

<sup>408</sup> The Employment Act 2007, Section 6(3)(a)

<sup>409</sup> The Employment Act 2007, Section 6(3)(b)(i)

<sup>410</sup> The Employment Act 2007, Section 6(3)(b)(ii)

<sup>411</sup> The Employment Act 2007, Section 6(3)(b)(iii)

<sup>412</sup> The Employment Act 2007, Section 6(iv)

<sup>413</sup> The Employment Act 2007, Section 6(v)

## 2.6 Implementation in Practice

### 2.6.1 The Sexual Offences Act 2006

- (a) The law provides for an environment to control and deal with forms of sexual harassment through a National Policy Framework. Research undertaken by FIDA Kenya identified institutional challenges on the implementation of the Sexual Offences Act. This research states that the Task Force on the Implementation of the Sexual Offences Act, which was originally set up in 2007 to work on a national framework and guidelines for administration of sexual violence, did not start working until 2010 and it has not yet managed to address the issue of education and training effectively.<sup>414</sup>
- (b) The Kenyan Delegation who went before CEDAW in 2007, stated that strict enforcement of the 2006 Sexual Offences Act and the 2003 Public Officer Ethics Act would ensure that sexual harassment in the workplace was a thing of the past and claimed that economic assistance was being given to women's groups to help empower them. The Delegation stated that the Inter-Ministerial Committee on Grants to Self-Help Groups had contributed significantly to the economic empowerment of women and cited an example of the Women Enterprise and Development Fund, set up to support the Sexual Offences Act 2006.<sup>415</sup>
- (c) Section 23 of The Sexual Offences Act provides that a victim of sexual assault can press charges against an alleged perpetrator. The Act specifies that any person, who being in a position of authority, or holding public office, who persistently makes any sexual advances or requests which he is she knows are unwelcome, is guilty of the offences of sexual harassment and shall be liable for imprisonment for a term of not less than three years or to a fine of not less than one hundred thousand shillings or to both.<sup>416</sup>
- (d) Section 24 of the Sexual Offences Act, outlines the maximum penalty of one convicted of sexual assault.<sup>417</sup>
- (e) Section 25(1) of the Sexual Offences Act states that conduct by a person which would otherwise be an offence under this Act is **not** an offence if a sexual relationship already existed before the position of authority or trust arose. It is unclear to what extent Section 25 is being used as a blanket protection against prosecution. It is also unclear how evidence of a prior sexual relationship can fairly be proven.<sup>418</sup>

### 2.6.2 The Employment Act 2007

- (a) Section 6 compels every employer with more than 20 workers to set up a workplace policy statement on sexual harassment.
- (b) Once the policy is in existence it is the duty of the employer, under the Employment Act, to ensure that all employees are aware of the existence of the policy. Generally, the policy requires the employer to:
  - a) create awareness about sexual harassment by defining it;
  - b) commit themselves to supporting a working environment that is free from sexual harassment;

---

<sup>414</sup> FIDA – K (2010) Research on Implementation of the Sexual Offences Act – Justice Sector

<sup>415</sup> UN Committee on Elimination of Discrimination against Women, Anti-Discrimination Committee urges Kenya to continue pursuing gender equality, News and Media Division, 799th & 800th Meetings (AM & PM).

<sup>416</sup> The Sexual Offences Act 2006, Section 23

<sup>417</sup> The Sexual Offences Act, Section 24

<sup>418</sup> The Sexual Offences Act 2006, Section 25

- c) assure workers of disciplinary measures against any perpetrator;
  - d) assure protection to the victim; and
  - e) provide an avenue for complaints of sexual harassment.
- (c) *Redress Procedures:*
- a) The Kenyan Delegation before the CEDAW Committee submitting Kenya's Seventh Periodic Report stated that cases of sexual harassment in the work place were reported to human resources departments for administrative action. In the event that the complainant is dissatisfied with the outcome then they report to the women's rights organisations e.g. the Federation of Women Lawyers in Kenya and the Kenya National Commission on Human Rights. The fact that the law requires every employer with more than 20 employees to have a sexual harassment policy which must define sexual harassment and set out procedures for instituting and investigating complaints has enabled the issue to be taken more seriously than it was previously. The challenge is that many women fear reporting incidences of sexual harassment for fear of losing their jobs.<sup>419</sup>
- (d) *The Equal Employment Opportunities Commission*
- a) Established to monitor compliance with the Employment Act, the Equal Employment Opportunities Commission has the specific mandate of regularly auditing employment practices and monitoring aspects of the Employment Act.

### 2.6.3 Appealing to the Trade Unions

- (a) Section 32 of the Labour Relations Act 2007 enables an employee who is above the age of 16 years to enjoy the rights of membership of a trade union. Through this membership, trade unions can represent individuals who are suffering injustices such as sexual harassment at the hands of their employees.<sup>420</sup>
- (b) According to a report by the International Labour Rights Fund 2002 ("ILRF"), the trade unions do not offer enough protection for women suffering from sexual harassment in the workplace. Even though the Industrial Relations Charter was forged in 1962 between the government, the Federation of Kenya Employers and the Kenya Federation of Labour, the Charter is silent on many forms of workplace violations, including gender discrimination and sexual harassment.<sup>421</sup>
- (c) The ILRF study established that most women did not report instances of sexual abuse either to the management or to the respective trade union. The women argued that the management compromised of men who harassed them whenever the opportunity arose. The trade union staff were also noted to do the same, in that some of the male staff also abused the women. Even those who were not perpetrators rarely took action to stop others from being abused. The study concludes that 90% of the women experiencing sexual harassment do not report instances due to fear of further victimisation and even loss of job.<sup>422</sup>
- (d) A woman cannot appeal to trade unions in cases where she is not a member of a union. A large proportion of rural workers and low paid workers are not members of a union and do not work with a contract. These are termed 'casual workers'.

<sup>419</sup> The CEDAW Committee considered the seventh periodic report of Kenya (CEAW/C/KEN/7) at its 963rd and 964th meetings on 19 January 2011 (CEDAW/C/SR.963 and 964), CEDAW/C/KEN/Q7/Add.1 (Kenya Responses)

<sup>420</sup> The Labour Relations Act No. 14 of 2007, Section 32

<sup>421</sup> Violence Against Women in the Workplace in Kenya: Assessment of Workplace Sexual Harassment in the Commercial Agriculture and Textile Manufacturing Sectors in Kenya, International Labour Rights Fund, May 2002

<sup>422</sup> Violence Against Women in the Workplace in Kenya: Assessment of Workplace Sexual Harassment in the Commercial Agriculture and Textile Manufacturing Sectors in Kenya, International Labour Rights Fund, May 2002

### 2.6.4 Casual Workers (“Informal Workers”)

- (a) The high percentage of sexual harassment in the work place is due to the fact that so many women in Kenya are employed as Informal Workers. A report by the ILRF states that these women are not afforded the same protections that regular workers would be afforded.<sup>423</sup>
- (b) According to one woman participating in a focus group discussion set up by Amnesty International with 15 women and girls, most of whom work as domestic house help in higher income areas around Mathare Slum, Nairobi, Kenya: *“often to sustain your job you have to put up with sexual and other forms of harassment”*.<sup>424</sup>
- (c) Two of the women interviewed in this focus group also explained how they had repeatedly been raped by their employers and how one had become pregnant and infected with HIV/AIDS in the process. When asked if they reported the matter to the police or any other official authority one of the them said that they: *“had not reported these incidents to the police because our employers would have bribed them”*<sup>425</sup>

## 3. EQUALITY ISSUES RELATING TO ECONOMIC AND SOCIAL WELFARE RIGHTS

### 3.1 Relevant Provisions of the Maputo Protocol

- 3.1.1 Article 13 of the Protocol<sup>426</sup> provides for the economic and social welfare rights of women. Under this Article, State Parties are required to adopt and enforce legislative and other measures to guarantee women equal opportunities in work and career advancement and other economic opportunities.

### 3.2 Relevant Provisions of Domestic Kenyan Legislation

- 3.2.1 Article 13(f) of the Protocol – establishes a system of protection and social insurance for women working in the informal sector and sensitize them to adhere to it.
  - (a) Under the Constitution, States shall provide appropriate social security to persons who are unable to support themselves and their dependants.<sup>427</sup>
  - (b) Article 11 of the CEDAW provides that there should be no discrimination between men and women in relation to the right to social security;<sup>428</sup> Article 13 extends the scope of non-discrimination in this regard to the right to family benefits, including certain forms of financial credit.<sup>429</sup>

---

<sup>423</sup> Natacha Thys, International Labour Rights Fund (“ILRF”) speaking to BBC World Service’s Africa Live programme, *‘Kenyan women workers ‘harassed’* (BBC World Service, 07 May 2004) <http://news.bbc.co.uk/1/hi/world/africa/3691605.stm>: *“In Kenya, we found that the working conditions, at least in terms of women workers, are rather poor”*, ILRF spokeswoman Natacha Thys told BBC World Service’s Africa Live programme. *“In terms of sexual harassment, it’s something that the majority of women have to endure every day ... What we found was 90% of the respondents had experienced some form of sexual harassment.”* Ms Thys said that the extremely high percentage was partly down to the fact that so many women in Kenya are employed as casual workers. They are not afforded a lot of the same protections that normal workers would be afforded.

<sup>424</sup> KENYA: Briefing to the Committee on the Elimination of Discrimination Against Women, 48th session January 2011, page 8, Amnesty International November 2010, Index: AFR 32/01/2010

<sup>425</sup> *Insecurity and Indignity: Women’s experiences in the slums of Nairobi, Kenya*, Amnesty International, (Index: AFR 32/017/2010). Available at: [www.amnesty.org/en/library/info/AFR32/002/2010/en](http://www.amnesty.org/en/library/info/AFR32/002/2010/en)

<sup>426</sup> “State Parties shall: (a) establish a system of protection and social insurance for women working in the informal sector and sensitize them to adhere to it; (b) introduce a minimum age for work and prohibit the employment of children below that age, and prohibit, combat and punish all forms of exploitation of children, especially the girl-child; (c) take the necessary measures to recognise the economic value of the work of women in the home; (d) ensure the equal application of taxation laws to women and men; (e) recognise and enforce the right of salaried women to the same allowances and entitlements as those granted to salaried men for their spouses and children; and (f) recognise that both parents bear the primary responsibility for the upbringing and development of children and that this is a social function for which the State and the private sector have secondary responsibility.”

<sup>427</sup> The Kenyan Constitution 2010, Article 43(1)(e)

<sup>428</sup> Convention on the Elimination of Discrimination Against Women, Article 11(1)(e)

<sup>429</sup> Convention on the Elimination of Discrimination Against Women, Article 13

- (c) Temporary and permanent disability benefits are available from the social security fund which covers employed persons, traders, self-employed persons and some workers in the informal sector, including farmers. Certain Informal Workers are excluded, primarily as payouts depend on the voluntary contributions the insured person makes on a monthly basis. The employer may also contribute a proportion of the monthly payroll. The benefit payable in instances of work injury appears to not be available for casual workers, as the payout amount is funded from direct employer provision of benefits.<sup>430</sup>
  - (d) Under the National Social Security Fund Act, benefits pertaining to age, survivor's benefit, invalidity or the like apply irrespective of gender.<sup>431</sup>
- 3.2.2 Article 13(g) of the Protocol - introduces a minimum age for work and prohibit the employment of children below that age, and prohibit, combat and punish all forms of exploitation of children, especially the girl-child.
- (a) Section 56 of the Employment Act 2007 prohibits the employment of anyone under the age of 13.<sup>432</sup> Children between the ages of 13 and 16 may undertake light work (undefined) and those between 16 and 18 are employable.<sup>433</sup> The minimum age for employment in an industrial undertaking is 16, unless the child is an apprentice under the Industrial Training Act.<sup>434</sup>
  - (b) Part VII of the Employment Act 2007 is dedicated to the Protection of Children. Although it does not single out the needs or rights of the girl-child, it outlaws the use of children in the 'worst forms of child labour' (including slavery, illicit trafficking, pornography and prostitution),<sup>435</sup> and includes a complaints and investigation framework to engage criminal investigation authorities,<sup>436</sup> and provides that such employment would amount to the commission of a criminal offence by the employer.<sup>437</sup> Labour officers may terminate or cancel employment contracts that violate these provisions and may stipulate in writing that an employer may not employ a child in certain stated circumstances.<sup>438</sup>
  - (c) The law provides for protection from child labour and armed conflict under The Children Act, No. 8 of 2001. Section 10, provides that every child shall be protected from: economic exploitation; any work that interferes with his/her education, or is harmful to the child's health or physical, mental, spiritual, moral or social development and recruitment to hostilities in armed conflicts.
- 3.2.3 Article 13(h) of the Protocol – takes the necessary measures to recognise the economic value of the work of women in the home
- (a) Article 14 of CEDAW enjoins "*States Parties to take into account... the significant roles which rural women play in the economic survival of their families, including their work in the non-monetized sectors of the economy, and shall take all appropriate measures to ensure the application of the provisions of the present Convention to women in rural areas*".<sup>439</sup>

<sup>430</sup> Available at: [www.ssa.gov/policy/docs/progdesc/ssptw/2010-2011/africa/kenya.pdf](http://www.ssa.gov/policy/docs/progdesc/ssptw/2010-2011/africa/kenya.pdf)

<sup>431</sup> The National Social Security Fund Act, Part IV

<sup>432</sup> The Employment Act 2007, Section 56(1)

<sup>433</sup> The Employment Act 2007, Section 56(2)

<sup>434</sup> The Employment Act 2007, Sections 58–59

<sup>435</sup> The Employment Act 2007, Section 53(1)

<sup>436</sup> The Employment Act 2007, Section 54

<sup>437</sup> The Employment Act 2007, Section 64

<sup>438</sup> The Employment Act 2007, Section 55

<sup>439</sup> Convention on the Elimination of Discrimination Against Women, Article 14



- 3.2.4 Article 13(j) of the Protocol – ensures the equal application of taxation laws to women and men
- (a) The Constitution provides that “*every person is equal before the law and has the right to equal protection and equal benefit of the law*”.<sup>440</sup> The Constitution also provides “*every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair*”.<sup>441</sup>
  - (b) CEDAW guarantees equality in respect of the “*ownership, acquisition, management, administration, enjoyment and disposition of property*”.<sup>442</sup>
  - (c) The Income Tax Act 2010 provides that the income of a married woman residing with her husband will be treated as the income of the husband for tax purposes, unless the woman chooses to file a separate return.<sup>443</sup> This provision represents a potential violation of women’s rights to equality in respect of the “*ownership, acquisition, management, administration, enjoyment and disposition of property*” under CEDAW.
- 3.2.5 Article 13(k) of the Protocol – recognises and enforces the right of salaried women to the same allowances and entitlements as those granted to salaried men for their spouses and children
- (a) The Constitution provides that “*Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres*”.<sup>444</sup>
  - (b) According to a World Bank study, there appears to be no specific tax deductions or tax credits that are applicable exclusively to either women or men under Kenyan law.<sup>445</sup>
  - (c) Both paternity and maternity leave entitles the parent in question to 100% of pay during the leave period. The Employment Act 2007 provides for 3 months of maternity leave without loss of benefits with the right to return to the job held immediately prior to taking maternity leave or to a reasonably suitable job on terms and conditions not less favourable than those which would have applied had maternity leave not been taken.<sup>446</sup>
  - (d) The Employment Act 2007 also requires equal pay for equal work and employees with minor children, irrespective of the gender of the employee have no additional legal rights to flexible working.<sup>447</sup>
- 3.2.6 Article 13(l) of the Protocol – recognises that both parents bear the primary responsibility for the upbringing and development of children and that this is a social function for which the State and the private sector have secondary responsibility
- (a) The Constitution states, “*the family 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*”.<sup>448</sup>
  - (b) The Constitution also states, “*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*”.<sup>449</sup>

---

<sup>440</sup> The Bill of Rights, Article 27(1)

<sup>441</sup> The Bill of Rights, Article 47(1)

<sup>442</sup> Convention on the Elimination of Discrimination Against Women, Article 16

<sup>443</sup> The Income Tax Act, Section 45

<sup>444</sup> The Bill of Rights, Article 27

<sup>445</sup> Available at: <http://wbi.worldbank.org/Data/ExploreEconomies/kenya/2011#providing-incentives-to-work>

<sup>446</sup> The Employment Act 2007, Section 29

<sup>447</sup> The Employment Act 2007, Sections 5(4) and 5(5)

<sup>448</sup> The Bill of Rights, Article 45(1)

<sup>449</sup> The Bill of Rights, Article 53

### 3.3 Implementation in Practice

- 3.3.1 The Kenyan government has a variety of institutions whose responsibilities with regards to women's economic participation intersect. These are:
- (a) National Labour Board: The board advises the Cabinet Secretary for Labour on all matters concerning employment and labour, labour relations, legislation and international labour conventions.
  - (b) The Industrial Court: has exclusive jurisdiction to hear, determine and grant any appropriate relief in respect of an application, claim or complaint relating to labour matters.
  - (c) Labour Administration and Inspection: have the authority to enter and inspect places of work by their registered labour, employment and medical officers.
  - (d) There are, however, concerns about the capacity of the Ministry of Labour to adequately perform its role in the realisation of the equality agenda. In its Strategic Plan (2008-2012), the Ministry was described as having *"inadequate staff, insufficient budgetary allocations and lack of budgetary provision for certain programmes, dilapidated and obsolete equipment, inadequate operational facilities, poor succession planning and management coupled with an ageing workforce, limited staff capacity, poor working environment, inadequate legal, institutional and policy framework, erratic disbursement of funds from the Treasury, disjointed schemes of service, difficulties in complying with e-government environment, and bureaucracy in procurement of goods and services."*<sup>450</sup>
  - (e) The UN Human Rights Committee challenged the Kenyan government on what steps it is taking to combat the disparity between men and women in economic, professional and political spheres.

---

<sup>450</sup> Ministry of Labour (Strategic Plan 2008–2012) Page 3

# CHAPTER EIGHT

## HEALTH AND REPRODUCTIVE RIGHTS

### 1. ABORTION IN THE CASE OF RAPE, INCEST OR SEXUAL ASSAULT

#### 1.1 Relevant Provisions of the Maputo Protocol

1.1.2 Article 14 provides women with the right to health, including sexual and reproductive health, and provides that this right should be respected and promoted.<sup>451</sup>

1.1.3 In particular, States Parties are required to take all appropriate measures to protect the reproductive rights of women by authorising medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus.<sup>452</sup>

#### 1.2 Relevant Provisions of Domestic Kenyan Legislation

1.2.1 The Kenyan Constitution 2010:

(a) Kenyan domestic law relating to abortions was previously based purely on the Penal Code (as amended in 1973). The Penal Code made it an offence to:

- a) attempt to procure an abortion, either by the pregnant woman or a third party;<sup>453</sup> and
- b) supply drugs or instruments to procure an abortion.<sup>454</sup>

(b) Section 240 of the Penal Code allows for a surgical operation to be performed in good faith upon an unborn child to preserve the mother's life.<sup>455</sup>

(c) The Kenyan Constitution, however, does not permit abortion, unless "*in the opinion of a trained health professional, there is need for emergency treatment, or the life or health of the mother is in danger or if permitted by any other written law*".<sup>456</sup>

(d) This departure from the restrictive provisions in the Penal Code maintains the illegal status of abortion in Kenya, safeguards the mother's life and health (both mental and physical), renders the medical standard for decision making less onerous (a trained health professional)<sup>457</sup> and incorporates any other written law.

1.2.2 The Sexual Offences Act 2006

(a) The Sexual Offences Act 2006 creates a number of criminal offences, including:

- a) Rape. If found guilty of rape a person will be liable to imprisonment for a term of not less than 10 years.<sup>458</sup>
- b) Attempted Rape. If found guilty of attempted rape a person will be liable to imprisonment for a term of not less than five years.<sup>459</sup>

<sup>451</sup> African Charter on Human and Peoples' Rights on the Rights of Women in Africa 2003, Article 14

<sup>452</sup> African Charter on Human and Peoples' Rights on the Rights of Women in Africa 2003, Article 14(2)(c)

<sup>453</sup> The Penal Code, Sections 158–159

<sup>454</sup> The Penal Code, Section 160

<sup>455</sup> The Penal Code, Section 240

<sup>456</sup> The Kenyan Constitution 2010, Article 26(4)

<sup>457</sup> See 1.4.1(a) below

<sup>458</sup> The Sexual Offences Act 2006, Section 3

<sup>459</sup> The Sexual Offences Act 2006, Section 4

- c) Sexual Assault. If found guilty of sexual assault a person will be liable to imprisonment for a term of not less than 10 years.<sup>460</sup>
- d) Defilement (penetration of a child). If found guilty of defilement a person will be liable to imprisonment for a term ranging between 15 years and life, depending on the age of the child defiled.<sup>461</sup>
- e) Attempted defilement. If found guilty of the offence of defilement a person will be liable to imprisonment for a term of not less than 10 years.<sup>462</sup>
- f) Gang Rape. If found guilty of gang rape a person will be liable to imprisonment for a term of not less than fifteen years.<sup>463</sup>
- g) Incest by a male person. If found guilty of incest by a male person a person will be liable to imprisonment for a term of not less than 10 years.<sup>464</sup>

### 1.2.3 Medical Practitioners and Dentists Board's Code of Professional Conduct and Discipline

- (a) This Code of Conduct provides that there is no access to termination 'on demand'. Further, in cases of illegal termination of pregnancies, the sentences imposed on professionals shall be suspension or erasure.
- (b) The key case in the Kenyan/Commonwealth abortion debate is **Rex v. Bourne (1939)**. It was held that *"if the doctor is of the opinion, on reasonable grounds and with adequate knowledge, that the probable consequence of the continuance of the pregnancy will be to make the woman a physical or mental wreck [then this constitutes] operating for the purpose of preserving the life of the mother."* This case opened the doors for medical practitioners to consider not only the immediate 'life or death' implications of not performing an abortion but also the implications of the continued pregnancy and the effect that forcing the mother to full term would have on her long term. However, the stringent Penal Code restrictions prevented medical practitioners from relying on this case.

**1.3** Abortion is a hugely divisive subject in Kenya; it is a subject that *"no one wants to touch"*.<sup>465</sup> Each year an estimated 300,000 women undergo abortions in Kenya.<sup>466</sup> 21,000 of these women end up in hospital with abortion related complications due to incomplete or botched procedures carried out either in backstreet clinics or at home. 2,600 women lose their lives as a result.<sup>467</sup> Current figures suggest that a woman or girl is raped every 30 minutes in Kenya.<sup>468</sup> In many of these cases, the victim knows her attacker; he may even be a male relative. It is estimated that only 1 in 20 women will report a rape and of these, only 1 in 6 will seek medical assistance after the act.<sup>469</sup> Rape is grossly stigmatized in Kenya and the reluctance to report incidents results in the official police figures appearing lower than the day-to-day reality.

## 1.4 Implementation in Practice

### 1.4.1 Changes to the Law

- (a) The Constitution overrides the previous requirement of the Medical Board's Code of Professional Conduct that advised that a medical practitioner should seek the approval of at least two other senior colleagues before performing

<sup>460</sup> The Sexual Offences Act 2006, Section 5

<sup>461</sup> The Sexual Offences Act 2006, Section 8

<sup>462</sup> The Sexual Offences Act 2006, Section 9

<sup>463</sup> The Sexual Offences Act 2006, Section 10

<sup>464</sup> The Sexual Offences Act 2006, Section 20

<sup>465</sup> Available at: [www.makeeverywomancount.org/index.php?option=com\\_content&view=article&id=5609:kenya-feted-for-pushing-de-stigmatisation-of-abortion&catid=39:hiv-aids&Itemid=66](http://www.makeeverywomancount.org/index.php?option=com_content&view=article&id=5609:kenya-feted-for-pushing-de-stigmatisation-of-abortion&catid=39:hiv-aids&Itemid=66)

<sup>466</sup> Available at: [www.guttmacher.org/pubs/IB\\_UnsafeAbortionKenya.pdf](http://www.guttmacher.org/pubs/IB_UnsafeAbortionKenya.pdf)

<sup>467</sup> Available at: <http://reproductiverights.org/en/feature/in-harm's-way-the-impact-of-kenya's-restrictive-abortion-law#mm>

<sup>468</sup> Available at: <http://theequalityeffect.org/160girls.html>

<sup>469</sup> Available at: [www.kenyaforum.net/?p=7001](http://www.kenyaforum.net/?p=7001)

an abortion. The Constitution provides that an abortion may be performed if required “*in the opinion of a trained health professional*”.<sup>470</sup> In theory, this relaxation of the law surrounding the autonomy of medical professionals to make the decision on whether an abortion would be appropriate without the requirement for a second opinion and psychiatric assessment<sup>471</sup> (as previously required under the Sexual Violence Guidelines 2004) is a step closer to greater efficiency in the decision making process.

- (b) International pressures are gradually receding with the lifting of the Mexico City Policy, commonly referred to as the ‘Global Gag rule’, that previously prevented Non Governmental Organisations from promoting abortion and abortion related care utilising non-U.S, funding outside of the U.S. This shift has “*helped remove the stigma around [abortion]*”<sup>472</sup> opening up discussions on a topic largely considered a political and personal taboo.
- (c) In theory the right to an abortion exists in the case of rape or incest.<sup>473</sup> However, the true position is unclear for a number of reasons.

### 1.4.2 Criminal Sanctions

- (a) Many women fear arrest and criminal sanctions for procuring an abortion, preferring to attempt the procedure at home or at an illegal clinic.
- (b) There is a lack of sexual and reproductive health information available to women and adolescent girls to educate them on their rights in the event of rape or incest. In a recent case, a girl of primary school age was defiled by her head teacher and impregnated. The matron responsible for taking the child to the hospital to seek an abortion was due to be charged under the Penal Code for attempting to procure an abortion.<sup>474</sup>
- (c) According to one report, “*Criminal sanctions relating to abortion appear to be imposed almost exclusively on women in Kenya. The uneven enforcement of Kenya’s abortion law, resulting in the disproportionate arrest and prosecution of women, as compared to unqualified or untrained abortion providers or men who are complicit in procuring abortions, is discriminatory against women.*”<sup>475</sup>

---

<sup>470</sup> Available at: [www.makeeverywomancount.org/index.php?option=com\\_content&view=article&id=3922:kenya-africas-abortion-rights-breakthrough&catid=39:hiv-aids&Itemid=66](http://www.makeeverywomancount.org/index.php?option=com_content&view=article&id=3922:kenya-africas-abortion-rights-breakthrough&catid=39:hiv-aids&Itemid=66)

<sup>471</sup> Available at: [www.makeeverywomancount.org/index.php?option=com\\_content&view=article&id=5609:kenya-feted-for-pushing-de-stigmatisation-of-abortion&catid=39:hiv-aids&Itemid=66](http://www.makeeverywomancount.org/index.php?option=com_content&view=article&id=5609:kenya-feted-for-pushing-de-stigmatisation-of-abortion&catid=39:hiv-aids&Itemid=66)  
[http://www.makeeverywomancount.org/index.php?option=com\\_content&view=article&id=3922:kenya-africas-abortion-rights-breakthrough&catid=39:hiv-aids&Itemid=66](http://www.makeeverywomancount.org/index.php?option=com_content&view=article&id=3922:kenya-africas-abortion-rights-breakthrough&catid=39:hiv-aids&Itemid=66)

<sup>472</sup> Available at: [www.makeeverywomancount.org/index.php?option=com\\_content&view=article&id=5609:kenya-feted-for-pushing-de-stigmatisation-of-abortion&catid=39:hiv-aids&Itemid=66](http://www.makeeverywomancount.org/index.php?option=com_content&view=article&id=5609:kenya-feted-for-pushing-de-stigmatisation-of-abortion&catid=39:hiv-aids&Itemid=66)  
[http://www.makeeverywomancount.org/index.php?option=com\\_content&view=article&id=3922:kenya-africas-abortion-rights-breakthrough&catid=39:hiv-aids&Itemid=66](http://www.makeeverywomancount.org/index.php?option=com_content&view=article&id=3922:kenya-africas-abortion-rights-breakthrough&catid=39:hiv-aids&Itemid=66)

<sup>473</sup> Available at: [www.makeeverywomancount.org/index.php?option=com\\_content&view=article&id=5609:kenya-feted-for-pushing-de-stigmatisation-of-abortion&catid=39:hiv-aids&Itemid=66](http://www.makeeverywomancount.org/index.php?option=com_content&view=article&id=5609:kenya-feted-for-pushing-de-stigmatisation-of-abortion&catid=39:hiv-aids&Itemid=66)  
[bigthink.com/focal-point/illegal-abortion-kills-kenyan-women](http://bigthink.com/focal-point/illegal-abortion-kills-kenyan-women)

<sup>474</sup> Available at: [www.makeeverywomancount.org/index.php?option=com\\_content&view=article&id=5609:kenya-feted-for-pushing-de-stigmatisation-of-abortion&catid=39:hiv-aids&Itemid=66](http://www.makeeverywomancount.org/index.php?option=com_content&view=article&id=5609:kenya-feted-for-pushing-de-stigmatisation-of-abortion&catid=39:hiv-aids&Itemid=66)  
[www.makeeverywomancount.org/index.php?option=com\\_content&view=article&id=5454:kenya-teacher-makes-girl-pregnant&catid=39:hiv-aids&Itemid=66](http://www.makeeverywomancount.org/index.php?option=com_content&view=article&id=5454:kenya-teacher-makes-girl-pregnant&catid=39:hiv-aids&Itemid=66)

<sup>475</sup> Available at: [www.makeeverywomancount.org/index.php?option=com\\_content&view=article&id=5609:kenya-feted-for-pushing-de-stigmatisation-of-abortion&catid=39:hiv-aids&Itemid=66](http://www.makeeverywomancount.org/index.php?option=com_content&view=article&id=5609:kenya-feted-for-pushing-de-stigmatisation-of-abortion&catid=39:hiv-aids&Itemid=66)  
[reproductiverights.org/en/feature/in-harm-s-way-the-impact-of-kenya-s-restrictive-abortion-law#mm](http://reproductiverights.org/en/feature/in-harm-s-way-the-impact-of-kenya-s-restrictive-abortion-law#mm)

#### 1.4.3 Lack of clarity among medical practitioners regarding the legal position

- (a) There is a lack of understanding from medical practitioners as to the legal position on performing legal abortions.<sup>476</sup> Despite the recent changes and relaxation in abortion laws, many practitioners, particularly public practitioners, are still reluctant to perform abortions, as they are concerned about the criminal ramifications of entrenched laws that have been in place for over 150 years.<sup>477</sup> Medical practitioners have previously been charged with murder and attempting to procure an abortion.<sup>478</sup>
- (b) Abortion education is not in the curriculum for many medical students as practitioners and academics are unclear on the legal position regarding abortion. The Kenyan Human Rights Commission identified gaps in training and called for a review of abortion care education.<sup>479</sup>

#### 1.4.4 Experiences in health care clinics with regards to abortion

- (a) Women fear abuse and maltreatment at health care clinics.
- (b) Reports of humiliation and berating by medical practitioners – physical, verbal abuse, refusal of access to pain control medication.<sup>480</sup> This constitutes violation of the CEDAW.<sup>481</sup>
- (c) Prohibitive price of abortions in private clinics: the wealthier and better-informed women are able to afford abortions in the safer and legal private clinics. Young women fear detention in public clinics if they are unable to pay the requisite fees, at times having to be bailed out by the same men who hospitalized them.<sup>482</sup> Women are required to pay up to 12,000 Kenyan Shillings for the procedure.<sup>483</sup> This often results in women undergoing the procedure at home.

#### 1.4.5 Police failure to investigate claims appropriately

- (a) Female victims of rape may not have faith in the justice system as police officers turn a blind eye to claims, often refusing to take statements (as in the case of the post election gang rapes) and even perpetrating rape while questioning a victim in one case.<sup>484</sup> However, a landmark case earlier this year, the ‘160 Girls’ case, marks a move towards greater police accountability for protecting victims of rape, in particular minors.<sup>485</sup>

<sup>476</sup> Available at: [www.makeeverywomancount.org/index.php?option=com\\_content&view=article&id=5609:kenya-feted-for-pushing-de-stigmatisation-of-abortion&catid=39:hiv-aids&Itemid=66](http://www.makeeverywomancount.org/index.php?option=com_content&view=article&id=5609:kenya-feted-for-pushing-de-stigmatisation-of-abortion&catid=39:hiv-aids&Itemid=66) [www.gutmacher.org/pubs/IB\\_UnsafeAbortionKenya.pdf](http://www.gutmacher.org/pubs/IB_UnsafeAbortionKenya.pdf)

<sup>477</sup> Available at: [www.makeeverywomancount.org/index.php?option=com\\_content&view=article&id=5609:kenya-feted-for-pushing-de-stigmatisation-of-abortion&catid=39:hiv-aids&Itemid=66](http://www.makeeverywomancount.org/index.php?option=com_content&view=article&id=5609:kenya-feted-for-pushing-de-stigmatisation-of-abortion&catid=39:hiv-aids&Itemid=66) [www.makeeverywomancount.org/index.php?option=com\\_content&view=article&id=3922:kenya-africas-abortion-rights-breakthrough&catid=39:hiv-aids&Itemid=66](http://www.makeeverywomancount.org/index.php?option=com_content&view=article&id=3922:kenya-africas-abortion-rights-breakthrough&catid=39:hiv-aids&Itemid=66)

<sup>478</sup> Available at: [www.makeeverywomancount.org/index.php?option=com\\_content&view=article&id=5609:kenya-feted-for-pushing-de-stigmatisation-of-abortion&catid=39:hiv-aids&Itemid=66](http://www.makeeverywomancount.org/index.php?option=com_content&view=article&id=5609:kenya-feted-for-pushing-de-stigmatisation-of-abortion&catid=39:hiv-aids&Itemid=66) [www.ipas.org/en/News/Newsletter-Articles/It-was-worth-the-sacrifice--Kenyas-Dr--John-Nyamu-on-why-he-spent-a-year-in-prison.aspx](http://www.ipas.org/en/News/Newsletter-Articles/It-was-worth-the-sacrifice--Kenyas-Dr--John-Nyamu-on-why-he-spent-a-year-in-prison.aspx)

<sup>479</sup> Available at: [www.makeeverywomancount.org/index.php?option=com\\_content&view=article&id=5609:kenya-feted-for-pushing-de-stigmatisation-of-abortion&catid=39:hiv-aids&Itemid=66](http://www.makeeverywomancount.org/index.php?option=com_content&view=article&id=5609:kenya-feted-for-pushing-de-stigmatisation-of-abortion&catid=39:hiv-aids&Itemid=66) [knchr.org/Portals/0/Reports/MAKING\\_THE\\_BILL\\_OF\\_RIGHTS\\_Operational.pdf](http://knchr.org/Portals/0/Reports/MAKING_THE_BILL_OF_RIGHTS_Operational.pdf)

<sup>480</sup> Available at: [www.makeeverywomancount.org/index.php?option=com\\_content&view=article&id=5609:kenya-feted-for-pushing-de-stigmatisation-of-abortion&catid=39:hiv-aids&Itemid=66](http://www.makeeverywomancount.org/index.php?option=com_content&view=article&id=5609:kenya-feted-for-pushing-de-stigmatisation-of-abortion&catid=39:hiv-aids&Itemid=66) [www.thepeople.co.ke/6327/grim-reality-of-backstreet-abortions](http://www.thepeople.co.ke/6327/grim-reality-of-backstreet-abortions)

<sup>481</sup> Available at: [www.makeeverywomancount.org/index.php?option=com\\_content&view=article&id=5609:kenya-feted-for-pushing-de-stigmatisation-of-abortion&catid=39:hiv-aids&Itemid=66](http://www.makeeverywomancount.org/index.php?option=com_content&view=article&id=5609:kenya-feted-for-pushing-de-stigmatisation-of-abortion&catid=39:hiv-aids&Itemid=66) [www.un.org/womenwatch/daw/cedaw/text/econvention.htm](http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm)

<sup>482</sup> Available at: [www.makeeverywomancount.org/index.php?option=com\\_content&view=article&id=5609:kenya-feted-for-pushing-de-stigmatisation-of-abortion&catid=39:hiv-aids&Itemid=66](http://www.makeeverywomancount.org/index.php?option=com_content&view=article&id=5609:kenya-feted-for-pushing-de-stigmatisation-of-abortion&catid=39:hiv-aids&Itemid=66) [blogs.reuters.com/the-human-impact/2012/12/18/drugged-raped-imprisoned-by-husband-suing-maternity-hospital-whos-accountable-for-kenyan-womans-plight](http://blogs.reuters.com/the-human-impact/2012/12/18/drugged-raped-imprisoned-by-husband-suing-maternity-hospital-whos-accountable-for-kenyan-womans-plight)

<sup>483</sup> Available at: [www.makeeverywomancount.org/index.php?option=com\\_content&view=article&id=5609:kenya-feted-for-pushing-de-stigmatisation-of-abortion&catid=39:hiv-aids&Itemid=66](http://www.makeeverywomancount.org/index.php?option=com_content&view=article&id=5609:kenya-feted-for-pushing-de-stigmatisation-of-abortion&catid=39:hiv-aids&Itemid=66) [www.gutmacher.org/pubs/IB\\_UnsafeAbortionKenya.pdf](http://www.gutmacher.org/pubs/IB_UnsafeAbortionKenya.pdf)

<sup>484</sup> Available at: [www.makeeverywomancount.org/index.php?option=com\\_content&view=article&id=5609:kenya-feted-for-pushing-de-stigmatisation-of-abortion&catid=39:hiv-aids&Itemid=66](http://www.makeeverywomancount.org/index.php?option=com_content&view=article&id=5609:kenya-feted-for-pushing-de-stigmatisation-of-abortion&catid=39:hiv-aids&Itemid=66) [www.trust.org/item/20130528134005-fb0c5](http://www.trust.org/item/20130528134005-fb0c5)

<sup>485</sup> Available at: [www.makeeverywomancount.org/index.php?option=com\\_content&view=article&id=5609:kenya-feted-for-pushing-de-stigmatisation-of-abortion&catid=39:hiv-aids&Itemid=66](http://www.makeeverywomancount.org/index.php?option=com_content&view=article&id=5609:kenya-feted-for-pushing-de-stigmatisation-of-abortion&catid=39:hiv-aids&Itemid=66) [theequalityeffect.org/160girlshighcourt2013.html](http://theequalityeffect.org/160girlshighcourt2013.html)



## 2. POST-EXPOSURE PROPHYLAXIS FOR RAPE SURVIVORS

### 2.1 Relevant Provisions of the Maputo Protocol

- 2.1.1 Article 14 of the Protocol provides the right to health of women, including sexual and reproductive health and requires State Parties to respect and promote such health.<sup>486</sup> In particular, State Parties must ensure the right to self-protection and to be protected against sexually transmitted infections, including HIV/AIDS.<sup>487</sup>
- 2.1.2 State Parties must also provide adequate, affordable and accessible health services, including information, education and communication programmes to women, especially those in rural areas.<sup>488</sup>

### 2.2 Relevant Provisions of Domestic Kenyan Legislation

#### 2.2.1 The Kenyan Constitution 2010

- (a) Under the Kenyan Constitution, every person has the right to the highest attainable standard of health, which includes the right to health care services, including reproductive health care.
- (b) Moreover, the Constitution provides that no person shall be denied emergency medical treatment.<sup>489</sup>

#### 2.2.2 HIV and AIDS Prevention and Control Act 2006

- (a) This Act provides that every health institution and every health management organisation or medical insurance provider shall facilitate access to healthcare services to persons with HIV without discrimination on the basis of HIV status.<sup>490</sup>
- (b) Further, the Government shall take the steps necessary to ensure the access to essential healthcare services, including the access to essential medicines at affordable prices by persons with HIV or AIDS and those exposed to the risk of HIV infection.<sup>491</sup>

#### 2.2.3 The Committee on the Elimination of Discrimination against Women – General Recommendation No. 15 (ninth session, 1990)

- (a) Having considered the potential effects of both the global pandemic of AIDS and strategies to control it on the exercise of the rights of women, the Committee recommended the following:
- a) that States increase their efforts in disseminating information about the risk of HIV and AIDS, particularly in women and children, and its effects on them;
- b) that programmes aimed at combating AIDS give special attention to the rights and needs of women and children;
- c) that States ensure the active participation of women in primary health care and enhance their role as care providers, health workers and educators in the prevention of HIV; and

---

<sup>486</sup> Available at: [www.makeeverywomancount.org/index.php?option=com\\_content&view=article&id=5609:kenya-feted-for-pushing-de-stigmatisation-of-abortion&catid=39:hiv-aids&Itemid=66](http://www.makeeverywomancount.org/index.php?option=com_content&view=article&id=5609:kenya-feted-for-pushing-de-stigmatisation-of-abortion&catid=39:hiv-aids&Itemid=66) African Charter on Human and Peoples' Rights on the Rights of Women in Africa 2003, Article 14(1)

<sup>487</sup> Available at: [www.makeeverywomancount.org/index.php?option=com\\_content&view=article&id=5609:kenya-feted-for-pushing-de-stigmatisation-of-abortion&catid=39:hiv-aids&Itemid=66](http://www.makeeverywomancount.org/index.php?option=com_content&view=article&id=5609:kenya-feted-for-pushing-de-stigmatisation-of-abortion&catid=39:hiv-aids&Itemid=66) African Charter on Human and Peoples' Rights on the Rights of Women in Africa 2003, Article 14(1)(d)

<sup>488</sup> Available at: [www.makeeverywomancount.org/index.php?option=com\\_content&view=article&id=5609:kenya-feted-for-pushing-de-stigmatisation-of-abortion&catid=39:hiv-aids&Itemid=66](http://www.makeeverywomancount.org/index.php?option=com_content&view=article&id=5609:kenya-feted-for-pushing-de-stigmatisation-of-abortion&catid=39:hiv-aids&Itemid=66) African Charter on Human and Peoples' Rights on the Rights of Women in Africa 2003, Article 14(2)(a)

<sup>489</sup> The Kenyan Constitution 2010, Article 43(2)

<sup>490</sup> HIV and AIDS Prevention and Control Act 2006, Section 19(1)

<sup>491</sup> HIV and AIDS Prevention and Control Act 2006, Section 19(2)

- d) that States include information on the effects of AIDS in their reports under Article 12 of the CEDAW.<sup>492</sup>
- 2.2.4 The Convention on the Elimination of All Forms of Discrimination against Women (“**CEDAW**”)
- (a) CEDAW adopted in 1979 by the UN General Assembly, is often described as an international bill of rights for women. Consisting of a preamble and 30 articles, it defines what constitutes discrimination against women and sets up an agenda for national action to end such discrimination.<sup>493</sup>
- 2.2.5 International Covenant on Economic, Social and Cultural Rights – Office for the United Nations High Commissioner for Human Rights
- (a) Article 12 provides that States should recognise the rights of everyone to enjoy the highest attainable standards of physical and mental health.<sup>494</sup>
- (b) In order to achieve this, States should take steps to:
- a) prevent, treat and control diseases;<sup>495</sup> and
- b) create conditions in which everyone is provided with medical service and attention in the event of sickness.<sup>496</sup>
- 2.2.6 National Guidelines for HIV Testing and Counselling in Kenya (2008) issued by the National AIDS and STD Control Programme (“**NASCOP**”)
- (a) The guidelines provide that while HIV testing and counselling (HTC) should be offered to all clients or patients attending any health facility as part of routine care, failure to offer HTC in a post rape scenario is considered unacceptable and will be considered negligent.<sup>497</sup>
- (b) It recommends that all HTC providers incorporate other health services into the primary HTC service and vice versa. It specifies post rape care as an area that would benefit from this dual incorporation strategy.<sup>498</sup>
- (c) Emphasis in the guidelines is placed on post test counselling. After the HIV test is complete, the HTC service provider must offer post-test counselling to the client or patient based on the results.<sup>499</sup>
- (d) PEP should be offered to HIV negative adult clients or patients, either by referral or direct provision of services.<sup>500</sup>
- 2.2.7 National Guidelines on Antiretroviral Therapy in Kenya issued by NASCOP (2011)
- (a) This includes a section on dealing with sexual assault, and the guidelines include offering Post-Exposure Prophylaxis (“**PEP**”) if appropriate (taking into consideration timing of the survivor presenting themselves and therefore whether the treatment is likely to be effective).<sup>501</sup>

<sup>492</sup> The Committee on the Elimination of Discrimination against Women, General Recommendation No. 15 (ninth session, 1990)

<sup>493</sup> Available at: [www.un.org/womenwatch/daw/cedaw](http://www.un.org/womenwatch/daw/cedaw)

<sup>494</sup> The International Convention on Economic, Social and Cultural Rights, Article 12(1)

<sup>495</sup> The International Convention on Economic, Social and Cultural Rights, Article 12(2)(c)

<sup>496</sup> The International Convention on Economic, Social and Cultural Rights, Article 12(2)(d)

<sup>497</sup> National Guidelines for HIV Testing and Counselling in Kenya 2008, page 5. Available at: [www.makeeverywomancount.org/index.php?option=com\\_content&view=article&id=5609:kenya-feted-for-pushing-de-stigmatisation-of-abortion&catid=39:hiv-aids&Itemid=66](http://www.makeeverywomancount.org/index.php?option=com_content&view=article&id=5609:kenya-feted-for-pushing-de-stigmatisation-of-abortion&catid=39:hiv-aids&Itemid=66)  
[www.ilo.org/wcmsp5/groups/public/---ed\\_protect/---protrav/---ilo\\_aids/documents/legaldocument/wcms\\_127533.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---ilo_aids/documents/legaldocument/wcms_127533.pdf)

<sup>498</sup> National Guidelines for HIV Testing and Counselling in Kenya 2008, page 24

<sup>499</sup> National Guidelines for HIV Testing and Counselling in Kenya 2008, page 17

<sup>500</sup> National Guidelines for HIV Testing and Counselling in Kenya 2008, page 18

<sup>501</sup> National Guidelines on Antiretroviral Therapy in Kenya 2011 (Fourth edition), Section 17.3.2, page 159. Available at: [www.makeeverywomancount.org/index.php?option=com\\_content&view=article&id=5609:kenya-feted-for-pushing-de-stigmatisation-of-abortion&catid=39:hiv-aids&Itemid=66](http://www.makeeverywomancount.org/index.php?option=com_content&view=article&id=5609:kenya-feted-for-pushing-de-stigmatisation-of-abortion&catid=39:hiv-aids&Itemid=66) <http://nascop.or.ke/library/ART%20guidelines/Final%20guidelines%20re%20print%2011-09-2012.pdf>

- (b) In assessing whether PEP is appropriate, as well as timing, consideration must be given to the increased likelihood of HIV in rape cases on account of the forceful penetration. Other factors that are stated to increase transmission risk include the disease status of the rapist (risk increases with viral load) and the presence of STIs in the source or the person assaulted. It is noted that in a high HIV prevalent population, rapists should be assumed to be HIV-positive unless proven otherwise.<sup>502</sup>
- (c) As a general proposition, PEP is recommended following exposures judged to be of 'high risk'.<sup>503</sup>

### 2.2.8 Kenya National Clinical Manual for ART Providers

- (a) Emergency doses of ARVs for post-exposure and emergency contraception ("EC") should be available in all health care facilities. This should provide for a month's dose of PEP being given, with HIV test and counselling follow ups.<sup>504</sup>

### 2.2.9 National Guidelines: Medical Management of Rape/Sexual Violence

- (a) Guidelines intended as a set of standards for comprehensive care of survivors of sexual violence. It is expected to provide to all health care workers who come into contact with survivors of sexual violence a practical reference source for service delivery.<sup>505</sup>
- (b) PEP is offered to rape victims. It is noted that the efficacy of PEP decreases with the length of time from exposure to the first dose, so administering the first dose is a priority. Studies have shown low efficacy (i.e: it has insignificant effect) if PEP is commenced after 72 hours after exposure. People presenting later than this should be offered all other aspects of post rape care, but not PEP.<sup>506</sup>
- (c) Emergency doses of PEP and also EC should be available in Casualty.<sup>507</sup>

## 2.3 Implementation in practice

2.3.1 As outlined above, there are various sets of guidelines for health care providers to follow when dealing with a victim of rape, which provide for the administration of PEP where appropriate. There seem to be two prongs to the notion of implementation however, bound up in the idea of "accessibility". It is one thing to provide guidelines outlining procedure, but a procedure only becomes relevant if it can be applied. In other words, post-rape care must be accessible in the first place. There is little publicly available information on exactly how closely Kenyan guidelines to post-rape care are followed in practice; indeed much information is not specific to cases of rape, but is given against the broader backdrop of HIV in Kenya, and exposure to it. There is however some information on the hurdles to accessing post-rape care.

### 2.3.2 National Aims and Minimum Care Standards

- (a) The National Aids and STI Control Programme ("NASCOP") is tasked with "leading the National response on behalf of the health sector with interventions for those infected and affected by HIV."<sup>508</sup>

<sup>502</sup> National Guidelines on Antiretroviral Therapy in Kenya 2011 (Fourth edition), Section 17.4.2, page 160.

<sup>503</sup> National Guidelines on Antiretroviral Therapy in Kenya 2011 (Fourth edition), Section 17.5, page 161.

<sup>504</sup> Kenya National Clinic Manual for ART Providers, pages 59–60. Available at: <http://nascop.or.ke/library/ART%20guidelines/Kenya%20clinical%20National%20Manual%20for%20ART%20providers.pdf>

<sup>505</sup> National Guidelines: Medical Management of Rape/Sexual Violence, page iii. Available at: [www.hennet.or.ke/downloads/Guidelines\\_for%20medical%20management%20of%20rape%20and%20sexual%20violence.pdf](http://www.hennet.or.ke/downloads/Guidelines_for%20medical%20management%20of%20rape%20and%20sexual%20violence.pdf)

<sup>506</sup> National Guidelines: Medical Management of Rape/Sexual Violence, page 5

<sup>507</sup> National Guidelines: Medical Management of Rape/Sexual Violence, page 15

<sup>508</sup> Available at: [http://nascop.or.ke/anti\\_retroviral\\_therapy.php](http://nascop.or.ke/anti_retroviral_therapy.php)

- (b) The program appears to have had some success: the number of those accessing antiretroviral therapy increased from less than 10,000 in 2003 to over 430,000 in December 2010.<sup>509</sup>
- (c) The National Aids Control Council (“**NACC**”) developed the Kenya National AIDS Strategic Plan III (“**KNASP III**”), 2012–2013, which aims to “*achieve Kenya’s Universal Access targets for quality integrated services at all levels to prevent new HIV infections, reduce HIV-related illnesses and deaths, and mitigate the effects of the epidemic on households and communities.*”<sup>510</sup> The aim, by 2013, is to reduce the number of new infections by at least 50% and AIDS-related mortality by at least 25%.<sup>511</sup>

### 2.3.3 Decentralisation

- (a) One of the problems faced by Kenyans in accessing treatment appears to be the centralisation of much of the health sector. For example, antiretroviral therapy sites from all districts countrywide have to make reports and requests for antiretroviral drugs centrally, which presents logistical challenges for ARV’s management at central level, and delays at district level.<sup>512</sup>
- (b) Tensions and bad communication between different levels of the health system can account for care not being followed through to its conclusion. An LVCT report noted that “*Poor referral mechanisms from the smaller health facilities to the three district hospitals and within the hospitals themselves were associated with losses to follow up, out-of-pocket costs to survivors and poor coordination of services.*”<sup>513</sup>

### 2.3.4 Extent of Post Rape Care Services

- (a) The Liverpool VCT, Care and Treatment’s annual report stated that in 2012, 106 public facilities in 6 provinces (compared to 50 in 2011) were provided on-going technical support and capacity building to initiate or strengthen post-rape care services. These included one national referral hospital, 67 provincial and district hospitals and 38 health centres and dispensaries.<sup>514</sup>

### 2.3.5 Costs

- (a) An important development in women’s access to post-rape treatment is the dropping costs of HIV-treatment regimens. The SADC Gender Protocol 2012 Barometer reported that according to preliminary estimates from country reports (from 2012), the most significant progress in HIV treatment in Africa has been seen in South Africa, Zimbabwe and Kenya. In 2011, at least 100,000 people in Kenya were newly enrolled in treatment. Increased treatment access in sub-Saharan Africa is due, in part, to the falling costs of HIV-treatment regimens. In 2000, the cost of a year’s supply of first line HIV treatment was about US\$10,000 per person; today, it is less than \$100 per person.<sup>515</sup>

<sup>509</sup> Available at: [http://nascop.or.ke/anti\\_retroviral\\_therapy.php](http://nascop.or.ke/anti_retroviral_therapy.php)

<sup>510</sup> National AIDS Control Council, Kenya National Aids Strategic Plan 2009/10–2012/13: Delivering On Universal Access To Services (National Aids Control Council, November 2009), page viii. Available at: [www.nationalplanningcycles.org/sites/default/files/country\\_docs/Kenya/kenya\\_national\\_hiv\\_aids\\_strategic\\_plan\\_2009-2013.pdf](http://www.nationalplanningcycles.org/sites/default/files/country_docs/Kenya/kenya_national_hiv_aids_strategic_plan_2009-2013.pdf)

<sup>511</sup> *Ibid.*, page xiii

<sup>512</sup> Ministry of Health HIV/AIDS Decentralisation Guidelines (National AIDS & STI’s Control Program, May 2009), page 9. Available at: [www.ilo.org/wcmsp5/groups/public/---ed\\_protect/---protrav/---ilo\\_aids/documents/legaldocument/wcms\\_127532.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---ilo_aids/documents/legaldocument/wcms_127532.pdf)

<sup>513</sup> Delivering post-rape care services: Kenya’s experience in development integrated services. Available at: [www.makeeverywomancount.org/index.php?option=com\\_content&view=article&id=5609:kenya-feted-for-pushing-de-stigmatisation-of-abortion&catid=39:hiv-aids&Itemid=66](http://www.makeeverywomancount.org/index.php?option=com_content&view=article&id=5609:kenya-feted-for-pushing-de-stigmatisation-of-abortion&catid=39:hiv-aids&Itemid=66) [www.who.int/bulletin/volumes/87/7/08-052340/en](http://www.who.int/bulletin/volumes/87/7/08-052340/en)

<sup>514</sup> Liverpool VCT, Care & Treatment Annual Report, October 2011–September 2012, page 21. Available at: [www.makeeverywomancount.org/index.php?option=com\\_content&view=article&id=5609:kenya-feted-for-pushing-de-stigmatisation-of-abortion&catid=39:hiv-aids&Itemid=66](http://www.makeeverywomancount.org/index.php?option=com_content&view=article&id=5609:kenya-feted-for-pushing-de-stigmatisation-of-abortion&catid=39:hiv-aids&Itemid=66) [www.lvct.org/images/pdf/annual%20report%202012-2013.pdf](http://www.lvct.org/images/pdf/annual%20report%202012-2013.pdf)

<sup>515</sup> Press release by UNAIDS Geneva, 6 July 2012. Available at: [www.makeeverywoman count.org/index.php?option=com\\_content&view=article&id=5609:kenya-feted-for-pushing-de-stigmatisation-of-abortion&catid=39:hiv-aids&Itemid=66](http://www.makeeverywoman count.org/index.php?option=com_content&view=article&id=5609:kenya-feted-for-pushing-de-stigmatisation-of-abortion&catid=39:hiv-aids&Itemid=66) [www.unaids.org/en/resources/presscentre/pressreleaseandstatementarchive/2012/july/20120706praficatreatment](http://www.unaids.org/en/resources/presscentre/pressreleaseandstatementarchive/2012/july/20120706praficatreatment)

*Whilst the cost has gone down, given the extreme poverty faced by many Kenyans, the fact of having to pay at all is still a complete bar to some women wanting to receive help.*

### 2.3.6 Geographical Access to Health Services

- (a) A 2011 report states that the number of health institutions increased from 6,190 in 2008 to 6,696 in 2009, an equivalent of 8.2%, but they are not equitably distributed. Health facilities are inaccessible in most parts of the country and most facilities are concentrated in urban areas. There are also less trained medical professionals in Kenya with a ratio of 40 enrolled nurses per 100,000 people and 15 clinical officers per 100,000 population, 17 per 100,000 doctors, and 3 per 100,000 dentists.<sup>516</sup>
- (b) The same report notes that lack of economic means to access treatment is a common problem in Kenya, in both rural and urban areas, with 50% of women in Kenya citing distance from health facilities as an important concern. Problems accessing health services are compounded by the limited availability of health personnel in Kenya.<sup>517</sup>

### 2.3.7 Awareness of Availability of PEP

- (a) A presentation given at an International Conference on AIDS, focused on members of the Mathare slum in Kenya. Of the 130 community members interviewed, 10.4% had heard about PEP, while 89.6% had not. The presenter also made findings on the clarity of referral systems: *“There is an unclear referral system in health institutions even though the majority of institutions offered free medical services”*.<sup>518</sup>

### 2.3.8 Stigma and fear of reporting an incident of rape or incest

- (a) Even where services do exist, it is widely believed that only a small proportion of those who experience gender based violence and sexual violence seek any type of institutional care for fear of retribution, reasons of shame and so on.<sup>519</sup>
- (b) It is commonplace for rape victims not to report the crime, even within their families as the stigma attached is too great.
- (c) Matters relating to sexual activity are rarely discussed with children in domestic settings.
- (d) Rape victims have been met with aggression and disbelief when returning to family homes after the incident.<sup>520</sup> The cultural stigma attached to being a victim of defilement or rape prevents women from coming forward to report the crime. Women have been removed from their family homes and left homeless, forced to move to other areas after having reported being raped. The widespread rape associated with the disputed 2007 elections<sup>521</sup> resulted in many women being abandoned by their husbands who witnessed them being attacked by police officers in many instances.<sup>522</sup>

<sup>516</sup> Women's Network for a Better World, Map of Sexual and Reproductive Health and Rights in Africa and Spain, Chapter 3, Kenya, page 135, available at [www.map-srhr.org/download/EN-kenya.pdf](http://www.map-srhr.org/download/EN-kenya.pdf)

<sup>517</sup> Women's Network for a Better World, Map of Sexual and Reproductive Health and Rights in Africa and Spain, Chapter 3, Kenya, page 135, available at [www.map-srhr.org/download/EN-kenya.pdf](http://www.map-srhr.org/download/EN-kenya.pdf)

<sup>518</sup> International Conference on Aids, Messy Semen in Mathare Slum: Prospects of Post Exposure Prophylaxis (PEP), Eunice Owino, December 2011, available at [www.icasa2011addis.org/media-center/presentations/viewdownload/48-dec-06/485-1045noreenhuni2theroleoffamiliesin dealingwithdisclosure](http://www.icasa2011addis.org/media-center/presentations/viewdownload/48-dec-06/485-1045noreenhuni2theroleoffamiliesin dealingwithdisclosure)

<sup>519</sup> Liverpool VCT, Care and Treatment, Strengthening Gender Based Violence and HIV Response in Sub-Saharan Africa, July 2012, page 16. Available at: [www.lvctinstitute.ac.ke/pdf/GBV%20HIV%20Workshop%202012%20final%202.pdf](http://www.lvctinstitute.ac.ke/pdf/GBV%20HIV%20Workshop%202012%20final%202.pdf)

<sup>520</sup> Available at: [www.kenyaforum.net/?p=7001](http://www.kenyaforum.net/?p=7001)

<sup>521</sup> Available at: [www.hrw.org/sites/default/files/reports/kenya1211webwcover\\_0.pdf](http://www.hrw.org/sites/default/files/reports/kenya1211webwcover_0.pdf)

<sup>522</sup> Available at: <http://blogs.reuters.com/the-human-impact/2012/08/08/kenyan-boy-conceived-through-hate-lives-without-love>

- (e) *“Fear has made it difficult to fight against the rising tide of rape cases. The girls are afraid to report the crime because the rapists are their neighbours or even friends of their brothers so they are easily bullied into silence. Families prefer to deal with the issue at home or they relocate from fear of reprisal from the gang of rapists or the accused vanishes when the crime is reported.”*<sup>523</sup>  
There is a preference for customary and community resolutions in some areas with incidents of rape and incest reported to chiefs for discussion.
- (f) Conversely, one organisation reported that rape has become so commonplace that females no longer report it and view it as a fact of life.<sup>524</sup> For such women, the repeated cost of the procedure and constant fear of humiliation by medical practitioners may prove too high.
- (g) Young girls fear being excluded from school, preferring to seek a ‘home solution’ rather than attend a clinic.<sup>525</sup>

---

<sup>523</sup> Available at: [www.makeeverywomancount.org/index.php?option=com\\_content&view=article&id=5197:kenya-dandoras-most-chilling-secret-gang-rape-on-the-rise&catid=39:hiv-aids&Itemid=66](http://www.makeeverywomancount.org/index.php?option=com_content&view=article&id=5197:kenya-dandoras-most-chilling-secret-gang-rape-on-the-rise&catid=39:hiv-aids&Itemid=66)

<sup>524</sup> Available at: [www.makeeverywomancount.org/index.php?option=com\\_content&view=article&id=5197:kenya-dandoras-most-chilling-secret-gang-rape-on-the-rise&catid=39:hiv-aids&Itemid=66](http://www.makeeverywomancount.org/index.php?option=com_content&view=article&id=5197:kenya-dandoras-most-chilling-secret-gang-rape-on-the-rise&catid=39:hiv-aids&Itemid=66)

<sup>525</sup> Available at: [http://reproductiverights.org/sites/crr.civicactions.net/files/documents/InHarmsWay\\_2010 .pdf](http://reproductiverights.org/sites/crr.civicactions.net/files/documents/InHarmsWay_2010.pdf)



# ANNEX ONE

---

## **PROTOCOL TO THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS ON THE RIGHTS OF WOMEN IN AFRICA<sup>526</sup>**

### **CONTENTS**

- Article 1: Definitions
- Article 2: Elimination of Discrimination against Women
- Article 3: Right to Dignity
- Article 4: The Rights to Life, Integrity and Security of the Person
- Article 5: Elimination of Harmful Practices
- Article 6: Marriage
- Article 7: Separation, Divorce and Annulment of Marriage
- Article 8: Access to Justice and Equal Protection before the Law
- Article 9: Right to Participation in the Political and Decision-Making Process
- Article 10: Right to Peace
- Article 11: Protection of Women in Armed Conflicts
- Article 12: Right to Education and Training
- Article 13: Economic and Social Welfare Rights
- Article 14: Health and Reproductive Rights
- Article 15: Right to Food Security
- Article 16: Right to Adequate Housing
- Article 17: Right to Positive Cultural Context
- Article 18: Right to a Healthy and Sustainable Environment
- Article 19: Right to Sustainable Development
- Article 20: Widows' Rights
- Article 21: Right to Inheritance
- Article 22: Special Protection of Elderly Women
- Article 23: Special Protection of Women with Disabilities
- Article 24: Special Protection of Women in Distress
- Article 25: Remedies
- Article 26: Implementation and Monitoring
- Article 27: Interpretation
- Article 28: Signature, Ratification and Accession
- Article 29: Entry into Force
- Article 30: Amendment and Revision
- Article 31: Status of the Present Protocol
- Article 32: Transitional Provisions

---

<sup>526</sup> [www.achpr.org/instruments/women-protocol](http://www.achpr.org/instruments/women-protocol)

## THE STATES PARTIES TO THIS PROTOCOL

**CONSIDERING** that Article 66 of the African Charter on Human and Peoples' Rights provides for special protocols or agreements, if necessary, to supplement the provisions of the African Charter, and that the Assembly of Heads of State and Government of the Organization of African Unity meeting in its Thirty-first Ordinary Session in Addis Ababa, Ethiopia, in June 1995, endorsed by resolution AHG/Res.240 (XXXI) the recommendation of the African Commission on Human and Peoples' Rights to elaborate a Protocol on the Rights of Women in Africa;

**CONSIDERING** that Article 2 of the African Charter on Human and Peoples' Rights enshrines the principle of non-discrimination on the grounds of race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status;

**FURTHER CONSIDERING** that Article 18 of the African Charter on Human and Peoples' Rights calls on all States Parties to eliminate every discrimination against women and to ensure the protection of the rights of women as stipulated in international declarations and conventions;

**NOTING** that Articles 60 and 61 of the African Charter on Human and Peoples' Rights recognise regional and international human rights instruments and African practices consistent with international norms on human and peoples' rights as being important reference points for the application and interpretation of the African Charter;

**RECALLING** that women's rights have been recognised and guaranteed in all international human rights instruments, notably the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination Against Women and its Optional Protocol, the African Charter on the Rights and Welfare of the Child, and all other international and regional conventions and covenants relating to the rights of women as being inalienable, interdependent and indivisible human rights;

**NOTING** that women's rights and women's essential role in development, have been reaffirmed in the United Nations Plans of Action on the Environment and Development in 1992, on Human Rights in 1993, on Population and Development in 1994 and on Social Development in 1995;

**RECALLING ALSO** United Nations Security Council's Resolution 1325 (2000) on the role of Women in promoting peace and security;

**REAFFIRMING** the principle of promoting gender equality as enshrined in the Constitutive Act of the African Union as well as the New Partnership for Africa's Development, relevant Declarations, Resolutions and Decisions, which underline the commitment of the African States to ensure the full participation of African women as equal partners in Africa's development;

**FURTHER NOTING** that the African Platform for Action and the Dakar Declaration of 1994 and the Beijing Platform for Action of 1995 call on all Member States of the United Nations, which have made a solemn commitment to implement them, to take concrete steps to give greater attention to the human rights of women in order to eliminate all forms of discrimination and of gender-based violence against women;

**RECOGNISING** the crucial role of women in the preservation of African values based on the principles of equality, peace, freedom, dignity, justice, solidarity and democracy;

**BEARING IN MIND** related Resolutions, Declarations, Recommendations, Decisions, Conventions and other Regional and Sub-Regional Instruments aimed at eliminating all forms of discrimination and at promoting equality between women and men;

**CONCERNED** that despite the ratification of the African Charter on Human and Peoples' Rights and other international human rights instruments by the majority of States Parties, and their solemn commitment to eliminate all forms of discrimination and harmful practices against women, women in Africa still continue to be victims of discrimination and harmful practices;

**FIRMLY CONVINCED** that any practice that hinders or endangers the normal growth and affects the physical and psychological development of women and girls should be condemned and eliminated;

**DETERMINED** to ensure that the rights of women are promoted, realised and protected in order to enable them to enjoy fully all their human rights;

### HAVE AGREED AS FOLLOWS:

## Article 1

---

### DEFINITIONS

For the purpose of the present Protocol:

- a) "African Charter" means the African Charter on Human and Peoples' Rights;
- b) "African Commission" means the African Commission on Human and Peoples' Rights;
- c) "Assembly" means the Assembly of Heads of State and Government of the African Union;
- d) "AU" means the African Union;
- e) "Constitutive Act" means the Constitutive Act of the African Union;
- f) "Discrimination against women" means any distinction, exclusion or restriction or any differential treatment based on sex and whose objectives or effects compromise or destroy the recognition, enjoyment or the exercise by women, regardless of their marital status, of human rights and fundamental freedoms in all spheres of life;
- g) "Harmful Practices" means all behaviour, attitudes and/or practices which negatively affect the fundamental rights of women and girls, such as their right to life, health, dignity, education and physical integrity;
- h) "NEPAD" means the New Partnership for Africa's Development established by the Assembly;
- i) "States Parties" means the States Parties to this Protocol;
- j) "Violence against women" means all acts perpetrated against women which cause or could cause them physical, sexual, psychological, and economic harm, including the threat to take such acts; or to undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life in peace time and during situations of armed conflicts or of war;
- k) "Women" means persons of female gender, including girls.

## Article 2

---

### **ELIMINATION OF DISCRIMINATION AGAINST WOMEN**

1. States Parties shall combat all forms of discrimination against women through appropriate legislative, institutional and other measures. In this regard they shall:
  - a) include in their national constitutions and other legislative instruments, if not already done, the principle of equality between women and men and ensure its effective application;
  - b) enact and effectively implement appropriate legislative or regulatory measures, including those prohibiting and curbing all forms of discrimination particularly those harmful practices which endanger the health and general well-being of women;
  - c) integrate a gender perspective in their policy decisions, legislation, development plans, programmes and activities and in all other spheres of life;
  - d) take corrective and positive action in those areas where discrimination against women in law and in fact continues to exist;
  - e) support the local, national, regional and continental initiatives directed at eradicating all forms of discrimination against women.
2. States Parties shall commit themselves to modify the social and cultural patterns of conduct of women and men through public education, information, education and communication strategies, with a view to achieving the elimination of harmful cultural and traditional practices and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes, or on stereotyped roles for women and men.

## Article 3

---

### **RIGHT TO DIGNITY**

1. Every woman shall have the right to dignity inherent in a human being and to the recognition and protection of her human and legal rights.
2. Every woman shall have the right to respect as a person and to the free development of her personality.
3. States Parties shall adopt and implement appropriate measures to prohibit any exploitation or degradation of women.
4. States Parties shall adopt and implement appropriate measures to ensure the protection of every woman's right to respect for her dignity and protection of women from all forms of violence, particularly sexual and verbal violence.

## Article 4

---

### **THE RIGHTS TO LIFE, INTEGRITY AND SECURITY OF THE PERSON**

1. Every woman shall be entitled to respect for her life and the integrity and security of her person. All forms of exploitation, cruel, inhuman or degrading punishment and treatment shall be prohibited.
2. States Parties shall take appropriate and effective measures to:
  - a) enact and enforce laws to prohibit all forms of violence against women including unwanted or forced sex whether the violence takes place in private or public;
  - b) adopt such other legislative, administrative, social and economic measures as may be necessary to ensure the prevention, punishment and eradication of all forms of violence against women;
  - c) identify the causes and consequences of violence against women and take appropriate measures to prevent and eliminate such violence;
  - d) actively promote peace education through curricula and social communication in order to eradicate elements in traditional and cultural beliefs, practices and stereotypes which legitimise and exacerbate the persistence and tolerance of violence against women;
  - e) punish the perpetrators of violence against women and implement programmes for the rehabilitation of women victims;
  - f) establish mechanisms and accessible services for effective information, rehabilitation and reparation for victims of violence against women;
  - g) prevent and condemn trafficking in women, prosecute the perpetrators of such trafficking and protect those women most at risk;
  - h) prohibit all medical or scientific experiments on women without their informed consent;
  - i) provide adequate budgetary and other resources for the implementation and monitoring of actions aimed at preventing and eradicating violence against women;
  - j) ensure that, in those countries where the death penalty still exists, not to carry out death sentences on pregnant or nursing women;
  - k) ensure that women and men enjoy equal rights in terms of access to refugee status determination procedures and that women refugees are accorded the full protection and benefits guaranteed under international refugee law, including their own identity and other documents.

## Article 5

---

### **ELIMINATION OF HARMFUL PRACTICES**

States Parties shall prohibit and condemn all forms of harmful practices which negatively affect the human rights of women and which are contrary to recognised international standards. States Parties shall take all necessary legislative and other measures to eliminate such practices, including:

- a) creation of public awareness in all sectors of society regarding harmful practices through information, formal and informal education and outreach programmes;
- b) prohibition, through legislative measures backed by sanctions, of all forms of female genital mutilation, scarification, medicalisation and para-medicalisation of female genital mutilation and all other practices in order to eradicate them;
- c) provision of necessary support to victims of harmful practices through basic services such as health services, legal and judicial support, emotional and psychological counselling as well as vocational training to make them self-supporting;
- d) protection of women who are at risk of being subjected to harmful practices or all other forms of violence, abuse and intolerance.

## Article 6

---

### **MARRIAGE**

States Parties shall ensure that women and men enjoy equal rights and are regarded as equal partners in marriage. They shall enact appropriate national legislative measures to guarantee that:

- a) no marriage shall take place without the free and full consent of both parties;
- b) the minimum age of marriage for women shall be 18 years;
- c) monogamy is encouraged as the preferred form of marriage and that the rights of women in marriage and family, including in polygamous marital relationships are promoted and protected;
- d) every marriage shall be recorded in writing and registered in accordance with national laws, in order to be legally recognised;
- e) the husband and wife shall, by mutual agreement, choose their matrimonial regime and place of residence;
- f) a married woman shall have the right to retain her maiden name, to use it as she pleases, jointly or separately with her husband's surname;
- g) a woman shall have the right to retain her nationality or to acquire the nationality of her husband;
- h) a woman and a man shall have equal rights, with respect to the nationality of their children except where this is contrary to a provision in national legislation or is contrary to national security interests;
- i) a woman and a man shall jointly contribute to safeguarding the interests of the family, protecting and educating their children;
- j) during her marriage, a woman shall have the right to acquire her own property and to administer and manage it freely.



## Article 7

---

### **SEPARATION, DIVORCE AND ANNULMENT OF MARRIAGE**

States Parties shall enact appropriate legislation to ensure that women and men enjoy the same rights in case of separation, divorce or annulment of marriage. In this regard, they shall ensure that:

- a) separation, divorce or annulment of a marriage shall be effected by judicial order;
- b) women and men shall have the same rights to seek separation, divorce or annulment of a marriage;
- c) in case of separation, divorce or annulment of marriage, women and men shall have reciprocal rights and responsibilities towards their children. In any case, the interests of the children shall be given paramount importance;
- d) in case of separation, divorce or annulment of marriage, women and men shall have the right to an equitable sharing of the joint property deriving from the marriage.

## Article 8

---

### **ACCESS TO JUSTICE AND EQUAL PROTECTION BEFORE THE LAW**

Women and men are equal before the law and shall have the right to equal protection and benefit of the law. States Parties shall take all appropriate measures to ensure:

- a) effective access by women to judicial and legal services, including legal aid;
- b) support to local, national, regional and continental initiatives directed at providing women access to legal services, including legal aid;
- c) the establishment of adequate educational and other appropriate structures with particular attention to women and to sensitise everyone to the rights of women;
- d) that law enforcement organs at all levels are equipped to effectively interpret and enforce gender equality rights;
- e) that women are represented equally in the judiciary and law enforcement organs;
- f) reform of existing discriminatory laws and practices in order to promote and protect the rights of women.

## Article 9

---

### **RIGHT TO PARTICIPATION IN THE POLITICAL AND DECISION-MAKING PROCESS**

1. States Parties shall take specific positive action to promote participative governance and the equal participation of women in the political life of their countries through affirmative action, enabling national legislation and other measures to ensure that:
  - a) women participate without any discrimination in all elections;
  - b) women are represented equally at all levels with men in all electoral processes;
  - c) women are equal partners with men at all levels of development and implementation of State policies and development programmes .
2. States Parties shall ensure increased and effective representation and participation of women at all levels of decision-making.

## Article 10

---

### **RIGHT TO PEACE**

1. Women have the right to a peaceful existence and the right to participate in the promotion and maintenance of peace.
2. States Parties shall take all appropriate measures to ensure the increased participation of women:
  - a) in programmes of education for peace and a culture of peace;
  - b) in the structures and processes for conflict prevention, management and resolution at local, national, regional, continental and international levels;
  - c) in the local, national, regional, continental and international decision making structures to ensure physical, psychological, social and legal protection of asylum seekers, refugees, returnees and displaced persons, in particular women;
  - d) in all levels of the structures established for the management of camps and settlements for asylum seekers, refugees, returnees and displaced persons, in particular, women;
  - e) in all aspects of planning, formulation and implementation of post-conflict reconstruction and rehabilitation.
3. States Parties shall take the necessary measures to reduce military expenditure significantly in favour of spending on social development in general, and the promotion of women in particular.

## Article 11

---

### **PROTECTION OF WOMEN IN ARMED CONFLICTS**

1. States Parties undertake to respect and ensure respect for the rules of international humanitarian law applicable in armed conflict situations, which affect the population, particularly women.
2. States Parties shall, in accordance with the obligations incumbent upon them under international humanitarian law, protect civilians including women, irrespective of the population to which they belong, in the event of armed conflict.
3. States Parties undertake to protect asylum seeking women, refugees, returnees and internally displaced persons, against all forms of violence, rape and other forms of sexual exploitation, and to ensure that such acts are considered war crimes, genocide and/or crimes against humanity and that their perpetrators are brought to justice before a competent criminal jurisdiction.
4. States Parties shall take all necessary measures to ensure that no child, especially girls under 18 years of age, take a direct part in hostilities and that no child is recruited as a soldier.

## Article 12

---

### **RIGHT TO EDUCATION AND TRAINING**

1. States Parties shall take all appropriate measures to:
  - a) eliminate all forms of discrimination against women and guarantee equal opportunity and access in the sphere of education and training;
  - b) eliminate all stereotypes in textbooks, syllabuses and the media, that perpetuate such discrimination;
  - c) protect women, especially the girl-child from all forms of abuse, including sexual harassment in schools and other educational institutions and provide for sanctions against the perpetrators of such practices;
  - d) provide access to counselling and rehabilitation services to women who suffer abuses and sexual harassment;
  - e) integrate gender sensitisation and human rights education at all levels of education curricula including teacher training.
2. States Parties shall take specific positive action to:
  - a) promote literacy among women;
  - b) promote education and training for women at all levels and in all disciplines, particularly in the fields of science and technology;
  - c) promote the enrolment and retention of girls in schools and other training institutions and the organisation of programmes for women who leave school prematurely.

## Article 13

---

### **ECONOMIC AND SOCIAL WELFARE RIGHTS**

States Parties shall adopt and enforce legislative and other measures to guarantee women equal opportunities in work and career advancement and other economic opportunities. In this respect, they shall:

- a) promote equality of access to employment;
- b) promote the right to equal remuneration for jobs of equal value for women and men;
- c) ensure transparency in recruitment, promotion and dismissal of women and combat and punish sexual harassment in the workplace;
- d) guarantee women the freedom to choose their occupation, and protect them from exploitation by their employers violating and exploiting their fundamental rights as recognised and guaranteed by conventions, laws and regulations in force;
- e) create conditions to promote and support the occupations and economic activities of women, in particular, within the informal sector;
- f) establish a system of protection and social insurance for women working in the informal sector and sensitise them to adhere to it;
- g) introduce a minimum age for work and prohibit the employment of children below that age, and prohibit, combat and punish all forms of exploitation of children, especially the girl-child;
- h) take the necessary measures to recognise the economic value of the work of women in the home;

- i) guarantee adequate and paid pre- and post-natal maternity leave in both the private and public sectors;
- j) ensure the equal application of taxation laws to women and men;
- k) recognise and enforce the right of salaried women to the same allowances and entitlements as those granted to salaried men for their spouses and children;
- l) recognise that both parents bear the primary responsibility for the upbringing and development of children and that this is a social function for which the State and the private sector have secondary responsibility;
- m) take effective legislative and administrative measures to prevent the exploitation and abuse of women in advertising and pornography.

## Article 14

---

### HEALTH AND REPRODUCTIVE RIGHTS

1. States Parties shall ensure that the right to health of women, including sexual and reproductive health is respected and promoted. This includes:
  - a) the right to control their fertility;
  - b) the right to decide whether to have children, the number of children and the spacing of children;
  - c) the right to choose any method of contraception;
  - d) the right to self-protection and to be protected against sexually transmitted infections, including HIV/AIDS;
  - e) the right to be informed on one's health status and on the health status of one's partner, particularly if affected with sexually transmitted infections, including HIV/AIDS, in accordance with internationally recognised standards and best practices;
  - g) the right to have family planning education.
2. States Parties shall take all appropriate measures to:
  - a) provide adequate, affordable and accessible health services, including information, education and communication programmes to women especially those in rural areas;
  - b) establish and strengthen existing pre-natal, delivery and post-natal health and nutritional services for women during pregnancy and while they are breast-feeding;
  - c) protect the reproductive rights of women by authorising medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus.

## Article 15

---

### **RIGHT TO FOOD SECURITY**

States Parties shall ensure that women have the right to nutritious and adequate food. In this regard, they shall take appropriate measures to:

- a) provide women with access to clean drinking water, sources of domestic fuel, land, and the means of producing nutritious food;
- b) establish adequate systems of supply and storage to ensure food security.

## Article 16

---

### **RIGHT TO ADEQUATE HOUSING**

Women shall have the right to equal access to housing and to acceptable living conditions in a healthy environment. To ensure this right, States Parties shall grant to women, whatever their marital status, access to adequate housing.

## Article 17

---

### **RIGHT TO POSITIVE CULTURAL CONTEXT**

1. Women shall have the right to live in a positive cultural context and to participate at all levels in the determination of cultural policies.
2. States Parties shall take all appropriate measures to enhance the participation of women in the formulation of cultural policies at all levels.

## Article 18

---

### **RIGHT TO A HEALTHY AND SUSTAINABLE ENVIRONMENT**

1. Women shall have the right to live in a healthy and sustainable environment.
2. States Parties shall take all appropriate measures to:
  - a) ensure greater participation of women in the planning, management and preservation of the environment and the sustainable use of natural resources at all levels;
  - b) promote research and investment in new and renewable energy sources and appropriate technologies, including information technologies and facilitate women's access to, and participation in their control;
  - c) protect and enable the development of women's indigenous knowledge systems;
  - c) regulate the management, processing, storage and disposal of domestic waste;
  - d) ensure that proper standards are followed for the storage, transportation and disposal of toxic waste.

## Article 19

---

### **RIGHT TO SUSTAINABLE DEVELOPMENT**

Women shall have the right to fully enjoy their right to sustainable development. In this connection, the States Parties shall take all appropriate measures to:

- a) introduce the gender perspective in the national development planning procedures;
- b) ensure participation of women at all levels in the conceptualisation, decision-making, implementation and evaluation of development policies and programmes;
- c) promote women's access to and control over productive resources such as land and guarantee their right to property;
- d) promote women's access to credit, training, skills development and extension services at rural and urban levels in order to provide women with a higher quality of life and reduce the level of poverty among women;
- e) take into account indicators of human development specifically relating to women in the elaboration of development policies and programmes; and
- f) ensure that the negative effects of globalisation and any adverse effects of the implementation of trade and economic policies and programmes are reduced to the minimum for women.

## Article 20

---

### **WIDOWS' RIGHTS**

States Parties shall take appropriate legal measures to ensure that widows enjoy all human rights through the implementation of the following provisions:

- a) that widows are not subjected to inhuman, humiliating or degrading treatment;
- b) that a widow shall automatically become the guardian and custodian of her children, after the death of her husband, unless this is contrary to the interests and the welfare of the children;
- c) that a widow shall have the right to remarry, and in that event, to marry the person of her choice.

## Article 21

---

### **RIGHT TO INHERITANCE**

1. A widow shall have the right to an equitable share in the inheritance of the property of her husband. A widow shall have the right to continue to live in the matrimonial house. In case of remarriage, she shall retain this right if the house belongs to her or she has inherited it.
2. Women and men shall have the right to inherit, in equitable shares, their parents' properties.

## Article 22

---

### **SPECIAL PROTECTION OF ELDERLY WOMEN**

The States Parties undertake to:

- a) provide protection to elderly women and take specific measures commensurate with their physical, economic and social needs as well as their access to employment and professional training;
- b) ensure the right of elderly women to freedom from violence, including sexual abuse, discrimination based on age and the right to be treated with dignity.

## Article 23

---

### **SPECIAL PROTECTION OF WOMEN WITH DISABILITIES**

The States Parties undertake to:

- a) ensure the protection of women with disabilities and take specific measures commensurate with their physical, economic and social needs to facilitate their access to employment, professional and vocational training as well as their participation in decision-making;
- b) ensure the right of women with disabilities to freedom from violence, including sexual abuse, discrimination based on disability and the right to be treated with dignity.

## Article 24

---

### **SPECIAL PROTECTION OF WOMEN IN DISTRESS**

The States Parties undertake to:

- a) ensure the protection of poor women and women heads of families including women from marginalized population groups and provide an environment suitable to their condition and their special physical, economic and social needs;
- b) ensure the right of pregnant or nursing women or women in detention by providing them with an environment which is suitable to their condition and the right to be treated with dignity.

## Article 25

---

### **REMEDIES**

States Parties shall undertake to:

- a) provide for appropriate remedies to any woman whose rights or freedoms, as herein recognised, have been violated;
- b) ensure that such remedies are determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by law.



## Article 26

---

### **IMPLEMENTATION AND MONITORING**

1. States Parties shall ensure the implementation of this Protocol at national level, and in their periodic reports submitted in accordance with Article 62 of the African Charter, indicate the legislative and other measures undertaken for the full realisation of the rights herein recognised.
2. States Parties undertake to adopt all necessary measures and in particular shall provide budgetary and other resources for the full and effective implementation of the rights herein recognised.

## Article 27

---

### **INTERPRETATION**

The African Court on Human and Peoples' Rights shall be seized with matters of interpretation arising from the application or implementation of this Protocol.

## Article 28

---

### **SIGNATURE, RATIFICATION AND ACCESSION**

1. This Protocol shall be open for signature, ratification and accession by the States Parties, in accordance with their respective constitutional procedures.
2. The instruments of ratification or accession shall be deposited with the Chairperson of the Commission of the AU.

## Article 29

---

### **ENTRY INTO FORCE**

1. This Protocol shall enter into force thirty (30) days after the deposit of the fifteenth (15) instrument of ratification.
2. For each State Party that accedes to this Protocol after its coming into force, the Protocol shall come into force on the date of deposit of the instrument of accession.
3. The Chairperson of the Commission of the AU shall notify all Member States of the coming into force of this Protocol.

## Article 30

---

### **AMENDMENT AND REVISION**

1. Any State Party may submit proposals for the amendment or revision of this Protocol.
2. Proposals for amendment or revision shall be submitted, in writing, to the Chairperson of the Commission of the AU who shall transmit the same to the States Parties within thirty (30) days of receipt thereof.
3. The Assembly, upon advice of the African Commission, shall examine these proposals within a period of one (1) year following notification of States Parties, in accordance with the provisions of paragraph 2 of this article.
4. Amendments or revision shall be adopted by the Assembly by a simple majority.
5. The amendment shall come into force for each State Party, which has accepted it thirty (30) days after the Chairperson of the Commission of the AU has received notice of the acceptance.

## Article 31

---

### **STATUS OF THE PRESENT PROTOCOL**

None of the provisions of the present Protocol shall affect more favourable provisions for the realisation of the rights of women contained in the national legislation of States Parties or in any other regional, continental or international conventions, treaties or agreements applicable in these States Parties.

## Article 32

---

### **TRANSITIONAL PROVISIONS**

Pending the establishment of the African Court on Human and Peoples' Rights, the African Commission on Human and Peoples' Rights shall be seized with matters of interpretation arising from the application and implementation of this Protocol.

**Adopted by the 2nd Ordinary Session of the Assembly of the Union  
Maputo, 11 July 2003**

