

# **ACCESS TO JUSTICE AND THE RULE OF LAW IN KENYA**

**A PAPER DEVELOPED FOR THE COMMISSION FOR THE  
EMPOWERMENT OF THE POOR**

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## EXECUTIVE SUMMARY

Development of the rule of law and Constitutionalism in Kenya has been informed by the Social Economic and political systems it sought to regulate. The current constitution, and its practice is a result of the use of the rule of law, whose principles and rationale was grafted from the British society, and whose aspirations were those of imperialist interests. The ruling class in Kenya has since independence used the rule of law in its struggle to balance the competing interests of the deeply rooted imperialist interests, the economic aspirations of the people in the context of extreme poverty and very high expectations, the meet the imperatives of a unified nations in the context of ethnic stratified society; to underpin its legitimacy and survival through the ideology of development; and above all to under-gird and facilitate the primitive economic accumulation of the ruling class in a context where capital has been in the hands of foreigners and Asian immigrants. This scenario is also set in the context of a patriarchal society with its discrimination against women and the vulnerable.

The paper has finds that the main challenges to desired reforms towards increased access to justice have been: poor domestication of international human rights norms; lack of political will; the public's ignorance of rights and the law; lack of accessibility to public information; archaic laws, legal language and practice lagging behind social change; conflict between customary and formal law; extreme poverty and non-affordability of the legal services; impunity of law enforcement officers in their violation of the law; poor conditions of work for law enforcement agencies hence poor moral; poor management of law enforcement institutions; and inadequate physical infrastructure among others.

This paper has sought to illustrate that reforms or initiatives to empower the poor through the law must find their logic and feasibility within the social, economic and political project going on in the country, and may be of more help, if they design a project whose goal would be to use the law to move the goals of the state project towards the interests of the poor. Relevant policies to in Kenya today are the Economic Recovery and Wealth and Employment Creation Strategy 2003, and the newly launched Kenya Vision 2030.

The paper established that the edifice of the legal and justice system- the laws and the practice is not designed to cater for the interests of the poor, women, children, workers, refugees and other vulnerable groups. There are large gaps in the constitution and laws on substantive provisions of rights of these groups; and the process norms of the entire system is broadly insensitive and exclusionary making it difficult for them to vindicate their rights in the system.

The customary justice system is much more preferred by majority poor especially in the rural areas. Opportunity for accessing justice within the system is however challenged by cost, discrimination against women, children, youth and poor men, corruption as the system is taken over by local administration officers as the institute of 'traditional elder' withers away, individualism and other principles of capitalist economy in the context where customary norms were developed within communal societies, non-enforceability in formal law of customary court decisions, conflict with formal law among others. This system is however being strengthened with infusion of principles of natural justice through the work of NGOs and FBOs.

The paper finds that the law reform stance and programmes currently going on if effected will conceivably afford more Kenyans especially the poor and vulnerable groups greater opportunity to access justice. However the economic project of the government as can be read in the two over-arching policy documents must be found to have a coincidence of purpose with the legal reforms. This paper has not done this

analysis. Earlier work by this author<sup>1</sup> on the same subject however found that the ERSWEC purpose and goal compliments goals of the current legal reforms, even though priority in implementation seems to have been towards the interests of capital.

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<sup>1</sup> Ngondi-Houghton, C., *The State of Human Rights in Kenya: A Baseline Survey Report for the Development of a National Action Plan and Policy for Human Rights in Kenya*. A Publication of the Ministry of Justice and Constitutional Affairs. 2005.

# 1. Definitions

Definitions are political, and the end goals of any enterprise are based on the definitions given to notions that support its edifice. For purposes of this paper critical notions are: legal empowerment; the poor; the rule of law; justice and access to justice.

## *Legal empowerment*

The word 'legal' emanates from the concept of law. A law is a rule or a principle. Within the context of this paper, law refers to the bundle of principles, rules and regulations that the Kenyan society has agreed upon and developed to facilitate their being as a nation, and the interaction of constituent individuals person and entities amongst themselves and between themselves and the state. 'Legal' means recognized, authorized, permitted by the law, or within the confines of the law. When one is recognized by the law, have authority of the law, is permitted by the law, and acts within the law, then they can expect, and should be able to access the benefits anticipated by that law. When majority of the population are in this position, and the law is enforced efficiently and fairly, then there is order, predictability, and justice in the society.

The word 'power' refers to authority, strength, ability or right. Legal empowerment would therefore mean to bring the poor to a position of authority, strength, ability and right within the meaning of the law. Such position would serve as a legitimate *medium* to engage the state and other entities and institutions towards individual and group goals. It would serve as a *platform* to make claims from the state and other members of society, and a *protective shield* against violation of their rights.

For such abilities to lead to the goal of lifting the poor out of the state of poverty, the capacity for fulfillment of the expectations and aspirations they create in the poor must be available in the logic and reality of the social, economic and political system that the law regulates and in which the poor live. Only then can legal empowerment serve any purpose towards eradication of poverty. It would seem then that legal empowerment of the poor must be preceded by an assessment of the extent to which the social, economic and political system within which the poor live can deliver on the aspirations of the poor.

## *The Poor*

The poor have been given many different technical definitions. For purposes of this paper, the poor are those members of society who do not have the abilities to realize their basic needs, that is, those substances, circumstances, conditions, powers, opportunities and relationships they need to live with human dignity, and to therefore pursue their human potential.

## *Justice, Access to Justice*

For purposes of this paper, justice is broad. It is conceptualised not as an end result but a continuum. It begins from the idea of endowment and recognition of the rights of persons, to protection, to opportunity to vindicate, to restoration and restitution. It therefore encompasses the embodiment of the rights of all in the law; the provision of equal protection of the rights of all in the law; the equal access to all of judicial mechanisms for such protection; the respectful, fair, impartial and expeditious adjudication of claims within the judicial mechanism; and the equal and humane treatment of those incarcerated for purposes of enforcement of the law.

Access to justice is therefore accordingly broadly conceptualised. It begins from inclusion within embodiment of rights in the law; awareness of and understanding of the law; easy availability of

information pertinent to one's rights; equal right to the protection of one's rights by the legal enforcement agencies; easy entry into the judicial justice system; easy availability of physical legal infrastructure; affordability of the adjudication engagement; cultural appropriateness and conducive environment within the judicial system; timely processing of claims; and timely enforcement of judicial decisions.

### *The Rule of Law*

The idea of the rule of law generally means to govern/preside over/ decide/oversee under the imperative/basis/guidance/regulation of a commonly decided code, or standard. The rule of law refers to both its statement and its practice and has therefore been said to have two meanings- the technical or juridical meaning and the political meaning<sup>23</sup>. The statement of the rule of law is its technical and juridical meaning. It is often embodied in a constitution. In the technical or juridical sense, a constitution is a legal document regulating political and social relations, delineating, structuring and empowering the different organs of state power and individuals in their interaction with each other. Thus it regulates the foundations of the social and state system and the legal status of the individual within the state. Politically, as the basic law in any country, the constitution is the factual basis of existing socio-economic and political relations and institutions.

The technical definition of a constitution as a juridical document however does not reveal its social and political character. Its political meaning reveals its social and political character. It is the socio-economic and the political nature of a given country that determines the nature of the state organs that exist, how they are comprised and how they interact with each other and with the individual. The constitution is essentially a political document given juridical characteristics.

This distinction is important for the projects that aim to empower the poor through the law. Changes from one constitution or constitutional provision to another does not necessarily change the social, economic and political order that traps the poor in poverty, if there has not been a fundamental change in the social, political and economic system. Such reforms may change the manner in which state organs relate to each other among themselves in the regulation of the same oppressive social system. Projects of this nature need to be preceded by an investigation of the legal concepts and assumptions embodied in the constitutional jurisprudence and the social system upon which such constitution is built.

## **2. The Political Economy of the Rule of law and Poverty in Kenya: A historical analysis**

### *Roots of Constitutionalism*

Constitutionalism, with its constituent concepts of the secularization, nationalization, separation and limitation of public powers emerged in Europe as part of bourgeois revolutions. The nationalization of power was necessary to advance the cause of national bourgeoisie in search of mercantilism. The other roots of constitutionalism lie in the need of capitalism for predictability, calculability and security of property rights and transactions.

The continuing imperative of the rule of law in the West is closely connected to its ideological function. It is generally accepted that the dominant ideology of the liberal economy is the rule of

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<sup>2</sup> W. Ncube and S. Nzombe, *The Constitutional Reconstruction of Zimbabwe: Much ado about nothing?*, in *The Zimbabwe Law Review*, Vol. 5, 1987, p2.

law. It is a powerful means of legitimization of western regimes that is carefully cultivated by their rulers. It serves to hide the way in which power is exercised in these societies; it gives the impression of pluralism and competitive political systems responsive to new interests and change; and it emphasizes the primacy of state representatives and judicial institutions, thus mitigating the appeal of radical politics.

Poulantzas has argued that legal ideology serves the interests of capitalism by procuring the economic isolation of individuals by emphasizing their separateness and autonomy while at the same time hiding the dominance of one class over another by notions of equal and free citizens “unified in the political universality of the state/nation. Capitalist legal ideology reinforces the notion that human beings are free and equal, and that processes of the law, particularly its application, are autonomous and impartial. The appearance of the neutrality and autonomy of the law is possible because the primary form of subordination or unequal relations is not the law but social and economic forces, which rely upon equal and neutral legal concepts and rules to achieve that effect.

Capitalism required the conversion of serfs to wage earners and the expansion and consolidation of national markets. At the same time it required the limitation of the arbitrary or discretionary powers of monarchy for intervention in property and contractual rights. The concept of general rules was well suited to these aims. The generality of rules prevented both discrimination and arbitrary action (important for competitive capitalism); it prevented the subordination of the judge to the legislature in specific disputes while at the same time it put a curb on judicial adventurism; and generally, with its connotations of rules for the future, ruled out the retro-activity of law. It is however evident that individual entrepreneurs and capitalists do not want general and equal conditions of competition. Profits are maximized when there is a monopoly. There is hence considerable tension between the needs of capitalism in general and the desires of individual enterprises or sections of industry.

#### *Independent Kenyan Constitutionalism*

The Lancaster Constitution was a Westminster model based on western rational-legal conceptions of the rule of law that regulated a capitalist socio-political system based on capitalist legal assumptions and concepts the central of which was the sanctity of private property. The model assumed settled political and economic conditions and a broad consensus on social values and anticipated results within such conditions. There were virtually no market institutions or capacity for engagement with the market for most of the population. The state model was inorganic as it was imposed on the different reality of the Kenyan society. The colonial state had stunted civil society development, and so political power of the independent ruling class was facing little censor from the very weak and fragmented civil society. The nature of the state by virtue of its imperialist genesis, and its very existence was conditioned by international economic and political relations and development. The state had little capacity to institutionalise power on the basis of general rules and to resist encroachments upon rights and democracy by the more powerful states and corporations.

Moreover, the Kenyan society consisted of diverse ethnic groups, was broadly characterised by a peasant mode of production, stiff competition for resources and opportunity, and few market institutions. The independent constitution was therefore expected to carry a much heavier burden. It had to foster a new nationalism, create national unity out of diverse ethnic and religious communities, prevent oppression and promote equitable development, inculcate habits of tolerance and democracy and ensure capacity for administration, and satiate the interests of international capital and politics.

### *The Political Economy of Poverty*

Faced with the challenge of these competing tasks and interests, and concerned about its political survival the ruling class found it difficult to derive legitimacy from the ideological base of the rule of law. It evolved an ideology that would satiate the immediate needs of the electorate, facilitate the linkage with international capital, and ensure its continued legitimacy- that of 'development'. The state aspirations and vision under this ideology was embodied in Sessional Paper No.10 of 1965. which became the blueprint framework for all state policy in the Kenyatta era. This ideology dovetailed neatly with the aspirations of the majority who were poor, and embodied the emotive aspirations of the struggle for independence. People regarded development as the primary task of the government, and the government on its part justified aggregation and concentration of power (dismissing debates on human rights) on the imperative of development. The government became the benefactor/giver and the electorate the beneficiaries/recipients. Further, the ruling elite found that they needed a stronger base for political domination, which was not forthcoming with the idea of diffused state power under the rule of law. They therefore evolved the political model of personalisation of state power in the President- a model directly antithetical to the rule of law. This mode of domination dovetailed neatly with the government goal of 'development'. This state of affairs eerily precipitated the equivalent to the 17<sup>th</sup> and 18<sup>th</sup> Century European Monarch that led to the search for the rule of law.

All these developments were facilitated through the constitution. The constitution and laws were progressively bent and tailored to the hegemony of the President so that his overriding legal powers grew for him a kind of a charisma of which fear was a major constituent. It was a neat reversal of the Weberian transition of legitimacy from charisma to law. The role played by general norms of law became secondary. A closely associated ideology was that of the proclamation of the supremacy of the political party – KANU in this case. This situation began in the Kenyatta era (1963- 1978), and was taken to the extreme in the Moi era (1978-2002).

The juridical concepts of the rule of law were used to perpetrate this unaccountable legitimization model of governance. State organisation in Kenya has been theoretically underpinned by the constitutional concepts of: parliament; the politically neutral zones of the judiciary, the Attorney General, the public service, the police, the armed forces and the electoral process together with the delimitation of constituencies; the application of the rule of law to the executive, constitutional guarantees of individual civil liberties; the separation of the executive from the legislature and the judiciary; and the building and checks and balances. The existence of checks and balances in the state apparatus turned out to be merely an efficient method of dividing labor between the different state organs and was designed to make the state operate more efficiently. It did not result in the creation of a more just state. On the contrary it facilitated the development of a ruthless and undemocratic state, and made it ruthlessly efficient especially in the Moi era.

The relationship between the new state and the market was problematic. The colonial state had unleashed market forces but did not establish a genuine market. An important role for the state for both economic and political reasons became the articulation of the diverse modes of production (capitalist, cooperative and subsistence). This compelled restraint of market forces. The economy became administered essentially through license and discretion. Equal opportunity, such as may have been anticipated under the Weberian rule of law was constrained.

Another dimensions that further constrained market forces and equal opportunity was that those who acceded to political power had an insecure base in the economy, which was dominated by foreigners and immigrants. This ruling elite could not therefore allow the market to become the primary agency for local integration or allocation, at least not until they had secured dominance over the market. The use of state resources for this primitive accumulation took primarily the

form of the exploitation and exclusion of the peasantry through compulsory state marketing channels and other forms of state enterprise and licensing, and the exploitation of workers through restriction of trade union rights.

As the state was the primary instrument of accumulation, corruption became endemic, woven into the very fabric of the apparatus of the state. The pressures for corruption arose not only from economic greed, but also the imperatives of political survival which then as now, was generally not party or other political platform but clientilism (which is sustained by regular favors to one's followers). Public control and accountability could not be permitted, and resistance from the part of the exploited was met principally with coercion. The state became authoritarian and irresponsible in the sense of its public accountability.

The greater the role of the state in accumulation, the lesser the scope for autonomy. The state therefore became more intolerant to independent centers of power, restricting the right of association and seeking total subjugation of civil society and permitting autonomy only where it was functional to its own purposes. This weakened groups of civil society to resist encroachments by the state.

Another major factor that undermined the development of a just state was the new state's limited autonomy from the international economic and political system. It was heavily dependent on the outside world for economic and military aid as well as for trade and technology. It was to a significant degree a vassal of the British government and susceptible to the whims of international capital. Foreign powers (and capital) had until late 1980s no principled attitude towards democracy and the rule of law. They were guided by their own interests and rarely did these lie in the support for democracy. It was easier for them to deal with a government that disregarded popular or worker struggles.

The role of the constitution and the law in this process and situation was totally instrumental, unmediated by autonomous processes and procedures. The law itself became a commodity that only the state could mobilise and manipulate. It was used to sanctify private property, as they acquired more and more and the judiciary was used to protect these interests, and justice was seen to flow from the President and his stooges.<sup>4</sup>

The government found it dangerous to allow the dominated groups (the poor workers and peasants) any purchase on the law except as part of careful stage management.

The patrimonial state in Kenya and its abilities that led to increased poverty and divisiveness emerged and grew on the legal foundations of a constitutionalist state. Core transformations were secured through formal amendments of the law, but a great deal of it was achieved through the practice of manipulation, trivialisation, and disregard of the law.

The social and economic forces which formed the conjuncture that facilitated the formation and development of the Kenyan state in the first 30 years of independence have changed, and there has progressively developed what might be said to be determined movement, albeit heavily contested, towards a more formal, law constituted polity, manifested by the constitutional and law reform movement and the general reform mode within the state and its organs, which began slowly in the early 1990s and is currently in high gear.

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<sup>4</sup> See Muigai Githu, 'The Judiciary in Kenya and the Search for a Philosophy of law: The Case of Constitutional Adjudication', in Kibwana, Kivutha, ed., *Law and the Administration of Justice in Kenya*. A publication of the International Commission of Jurists (Kenya Section). 1992, p93.

The state of the rule of law and the extent of access to justice for the poor and vulnerable groups in Kenya fundamentally takes its nature and complexion from this historical development of the

Development of the state and of constitutional practice, as has been illustrated, it is heavily dependent on the social, economic and political systems, and the goals that these seek to achieve. This complexion is discerned in the following section. A project to legally empower the poor out of poverty, must therefore be informed by an understanding of the current social and economic goals, and the capacity and will of the ruling class to bring them to the realisation of the entire community through the use of the law.

### **3.0 Access to Justice for the poor and vulnerable groups in Kenya**

Justice is a continuum that begins from the pronouncements and substance of the law, to the different stages and forms of its enforcement. For purposes of this paper, the analysis in this section approaches the concept of access to justice from a human rights perspective that views what ought to be included in the substance of the law as the entitlements embodied in human rights as proclaimed in international instruments. Measuring justice from these highest standards therefore means that a legal framework that does not afford citizens the substance of those entitlements in its pronouncements and practice is occasioning them injustice. We therefore look at each core right, especially those affecting the poor and women, and explore the extent of its provision in the law. In the second part of this section, the analysis focuses on the actual process of the justice mechanism from arrest to serving of sentences.

#### **The State of the Law**

##### ***Civil and Political Rights***

##### ***Right to Equality***

Kenya is one of the ten most unequal countries in the world with a gini co-efficient of .57. Equality of all before the law, socio-economic equality is manifested between regions, gender, and class. The current Kenyan *Constitution* makes provision for the principle and right to equality and non-discrimination in: realisation of fundamental rights; with regards to the law and before courts and tribunals under Section 70, regardless of race, tribe, place of origin or residence, or other local connection, political opinions, colour, creed or sex. Section 82 (1) further provides for equality under the law, to the effect that no law shall make any provision that is discriminatory of itself or in its effect.

However, section 82(4) (b), seems to justify derogation from S. 82 (1), and to provide that the principle of equality does not apply to matters of personal law including adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law. This effectively means that persons governed by these laws are not availed the right to equal access to rights under CCPR, under the Kenyan law and before Kenyan courts and tribunals. In effect, equality is not guaranteed by the Constitution for all persons under Kenyan law as required by international law standards. Legislation on equality in disparate with some progressive provisions in the Children's Act, Persons with Disabilities Act, the National Commission on Gender and Development Act. Retrogressive laws infringing on equality include the Citizenship Act, the Succession Act, and the Employment Act.

Challenges to access to justice under this right include: archaic laws that lag behind social change and demands; pressures of globalisation and the economic orientation and its indifferent to equity and social concerns; slow legal reforms.

#### *The Right to Life*

This right is not realised by many Kenyans with the death penalty still legal and 1900 convicts sentenced to death though there have been no executions since 1987. The main causes of death in Kenya are: ill-health especially malaria with malaria morbidity standing at 30%; HIV/AIDS with daily mortality rates of an estimated 520; reproductive health related causes with maternal mortality rate at 590 per 100000; infant death causes with infant mortality standing at 78 per 1000 and under five mortality at 114 per 1000; abortion; insecurity and road accidents; extra-judicial killings; mob/extra-judicial 'justice; murder especially through violent crime which has been on the increase. The right is provided for by current constitution except for death penalty, among other exceptions that have to do with defense of the person, property, peace and order, prevention of crime and lawful war. The Draft constitution expounds on this and restricts ambit for death penalty, and other exceptions.

Challenges here include extreme poverty of majority; lack of political will to remove death penalty; neglect of support for health; corruption and wastage; prioritisation of curative and neglect of preventive health care; increasing prevalence of HIV/AIDS.

#### *The Right to Liberty and Security of the Person*

Though provided for in constitution and various laws, in practice the right is frequently violated. Violations are characterised by: *Arbitrary arrests and brutality* especially by police in congested poor urban neighbourhoods and by police and other security forces remote areas of country; *rampant brutality in military operations* in Northern Kenya especially Marsabit and Isiolo; *torture* is still rampant despite inadmissibility of confessions as evidence of guilt; *domestic violence, incest, defilement, rape* are on the increase with 1653 case of rape reported in 2003 alone; *illegal scientific research on humans* has been reported with regards to children in children's homes; *insecurity and crime-related assaults* are on the increase such as car-jackings and robbery with violence.

The *Current constitution* guarantees liberty and security of person (though these are watered down by many exceptions); provides for rights of persons whose liberty has been legally taken away such as arrested and imprisoned persons; and for security of persons under provisions against torture and inhumane and degrading punishment. *The draft constitution* is more elaborate on these provisions. *The Penal Code* promotes, protects these rights in its provisions. *The Prisons Act* still permits solitary confinement which is inhuman; *The Police Act (Repeals Miscellaneous Amendment)* prohibits torture with liability of a felony but does not prescribe punishment; *Criminal procedure Code* provides for issue of Habeas Corpus orders in protection of rights of arrested persons; and *the Criminal Laws Amendment Act 2003* abolishes the use of corporal punishment.

Challenges here include: lack of political will to bring efficient and responsibility to enforcement agencies; impunity of agencies; lack of knowledge of rights by public; slow legal reform.

#### *Right to Equal Protection of the Law*

This is the equal right of all to a fair trial before an impartial tribunal, and all the rights of an accused person. It is a right to realised by majority in Kenya. *Lack of physical infrastructure of courts in some regions; un-affordability of court fees and legal representation for majority; illiteracy; and lack of basic legal and court information* are some leading barriers to realisation of

this right by majority of Kenyans. *Backlog* in cases is a major barrier with for instance 1944 unfinished cases in at the High Court in Nairobi alone in 1998. *Lack of integrity, impartiality and lack of independence on part of judiciary* has also caused inaccessibility to justice of many Kenyans. Rights of accused persons are also violated with prison and remand home conditions being harsh with *poor health facilities; frequent assaults; corporal punishment; unnatural deaths; indecent searches; denial of visiting and mail rights; lack of voting rights; solitary confinement; congestion; with total prisons' holding capacity in the country being 17000, yet prisons held 94, 220 in 2003.*

The current constitution under section 77 provides for this right, albeit with provisions that remove the right to legal representation and regard to needs of juveniles; and also creates the institution of the judiciary. The draft constitution reiterates this provision and expounds on it removing exceptions. It also creates the institution of the judiciary and adds provisions that go towards strengthening and rendering more effective function of the judiciary for purposes of this right.

Challenges to access to justice under this right include: illiteracy; Lack of law enforcement by responsible government departments; corruption; poverty; intimidating demeanor of courts; lack of incentives and proper supervision of judicial officers; Slow implementation of legal and institutional and judicial reforms.

#### *The Right to Privacy, Honour and Reputation*

Violation of this right has reduced after the 2002 elections especially in the form of the blatant and open interference with privacy of 'perceived enemies of the state through phone bugs and mail interception and searches. Violation is however perpetrated in other forms such as by security forces in their 'law enforcement missions' in ASAL districts; police on their night patrols in the cities and poor neighborhoods; the media with frequent attacks on public personalities and their families especially 'ghetto' media; terrorist searches at airports and public buildings and places like cinemas.

The current constitution narrowly provides for this right under sections 70 and 76 and leaving out the elements of 'unlawful and arbitrary interference. The draft Constitution is more comprehensive and clear covering all elements of the right filling gaps left by current constitution. Legislation is disparate and inadequate on this right with the Penal Code addressing only the dimension of reputation and honour and leaving out that of privacy of person and home; and the Criminal Procedure code protecting privacy of home and person from arbitrary search by police albeit with large loopholes in language such as 'if officer has reason to belief', which have been used to violate this right in practice.

Challenges include: Lack of knowledge of rights; Impunity of police; Slow pace of legal and judicial reforms.\

#### *The Right to a Family*

This right includes the right to marry, to found a family, not to be forced to do so, and equal rights and responsibilities of the spouses at all stages of marriage. Though this right is broadly realised in Kenya, and the family is accorded various forms of state protection, there are numerous instances in which various aspects of it are violated for many in Kenya. Kenyan laws have *no definition of marriage*, and with the different marriage law regimes- customary, Islamic and common law, having different values (such as polygamy) has left many not sure whether they are in a marriage or not. *Registration of marriages is also disparate* in different registries with some people contracting marriages in different registries. *Customary marriages are not registered*

so one cannot ascertain whether another is married customarily, and also rights within a customary marriage are difficult to ascertain. *Forced/arranged marriages* still happen in some Kenyan communities. *Conflict of rights* of people in monogamous unions and wishing to stay in such, and those in such marriages who wish to enforce their rights to polygamous unions is also an issue. *Early and under-age* marriages are common with differing marriageable ages for different communities and marriage regimes-Hindu-18, Islam-puberty, civil law -16. *Wife inheritance is common* in some communities. *Legal provisions on prohibited degrees of relationships* in marriage are disparate. *Bigamy is common* and increasing in Kenya against the marriage Act and Penal Code threatening rights within monogamous marriages. *Cohabitation is common* but no legal framework for rights of parties therein, leaving many unprotected especially in break-ups. *Sororate unions* continue though not recognised by law, and informal homosexual unions though illegal are increasing. The law provides for *few grounds of divorce* leaving out important contemporary causes such as incompatibility and denying many recourse to the law. Laws on *custody and maintenance discriminate against children born out of wedlock* and procedures are long and cumbersome and enforcement is ineffectual. *Unequal legal rights to matrimonial property* persist in the laws and practice and are discriminative towards women.

Current constitution makes no provision of this right but draft constitution provides for it. There are five regimes of marriage laws in Kenya meaning that the rights and responsibilities of parties in these unions are not uniform hence causing vindication complexities.

Challenges include: Conflict of laws across the five legal marriage regimes causing legal impediments in allocation of status, rights, and responsibilities of children and parties in unions; Diversity of laws causing difficulties in ascertaining marriages, in processing disputes; emerging polygamous unions under customary law, in context of formal legal monogamous unions cannot be addressed by law; Disparate registration system; Lack of political will to pass proposed bills on issues of marriage and family; Slow pace of legal and institutional reforms, and the recommendations of the Women's Law Task Force.

#### *Right to Assembly and Association*

This right is realised more in Kenya after NARC government came to power in 2002. However the legal framework and practice still facilitate violation. The Societies Act violates the element of freedom in the right by requiring that any association of ten or more people must be registered as a society, and gives broad powers to registrar of societies to refuse registration and to de-register, which has been abused. The Public Order Act requires licensing for public meetings in advance removing freedom for impromptu meetings, and gives broad powers to officer, which have been repeatedly violated stopping opposition meetings and civil society functions even in the NARC era. Trade Unions are registered under the Trade Unions Act, which has many provisions that inhibit right of association such as allowing registrar to defer or deny registration, which have been abused.

The current constitution provides for this right in protective terms, but puts provisos whose interpretation has restricted its realisation in practice. The Draft Constitution expounds on this right providing new dimensions that capture the scope of the right. The Societies Act, the NGO Co-ordination Act, The Companies Act, and the Public Order Act are the laws regulating this right.

Challenges include: Slow pace in Law Reforms; Disparate associational registration laws and mechanisms.

### *The Right to Movement and Residence*

This right is broadly realised in Kenya but there are instances of inhibition caused by factors such as: *ethno-phobia; Ethnic violence/clashes; insecurity; lack of basic infrastructure* in many remote parts of the country; *discriminatory provisions in immigration laws* that restrict women's movement when accompanied by their children; *denial of travel/refugee status documentation* to deserving aliens with over 226 512 aliens being banished to refugee camps for many years of their lives; poverty and un-affordability of transport costs. *The current constitution* provides for the right but creates many provisos that water down its realisation. *The Draft Constitution* reiterates the right in clearer language. *The Immigration Act* creates a framework especially for cross-border and international movement. *A Refugees Bill* has been developed seeking to address this right for refugees.

Challenges include: Ethnicity; Poverty and un-affordability; Insecurity caused by refugees accessibility to arms; Limitation of physical transport infrastructure in remote parts; Lack of political will and prioritisation to address refugee encampment problem.

### *Right to Information and Expression*

Realisation of the right to information and expression in Kenya has increased in the last few years. Universal access to information and facility for expression has improved through full liberalisation of the sector such as licensing private broadcasters that broadcast in different languages and reach rural populations. The Draft Communication and Media policy seeks to create a progressive policy framework for the sector. There are four nation-wide newspapers and alternative media papers, many magazines in different themes of information. Tele-density has improved with subscriptions of 3.9 million to current providers and potential demand of 9.4 million. Fixed telecommunication lines stand at 4 per 100 in rural areas which is grossly inadequate but TELKOM is expanding automation of these areas. Only 20 of 80 licensed Internet service providers are operational using Internet backbone services provided by Telkom through JAMBONET and data services through KNPAC and KENSTREAM and VSAT. The ratio of accounts to users is too high with 52000 to 1.3 million users. Four other gateway keepers have been licensed.

Mass media is however still restricted in reach with print media facing distribution constraints and electronic media facing infrastructural constraints, and costs by users. Access to government information remains limited, but is being enhanced through the introduction of public participation in policy formulation, such as budgeting, NPEP, PRSP, Draft Constitution among others. There is still no mechanism for information from state agencies to reach popular media and the official Secrets Act inhibits this further. Majority of the poor also cannot afford radios and newspapers, while others are illiterate.

*The current constitution* provides for this right under section 79 but leaves out the important elements of right to seek information and ideas. *The draft constitution* corrects this omission and expounds on current provisions. *The Official Secrets Act, the Penal Code* and the *Public Security Act* affect this right. *The Official Secrets Act* is the main law, is out dated in general presumption that all state information is secret until its release has been specifically authorised and criminalises such illegal release with stiff penalties. Because of its general ambit, it endangers classifiable information. *The Penal Code* places serious obstacles on the free flow of information and expression because it places constraints on the *Public Security Act* gives the President powers to derogate from these rights without legislative or judicial oversight, and this was widely abused in KANU era. *The Kenya Broadcasting Act, the Film and Stage Plays Act, and the National Intelligence and Security Act* are other laws that affect this right.

Challenges include: Official Secrets Act; Culture of Secrecy in Government; Lack of mechanism for accessing state information; Expense on information technology/poverty and un-affordability; Slow pace of legal and institutional reforms.

#### *Freedom of Thought, Conscience and Religion*

This right has been freely enjoyed by all in Kenya since independence. Kenya is a religious society with a large religious population- 45% protestant, 33% roman catholic, 10% indigenous beliefs, 10% Muslim and 2% others. These are allowed to form umbrella organisations to co-ordinate their activities such as the NCKK; Hindu Council and Muslim Council. There has been an increase in evangelism and religious organisations have been granted broadcasting licenses. Such as Hope FM, Inoro FM, and Iqra FM. Religious organisations are given tax incentives under the Income Tax Act and the Customs and Excise Act for the social work they do and also their religious activities. Some religious educational organisations have however been reported to force students to learn their religions against their faiths. Muslims are also living in fear of biases and prejudice after terrorist attacks have been associated with Muslims.

The current constitution provides for this right under section 78, and the draft constitution expounds on it adding the rights not to be compelled to disclose one's religious affiliation; and that of equality of representation in saying prayers at public meetings. The Societies Act facilitates registration of religious organisations and the Education Act protects students in religious institutions from being forced to receive instruction or to attend worship in the school against their will and that of their parents.

Challenges include: Lack of enforcement of relevant provision of Education Act; Proposed Anti-terrorist legislation, and religious fundamentalism.

#### *Right of Participation in Public Affairs*

This includes right of equal opportunity to participate directly or by representation in public affairs, to vote freely, to be elected and access electoral machinery, and to equal opportunity of service to one's country. In almost all elections however there have been claims of irregularities that point to likely inadequacy of electoral machinery and lack of proper enforcement of electoral laws. Elections have been held regularly since independence in Kenya. Multiparty democracy has facilitated more people's engagement in organised politics. Whereas universal suffrage has been generally observed, certain categories of Kenyans have however not been accessed this right: members of disciplined forces, members of diplomatic missions abroad, citizens in *Diaspora*, elections officials, bankrupt individuals, those in lawful custody, and patients in hospitals.

The current constitution provides for multiparty politics, for freedom of information, expression and opinion, assembly and association that are important for public participation, and facilitates for representation through creation of parliament and electoral commission. The draft constitution elaborates and expands provisions as for instance through elaboration on effective representation under Chapters 9 and 10, such as creation of Ethics and Integrity Commission, among other progressive provisions. All legislation enabling the realisation of freedom of expression, assembly, information and opinion is construed as facilitating this right, and accordingly all constraining legislation of the above rights such as the Official Secrets Act, Public Order Act and Public Security Act are constraining of right to participation in public affairs.

The NARC government has adopted a policy of public participation in public affairs evident in public forums on constitutional development, and other matters of policy and law reform. Infrastructural changes within the media that have facilitated the extent of FM stations have been an effective tool of public participation in public debates. Women are still discriminated against

in representation opportunities with only 7.7% presence in current parliament. Affirmative Action Bill meant to fast track increased opportunities for women has been shelved.

Challenges include: Slow pace of legal reforms; Lack of political will for inclusive political practice; Lack of enforcement of existing laws; Public ignorance of political rights

#### *Right of freedom from Slavery*

This is the equal right of all not to be held in servitude, or be required to perform forced or compulsory labour except in the circumstances provided for as punishment for a certain crime among other things listed in the relevant Article.

Kenya has ratified the Optional protocol to the Convention on the Rights of the Child and Involvement and Children in Armed Conflict and is signatory to the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, child Prostitution and Child Pornography. Kenya is also a member of the International Labour Organisation and has ratified the following Conventions: Convention number 29 on Forced Labour; Convention number 105 on Abolition of Forced Labour; Convention number 182 on elimination of the worst forms of child labour. Child labour however is high in the country. This is mainly occasioned by extreme persistent poverty with parents in some areas sending their children to work in other peoples farms and plantations, as domestic servants, prostitution (especially in slum areas), and to beg, to supplement the family income. Lack of adequate personnel capacities to monitor the situation makes it difficult to enforce the related labour laws. There is evidence of increase in human trafficking involving mainly children and women.

The current constitution prohibits slavery, servitude and forced labour save as in the circumstances such as those provided under the Article with regard to forced labour. The draft Constitution provides for the same but does not list any exceptions. *The Penal Code* in section 147 provides that any body who procures or attempts to procure any girl or woman under the age of 21 to have carnal knowledge or to become a prostitute may be given any sentence of imprisonment at the discretion of the court. The Children Act prohibits specifically the sale of children and child labour. However it provides that the minister may make exceptions through Regulations with respect to children between the ages of 16 and 18 with regard to labour.

Challenges include: Lack of mechanisms for enforcement and policing; Slow pace of law reform; Lack of public education on rights of children and women

#### ***Economic, Social and Cultural Rights***

##### *The Right to Work*

This right includes include the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and obligates the state to take appropriate steps to safeguard this right.

Recent statistics show that there is gross inequality in work opportunities between the rich and the poor, with 77% of males in the richest 20% in active employment compared to only 62% in the bottom 20%. The participation of men in the labour force is also higher than that of women with women mostly occupying low-grade positions.

*Minimum wages* in Kenya are away below the amounts required for the basic survival and there is no enforcement mechanism even in the formal sector especially agriculture. The *right to strike* is

not recognised, and recent events have shown the government taking the approach of violation rather than protection of this right. There is no protection of workers in the informal sectors.

With regard to *labour market regulation*, a Sessional Paper on employment has been prepared and forwarded to parliament for debate and enactment. Six Labour laws have been reviewed and submitted to the AGs chambers for drafting of bills. *Child labour* with statistics in 2002 showing the working population of children comprised 984168 boys and 909596 girls. Though the Children's Act makes provisions against child labour, enforcement is a challenge because the monitoring and policing infrastructure is largely missing especially in the rural areas. In 2004, the *Persons with Disabilities Act* was passed and it contains major rights of work gains for persons with disabilities. The coverage of *social security* infrastructure is very low compared to the extent of the need, as they cater only for workers in the formal sector leaving out informal sector and smallholder agriculture workers. *Employees' rights in work* are denied by the now prevalent practice of employers hiring workers in casual basis for many years in order to escape paying benefits that are related to permanent employment.

The *current constitution* does not make any express provision of the right to work. It however makes some provisions that are facilitative of the right directly or indirectly such as the freedom of movement, association and assembly. The draft constitution elaborates on the current constitution, but does not pronounce expressly the right to work, but pronounces the right to fair labour practices, rights in work, employers rights and the rights of trade unions and employers organisations.

The *legislative framework* is disparate, and regulatory and focuses on rights in work, and not right to work includes the Employment Act, (CAP 226) and the Regulations of Wages and Conditions of Employment Act (CAP 229); the Trade Unions Act (CAP233) and the Trade Disputes Act (CAP234); and the Workmen Compensation Act (CAP 236) and the Factories and Other Places of Work Act (514).

Challenges included: Poor economic growth; Lack of public knowledge of this right; Slow pace of law reforms; Lack of domestication of right into constitutional right; Lack of political will for investment in areas with high potential for job generations such as the agricultural sector.

#### *The Right to Adequate Housing*

The right to adequate Housing is a core part of the right to an adequate standard of living. According to the 1999 National Population Census, there are about 3 million people in urban areas and about 6 million in rural areas in urgent need of proper housing. Recent figures have been put at 9 million in rural areas. There are about 750000 households in urban areas and 1500000 in rural areas that need to be housed. This deprivation manifests especially amongst the poor<sup>5</sup> who have no ownership abilities.

Under the new Housing policy however the government proposes measures that will, if properly implemented increase availability and access to finance for housing.

Ineffective facilitative infrastructure such as land policies, appropriate building codes and a balance in tenure and finance has locked out majority from home ownership opportunities. Lack

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<sup>5</sup> Ibid.

of effective and reliable land tenure system, lack of physical infrastructure including roads, lighting and water, and poor financing has negatively impacted on these initiatives.<sup>6</sup>

In urban areas, for instance Nairobi, over 60% of people live in slum dwellings which occupy only 5% of the surface area of Nairobi, and are characterised by congestion and overcrowding with density of up to 1300 inhabitants per hectare; lack of basic services (such as water, sewerage system and electricity); substandard housing or illegal and inadequate structures; unhealthy living conditions; hazardous locations; insecurity of tenure; poverty and social exclusion.<sup>7</sup> Kibera, the largest slum in Sub-Saharan Africa for instance has over 500000 inhabitants.

The estimated current urban housing needs are 150000 units per year. This level of production can be realised if the existing resources are fully utilised by the private sector with the enabling hand of the government. It is estimated that the current production of new housing units in urban areas is only 20000-30000 units annually, giving a shortfall of over 120000 units per annum. This is the shortfall that occasions proliferation of squatter and informal settlements and overcrowding.

*Ownership* for majority is low for both rich and poor in urban areas meaning that sustainability of the right is not assured. In urban areas, 76% of the poor and 80% of the non-poor rent their dwellings. In the rural areas 95% of the poor and 83.5% of non-poor own their dwellings due primarily to high incidence of land ownership.

*Forced evictions* are a common occurrence in Kenya.

Physical *Infrastructural facilities* are a vital component of the right to shelter. As a result of poor enforcement of the Physical Planning Act provisions with regard to provision of public utilities in areas where houses are self-built, a large number of urban populations in the country do not have access to these facilities. Further, *lack of trunk infrastructure* is a serious constraint to private sector housing development. *Inequalities* between wealthy groups and the poor characterises the realisation of this right. For instance with regard to access to safe drinking water, more than 93% of the richest 20% have access to clean drinking water compared to only 28% of the poorest 20%.<sup>8</sup> Gender inequality also manifests in the realisation of this right with women facing many challenges in this regard.

There is a glaring lack of *legal infrastructure* governing landlord/tenant relationships, and land ownership regime is confused and unavailable to the poor and certain regions of the country restricting the use of land as security for credit for housing development.

The *Rent Control Act* is under review to include the provisions that would empower the *Rent Tribunal* to arbitrate in rent disputes involving those living in slums. The *current constitution* does not expressly provide for the right to adequate housing, but it provides for other rights under which that right may be deduced such as the right to health, to life and to privacy. The *draft Constitution* however under section 61 expressly provides that every person has the right to accessible and adequate housing. The *laws* that form the legal framework for housing in Kenya

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<sup>6</sup> Kamau P.K & Omura Kenjiro, (2004), *Factors that Affect Self-Build Housing in Nairobi*, Kenya. Paper Presented at the ENHR conference, 2<sup>nd</sup> July-6th 2004, UK, pg2.

<sup>7</sup> United Nations (2004), *Report of the Special Rapporteur on Adequate Housing As A Component of the rights to an Adequate Standard of Living in Kenya*.

<sup>8</sup> International Water and sanitation Centre, Kenya: *Big Regional Gaps in Access to Water*, [www.irc.nl/page/14671](http://www.irc.nl/page/14671)

currently are mainly regulative without any provisions on the substantive right to housing. They include the Housing Act (CAP117); the Building Societies Act; the Rent Restriction Act; the Sectional Properties Act, and the Landlords and Tenants Act.

Certain provisions of the *Rent Restriction Act* restrict operations of the rental market in favor of the tenant interests more than those of the landlord, invariably discouraging investment in rental housing as many people who buy or build houses for rent do so with the interest of making a profit. *Building regulations and infrastructure standards* are still too restrictive to enable the use of appropriately functional materials. The present *Housing Act*, only covers the operations of the National Housing Corporation. The actions of the Ministry in-charge of housing development matters are limited due to absence of the legal authority.

Sessional Paper No. 3 on *National Housing Policy* for Kenya of June 2004, aims at ‘arresting the deteriorating housing conditions countrywide and to bridge the shortfall in housing stock arising from demand that far surpasses supply, particularly in urban areas. The policy targets include urban housing, rural housing, slum upgrading and vulnerable groups with proposals for the solutions to problems in each. The policy also addresses issues of housing inputs such as land, infrastructure, building materials, building technology and financing; and issues of estate management and maintenance, and legislative and institutional framework for housing.

#### *The Right to Clean and Sufficient Water*

A large portion of the Kenya population has no access to safe and adequate drinking water. The current NDP<sup>9</sup> indicates that about 75% and only 50 % of the country’s urban and rural populations respectively have access to safe drinking water, which has been achieved through provision of some 330 gazetted water sources countrywide, accounting for 80% of the served population, while the rest 20% of the population being served by non-gazetted schemes. According to the National Health sub-sector Strategic plan, the major causes of morbidity in Kenya are diseases caused by poor environmental management and hygiene conditions. The hygiene problems are mainly as a result of lack of adequate water for hygiene purposes and lack of safe drinking water resulting to a marked increase in water borne diseases such as typhoid and cholera.

Lack of proper management and regulation of water acquisition and distribution through out the country has led to misuse, pollution, depletion. Frequent conflicts between households, wildlife and commercial groups sharing water sources illustrate gross inadequacy. Water resources across Kenya are also threatened by pollution, siltation, hence reducing availability, safety and cleanliness and acceptability of Kenyans realisation of their right to water from these sources. Lake Victoria is under attack from the hyacinth weed, Lake Turkana is threatened with drying up, and Lakes Elementaita, Nakuru, Naivasha and Yala river are threatened with siltation and pollution, and the Mere springs in Malindi have stopped flowing.<sup>10</sup>

The enactment of the Water Act 2002 provides an improved legislative framework for more effective management, conservation and regulation of rights to use water and provide for the regulation and management of water supply and sewerage service, all of which will address those specific issues to stem the degenerative process discussed above.

The current constitution makes no provision for the right to clean and sufficient water. The draft constitution however pronounces this right vide section 65. The Water Act, (CAP 372) 2002 is the

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<sup>9</sup> Page 86.

<sup>10</sup> Ibid.

core legislation informing and regulating the sector. The Water Act 2002 provides an improved legislative framework for more effective management

### *The Right to Health*

The right to health is the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. The extent of realisation of the right to health in Kenya improved between 1960 and 1992, with *infant mortality* rates dropping from 119 to 51 per 1000 live births and *under-five mortality* rate dropping from 202 to 74 per 1000 live births.<sup>11</sup> This rate of realisation was reversed in the decade of the 1990, with infant and under-five mortality rates increasing from 51 and 74 in 1992 to 74 and 112 in 1998, respectively. The current situation, according to the most recent statistics from the Kenya Demographic and Health Survey 2003,<sup>12</sup> is worse with infant and under-five mortality rates having increased further to 78 and 114 in the year 2003, respectively. Increasing poverty, deterioration of quality of and poor access to health services due to introduction of user fees, decline in per capita, unavailability of food, increased incidence of HIV/AIDS, and limited budget allocations to the health sector have been suggested as some of the contributing factors to this trend<sup>13</sup>. *Maternal mortality* was estimated at 590 per 100000 in 1998, representing 27% of all the death of women aged 15-49 years.<sup>14</sup> *Life expectancy* rose from 40 years in 1963 to 60 years in 1993<sup>15</sup> and declined to 51 in 1998.<sup>16</sup> The 1998 Kenya /Demographic survey estimate of the prevalence of chronic malnutrition and stunting is 33%, which is the same as the 1993 estimate. According to Kenya Human Development Report<sup>17</sup> approximately 1.5 million Kenyan Children under five years old were chronically under-nourished in 1994.

Major causes of *morbidity or illness*, have changed in the last two decades, with malaria and acute respiratory infections accounting for almost half of the reported visits to outpatient facilities. There are three types of *health facilities* in Kenya: hospitals, health centres and health sub-centres including dispensaries and mobile clinics. There were 4,125 health facilities in the country in 1997 with 51% being public and the rest private. Increases in health facilities are neutralised by increases in population, emerging forms of morbidity and lack of equitable distribution. The government has invested significantly in expansion of health personnel and health infrastructure through training. By 1999 there were 4411 doctors, 734 dentists and 1650 pharmacists, up from 734 doctors, 26 dentists, and 148 pharmacists in 1965. In 1999 the ratios of doctors to 100000 persons was 15.3 while that of clinical officers was 14.9. *Distribution* of this growth is however very uneven with heavy concentration of government medical staff in Nairobi. Government health institutions are faced with *staffing problems*, which include over-staffing at the lower cadres and deficits at professional categories *Poor remuneration and low morale* is also a factor in poor healthcare provision

With regard to *immunisation* the percentage of children with a vaccination card dropped from 69 in 1993 to 55 in 1998 hence registering a decrease in access to these services with distribution across provinces being unequal. *Affordability* is a major hindrance to access to quality healthcare

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<sup>11</sup> Government of Kenya (2000), *Interim Poverty Reduction Paper for Period 2000-2003*, Nairobi Government Printer.

<sup>12</sup> Government of Kenya (2003), *Kenya Demographic and Health Survey, 2003*, Preliminary Report, Nairobi: Government Printer.

<sup>13</sup> Kimalu Paul et al, op cit, p10.

<sup>14</sup> Republic of Kenya (2002), *National Development Plan 2002-2008*, p64.

<sup>15</sup> Government of Kenya, (1994). *Kenya Demographic and health Survey, 1993*. Maryland: Macro International Inc.

<sup>16</sup> Kimalu Paul et al, op cit, p 11.

<sup>17</sup> UNDP/Government of Kenya, (1999), *Kenya Human Development Report*.

and essential drugs for majority of Kenyans with 8.9% of Kenyans not visiting government health facilities because of cost, yet 70% in rural areas and 81% in urban areas not affording private healthcare and rely on public health facilities. *Inefficiency* in the health system is a major cause of inaccessibility of healthcare services to majority. *Lack of drugs* too is a major problem with 54.2% of Kenyans not visiting government health facilities because of non-availability of drugs.<sup>18</sup> According to UNDP<sup>19</sup>, only 36% of Kenyan population needing them had access to essential drugs in 1999. The *balance between curative and preventive care* is grossly skewed, with recurrent expenditure in 2002/2003 indicating 50.8% accounted for curative spending, while preventive and promotive care accounted for only 5.3. *Physical accessibility* to healthcare facilities is also a great as a quarter of the Kenyan households are located more than 8 kilometres from any form of health facility. *Health insurance* is grossly insufficient, with only the core provider being the inefficient and ineffective NHIF, which is rarely used by the poor. Private third party insurance is a growing sector but is still small and covers mainly those in urban areas employed in the formal sector. Moreover, the poor rarely use most of the registered health facilities with NHIF.<sup>20</sup> The MOH has initiated the development of an alternative scheme referred to as the National Social Health Insurance Fund (NSHIF) which has no yet been approved for implementation. It is hoped to make health insurance more accessible to the poor. *HIV/AIDS pandemic* is the greatest health problem in Kenya, believed to have reversed the significant gains made in health indicators since independence.

The *current Constitution* does not have any provision for the right to health. The *draft Constitution* under section 61 provides for the right to health for everyone, which includes the right to health care services including reproductive health care. Further, it provides that no one shall be denied emergency medical treatment. The *legislative framework* consists of disparate pieces of legislation providing for protection of different aspects of health including; the Public Health Act; The Children's Act; The Narcotic Drug and Psychotropic Substances and Control Act; the Food, Drug and Chemical Substances Act.

#### *The Right to Adequate Food*

The right to adequate food refers to the right of everyone to be free from hunger. The current constitution does not make any provision for the right to food. The draft constitution however under section 64 provides that every person has got the right to be free from hunger and to adequate food of acceptable quality. There is no single legislation dealing with the issue of food security but for some disparate provisions in laws on agriculture, land control among other things. These include the Agriculture Act (CAP 319); Agricultural Produce Marketing Act (CAP 320); the Public Health Act, the Food, Drugs and chemical substances Act; and the Meat control Act among others.

A large majority of the Kenyan population is food insecure. Estimates indicate that about 56.6% of the population lack access to adequate food and even the little they get is of poor nutritional value and quality.<sup>21</sup> According to the World Food Programme, Kenya is considered to be a low income, food –deficit country with an aggregate household food security index of 7.17, ranking it 51<sup>st</sup> out of 61 countries.<sup>22</sup> Food insecurity is occasioned by low agricultural productivity,

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<sup>18</sup> Kimalu et al op cit., p58.

<sup>19</sup> UNDP (2001), *Human Development Indicators*, 2001.

<sup>20</sup> Mwabu et al (2002), "Quality of Medical Care and choice of medical treatments in Kenya: An empirical analysis", *Journal of Human Resources*, Vol.28, No.4.

<sup>21</sup> Republic of Kenya, 92004) *Strategy for Revitalising Agriculture 2004-2014*. Ministry of Agriculture and Ministry of Livestock Development. p28.

<sup>22</sup> World Food Programme, website <http://www.wfp.org>

inadequate access to productive assets (land and capital), inadequate infrastructure, limited well functioning markets, high population pressure on land, inadequate access to appropriate technologies by farmers, effects of global; trade and slow reform process. The issue of access to the productive asset of land has been exacerbated by the uncoordinated land policy which has led to low production as a small portion of the population holds large tracts of fertile land that lie fallow.

With regard to *production*, Ministry of Agriculture (MOA), estimates that out of 34 million bags of maize required by the country annually, production fluctuates between 16.6 million bags in some lean years to 34.8 million bags in some boom years. Production is lowest, and therefore food insecurity is most prevalent in *the arid and semi-arid areas (ASALS)* because of recurring natural disasters of drought, livestock, diseases, animals and crop pests and limited access to appropriate technologies, information, credit and financial services.<sup>23</sup> Further *inadequate land tenure systems* means that many farmers do not have titles to the land on which they farm, and as such cannot use it to obtain credit to invest into more productive food crop farming. With regard to *relief*, for those in deprivation, it is estimated that the government spends about US\$ 40 million on famine relief. <sup>24</sup>This figure is even higher with figures from NGOs contribution. The state's duty to aid under human rights is not meant to be a permanent or predictable repeated occurrence. With regard to *accessibility*, even where food is available, income poverty levels in 54% of the population living below poverty line mean many households cannot *afford* and are therefore food insecure. Food prices are also affected by *over- taxation* and prohibitive costs of farm inputs such as fertilisers, and poor infrastructure such as roads leading to high transport costs also affect food pricing.

Lack of *availability and low distribution* is affected by the poor transport infrastructure; Inadequate storage facilities and technologies; and mismanaged regulatory boards which take a large portion of the ministry's budget without much returns. *Nutritional acceptability* of food in Kenya is low with MOH recording 19.2% of all pre-school going children in the country suffer from mild anaemia, while 54.2% of the same group suffers from severe anaemia. 50-60% of all school going children lack vitamin A as well as Zinc. 70% of all pregnant women are deficient in iron leading to the birth of underweight babies 42% of all women in the country are deficient of iron and 15.9% of all male are similarly deficient. The 2003 Demographic and Health Survey indicates that 31% of Kenyan children are stunted with 11% severely so; and one fifth of Kenyan children are underweight, with 4% classified as severely underweight.

#### *The Right to Education*

The *current Constitution* makes no provision for the right to health. The *draft constitution however under section 62* provides that every person has the right to education. It obligated the state to institute a programme to implement the right of every child to free and compulsory pre-primary and primary education, paying particular attention to children with special needs; and to take measures to make secondary and post-secondary education progressively available and accessible. There are *14 Acts of Parliament* that in one way or other touch on different aspects of education or other. These include the *Education Act, the Children Act, the Adult Education Board Act*, and others creating the various universities. Most of these laws create institutions of education and administrative institutions such as boards.

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<sup>23</sup> Kinyua J, Ministry of Agriculture, *Assuring Food and Nutrition Security in Africa 2020*.

<sup>24</sup> FEWS NET (2003), *Kenya Food Security: Food Insecurity May rise in Coast*. November 2003, p3.

*The Education Act* which is supposed to be the overarching law in the sector, harmonising other laws, and covering all needy areas, concerns itself with the issue of governance of schools and other learning institutions. The Act contains provisions for the regulation and progressive development of education in Kenya and lays primary emphasis on primary and secondary education. *The Children Act*, is a landmark legislation in Kenya, which guarantees free and compulsory basic education and the right to health care. *Section 7* of the Act provides that ‘every child shall be entitled to education the provision of which shall be the responsibility of the government and the parent’s and that ‘every child shall be entitled to free basic education which shall be compulsory in accordance with Article 28 of the ICRC.’ It further imposes a sanction upon any person who willfully violates this right, with a term of imprisonment not exceeding 12 months or a fine not exceeding fifty thousand shillings or both such fine and imprisonment.

The education sector has been said for a long time to suffer from lack of proper legislative and policy framework, and this led to the development of the *Draft Education Bill of 2003* which aims to: repeal the Education Act; consolidate all the laws relating to education in Kenya; and among other things gives examples of policy guidelines to be followed including: access and equity, quality and relevance, affordability, efficiency, management, gender, equality and others. *Enrollment* in the in the various levels is characterised by gender, region and income disparities. In 2000, the National Gross Enrolment Rate (GER) in primary education was 87.6%, but lonely 17.8% in NE Province as compared to 106% in Central Province. In the same year, female representation was 49.1% at pre-primary, 49.4% at primary, 46.2% at secondary, 29.2% in national polytechnics and 31.7% in public universities.<sup>25</sup> Females are also grossly under-represented in the post-school science, maths and technology based courses, and in other post school institutions. *Grade repetition* and *failure to complete* are serious impediments to full realisation of the right to education in general but especially for low-income groups and for girls.<sup>26</sup> *Completion rates* have remained below 50% and have been on the decline since 1986. For example only 43.2% of the girls and 45% of the boys enrolled in Standard 1 in 1989 completed Standard VIII in 1996. Poor parents increasingly withdraw their children from school when faced with increased demands on household incomes.

*Affordability* still is a great hindrance to accessibility for many especially after the introduction of cost sharing. In 1999 the average education cost burden for the household was too high, amounting to four months income, and resulting with poor households spending less on it and withdrawing their children from school. Even after UPE, costs of uniforms, food, and fare in urban areas still inhibit attendance by pupils from very poor households. Further the FPE programme has left out of its ambit *informal community schools* mostly found in the informal urban settlements. For instance, Kibera slum alone has over 15 such schools each with populations of between 350-1500 students. *At secondary school level* the average proportion of costs borne by households are high at 46% for day schools; 63.8% for boarding schools and an overall average of 56.6% for day and boarding schools, leading to decline in enrollment rates at that level. Transition rates from primary to secondary have remained below 50% over the last ten years standing at 47% in 2003<sup>27</sup> and the gross enrollment rates are much lower for secondary education .<sup>28</sup>

*High wastage rates*, as a result of high drop out rates, low transition between sub-sectors, over-centralised school curriculum development and unduly lengthy completion periods in higher

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<sup>25</sup> Ibid.

<sup>26</sup> Op cit note 9, p40.

<sup>27</sup> Ibid.

<sup>28</sup> ROK, NDP, op cit, p55.

education affects realisation of this right. Among causes responsible for drop out and non-completion is the HIV/AIDS pandemic and increased poverty.<sup>29</sup>With regard to *equity in realisation along gender lines*, female and male enrolment ratios at the primary level are not dissimilar and in some areas especially urban females appear to have slightly higher rates in primary GER.<sup>30</sup>*Regional disparities* at the national level are more alarming with overall enrolment rate in North Eastern Province being just about 15%, with rate for girls being only 10.6%. With regards to equity in affordability (income levels), overall, fewer than 9% of secondary students are drawn from the poorest per capita expenditure quintile, while nearly 30% are drawn from the richest quintile. As with primary education, there are serious disparities amongst districts in access to education. *Children with Special Education needs* have not accessed this right equally as other children with the proportion of government (MOE) going to special education having declined from a meagre 0.46% in 1980 to 0.09% in 2000/2001, according to Economic Surveys in those years. *Early childhood education* has remained one of the least funded Pre-school education has remained the responsibility of parents community organisations, NGOs and local government authorities. *Quality assurance* is also a problem in the current education system with the inspectorate arm of the ministry being said to be inefficient.

#### *The Right to a Clean and Healthy Environment*

Kenya has over 35000 *identified species* of animals, plants and microorganisms, and a wealth of indigenous knowledge on different uses of plants and animal materials, with medicinal value.<sup>31</sup> The country has however over time *lost some of her well known bio-diversity* resources mainly due to population increase, habitat destruction, desertification, over-exploitation of species and conversion of wetlands into agriculture and settlement.<sup>32</sup>*Limited functional regulatory mechanisms* of importation of alien invasive species including Genetically Modified Organisms (GMOs) has exacerbated this challenge to environmental conservation and preservation<sup>33</sup>, leading to increased incidence of *invasive weeds* in most of her water bodies including the water hyacinth and *salvinia molesta* weed and land-based invasive weeds that have been officially noted in the ASAL districts. Pest invasions have been cyclic, with the most notable being aphids and army worms, which destroy agricultural products resulting in famine.<sup>34</sup>

With regard to bio-diversity and ecosystem Management, as there is no mechanism for regulation, *illegal collection of genetic resources* mainly for industrial purposes has increased, denying the country of its rightful *property rights* in the it's environmental endowment.<sup>35</sup>

*Desertification and environmental disasters* statistics show that *floods in Kenya will increase in intensity, and in spatial and temporal terms*.<sup>36</sup>

*Environmental pollution* management is poor with, studies showing that there is high presence of oxides of sulphur and nitrogen, carbon monoxide particulates, hydrogen sulphide and other organic gaseous pollutants in the main urban centres in the country.<sup>37</sup> Disease patterns are also related to the air quality, with for example acute respiratory infections accounting for almost half of the hospital visits and 22% of Kenya's Medical cases.<sup>38</sup>

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<sup>29</sup> Ibid.

<sup>30</sup> ROK, *Welfare Monitoring Survey II* 1994.

<sup>31</sup> RoK, (2002-2008), op cit p118.

<sup>32</sup> Ibid.

<sup>33</sup> Ibid.

<sup>34</sup> Ibid.

<sup>35</sup> Ibid.

<sup>36</sup> Ibid, p119.

<sup>37</sup> ibid.

<sup>38</sup> Ibid.

Agricultural activities, industrial processes and service providers have become major polluters of the environment resulting in high levels of waterborne and respiratory diseases. Some of these chemicals end up in the agricultural products in levels too high for human health. With regards to *environmental planning and education*, the adoption of the NEAP marked a significant step towards integrating environmental matters in development planning process. In addition, the EMCA is set to ensure that all projects are subjected to an Environmental Impact Assessment (EIA). The government under NDP plans to use tariff market and prices to influence behaviour and attitudes towards environment and natural resources conservation.<sup>39</sup> *The forestry sector is faced with problems* of uncontrolled logging grazing and forests fires; excisions, urban development and human settlement and increased demand for wood fuel, with the demand in 2002 for wood production standing at 13.7 million cubic metres being expected to outstrip the sustainable supply coming from indigenous forests, plantations and ASAL regions.<sup>40</sup>

Kenya has got ample potential in wildlife with 59 wildlife parks covering about 8% of the total land area under protected area system managed by the Kenya Wildlife Service (KWS). *Wildlife management and conservation is hampered* by land tenure constraints, inadequate laws, ownership rights and lack of land use and zoning policies. Despite a 1977 ban on wildlife hunting and other forms of wildlife utilisation, wildlife numbers, especially the large herbivores have continued to decline. On fisheries, the production in the Lake Victoria for instance is considered unsustainable with a potential collapse of the Nile perch fishery imminent.<sup>41</sup>

With regards to *renewable energy sources*, Kenya's energy demand is increasing at an estimated rate of 5% per year and it is facing a wood fuel crisis. It is estimated that over 93% of the rural population is almost 955 dependent on wood fuel while over 90% of commercial and urban population are dependent on electrical energy. This dependence leads to increased pressure on environment and natural resources and especially the forest resource. *Solar energy* has not been developed in Kenya with only 120000 solar home systems rated at approximately 1.3 MW of power. This is because of cost of the systems, lack of standards and poor consumer education. Lack of effective technology and promotional strategies have hampered the exploitation of *wind energy* and *biogas*.

Funding for environmental activities is grossly inadequate with for the Ministry of Environment and Natural Resources, receiving only 1.3% of overall recurrent expenditure; 1.7% of overall development expenditure and 1.4% of total government expenditure.

The current constitution makes no provision for the right to a clean and healthy environment, but the draft constitution under section 67 makes elaborate provision of it. The over-arching legislation on the environment in Kenya is the Environmental Management and Coordination Act (1999) (EMCA), which provides that in section 3(1) that 'Every person in Kenya is entitled to a clean and healthy environment and has the duty to safeguard and enhance the environment'. Other laws forming the legal regime on environmental issues include: *Forestry Act (CAP 385)* and *Wildlife Conservation and Management Act, 1985*.

### ***Women's Rights***

#### *General Legal Framework*

The *current constitution* provides for the equal entitlement to all, of rights and freedoms and against discrimination of any kind, but is restricted by section 82(4) which excludes its application to personal law on matters. The *draft constitution* provides for equality of all, outlaws

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<sup>39</sup> *ibid.*

<sup>40</sup> *Ibid*, p124.

<sup>41</sup> *Ibid*, p29.

discrimination including on basis of pregnancy and marital status and provides for affirmative action. There is no one single law that provides for women's rights issues but disparate provisions are found in different laws. Some laws that are violative of women's rights include the *Citizenship Act*, and *Immigration Act*. There have been law reform efforts on women's rights and issues especially emanating from the recommendations of the Task Force on Laws Affecting Women, but these have been pending for years and lagging behind international developments on women's rights. Examples are such as the Equality Bill; the Employment Act (Amendment Bill); Income Tax Amendment Bill; Domestic Violence (Family Protection) Bill 1999 and the Sexual Offences Bill among others.

### *Specific Rights*

#### *The Right to Education*

There is no express provision on gender in the Education Act or any other of the 14 laws touching on education. Despite marked expansion in the education sector in the last decades, gender disparities in terms of access to education, retention in school, transition from one level of education to another, and in general performance have become more pronounced. Gender gaps are still evident at the regional and district level.<sup>42</sup> Illiterate women still outnumber illiterate men. In 1994, 23.4% of male and 55.3% of female heads of households were illiterate.<sup>43</sup> Illiteracy rates among females is almost twice (21%) that of males (14%).<sup>44</sup> This inequality also takes a regional dimension with 91.8% of women in Nairobi being literate and only 6.4% women in NE province.<sup>45</sup> Regional disparities in gender equality in access to education are alarming with 93% of women in NE province be said to have no education at all.<sup>46</sup>

#### *Protection Against Violence*

The National Plan of Action for elimination of Female Circumcision by 2019, the National Policy on Gender and Development, Public Officers Safety Act 2003, the National Policy on Gender and Development, the Criminal Law Amendment Act 2000, the Sexual Offences Act 2006 are all initiatives set to deal with violence against women. Pending bills that are also facilitative of the right include the Domestic Violence (Family Protection) Bill, HIV/AIDS Prevention Bill and Refugee Bill. Violence against women is rampant and increasing as illustrated elsewhere in this report, with girl being raped every 30 minutes in Nairobi<sup>47</sup> and 49% of all women having experienced violence.<sup>48</sup> Authorities are lax in taking deterrent measures and currently there is no law, adequate programs and services to comprehensively address prevention and management and rehabilitation of victims. Police officers, lawyers, judges, doctors and other administrators and service providers do not have adequate skills to detect or manage survivors of violence and there is no maximum sentence for rape and defilement.

#### *Non-Discrimination and Equality of Opportunity and Treatment in Employment and Occupation and Right to a Livelihood*

The Employment Act does not provide for gender equality or for remedy in the case of discrimination. Indeed some of its provisions (30, 36, and 37) prohibit the employment of women in some professions. With regards to *social security*, both the NSSF and NHIF cater solely for people in formal paid employment. Majority of women are engaged in the agricultural sector,

<sup>42</sup> Republic of Kenya (2000), *National Gender and Development Policy*, p21.

<sup>43</sup> Ibid.

<sup>44</sup> SID (2004), op cit, p43.

<sup>45</sup> Ibid.

<sup>46</sup> <sup>46</sup> Bo Goranson 'Affirmative action isn't degrading' *Daily Nation* Wednesday, March 9,2005, p.9

<sup>47</sup> Bo Goransson 'Affirmative action isn't degrading' *Daily Nation* Wednesday, March 9,2005, p.9

<sup>48</sup> SID (2004), Op cit p45.

informal and other sectors and therefore do not benefit from these crucial health and social security systems.

There are wide disparities in employment by between men and women in Kenya. Data shows that men not only have higher incomes, but are also better placed in the labour market in terms of the kind of jobs they do.<sup>49</sup> Women mostly occupy low-grade positions, especially in the public sector and are concentrated in the non-professional positions. Only 13% of the total professionals in public service in 2002 consisted of women.<sup>50</sup> Unemployment for Kenya women is twice that of men. Incomes from employment for Kenya women are 65% of men's incomes.<sup>51</sup> Nationally, the illiteracy rates among women are 21%. These work on casual basis with no job security.<sup>52</sup> Only 394 700 women are in wage employment compared to 995 600 men (id). The proportion of women employed in both formal and informal sectors has slightly increased from 29.5% in 2000 to 29.6% in 2003. Women are primary economic actors as labour force in the agriculture and informal sectors where there has been an economic decline.<sup>53</sup> Yet, they are excluded from social protection and employment safety legal frameworks such as the Employment Act, NSSF, Workmen's Compensation Act. Under the Draft Constitution, Section 60(1) Every person has the right to social security.

#### *Right to Health Including Sexual and Reproductive Health*

*Maternal mortality* is increasing due to limited facilities for safe maternity on account of lack of budgetary allocation to implement the reproductive health policy. 76% of those infected with HIV in sub-Saharan Africa are women. The *prevalence of HIV/AIDS* in Kenya is higher among women than men, especially middle-aged women, where it is 12% compared to men's 6.6% in the ages 30-34.<sup>54</sup> Abortion related deaths and health complications are on the increase, as are cases of health conditions related to sexual abuse especially in children. The HIV/AIDS Bill seeks to provide a legal framework for the prevention, management and control of HIV and AIDS. The Draft Constitution, section 61(1) grants everyone the right to health, which includes the right to health care services, including reproductive health care.

#### *Equal Rights to Political Participation and Decision-Making*

The Draft Constitution provides for the membership of women in all levels of government. The *National Gender Policy* aims to enhance gender parity in political participation and decision-making. The mandate of the *National Commission on Gender and Development* includes enhancing women's participation in public affairs, and the proposed *Affirmative Action Bill* is intended to fast-track gender parity in decision-making positions in the country.

Kenyan women have been grossly under-represented in both the political and other decision-making spheres of life. Women's groups represent the primary decision-making outlet for women in Kenya. Currently, there are over 90,000 women groups in the country with a membership of<sup>55</sup> 3,900,548 members and their paid up contribution standing at Kshs. 381,800,000.<sup>56</sup> Whereas women have been able to organize at the community level, they have limited economic control at the household levels. At the national level, their access to and control over resources is virtually non-existent. Women's ability to organize at community level has not been translated into

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<sup>49</sup>SID (2004), op cit p38.

<sup>50</sup> Ibid.

<sup>51</sup> Bo Goransson 'Affirmative action isn't degrading' *Daily Nation* Wednesday, March 9,2005, p.9

<sup>52</sup> IEA Budget 2004/2005: A Guide for MPs (June 2004)

<sup>53</sup> id.

<sup>54</sup> Ibid, p44.

<sup>55</sup> ROK, Gender Policy, op cit p18

<sup>56</sup> Ibid.

political clout either. Women's groups are controlled and managed by women and focus on women issues. The Government's response to women's groups has been welfarist and the regulatory framework has been rudimentary.<sup>57</sup> The representation of women in the Trade Unions Movement has been low, a factor that is closely linked to the low participation of women in wage employment. There has been a remarkable improvement in women's representation in the Judiciary over the years and at various levels. This has been more significant at magisterial level than at higher levels.<sup>58</sup> The Ninth Parliament has the highest ever-achieved level of representation by women in Kenyan history with 18 women out of 222 members. This is only 7.2% however, and falls drastically short of the UN target of achieving 30 per cent representations of women in politics by 2005. Women represent only 13% of senior government officials. In local authorities, they represent a meagre 10%.<sup>59</sup>

#### *Equal rights in relation to marriage, nationality and inheritance*

The *Draft Constitution* provides that a child's mother and father, whether married to each other or not, have equal responsibility to protect and provide for the child and further bestows the power to bequeath citizenship upon marriage on mothers as well, to their children at birth. It also provides that 'Citizenship is not lost through marriage or the dissolution of marriage'. The *Citizenship Act* bestows the power to bequeath citizenship upon marriage on men and in fathers, to their children at birth. Women do not enjoy the right. Women who wish to travel are forced to seek permission or proof of their fathers or spouses citizenship to secure documents.

#### *Equal rights in relation to property*

Lesser rights for women relating to marriage and property originate in their treatment as dependents whose legal, economic and social status is derived from that of the 'head of the family'.<sup>60</sup> Land tenure systems that have done away with the idea of community usufruct (which was fair to women users) have alienated women from ownership of land. Men own 95% of all landholdings in Kenya while women own just 5%. Due to their little experience in dealing with formal financial institutions, women tend to have smaller businesses and are less likely to own land or other assets as collateral. Discriminatory Bank policies exist; permission of husbands is required in order to grant credit to wives. This hinders women's access to productive resources. Women are also excluded from membership of agricultural cooperatives due to administrative arrangements governing this sector that recognise title holders as the official channel for benefits of agricultural production, regardless of the fact that it is the women who form the productive labour. UNDP reports indicate that women do 80% of agricultural work yet access only 5% credit in loans.

The Succession Act, 1981 stipulates that women may inherit property as dependents of the deceased. Section 29(a) includes wives in its definition of 'dependent'. Socio-cultural norms in some communities prohibit this, especially where such property is land. Under section 82 (4) (b) & (c) of the *current constitution*, allowance is given for the application of personal law on marriage, divorce, burial and devolution of property at death where it exists. Section 39(1) of the Succession Act curtails the right of women to her deceased's child's property by stipulating the order of priority in devolution of an interstate's estate. First, the father, then the mother of the deceased, if the father is dead. No provision is made for sharing of the property. The *Draft Constitution* (Section 37 (2)) provides that women and men have an equal right to inherit, have access to and manage property.

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<sup>57</sup> Shanyisa Khasiani, op cit.

<sup>58</sup> Ibid.

<sup>59</sup> Bo Goransson 'Affirmative action isn't degrading' *Daily Nation* Wednesday, March 9, 2005, p.9

<sup>60</sup> Katarina, opcit.

### *Freedom from Economic and Sexual Exploitation*

*Anti-trafficking laws* have primarily focused on criminal legislation on trafficking for purposes of prostitution. In the absence of comprehensive legislation specifically dealing with trafficking, the situation is tackled by means of laws in place to deal with a wide range of de facto situations e.g. prostitution, child abuse and exploitation, child labour and employment regulations. *Penal Code* prohibits abduction - the forcible detaining or taking away of a woman of any age with the intention to marry or carnally know her; makes it an offence to procure or attempt to procure any women or girls to become, either in Kenya or elsewhere, a common prostitute; or to leave Kenya, with intent that she may become an inmate of or frequent a brothel elsewhere; makes it an offence for a female and male person to exercise control, direction or influence over the movements of a prostitute in such a manner as to show that he/she is abiding, abetting or compelling her prostitution with any person, or generally. All these offences related to trafficking in women and prostitution are classified only as mis-demeanors carrying a maximum sentence of three years.<sup>61</sup> There is no government facility and apart from an NGO, FIDA, which provides legal assistance, there are no organizations providing assistance to trafficked women returning (or attempting to return) to Kenya.

### *The Rights of Children*

*The Draft Constitution* obligates the state to take steps to implement in law and administration the provisions of the Constitution and of international instruments and standards on the rights of the child; and as *parens Patriae* to provide an enabling environment for children to enjoy their basic needs. *The Children Act of 2001*, is one of the most progressive human rights legislation in Kenya as it has effectively domesticated the ICRC in one legislation. The Children's Department; Family Division of the High Court; the Children's Abuse Crisis Desk and a Hotline service; the Peace House for abused children; the Secretariat in the Ministry of Gender, Culture and Social Services with the mandate of coordinating matters relating to children; National Council for Children's Services (NCCS); *District Children's Advisory Committees*; National Drugs Control Council and the National Agency for the Campaign against Drug Abuse; National Commission on Human rights; The National Policy on Gender and Development are all tools and mechanisms with full and part mandates for the promotion and protection of the interests of children. Kenya's policy framework on children's rights is inadequate both in content and implementation. There are also social, cultural and traditional barriers that hold back the implementation process. Inadequate resources; lack of special programmes for vulnerable groups of children; laws that contradict the Children's Act and economic and social difficulties such as ethnic clashes and evictions further impede realisation of children's rights.

### *Definitions of the Child*

There is a disparity between the legal minimum ages for marriage of boys and girls under the Marriage Act (CAP 150), the Hindu Marriage and Divorce Act and the Children's Act with the latter describing a child as anyone below the age of 18. Under customary law, some communities deem a person ready for marriage after he/she undergoes the relevant initiation rites or after puberty. The Adoption Act (Cap 143) and the Guardianship of Infants Act (Cap.144) define an infant as a person under the age of 18 years excluding persons who have been married. This implies that marriage confers adult status, irrespective of age. The Sexual Offences Act provides 18 years as the legal age of consent for marriage. The Penal Code (CAP 63) provides that a person below 8 years is incapable of forming criminal intent and that a male child below the age of 12 years cannot commit the offence of rape. The Criminal Law Amendment Act raised the age

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<sup>61</sup> CEDAW, 3<sup>rd</sup> and 4<sup>th</sup> periodic report of Kenya to the CEDAW, CEDAW/C/KEN/3-4 p. 14.

of consent to sexual intercourse for a girl, from 14 years to 16 years. This is in contradiction to the Children's Act which defines a child as a person below the age of 18, making 16 and 17 year olds children, who lack the legal capacity to consent (to sexual relations and other legal contracts). The Convention On the Rights of the Child calls upon the state to set minimum ages for employment. Kenya ratified the ILO Convention No.138 on Minimum Age for admission to employment in 1979 which specifies not less than 15 years as the minimum age for employment (Article 2(3)) and sets the age of 18 years for work which is likely to jeopardize the health, safety or morals of young persons and allows national laws or regulations to permit employment of persons 13 to 15 years of age on light work.

Under the Employment Act the minimum age for employment in an industrial undertaking is 16. There is no legal minimum in the agricultural and services sectors, and for domestic work. There is no legal minimum age under the Regulations of Wages and Conditions of Employment Act, at which a person may independently bring a matter before court. According to the Trade Unions Act (Cap.233) children below 16 years may not participate or be represented in trade unions. The Minister of Labour, under the Children's Act is required to make regulations in respect of periods of work for children above the age of 16 years. This is yet to be done. Under the Armed Forces Act (Cap 199), persons under the age of 18 may be recruited in the armed forces with the consent of their parents, guardians or the District Commissioner. While recruitment into the armed forces or direct participation in hostilities is expressly prohibited for those under age 15, article 38 of the Convention on Children's Rights, an Optional Protocol to the Convention on the involvement of children in armed conflict which was adopted by the General Assembly on 25 May 2000, and which Kenya acceded to in 2002, raises to 18 years the age of participation in hostilities and forced recruitment of children into armed forces.

#### *Non-Discrimination by reason of Parentage or other Conditions, Right to Registration and a Nationality*

The current *Constitution and the Kenya Citizenship Act* provide that children, born of Kenyan fathers, obtain Kenyan citizenship automatically, while those born of Kenyan women and other nationalities have to apply for citizenship. The *Draft Constitution* guarantees children the right to a name and nationality and to have their birth registered. The principle of non-discrimination is not adequately implemented with respect to certain vulnerable groups of children, especially girls, children born out of wedlock, children with disabilities, children living in institutions, street children, child victims of abuse, refugee and asylum-seeking children and those living in rural areas. Many children are not *registered*, particularly those born at home and living on the street or in rural communities. Indeed, it is estimated that only 30 per cent of births are registered annually. The situation of *destitute and refugee children* poses a major challenge for registration.

#### *The Right to Education* <sup>62</sup>

The *Draft Constitution* guarantees the right to free and compulsory basic education and obligates the state to take measures to make secondary and post-secondary education progressively available and accessible. The *Children's Act* provides for the right to basic education for all children and imposes sanctions on anyone violating this provision. See also statistics on education elsewhere in the paper. The structure of education makes school participation difficult for those from agricultural and sedentary communities. Child labour has affected children enrolment and completion rates in schools. Sexual violence and forced marriages has affected especially girl children completion rates in schools. Hidden costs such as those of uniforms, lunch and fare especially in the urban areas has resulted in many poor children dropping out of school.

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<sup>62</sup> See also part on Status of Women's right: the right to education elsewhere in the report.

The children's Act is not widely known of, and therefore not being enforced effectively in the case of education.

#### *Protection Against Abuse and Neglect*

*The Draft Constitution* guarantees children the right to be protected from harmful cultural rites and practices, exploitation, neglect or abuse and also the right to be free of corporal punishment and other forms of violence. The Children's and Young Persons Act provides for protection against all forms of abuse and creates machinery for intervention where a child or juvenile has been sexually assaulted, or is a member of the same household as a person who has been convicted of such an offence. *The Criminal Law Amendment Bill 2001* harmonizes penalties relating to rape and defilement, enhancing the penalty for child defilers. It also seeks to amend penal laws by abolishing corporal punishment. Corporal punishment was formally banned in schools in April 2001 as a matter of policy but continues to be practiced in schools, as well as in the juvenile justice system, in families and in care institutions. *The Domestic Violence (Family Protection) Bill* seeks to pass a law allowing the courts to intervene in cases of domestic violence and provide an avenue for the making and enforcement of orders that protect the family members from domestic violence. There is inconsistency between policy and legislation. According to the Children's Department regulations, corporal punishment should not be administered to children below 7 years. The Prison's Act provides that where corporal punishment is awarded to children below 16 years, it should be limited to ten strokes. The Borstal Institution's Act provides that children between the ages of 15 and 18 should not be awarded punishment exceeding 10 strokes.

Authorities have traditionally *avoided the domestic set-up* even though domestic punishment of children has resulted in grievous bodily harm and even death. *The Sexual Offences Act* seeks to consolidate laws relating to sexual offences in one piece of legislation and to expand the scope of sexual offences to include offences not covered adequately or at all in the current laws and treats cases of sexual offences as crimes of violence and not crimes against morality. The Act provides a heavy penalty for persons found guilty of sexual harassment and in particular, especially persons who serve in positions of responsibility over children such as head-teachers and teachers.

#### *Children with Disabilities*

The current constitution is silent on discrimination on the basis of disability. *Under the Draft Constitution* the State is obligated to implement the right of every child to free and compulsory pre-primary and primary education and in doing so shall pay particular attention to children with special needs. *The Disability Act* has been enacted but its provisions have yet to be implemented/enforced. The provision of social amenities by the State to *disabled children* has been inadequate with only a few special schools established to cater for some groups and there being no policy of integration of disabled children in formal schools.

There is a *low enrolment* of children with disability in schools owing to the lack of training aids, the high cost of training and the stigma associated with disability. The girl child with disability is especially affected. The Comprehensive Education Sector Analysis (CESA) estimated that Kenya had about 750 000 children with disabilities in the age group 0 – 16 years. A recent study estimated that the rate of enrolment in special schools programmes is only 6 per cent of the eligible school-going population. The Ministry of Education spends 0.3 per cent of its total budget on this sub sector, which is inadequate to sustain the 34 special schools, which receive government grants. There is inadequate data on the number of children and people with disabilities even within established reports like the National Development Plan, Economic Surveys and the Population Census. There are also insufficient programmes in place for addressing the needs of children with disabilities.

### *Children in Need of Special Care*

The *Draft Constitution* provides that Children with special needs are entitled to the special protection of the State and society. The Children's Act gives the Director of the Council the authority to intervene and provide assistance to 'children in hardship, including disabled children, street children, orphaned and destitute children, children who abuse drugs, children who are sexually abused and children who are affected by domestic violence. Since 1999, UNICEF and the Government have implemented projects for children in need of special protection, with particular focus on street children, AIDS orphans and AIDS prevention, and on building the capacity to implement a broad based child welfare agenda.<sup>63</sup> While the Government, in cooperation with UNHCR has made efforts to accommodate refugee and asylum seeking children, there are inadequate procedures and policies to guarantee and protect the rights of these children and unaccompanied and internally displaced children. The Children's Act does not provide for refugee children. The available child-care institutions for children outside the home and the community do not address the root causes of their status, such as poverty.

### *Adoptions and Foster Care*

The *Draft Constitution* provides for the right to every child to appropriate alternative care when the child is separated from its parents. Rules and regulations have been drafted, regulating the registration, supervision and management of children's homes but they are not yet in force.<sup>64</sup> Adoption procedures are complicated and expensive, and majority of Kenyans do not know how to go about the process

Many children's homes especially in the urban areas are non-governmental and are inadequate compared to the need. There is also inadequate regulatory framework for the standards in these facilities leading to many cases of child abuse and neglect. There are no effective coordination mechanisms between the children's department and children homes and so cases that could be resolved quickly with state help such as tracing parents, or relatives are not. Kenyans are not sensitised on the option and practice of adoption. In some communities, adopted children are stigmatized as are their parents hence discouraging the practice.

### *Administration of Juvenile Justice*

The *Draft Constitution* is very comprehensive in this regard and provides that children have a right not to be arrested or detained except as a measure of last resort, and when arrested or detained, to be treated in a manner that promotes the child's dignity and self-worth and that pays attention to the child's rights. Children also have a right to be assigned a legal practitioner, by the State and at the State's expense in other proceedings affecting the child if injustice would otherwise. The *Penal Code* requires that those under 18 years be housed in juvenile remand rather than remand prisons. Under section 2 of the *Borstal Institutions Act* young offenders between 15 and 18 may be committed to a borstal institution.

Kenya has 12 juvenile remand homes. These are inadequate to cater for the needs of all children in conflict with the law. Further, the Children's Act is not followed strictly and many children stay in remand for more than three months even for petty offences.<sup>65</sup> Delays in prosecuting cases continue to be a major handicap. Most children in need of protection of the law and child offenders are from poor families and cannot afford legal assistance.<sup>66</sup> Some of the children at Industrial Area Remand facility have been there for over a year.<sup>67</sup> The law also states that children should always be held and even transported separately from adults. Only five police

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<sup>63</sup> UNICEF, *Country Project Proposals*, 1999-2003, Nairobi, October 1998, p.33

<sup>64</sup> Erica Neiglick 'Monitoring International Obligations: Implementation of the CRC and the ACRWC in Kenya: Kenya's submission of her periodical reports' *Juvenile Justice Quarterly*, Vol.1, Issue 4. Oct-Dec 2004, pp 8-10 p.10.

stations in the country have separate and specific holding and processing places for children. These have come up through a joint initiative between the Government, local and international partners. The programme is in its expansion phase.<sup>68</sup>

*Protection from Economic and Sexual Exploitation*<sup>69</sup>

This is enshrined in: ICESCR; CEDAW; CRC; Worst Forms of Child Labour Convention, No.182, 1999; Vienna Declaration and Programme of Action; and Programme of Action for Prevention of Traffic in Persons; the Exploitation of the Prostitution of Others; and Global Program against Trafficking in Human Beings of the UN Office on Drugs and Crime. The current Constitution prohibits slavery, servitude and forced labour. The Draft Constitution Section gives children the right to be protected from all forms of exploitation and any work that is likely to be hazardous or adverse to the child's welfare.

The *Penal Code*, provides that girls under the age of 21 are protected from being procured for immoral purposes; and that girls under the age of 18 may not be retained for sexual exploitation by a householder. The *Employment of Women, Young Persons and Children's Act* restricts the employment of children in certain economic sectors. *The Sexual Offences Bill*: To addresses recent violations of rights such as child pornography, trafficking, prostitution and sex tourism. The *Children's Act 2001* prohibits all forms of exploitative and hazardous child labour and child sexual exploitation Other laws touching on child labour include: the *Trade Unions Act (Cap 233)*, *The Trade Disputes Act (Cap 234)*, *the Workmen's Compensation Act (Cap 236)*, *the Education Act (Cap 211)* and *the Children and Young Persons Act (Cap 141)*.

Ministry of Labour enforces child labour legislation through the labour inspectorate. More than 80 Directorate of Occupational Health and Safety Services Inspectors and 140 Ministry of Labour officers have been trained in the detection and reporting of child labour. Nonetheless, the number of inspectors is reported to be insufficient, and fines are not high enough to effectively deter employers from utilizing children under the minimum age.<sup>70</sup> Department of Children's Services is responsible for the administration of all laws regarding children (particularly awareness rising regarding children's rights and the management of rehabilitation institutions). Section 13(1) Children are entitled to protection from exploitation including sale, trafficking or abduction. Under section 14, children are also entitled to protection from 'sexual exploitation and use in prostitution, inducement or coercion to engage in any sexual activity and exposure to obscene materials'. This provision is however, not followed by specific provisions on how to address the issue of sexual exploitation. No mechanisms have been established to deal with this.

Despite these laws, child labour in Kenya is widespread. There are no mechanisms in place to enforce the provisions. Children are therefore still engaged primarily in the agricultural, mining, household, manufacturing, hotel and other industries. Cases of forced labour, in which children are loaned out to creditors to pay off family debt, have also been documented, primarily in rural areas.<sup>71</sup> There is also no firm minimum age for admission to employment. There is a dearth of

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<sup>65</sup> The CRADLE – The Children's Foundation (Annual Report) Nairobi, 2003, p.26.

<sup>66</sup> id.

<sup>67</sup> Mkangi Bobby Munga 'What the law says in regard to children in remand or prison' *The Standard Interactive*, Thursday, March 10, 2005, p. III.

<sup>68</sup> Id.

<sup>69</sup> See also section on the right to work above.

<sup>70</sup> The Department of Labour's 2002 Findings on the Worst Forms of Child Labour. Trade and Development Act of 2000 (US Department of Labour Bureau of International Labour Affairs, 2003)p. 260

<sup>71</sup> U.S. Department of State, *Country Reports 2001*: Kenya, 382-85, Section 6d.

information and adequate data on the situation of child labour and economic exploitation in Kenya. To improve statistics about the child, a

Multiple Indicator Cluster Survey (MICS) and Child Labour Module of the Integrated Labour Force Survey of 1988/99 have been completed and both have generated up-to-date information on child labour and other social statistics. Family poverty limits the willingness of government ministries to enforce child labour provisions. The hidden nature of the worst forms of child labour makes the regulation and prosecution of cases of children involved in forced labour, commercial sexual exploitation and other illicit activities difficult.

## **4.0 Access to Justice under Formal Judicial System**

The justice system too is a continuum. It begins from points of entry where service of the system is sought, to the enforcement of end of case, enforcement of judgment or the serving sentence.

### ***Notion of Accessibility***

The idea of accessibility is broad and goes beyond physical accessibility of legal institutions to include affordability, cultural appropriateness such as language, social acceptability and relevance of applicable norms and processes, simplicity, convenience and friendliness of processes and agents of the law; fairness of treatment throughout the process and of outcomes; and timeliness and efficiency of delivery among others. It therefore includes law enforcement agents such as the police, administration agents in charge of order and security such as the provincial administration, Criminal Investigation and Intelligence agents, lawyers, judicial officers, and prison agencies. It is relevant to matters of language, dress, procedure, cost, physical accessibility, legal representation, sentencing, judicial legal development, impartiality, independence of judicial officers and general efficiency of the entire system.

Only a small percentage of Kenyans seek the services of or interact with, and an even smaller percentage access justice through the formal system. Majority of the latter is the poor, women, children, and refugees.

### ***Language and presentation of the Law***

All laws are in very *complex archaic English*, in small print, and have to be purchased. This limits peoples understanding of the law in a context where ignorance of the law is no defense. This also necessitates the use of *interpreters* with a frequency that creates ample occasion for misinterpretations and risks of injustice. The use of interpreters is often superfluous where all parties understand *Kiswahili* but the magistrates insist on conducting proceedings in English via interpreter.

### ***Gate-Keepers to the System***

*Hostile entry points into the justice systems* inhibit many from entering or even approaching the system. Police in Kenya are often rough, insensitive and dismissive in their handling of both complainants and suspects. There have been many reported cases of people being arrested when they have gone to report a crime, women being detained within police stations percents and raped when they have sought refuge there, women being dismissed and humiliated when they have gone to report domestic violence incidents, and of long periods of un-necessary delays at the police stations and in response of police to distress calls. The resulting fear of the police has created a psychological barrier in people's mind and mistrust of the police and provincial administration officers such as chiefs and assistant chiefs.

Abusive and extra-legal acts by the police have led to further lack of trust and of ingrained fear of the police by many. *Arbitrary Arrests and Brutality* have been pervasive in Kenya perpetrated mostly by the Kenya Police but also by other security forces in some parts of Kenya.<sup>72</sup> Swoops by night in urban centres are frequent, and police raids especially in poor and congested urban neighborhoods are common with intentions of eviction or to uncover illegal brew dens, or just routine swoops. Law abiding citizens and innocent people are arrested during such night and security operations by the police on allegations of failing to carry with them national identity cards or passports, loitering, idling and 'looking suspicious with the youth being most affected.<sup>73</sup> Even where there is justifiable cause for police intervention, excessive force is used, sometimes resulting in death.<sup>74</sup>

*Torture* is still rampant in parts of Eastern and North Eastern Kenya especially in Marsabit and Moyale. It is mainly perpetrated by the Kenya Police, the Kenya Army and the Administration Police, and even in some instances game rangers from the Kenya Wildlife Services. According to a report compiled by Bakalcha-Barii Support Programme legal consultant, the atrocities meted out on the residents range from rape, castration of males, amputation, brutal beatings, unlawful confinement, arbitrary arrest and intimidation.<sup>75</sup> This has ingrained fear of law agencies and any interaction with state agents in these areas. Even after the amendment to the Evidence Act in 2003, torture still persists by police officers. Further though corporal punishment was abolished by the Criminal Laws (Amendment) Act 2003, it is still widely meted out in prisons according to KHRC reports.

and approval of the NCST.<sup>76</sup>

protection of human rights.<sup>77</sup>

#### *Women, Children, disabled, illiterate dismissed by police*

Women are the ones mostly inhibited by these entry points. Police officers do not have guidelines as to what to do after a *rape report* is made and they therefore often do not take the evidence required. There are many claims of police mishandling of victims and not taking victims to hospital in time when they have come to them. Further, police tend to *treat marital violence as minor domestic matters* that have nothing to do with criminal law. When they do prosecute, they do so half-heartedly and upon insistence of the victim.<sup>78</sup> As a result many cases go unreported except where the media gets to hear of them, and even then, many victims refuse to have cases prosecuted, or withdraw their complaints soon thereafter. The Domestic Violence (Family) Bill 2001 is still awaiting discussion in and approval in Parliament and is therefore still not accessible to women.

The prison's Act provides that female offenders should be in the care and superintendence of female officers and any searches on them should be carried out by female officers. Police cells are however inappropriate for women needs and those of their young children. Blankets are few and have to be shared, and they are not provided with beds or mattresses. There is lack of personal facilities for personal hygiene of women remand and convicted prisoners such as soap and sanitary towels in remand.<sup>79</sup> Health facilities are inadequate with no drugs. This compromises

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<sup>72</sup> KHRC (2004), *Quarterly Human Rights Report. Volume 6 Number 1 & 2.*

<sup>73</sup> Ibid.

<sup>74</sup> See KHRC Quarterly reports to date.

<sup>75</sup> F.A. Goliha. Ibid.

<sup>76</sup> Republic of Kenya (2004) Second Periodic Report on the ICCPR, p 19.

<sup>77</sup> Republic of Kenya (2004), Second Periodic Report on the ICCPR., p 18.

<sup>78</sup> Report on Women's law. Ibid.

<sup>79</sup> Ibid, p77.

the state of mind and confidence of the women when they do appear in court leading to many being convicted where they might have put up a stronger case for their release.

Sometimes lingual and sign interpreters are not available to assist litigants and witnesses needing it and there are no access ways for physically disabled in the court buildings.

#### *Irrational Sentencing policies*

*Sentencing* rationale is often unfair with for instance a person convicted of stealing a chicken getting the same sentence as one who robbed a bank. Wealthier members of the society have also been known to get light or dispensable sentences where poor persons get the harshest sentences in the books.

#### *Inhuman Prison conditions*

Accused and Convicted Kenyans also do not get justice in that the conditions of *the remand and long term prisons are inhumane*. *Conditions of the prisons* often lead those incarcerated to them to serve much harsher sentences, and to often loose their lives even where they were serving short sentences. Many of those remanded awaiting trial often end up serving long periods of incarceration running into years, only to be released for lack of evidence.

Generally however, *prison conditions* in Kenya are harsh and harmful to the physical and mental well being of prisoners.<sup>80</sup> Prison officers persistently ignore complaints of illnesses, and health facilities are poor with no drugs and health personnel from MOH spend little time with inmates. Bullying, assault, and corporal punishment are prevalent resulting with deaths and injuries.<sup>81</sup> Other things include indecent searches, denial of visiting and mail rights as contact with the outside world. Prisoners are also disenfranchised and do not vote.<sup>82</sup> The use of solitary confinement as a punishment is still widely used resulting in mental instability of many prisoners.<sup>83</sup> Because of being cut-off from outside world, many prisoners find it difficult to enforce their rights through the court process.<sup>84</sup> Prisons are grossly congested and overpopulated resulting in inhumane conditions of living. The holding capacity of prisons is 17000, yet they hold over 94,220 in 2003. Some problems that lead to prolonged incarceration of most remandees is lack of transport facilities to the courts, which means that accused persons miss their hearings leading to numerous adjournments. This means that persons who otherwise might have left remand continue occupying space while others continue to come in, leading to annual population increase of up to 60% in some prisons like Kodiaga prison in 2003.<sup>85</sup>

In relation to *juvenile offenders* the Prisons Department administers two Borstal Institutions (in Kakamega and Shimo La Tewa) and one Youth Corrective Centre each with a daily average population of 400 inmates. Kenya has 11 children rehabilitation schools of which one is for girls. The average capacity of these institutions is 200-300. There are also 11 children remand homes. All these homes and centres are run by the Children's Department at the Ministry of Home Affairs.

#### *Formality*

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<sup>80</sup> KHRC (2002), *Improving Prison Conditions in Kenya: Proposals and Recommendations*, p25.

<sup>81</sup> Ibid.

<sup>82</sup> Ibid.

<sup>83</sup> Ibid.

<sup>84</sup> Ibid.

<sup>85</sup> LSK (2004).

*Recognition by the legal system* to access its services, and to get certain prayers from it requires certain forms of formality that majority especially the poor do not have, or if they have, they are not willing to bare it to law enforcers for various reasons. One requires to prove identity by producing a Kenyan identity card or other form of identity. The process of getting forms of identification in Kenya is long and tedious and many young people therefore do not have. Police and chiefs do not routinely attend to people without identity cards.

*Refugees*, and persons of Somali origin or Somali like features, even those with identity papers will often not report to police stations for fear of harassment and arrest if they do not have Kenyan identity documents. *Women* have faced problems of proof of marriage where they were married under customary law where there are no records or certificates, and where their husbands subsequently formally married another wife. Such women are often disinherited upon their husband's deaths especially if they have no funds to hire lawyers to proof their case. Certain *children's* rights such as those of inheritance and support are often afforded legitimate children, so that the formal boundaries of formal marriages can lock out such children from rightful maintenance from their fathers. Emphasis of employment contracts in order for *workers* to enforce their rights has locked out majority of workers in Kenya from justice, as the trend is to employ workers as renewable casuals for short periods of time to save from paying benefits and taxes. This also affects workers in the informal sector.

*Formal ownership requirements*, in a context where most people do not understand, and have no access to avenues of formalising their ownership of land, and are not aware of the legal forms of property that are being developed such as *Intellectual Property and Cultural Property* has led to many Kenyans losing their property rights to foreigners and other Kenyans through the legal the system. *Licensing*, its implications and its tedious and expensive nature is another formality that has led to many Kenyans losing their property, and having their businesses shut down by courts and other regulatory agencies.

Rigorous requirements for formality in the context of non-education of the population and non-availability of avenues for such formalisation is itself an injustice and deliberate exclusionary measure. Further most formalisation agencies are unfriendly, time-consuming, complex and unreliable. For instance registration of marriages can be done in different registries that have no data link with each other, hence men have been known to register different marriages in different registries. Many Kenyans moreover *are afraid of certain forms of formalities* such as licensing. This is because of the indiscriminate taxation policies of governments, which often lead the small traders out of business. Identification formality has in the past been used to further ethnicity and nepotism, to disenfranchise certain regions and races, and to harass certain communities. On the other hand, denial of the same has been used in the same way to lock out certain groups. If then formalisation is to be used as an avenue to avail the poor justice, then it must be accompanied by *protective guarantees*

#### *Lack of locus standi*

Even where they are able to enter the system, many cases of poor people especially where they present cases as interest groups are often thrown out for *lack of locus standi*.

### *Ignorance of the law and lack of relevant information*

Majority of Kenyans does not know their rights, and are unaware of the provisions or requirements of the law or legal procedure. Many court buildings lack signboards and information desks to direct people around leading to confusion, waste of time, especially for first comers to the complexes. Further the *Kenya Gazzette*, which is the key source of information on legal development, and proposed actions by persons that may affect rights of others is produced only in English, in small unfriendly print and has to be purchased, hence removing it from reach of majority of the poor and non-English speaking.

### *Delays*

Justice *delayed is justice denied*. Many Kenyans who do engage the system do not access justice because of delays in the process. There is a large *backlog of unfinished cases* with a 1998 study<sup>86</sup> indicating that the High Court of Nairobi alone, with a capacity of 15 judges had over 20000 pending cases. The average period of a case in Kenya is 4-5 years. This has led to lack of confidence in the judicial machinery, with people often giving up their rights after weighing the time and money costs of the whole process. It has also led to the development of some alternative undesirable extra-legal phenomena that is antithetical to the rule of law such as ‘*mob-justice*’, where communities seek justice for themselves by communally executing suspects on the spot. This has been attributed to repeated failure of system to work with the result of criminals finding their way back to the streets and communities shortly after arrest.

*Delays* are also caused by *lack of case tracking systems and technology* and poor maintenance of case statistics, poor case management capacities of judges and magistrates. Manipulation of the case allocation process is also a problem with lawyers and litigants ‘arranging to have their cases heard by judicial officers they think might be favorable to their case. This disorganizes the court diary leading to litigants and lawyers wasting a lot of time walking in the court corridors locating the relevant courts for their cases. The process of *giving judgments on notice* also occasions delays as the presiding officers often forget the facts of the cases, and therefore keep postponing and eventually give very weak judgments, that often occasion appeals hence elongating the process further.

*Other reasons causing delays and backlog* include: laxity of officers due to lack of supervision; congestion in the registries leading to loss of files; delays in procuring the AG’ consent, committal bundles and the attendance of expert witnesses, such as document examiners of which there is only one in Kenya and ballistic experts of which there is only two in the country; delays in bringing remand prisoners to courts due to lack of transport with for instance only one truck covering Kamiti, Thika, Githunguri, Nairobi Law Courts, Kibera, Makadara and Machakos; unprepared and late-coming and absentee advocates also leads to delays as these practices lead to many and repeated adjournments; and procedural bottlenecks such as preparation of committal bundles and preparation and presentation of appeal files in criminal matters, and summons for directions in civil matters. Others include recording of proceedings in long hand and ignoring geographical jurisdiction in filing suits, especially running down cases, and the annual 90 day vacations of the judges of the High Court and Court of appeal.

### *Corruption, Partiality and Lack of Independence of Judiciary*

Lack of integrity, partiality and lack of independence of the judiciary have also been critical causes of inaccessibility to justice for many in Kenya. Independence and integrity of the judiciary is manifested by and hinged on the personal conduct, values, principle and standards of every

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<sup>86</sup> Republic of Kenya (1998), *Report of the Committee on the Administration of Justice*.

judicial officer. The 1998 Committee found that both petty and grand corruption were practised in the judiciary hence compromising judicial rectitude. To date, even after the dismissal of judges found to have engaged in the practice, there is no indication that the practice has stopped. It took the forms of inducing court official to manipulate the court processes through among other things hiding files, delaying trials, judgements and rulings, and paying judges and magistrates to influence their decisions. Unethical conduct that pointed to lack of integrity on the part of judicial officers included: interaction with litigants or their relatives, entertainment of visitors in chambers, or engaging in business activities, undue familiarity with the bar and local populace due to overstaying in one stations, hearing and determining cases that do not emanated from their jurisdiction, and deliberately delayed judgements and rulings

#### *Hostile environment in court, adversarial process*

Language and speak of the judicial officers is foreign and they are often very harsh to litigants, shouting them down and intimidating them when they make a mistake, or are inaudible. Their manner of dress (the wigs and gowns) is foreign, removed and intimidating. The conduct of proceedings is complex and the general demeanor of officers of the court is unfamiliar and unbending towards litigants. This intimidates them, and many do not return to the system for justice. Some withdraw their cases.

The adversarial process of proceedings often pits the rich versus the poor or stronger versus the weak creating a conflictual environment. The weak and poor are often intimidated outside of court or otherwise compromised to withdraw cases by the richer and stronger parties. Even where the weak/poor do win cases, they are not restored to their peaceful state as they are often followed with threats and lack and sometimes harm from the richer losers. This is not so in customary system which is more reconciliatory. -

#### *Poor infrastructure and capacity*

Some regions have scarce courts infrastructure such as Turkana District in North Eastern Province that has only one court covering the 77000 square kilometres of the district. This occasions delays in court processes, as litigants and witnesses have to walk long distances to attend court due to poor of transport infrastructure. These conditions lock out women, the old and children from accessing this court.

#### *Lack of Bail and Bond for the poor and children*

Even though the Criminal Procedure Code is clear on the questions of bail, it leaves a lot of discretion to the police and judicial officers. Most times bail prescriptions are beyond what majority of the poor and women can afford. A court of appeal judgment interpreted the Children's Act providing for bail for children charged on capital offenses as being unconstitutional hence such children now cannot access bail in Kenya. Most of those in remand stations are the poor men, women and especially street children.

#### *Socio- Cultural Biases*

Socio-cultural biases in the mind-sets of judicial officers, and in the law based on the patriarchal society notions and norms affect the discriminatory treatment and regard of women in court processes and are also often reflected in decisions.

#### *Cost of justice too high*

Filing fees and legal fees are too high for most Kenyans. Time cost and transport costs also keep many away from the system. Women, children and poor men are the ones most affected by this lack of affordability. There is no reliable or functional state provided legal aid scheme. NGOs and FBOs have stepped to provide legal aid and advice to the poor and women. They are only able to

reach a very small percentage and usually only offer aid for civil matters not criminal. There is only one NGO (FIDA Kenya) that offers women legal aid and it is mostly accessible to women in Nairobi, Kisumu and Mombasa urban areas.

## 5.0 Justice under Traditional Legal Mechanisms

In most rural districts, people are governed by traditional norms and customs of entitlements and regulation of co-existence in the different spheres of their lives. 'Traditional' is here used relatively. This is because the social-economic edifice upon which customary law is based is evolving, and the norms based on social relations of pre-colonial communities are slowly losing their authority and rationale. These communities, mostly marked by ethnic or linguistic differences are evolving with increased interaction with others, western education and spread of communication technology. The bonds of affiliation that hold them together and the boundaries that mark their unique 'community' are wearing off and getting blurred. In these same districts, there are pockets of those who would rather seek the formal system of justice even where it is inconvenient and expensive. Further, customary norms are slowly being eroded or fused into the formal normative system and the customary justice mechanisms influenced by principles of natural justice. For a significant majority however, these systems are their only recourse for justice, and they mostly do deliver justice.

Current traditional justice systems existed and were essentially developed in the pre-colonial system. Any appreciation of their conception of justice must be based on an understanding of how these communities were organised, how the laws were made and their 'codification' processes and forms. The idea of justice under traditional legal systems in Kenya was based on the patriarchal social system, and a subsistent agricultural and herder economy with undeveloped trade notions and practice. Society was organised as a community based on kinship ties, and so the underlying principles of justice served to protect and reinforce those ties. Legal processes were based on ideas of reconciliation, restoration, and peaceful mediation and not the idea of winners and losers. Customary norms allocated entitlements, and design justice mechanisms that sought to protect the institutions, principles and 'legitimate' beneficiaries of patriarchy. Property ownership, social relations, labour formulae, and resource management were all organised according to communal patriarchal principles and a subsistence economy. Though certain generalities such as these may be drawn, it is important to note that each ethnic group (there are about 49 in Kenya), exhibits different variations in principle and practice.

### *Law-making making in the Pre-colonial Period*

Law making as defined above has to do with governments. If history in large part is past experience of mankind with regard to the institutions and individual actions which affected this experience, then there is a case on the face of this definition for arguing that pre-colonial Kenyan communities however disparate, had governments which regulated the affairs of a people who identified themselves as one with their various community systems.<sup>87</sup>

By drawing on examples from the *Miji Kenda* and *Kalenjin* ethnic societies it is evident that governmental power, both at the vertical and horizontal levels of distribution of authority, was more complex than has been assumed. They were replete with elaborate in-built mechanisms for the maintenance of law and order, and the formulation and implementation of policy. Quite importantly, they were also ingrained with the element of permanent timelessness manifested in

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<sup>87</sup> O. A. L. A. Olumwullah, "Government", in William R. Ochieng (ed.), *Themes in Kenyan History*. EABA Ltd Nairobi 1990, James Curry Ltd. London, 1993.

the unwritten constitutions and the age-sets, which ensured continuity – an element, which is lacking in today's democratic systems.<sup>88</sup>

The *Kalenjin*<sup>89</sup> for example governed themselves in fairly small territorial units called *pororosiek*. These were both military regimental units and territorial political entities in which social, political and economic affairs were regulated, laws enforced and decision made in councils. Within these units, were various localities among which were homesteads with their own councils to regulate agricultural and grazing activities as well as to settle disputes between individual and groups of individuals. There was therefore a clearly defined vertical distribution of power, so that the bigger and more important the council the more formal its proceedings were. The leadership of each council whether local or territorial was elective, and broadly the government system was democratic. This system of government was maintained through an in-built mechanism of recycling age-sets. Though its working was complex, the age-set system was the essence of social and political organisation.

A normal age-set took some fifteen to twenty years to form and it consisted of several circumcision groups and sub-sets. When complete, it comprised youths of fifteen years and mature men in their mid-thirties. Every fifteenth or twentieth year after the closing of a new age set, the changeover ceremony was held by the elders. This was a single most important event in the *Kalenjin* political life as it marked the official handing over of power from one age-group to another. The younger group would get into the positions of warriors in power, and the elders would graduate into the position of junior elders. The junior elders were a resource of wisdom, and played the roles of exhorting diligence and bravery, restraining disrespect, and approving or vetoing proposed policies leading to acts of raids or military action. Most important however the junior elders had the powers to prematurely close the period of power of an unruly or disgraced age-set.

Law in these traditional societies was unwritten. It was orally formulated, and communicated by word of mouth, at community meetings and by folklore. It was manifested in the established way of living and doing things and relating – in culture, which was firmly based on universally agreed values of social, economic and political nature. Various institutions played the law-making role. As may be deduced from the account above, predominant among these were the councils of elders and male age groups such as described above among the *Kalenjins*. The councils, which were stratified by age and roles, ensured the respect for and practice of these traditions. When unprecedented issues surfaced, the councils through the various mechanisms would develop a policy to address the issue. Key among the values that informed traditional governance and law and public policy making in pre-colonial African communities have been identified as political democracy and mutual social responsibility<sup>90</sup>.

Political democracy implies that each member of society is equal in his political rights and that no individual or group will be permitted to exert undue influence on the policies of the councils. The councils, therefore, could not become the tools of special interests, catering to the desires of a minority at the expense of the needs of the majority. They represented all the people and did so impartially and without prejudice. This value of political democracy, in the African sense provided a genuine hedge against the exercise of disproportionate political power by economic

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<sup>88</sup> See Olumwullah, *ibid.* at 92.

<sup>89</sup> This account on government among the *Kalenjins* borrows heavily from Olumwullah, *ibid.*

<sup>90</sup> Republic of Kenya, *African Socialism and its Application to Planning in Kenya*. Sessional Paper No 10, 1965.

power groups. Based on this, in most African societies, a man was born politically free and equal and his voice and counsel were

heard and respected regardless of the economic wealth he possessed<sup>91</sup>. The age-sect mechanism of governance ensured this. An individual only needed to be a mature member of it to participate fully and equally in political affairs. Even where the elder sets, and leaders in the councils appeared to have greater wealth and hold disproportionate political influence, such as those who had seats on the *Kambi* and the *vaya* councils among the *Mijikenda*, there were traditional checks and balances including sanctions against any possible abuse of such power. Leaders were regarded as trustees whose influence was circumscribed both in customary law and religion. Political rights did not derive from or relate to economic wealth or status<sup>92</sup>.

These characteristics distinguished pre-colonial political and economic systems from communism in that they ensured every mature citizen equal political rights; and from capitalism in that it they prevented the exercise of disproportionate political influence by economic power groups.<sup>93</sup> Since legal and policy making is closely related to the structure and practice of a political system, it can be inferred that law and public policy-making practice in these traditional pre-colonial societies in Kenya was pluralistic and democratic in nature, involving all mature individuals and interest groups through the various institutions. The institution of chiefs and the concept of nobility was unheard of in these traditional Kenyan societies<sup>94</sup>.

The political arrangement did not posit any communal wealth in any particular unit of the governing mechanism, for use in the achievement of social welfare and the common good of the community and every individual. Land and other productive assets, no matter who owned them were expected to be used for the general communal welfare. No individual family or clan could treat productive assets as private property unless the uses to which those assets were put were regarded as consonant to the general welfare. Communal wealth therefore was posited in the ability of each individual to input in the production process. This was ensured through the broad policy of mutual social responsibility. It implies a mutual responsibility by society and its members to do their best for each other with the full knowledge and understanding that society cannot prosper without the full co-operation of its members. Everyone had a duty to work, and this duty was acknowledged and willingly accepted. Work here includes the different forms of inputs required of an individual by the society, such as participation in defense of the community among other things. This acceptance was motivated by the definite, automatic and universally recognized promise of society's reciprocal response to the individual's contribution. Participation in social activity was a social security net for each individual.

A good example of a social service, which was effectively delivered communally through the policy of mutual social responsibility, was that of education. This system of education involved every member of the community in different capacities. This was possible because it had no literacy and did not involve schooling within the walls of a school building. Rather, it was largely informal and the children learnt through initiation ceremonies. It involved learning unconsciously where older members of the community deliberately manipulated the impulses and feelings of the

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<sup>92</sup> Ibid.

<sup>93</sup> Op cit.

<sup>94</sup> Nobility was however the mark of many societies in West Africa as well as close to Kenya in Uganda.

young so as to impress upon them the acceptable manners and etiquette of the age group<sup>95</sup>. It however included an aspect of formal learning when young people were instructed in group or community rules of behavior during the initiation ceremonies. Accordingly *all members of the community knew the rules and laws* that affected and governed their behaviour and relationships.

The nucleus family unit members, the extended family, the clan members, older age-sets, all played a role in the education of the young ones. Core elements of the education were communicated through rites, the apex of which was that of circumcision which marked the end of childhood and provided an opportunity for preparation for the responsibilities of adulthood. Every member of a community had a role to play in the circumcision rite. Instruction was done through a broad range of methods, which required different members of a family or society to participate. These include folk songs, folklore, riddles, proverbs, dances, games, ceremonies, festivals, which intimated, laws, required or acceptable standards of behavior, customs, norms, language, beliefs and values.

Religious and moral education was very important. *Religion, politics, economics, laws and social and communal relations were all wholly interwoven under this system. Every one needed to go through this education to survive in the society.* Indeed social life was such that one had no choice, having been born in a family that is member of such a society. Those who for whatever reason missed out on any important educational rite such as circumcision, were denied the social status it endowed and the various group rights until they underwent the rite. The education began at birth and ended at death.

Through the policy of reciprocal communal responsibility, this system successfully fulfilled the goals it was designed for, that of perpetuating and maintaining the status of the society. It was an ingrained system, administered by the society's existing institutions, supported by its own resources and ideal for that static society, and not designed to cope with change. Perpetuation and well being of the community depended entirely on resources within it. Kenyan traditional societies were not developed in the art of trade. They were mostly agricultural based (land tillers and cattle herders). They were therefore not part of any broader trade system prior to the conquest by the British.

This is the general form of law and public policy-making and implementation processes that were in effect before the European conquest of East Africa. This system has been challenged by permeation of capitalism and its principles of individualism and competition, which are antithetical to communal living and a subsistence economy. Communal ties and the rationale of customary law have also been challenged by: labor migration processes; re-definitions of kinship towards the nuclear family displacing core legal education conduits such as grandparents; introduction of the alternative of the formal English law; imposition of the western governance system; dissipation of age-sets and their replacements with lines of affinity such as school alumni which cuts across ethnic community lines; demonisation of circumcision and other cultural rites of passage rituals that were important for legal education and training for legal enforcement; undermining of folklore, traditional music and other forms of communal communication and education systems; the inter-ethnic marriages and inter-regional migration with the idea of land purchase and individual ownership; introduction of idea of women's and children's rights, and their equal individuality with men in rights and entitlements. To a significant extent however, ethnic and linguistic communities are still bound together by proximity and the above factors have not succeeded in formalising a significant portion of rural

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<sup>95</sup> J. E. Otiende, "Education Since the Early Times", in William R. Ochieng (Ed) *Themes in Kenyan History*, EABA Ltd. Nairobi, 1990; James Curry Ltd., 1993, at 145.

communities. Indeed even urban-based middle and upper class populations still bind themselves to certain customary norms and practices especially around personal laws.

## 5.1 Access to Justice in Traditional Mechanisms

The goals of customary justice mechanisms are reconciliation, restoration and restitution. It is not about winners and losers, and is therefore not adversarial.

The systems across ethnic groups manifest in *ad hoc* sittings of a ‘court of elders’ consisting mostly of old men even though increasingly with the influence of women’s rights and youth NGOs there are women and youth in a number of these courts such as in Lodwar in District. With the dissipation of the idea and definitions of ‘elder’ in some communities, these courts are also increasingly manned by chiefs and sub-chiefs; religious leaders; police; and community paralegals. Some are constituted or initiated by special interest groups such as child rights activists to adjudicate cases in their area of interest. They are however always sanctioned by community recognition. Most community members however expect that a good system should have elders who are experienced and familiar with community mores and expectations, well known by all, of good repute and preferably married.<sup>96</sup>

The influence of paralegal training within the communities in Turkana district has led to the combination of formal law with customary law to fill in the wide gap in Turkana of dispute resolution infrastructures. There is only one court in a district of 77000 square kilometres. Traditional community elder’s courts have been reconditioned using principles of the rule of law and justice training and are now dispensing justice successfully in the district. The Catholic Justice and Peace Commission in the Lodwar Diocese has educating traditional local elders’ courts to conduct dispute resolutions informed by progressive principles from both regimes. This has led to an increase in the number of cases solved in the communities, as there is little court. Women and youth are included in the courts now as women are found to be good investigators and counselors of victims and the strong youth are used for making arrests and walking long distances to collect evidence.

In a survey conducted by the Legal Resources Foundation (LRF)<sup>97</sup>, majority of the respondents found community justice systems fairly constituted, and found most of the community courts presided over by the assistant chief. According to the study, awareness of the existence and processes of these systems was high. Cases of unfairness have been reported especially where victims are women or the very poor. *Appeals* are handled differently in different communities, and most communities believe in rulings of the court. Unsatisfied parties can seek further *recourse in the formal system*, and the formal court is not bound by the customary decision. Most communities rely on trust and respect as they *lack mechanisms of enforcement*. Some communities *use oaths, which instill fear* in parties to a case, and lead to unquestioned abidance to courts ruling. *Compensation* forms and levels depend generally on frequency of offense, but there are some agreed upon standards penalties for frequently occurring cases.

The LRF study found that the type of cases preferred for adjudication in community justice systems to formal courts in cases of land disputes, marital issues and witchcraft. Other cases frequently addressed by these systems are petty theft, family disputes, unprecedented happenings,

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<sup>96</sup> See *Balancing the Scales: A Report on Seeking Access to Justice in Kenya*. Legal Resources Foundation Kenya. 2005. P17.

<sup>97</sup> *Ibid.*

and defamation of character. Cases of killings are often taken up by the state in formal processes where there are police. In some communities, murder, rape, and robbery with violence are still addressed through these courts. In the study, communities voted the community systems better than the formal systems overall on scores of easy accessibility, faster in dispensing justice, more affordable, friendlier, uncomplicated process, and understandable and familiar language. 56% of respondents were satisfied with the quality of service.

With regard to *access*, the LRF study found that community justice systems are accessed by all groups of people in society as due to proximity and affordability. However the study found that in all communities men were able to access justice more easily than women. In most communities women and children have no *locus standi* in these courts and have to be represented or accompanied by a male even where they are complainants. Children are mostly. In some communities women cannot attend court at all even when decisions are being made about them. Children and youth are often treated as chattels in some communities with for instance no recourse for personal justice, so that recourse for rape and other forms of sexual abuse are in the form of compensation in kind paid to the fathers, uncles or brothers. Women have almost no recourse in cases of domestic violence with all cases ruled against women, and just reprimand for men on the severity of the beating.

Service in these systems is at *a cost of money or some other stipulated form* such as goats or chicken, which must be paid before one is listened to. Among the Turkana in Lodwar for instance the amount paid depends on the type and severity of offense, significance of claim, wealth status of the complainant, and whether the accused or respondent is a frequent offender. Because men are the owners of wealth in most of these communities, women's and the children's accessibility to these systems is at the mercy of their husbands, fathers, uncles or brothers. Most of these courts charge a fee of between KSH 100-1000 or the equivalent in stipulated kinds, which is prohibitive for poor women and definitely to children.

Some of the customary norms are directly *violative of core human rights* of parties. For instance among the Turkana and Samburu, if a girl gets pregnant out of wedlock she is forced to abort the child by being stepped on in the stomach by other women in the household and if she gives birth she is ordered to kill the child or else it is killed by older women. This is not considering that young men are allowed to ambush and 'rape' young girls they are interested in for marriage as a sign of 'making their mark' and claiming the girl. If the young man changes his mind, and the girl gets pregnant she has to undergo the above ordeal. Where a case is a clear case of rape and not of 'expression of interest to marry', survivors of the rape are forced to marry the rapist. In most murder cases, there is no opportunity for suspects to be heard and they are summarily executed communally through very cruel methods.

It seems clear that of the two systems, customary system seems to have more practical relevance for the majority of the Kenyans in rural areas than the formal system. Though the quality of justice and equality of access to justice for all is still unsatisfactory by formal standards, it does fill a critical vacuum of regulating relations and maintaining some form of order in these communities. It is however not always recognised by formal courts, and its decisions do not bind formal courts.

## 6.0 Strategies being adopted to enhance accessibility to justice for Kenyans

### *Constitutional Review Process*

Kenya has been in the process of constitutional review for the last decade. The preliminary products in the forms of various drafts of a much laborious and mostly participatory process that is still going on indicate much hope for offering solutions to many of the hindrances to justice identified in the laws in terms of gaps and excesses. The Constitutional Review draft of 25<sup>th</sup> March 2005 (the Bomas draft) which is the most comprehensive draft yet, contains provisions that would create constitutional principles for domestication of most of the core International Human Rights instruments. Such a step would then lead to enactment of laws on which Kenyans can base their claims within the judicial system.

### *The Governance, Justice, Law and Order Sector-wide Reform Programme (GJLOS)*

The blue print policy for the current government has been the Economic Recovery Strategy for Wealth and Employment Creation, (ERSWEC) 2003. Under the framework of this policy and towards these goals, the government, in partnership with development partners, civil society and private sector have since 2003 embarked on a sector wide reform programme dubbed 'Governance, Justice, Law and Order Reform Programme (GJLOS). Its goal is to improve the quality of life of the people of Kenya especially the poor and vulnerable. A core purpose of the policy is to enhance the effectiveness, accessibility, accountability and efficiency of the delivery of human rights, governance, safety and the rule of law. The programme has seven key result areas all of which have as core elements of their construction, and the potential for the enhancement of the equality of all, Ethics, integrity and anti-corruption; Democracy, human rights and the rule of law; Justice, law and order; Public safety and security; Constitutional development; Legal services provided to government and public leadership and management development.

These reforms target key institutions that are involved in one way or another in the formal process of ensuring the accessibility of justice to all Kenyans. They include the *Judiciary; the Attorney Generals Office; the Law Reform Commission; National Commission of Human Rights; the Police; Prisons and the Probation Service* among others. The GJLOS projects aim towards the enhancement of among other things:

- more people's access to courts of law, that will be impartial including equal treatment of women as of men in administration of justice, and special attention to needs of women, children, the poor and other vulnerable groups in the adjudication of cases that affect them.
- Access to alternative methods of dispute resolution that are faster, easily accessible to all, and less costly than the court process, but that are also set within controls that protect vulnerable groups such as women, and children from the cultural and social biases that sometimes inform the informal systems of dispute resolution. Better protection by the police against instances of discrimination, and better access to police services equally to all without discrimination
- Better treatment of prisoners and other persons incarcerated by order of law, giving equal regard to their human dignity as all other persons

Progress towards these goals includes: The proposed Legal Education and Aid Policy which has been successfully piloted in three districts and is due for launching; establishment of the Families Courts Division more friendlier and protective of children and accessible to women and the

amendments of Civil and Criminal Procedure Rules which is already applicable in these courts; the development of the Small Claims Court Bill which seeks to establish a regime of courts geographically, financially, psychologically and in terms of size, value and gravity of claims to poor and vulnerable people; ongoing human rights and gender training for police, and reforms within the management and incentive regimes of the police; training and reforms of the prisons and remand homes.

Under the GJLOS the Law Reform Commission of Kenya was restructured and strengthened, and is spearheading *legislative reforms* that would resolve many of the hindrances to justice identified in this paper. The Commission employs a participatory process where they hold widely publicised public hearings equally in all regions of the country on each proposed law set for reform, and hold a validation forum for the law before passing it on to the Attorney General for presentation to parliament. Some bills that have been prepared under GJLOs include: the Equality Bill; Employment Act (Amendment) Bill; Affirmative Action Bill; Criminal Laws Amendment Bill; Domestic Violence (Family Protection) Bill; Disabilities Act (Amendment Bill); Income Tax (Amendment Bill); HIV/AIDS Prevention Bill; The Refugees Bill; the Education Bill; National Social Health Insurance Fund Bill; the Labour Institutions Bill; the Statute Law (Miscellaneous Amendment) Bill which amends many important laws; among others. Important laws that have been passed include the Children's Act 2003, and the Sexual Offenses Act 2006.

The judiciary is also undergoing major reforms including computerisation of the registries and judicial officers' offices; the development of the Kenya Law Reports which are now upto date electronically and in hard volumes; human rights training for judicial officers; proposals for reform of the Judicial Commission to make it independent from executive; proposals for de-linking appointment of judges from the executive; anti-corruption measures; among others.

Further under the ERSWEC, institutions that are central to the pursuit of the rule of law and justice have been established and are focal in the implementation of GJLOS. These include the National Commission of Human Rights, the National Gender Commission and the Ministry of Justice and Constitutional Affairs (MOJCA). MOJCA is responsible for policy on administration of justice, law reform, and anti-corruption strategies, integrity and ethics, legal aid and advisory services and the Kenya /national Human Rights Commission. The Ministry's five year strategy is to improve legal education, increase access to justice through support to legal aid, create mechanisms for community justice, and develop and implement a five year anti-corruption campaign. The Ministry through the Law Reform Commission is spearheading an ambitious law reform campaign topped by the constitutional reform agenda.

#### *Civil Society Contribution*

Legal and human rights education and is still mostly provided by the Civil Society organisations. Since they do not have resources of their own, but rely on donors, their work covers a very small percentage of Kenyans. Further donor funding is unreliable and comes with impositions of approaches and goals that have often been found not to fit with realities of communities targeted, whose lives are mostly governed by customary laws, or whose immediate needs are not legal education but food, shelter or security. Paralegal training is the main strategy used in community legal education. Whereas it has played a key role it has its major limitations and challenges, and has not been reviewed for long term effectiveness since the 1980s when it was introduced. It relies on the volunteer spirit of paralegals in a context of extreme poverty. It also expects that these paralegals spend not only their time, but also resources moving from place to place organising forums for education. Where paralegals have been paid, programmes have collapsed when donors have pulled out. Where communities have taken over the programmes, they have often become vehicles of aggrandisement for a few. They have however survived where they are

established under churches. Civil society could not possibly meet the vast need for legal education and aid in Kenya but they could compliment government efforts through innovations in strategies.

## CONCLUSION

Development of the rule of law and Constitutionalism in Kenya has been informed by the Social Economic and political systems it sought to regulate. The current constitution, and its practice is a result of the use of the rule of law, whose principles and rationale was grafted from the British society, and whose aspirations were those of imperialist interests. The ruling class in Kenya has since independence used the rule of law in its struggle to balance the competing interests of the deeply rooted imperialist interests, the economic aspirations of the people in the context of extreme poverty and very high expectations, the meet the imperatives of a unified nations in the context of ethnic stratified society; to underpin its legitimacy and survival through the ideology of development; and above all to under-gird and facilitate the primitive economic accumulation of the ruling class in a context where capital has been in the hands of foreigners and Asian immigrants. This scenario is also set in the context of a patriarchal society with its discrimination against women and the vulnerable.

The paper has found that the main challenges to desired reforms towards increased access to justice have been: poor domestication of international human rights norms; lack of political will; the public's ignorance of rights and the law; lack of accessibility to public information; archaic laws, legal language and practice lagging behind social change; conflict between customary and formal law; extreme poverty and non-affordability of the legal services; impunity of law enforcement officers in their violation of the law; poor conditions of work for law enforcement agencies hence poor moral; poor management of law enforcement institutions; and inadequate physical infrastructure among others.

This paper has sought to illustrate that reforms or initiatives to empower the poor through the law must find their logic and feasibility within the social, economic and political project going on in the country, and may be of more help, if they design a project whose goal would be to use the law to move the goals of the state project towards the interests of the poor. Relevant policies to in Kenya today are the Economic Recovery and Wealth and Employment Creation Strategy 2003, and the newly launched Kenya Vision 2030.

The paper established that the edifice of the legal and justice system- the laws and the practice is not designed to cater for the interests of the poor, women, children, workers, refugees and other vulnerable groups. There are large gaps in the constitution and laws on substantive provisions of rights of these groups; and the process norms of the entire system is broadly insensitive and exclusionary making it difficult for them to vindicate their rights in the system.

The customary justice system is much more preferred by majority poor especially in the rural areas. Opportunity for accessing justice within the system is however challenged by cost, discrimination against women, children, youth and poor men, corruption as the system is taken over by local administration officers as the institute of 'traditional elder' withers away, individualism and other principles of capitalist economy in the context where customary norms were developed within communal societies, non-enforceability in formal law of customary court decisions, conflict with formal law among others. This system is however being strengthened with infusion of principles of natural justice through the work of NGOs and FBOs.

The paper finds that the law reform stance and programmes currently going on if effected will conceivably afford more Kenyans especially the poor and vulnerable groups greater opportunity to access justice. However the economic project of the government as can be read in the two over-arching policy documents must be found to have a coincidence of purpose with the legal reforms. This paper has not done this analysis. Earlier work by this author<sup>98</sup> on the same subject however found that the ERSWEC purpose and goal compliments goals of the current legal reforms, even though priority in implementation seems to have been towards the interests of capital.

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<sup>98</sup> Ngondi-Houghton, C., *The State of Human Rights in Kenya: A Baseline Survey Report for the Development of a National Action Plan and Policy for Human Rights in Kenya*. A Publication of the Ministry of Justice and Constitutional Affairs. 2005.

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