MAKING THE BILL OF RIGHTS OPERATIONAL:

POLICY, LEGAL AND ADMINISTRATIVE PRIORITIES AND CONSIDERATIONS

Occasional Report

Kenya National Commission on Human Rights

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TABLE OF CONTENTS

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From: Lawrence Mute and Rose Kimotho, Editors, October 2011

LIST OF ABBREVIATIONS AND ACRONYMS

ACHPR: African Charter on Human and Peoples' Rights

CRPD: Convention on the Rights of Persons with Disabilities

EPZ: Export Processing Zone

ESC: economic, social and cultural

FGM: Female Genital Mutilation

ICCPR: International Covenant on Civil and Political Rights

ICESCR: International Covenant on Economic, Social and Cultural Rights

ICT: Information Communication Technology

KSL: Kenyan Sign Language

KNCHR: Kenya National Commission on Human Rights

KNHREC: Kenya National Human Rights and Equality Commission

NCPWD: National Council for Persons with Disabilities

NHRI: National Human Rights Institution

UDHR: Universal Declaration of Human Rights

UN: United Nations

PREFACE

The Kenya National Commission on Human Rights (KNCHR) is established pursuant to Article 59 (4) of the Constitution of Kenya 2010 as one of the successor commissions to the Kenya National Human Rights and Equality Commission, itself established under Article 59 (1) of the Constitution. KNCHR is constituted under the Kenya National Commission on Human Rights Act (No. 14) of 2011, a statute which in turn has succeeded the now repealed Kenya National Commission on Human Rights Act (No. 9) of 2002 under which KNCHR was first established in 2003.

The mandate of the Commission, which is elaborated in section 8 of the KNCHR Act, is broadly to enhance the protection and promotion of human rights in Kenya. The National Commission is an independent agency whose operations are guided by the United Nations approved Paris Principles on the establishment and functioning of national human rights institutions.

The Commission executes its mandate through advocacy, investigations, visits to places of detention, research and human rights education, among other strategies. The Commission is also mandated to advise the Government on how to enhance protection and promotion of human rights.

The National Commission is the national focal point for reliable and current information on human rights. It conducts research on emerging and key human rights issues with a view to catalyse policy and legislative reforms or to inform and precipitate debate on key human rights issues. Towards this end, the Commission issues authoritative, occasional issue-based human rights reports.

This Occasional Report, 'Making the bill of rights operational: policy, legal and administrative priorities and considerations', is the first in a series that will look at the application and operationalisation of the whole Bill of Rights in the Constitution. KNCHR anticipates that this and future research will assist policy makers and implementers as they go about the business of implementing the Constitution.

The preparation of this report was coordinated by the Commission's Research and Compliance Department which among other functions undertakes research on diverse issues and makes recommendations on human rights concerns.

SUMMARY

The coming into effect of the Constitution of Kenya 2010 is only a beginning of the process of change that Kenyans voted for. Real and meaningful change will happen only when the letter and spirit of the Constitution is effected. This calls for enactment of enabling legislation consonant with the new supreme law. In addition to the law, the State must also put in place policies and programmes that actualise the Constitution. However, implementation of the Constitution is not just up to the State. Private actors comprising business, civil society and individuals must also understand their obligations and live up to them.

In this occasional report, the Commission seeks to provide policy makers and policy implementers with practical ideas on how to utilise the Bill of Rights while undertaking their executive, legislative or judicial functions under the Constitution.

The report has been compiled following a study of the conceptual and practical uses of Bills of Rights around the world. Specific themes in Kenya's Bill of Rights have been reviewed alongside comparable experiences from other jurisdictions. The report is presented in ten chapters. Chapter one examines the conceptual and normative value of a Bill of Rights and, more specifically, what it means for Kenya. Having an expanded Bill of Rights is an important step towards creating a culture of constitutionalism in the country.

Chapter two examines the implications of Article 2 (5) and 2 (6) of the Constitution which move Kenya from a dualist to a monist State. The chapter finds that Article 2 (5) and (6) seeks to ensure that Kenyans enjoy greater protection of the international treaties and conventions ratified by the State. It proposes the character of the ratifications legislation which Parliament should pass to enable these provisions.

As well, it proposes approaches which the Judiciary should take on pertinent issues.

Chapter three unpackages in an easy-to-understand way the enforcement mechanisms and options which individuals have in terms of Article 23 of the Constitution if they wish to seek remedies for alleged violations under the Bill of Rights. Among other things, the chapter recommends that the Chief Justice should hasten to make the rules to enable individuals to seek these judicial remedies effectively.

Chapter four provides a context for understanding the limitations clause in the Bill of Rights. The rights guaranteed under the Bill of Rights are absolute only in a few specified instances; but even rights which are limited are protected from abuse by a careful network of provisions. The chapter also addresses the more controversial limitations established in the Bill of Rights covering persons who profess the Muslim faith and members of the Defense Forces.

Chapter five offers guidance on how to effect the principle of progressive realisation of economic, social and cultural rights provided under Article 43 and other related provisions of the Constitution. The State should convert these constitutional principles to manageable circumstance-specific policies and the courts have to decide their approach in interpretation of economic, social and cultural rights, while being circumspect not to overly interfere with the Executive and Legislature's implementation and policy-making functions.

Chapter six discusses safe abortion and the right to reproductive health in the context of implementing Articles 26 (4) on legal termination of pregnancy and Article 43 (1) on the right to reproductive health. There is need for urgent legal and policy guidelines to regulate the conduct of safe abortion in the country.

Chapters seven and eight focus on Article 54 on the rights of persons with disabilities, and Article 55 on the rights of the youth, respectively. The rights of persons with disabilities should be mainstreamed into the overall framework for protecting and promoting the rights of all Kenyans. For the youth, Article 55 offers an important basis for ensuring sustainable programming for the youth of Kenya.

Chapter nine shows how Article 20 of the Constitution has expanded responsibility for human rights to business enterprises. The chapter relates the Bill of Rights with the United Nations work on business and human rights, specifically the 'protect, respect and remedy' framework that has been put forth by the Special Representative on Business and Human Rights. It recommends the enactment of legislation on companies which will enhance accountability for human rights by companies and for the formulation of a human rights policy for all businesses no matter their complexity or size.

Chapter ten concludes the report.

PART ONE

1. CHAPTER ONE: PURPOSE AND CONCEPTUAL FRAMING

1.1 Purpose of Study

The Constitution of Kenya 2010 was promulgated on August 27, 2010. The country's new supreme law, which was endorsed by an overwhelming majority,[1] is the foundation for ushering in the changes that Kenyans have been clamouring for decades, including restructuring of governance and expansion of the Bill of Rights. However, having a Bill of Rights is not an end in itself; the test is in ensuring that Kenyans have effective exercise of their human rights.

The theme of this occasional report is how to make Kenya's Bill of Rights operational in relation to the various state organs which must contribute to its implementation. The report focuses specifically on clarifying the gains and opportunities that the Bill of Rights presents to Kenyans. It provides policy makers and policy implementers with practical proposals on how to effect the different provisions.

The Bill of Rights comprises articles covering civil, political, economic, social and cultural rights. While the Constitution is now clearer on the rights due to Kenyans, their realisation requires significant policy, legal and administrative changes. The inclusion of economic, social and cultural rights in the Bill of Rights will require specific and deliberate legislative and policy interventions on the part of the State if progressive realisation is to be achieved as envisaged in the Constitution. An

1. The Constitution was ratified by over 67 percent of the total votes cast, http://www.iiec.or.ke/index.php/August-2010/final-referendum-results-are-gazetted.html

additional consideration is that Kenya's new monist status brings into play many more human rights provisions contained in treaties to which Kenya is a party and which need to be made operational. Lastly, the Constitution identifies categories of persons in respect of who specific application of rights is elaborated so as to better protect those groups. The question then is how to implement those provisions so that they can have meaning for those groups.

Objectives

The report's overall objective is to provide policy makers and policy implementers with operational ideas on effective use of the Bill of Rights while undertaking their executive, legislative or judicial functions under the Constitution. Specifically, the report:

1. Highlights the value of Kenya's new Bill of Rights;
2. In relation to eight themes, proposes priorities within the Bill of Rights which key public and private institutions and individuals should focus on in the next few years: it is envisaged that future occasional reports will provide similar analysis for further themes drawn from the Bill of Rights; and
3. Identifies other considerations which the Executive, Legislature, Judiciary and other public and private institutions and individuals should have as they implement the Bill of Rights.

1.2 Introduction to Bills of Rights

A Bill of Rights is important as a symbol of the values that a country stands for. Principles of human rights are a key "countervailing force to the exercise of totalitarian, bureaucratic and institutional power—widely identified as the greatest threats to the liberty of the individual and democratic freedoms."[2] These principles are entrenched in

2 Sir Anthony Mason, "A Bill of Rights for Australia" 5 Australia Bar Review (1989) 79 at 79-80)

constitutions around the world to provide citizens with protection from unwarranted interference from the state and to offer a legal basis upon which to challenge government action that violate them. A Bill of Rights is particularly important to protect the rights of religious, ethnic, linguistic and other minorities, whose interests can be easily ignored by the numerical majority and overruled by democratically elected governments.

The origin of the concept of a bill of rights

The idea of a Bill of Rights descends from a long tradition of philosophy, espoused by theorists such as John Locke and Thomas Jefferson, which focused on the idea of individual rights that are safeguarded by and against the government.[3] This conception of human rights was enshrined in the 1789 French Declaration of the Rights of Man and the Citizen and the American Bill of Rights.

The contemporary framework for human rights discourse was initiated following World War II with the inception of the 1948 Universal Declaration of Human Rights (UDHR). This perspective on human rights is more egalitarian, less individualistic and has an international focus.[4] It places additional emphasis on protection from discrimination, focuses on the right of every individual to equality before the law, and introduces socio-economic rights, which attempt to reduce inequality and remedy unequal access to services. It is less individualistic because it looks beyond the individual, who is the primary repository of rights under classical theories of human rights, to provide for some group rights. The contemporary conception of human rights also places the family at the forefront as the foundational unit of society. Finally, contemporary Bills of Rights are more international because

3 James Nickel, Making Sense of Human Rights: Philosophical Reflections on the Universal Declaration, University of California University Press, 6-7, 1987

4 Id.

they draw on the language and principles of the many international and regional human rights conventions and treaties established after the UDHR. Indeed, the Constitution of Kenya 2010 incorporates the country's international obligations directly into domestic law.[5] International standards, as codified in treaties and other instruments, therefore, play critical roles in the creation and evolution of national Bills of Rights and human rights legislation.

By having a Bill of Rights, Kenya has accepted the idea of international human rights as universally applicable and relevant to Kenyan society. However, the ability of the Executive, Legislature and Judiciary to effect change depends somewhat on the perceived relevance of the Bill of Rights to Kenyan society. State organs will only be willing to provide a robust interpretation and application of the Bill of Rights, and stakeholders will only be willing to observe the Bill of Rights and its associated jurisprudence, if they perceive the Bill of Rights as legitimate and a reflection of values widely held in society.[6] It is therefore important for stakeholders to continue to provide public education on the Constitution to ensure that the general population has a basic understanding of what the Bill of Rights is and why it is beneficial to them.

The value of a Bill of Rights

A Bill of Rights can be an important element in the movement towards creating a culture of constitutionalism. Constitutionalism "enshrines respect for human worth and dignity as its central principle, fostering conditions for political participation and legitimating substantive restraints on governmental power, even in cases where government action purportedly mirrors the popular will."[7] A codified Bill of Rights

5 See chapter two of this report.
6 Mac Darrow and Philip Alston, "Bills of Rights in Comparative Perspective" at 490
7 Id. at 465

can help to foster a "culture of liberty" by serving as a powerful symbol of democratic renewal and a new era of government accountability, more so than if a country relies on human rights legislation or case law.[8] In South Africa, for example, the introduction of its new Constitution with its entrenched Bill of Rights in 1996 marked the decisive moment when the State left the era of Apartheid and moved forward under new political leadership.

Actualising rights

It is generally accepted that a democratic government that is constrained by strong institutions and a constitution will be less likely to commit human rights abuses against its citizens.[9] Constitutions that provide effective safeguards to curtail government excesses and create democratic space for citizens can play an important role in the protection of human rights both domestically and internationally. Yet the enactment of a Bill of Rights does not necessarily mean that a government has a theoretical, let alone practical, commitment to constitutionalism. Separation of powers and rule of law must guide the exercise of government power; thus the Executive, Legislature, Judiciary and related institutions must be committed to governance by established laws. Without independent and effective institutions of governance to implement the Bill of Rights it is impossible to entrench or enforce the protections that are included therein.[10] Given the interplay between the constitution and the institutions that oversee its enforcement, it is extremely difficult to establish a causal link between the enactment of a Bill of Rights and the reduction of human rights violations.[11]

8 Id. at 486
9 Id. at 466
10 Okoth-Ogendo, 'Constitutions Without Constitutionalism: Reflections on an African Political Paradox' in Greenburg et al. (eds.) Constitutionalism and Democracy: Transitions in the Contemporary World (1993) 65-82 at 80
11 Supra note 8

Therefore, the process of implementation of the Constitution of Kenya needs to enhance perceptions of inclusion if it is to facilitate real transition to democracy, peace and respect for human rights. Through fulfilling its duty to observe, respect, protect, promote and fulfill the rights and fundamental freedoms in the Bill of Rights, the State has the opportunity to ensure that every Kenyan feels equally protected by the Constitution, which is necessary to facilitate meaningful movement towards a just and equal society.

The chapters which follow in this report describe and analyse how Kenya might establish its new Bill of Rights as the fulcrum for ensuring that every Kenyan can exercise his or her rights effectively.

PART TWO

2 CHAPTER TWO: FROM DUALISM TO MONISM- THE IMPLICATION OF ARTICLES 2 (5) AND 2 (6) OF THE CONSTITUTION

2.1 Introduction

Monism and dualism are terms used to describe the two approaches that states take in applying international law in their domestic systems. In states with a monist legal system, international law does not need to be translated into national law; the act of ratifying an international treaty immediately incorporates that international law into national law. For states with a dualist system, international law is distinct and separate from national law and is not directly applicable domestically. It must be translated into national legislation before it can be applied by the national courts or implemented by the executive.

Under the 1963 Constitution, Kenya was a dualist State; any treaty or convention ratified by the country did not have the force of law unless it was domesticated by passage of appropriate legislation.

Article 2 (5) of the Constitution of Kenya 2010 states that the general rules of international law shall form part of the law of Kenya. This means that international law, including customary international law, shall be a source of law in Kenya. Article 2 (6) then states that any treaty or convention ratified by Kenya shall form part of the law. By virtue of this provision, Kenya is converted from a dualist into a monist State as treaties and conventions do not now have to be domesticated for them to have the force of law in Kenya. However, the opinion has also been expressed that these provisions do not convert Kenya into a strictly monist State because another constitutional provision

requires the State to legislate international obligations in respect of human rights and fundamental freedoms.[12]

The difference between the dualist and monist systems relates, at a practical level, to the steps needed before an international treaty has effect within the national system and what a court is to do in a situation where the obligations under international and national law differ.

2.2 Kenya as a dualist State

The former Constitution was silent on the process of treaty ratification, but conferred executive powers on the President. The Executive was vested with the authority to negotiate and execute treaties on behalf of the country and also exercised residual powers of ratification. There was no law that required parliamentary approval as a prerequisite for treaty ratification, and constitutional checks and balances operated through Parliament's role of passing legislation to give effect to treaties. Parliament's role therefore was to domesticate treaties by passing implementation legislation following ratification by the Executive.

The Judiciary played an oversight function over the system and would often only apply instruments that had already been domesticated. For a long time, courts were reluctant to apply provisions of any treaty which had not been domesticated.

However, over the years, there was a gradual shift towards acknowledgement and application of international treaties and the courts even affirmed their willingness to apply rights created by treaties that were ratified without reservations where Parliament had not domesticated such treaties. For example, in *Rono v. Rono &*

12 Article 21(4) of the Constitution provides: "The State shall enact and implement legislation to fulfil its international obligations in respect of human rights and fundamental freedoms."

another, the Court of Appeal asked itself whether international law was relevant in its consideration of the unequal allocation of property among male and female heirs. The Court stated that although the traditional view had been that international obligations are applied domestically only when they had been incorporated into domestic law, "*the current thinking on the common law theory is that both international customary law and treaty law can be applied by State courts where there is no conflict with existing State law, even in the absence of implementing legislation*." The Court then listed the numerous human rights treaties that Kenya has ratified but not domesticated, going on to state that these would inform the Court's decision.[13] However, there was lack of uniformity in acknowledging and applying international law, for while some courts started moving towards application of international law, others enforced dualism strictly and would not apply provisions of a treaty which had not been domesticated.[14] With the clarity afforded by Articles 2 (5) and (6), it is expected that the courts will now develop uniform jurisprudence in the application of international law.

The introduction of international law norms and ratified conventions into

13 Rono v. Rono & another, [2008] KLR, available at, at p. 812-13 (citing Bangalore Principle No. 7). See also Republic vs. Minister for home affairs & 2 others Ex-parte Leonard Sitamze [2008], available at http://kenyalaw.org/CaseSearch/view_preview1.php?link=810836047490385154082 78 where the court, following the decision in Rono vs. Rono, applied provisions of the International Covenant on Economic, Social and Cultural Rights (ICESCR) on the basis that Kenya as a signatory to the Convention could not just wish it away.

14 For instance in a 2007 judgment in Peter Echaria v Priscilla Echaria, Civil Appeal No. 75 of 2001, the court stated: "Human rights issues, and in particular women's rights issues, took centre stage on the global theatre from the 1960s. There were, for example, International Covenants on Civil & Political Rights and Economic, Social and Cultural Rights which were adopted in 1966 and came into force in 1976; the Convention on the Elimination of All Forms of Discrimination against Women which came into force in 1981; and the African Charter on Human & Peoples' Rights which was adopted in 1981. Kenya has ratified all those international instruments and they therefore provide a source of law which, in appropriate cases, the courts in this country may tap from. It is in that light that the obiter dicta expressed by Omolo Ag. JA (as he then was) and Kwach JA in the two decisions we alluded to above should be viewed." Available at: http://www.kenyalaw.org/CaseSearch/print.php?link=43831, last accessed on 28 June, 2011

the domestic system brings on board not only new rights but also duties and obligations towards many other actors. There must be public and parliamentary scrutiny of international instruments that the Executive signs to anticipate and respond to the ramifications of such instruments.

Beyond information, however, the significance of ratification of any treaty will vary widely, with diverse impacts on compliance by different State agencies with the ratified instrument. Provisions of ratified treaties have to be practically enforced, which may require responses by various sectors for incorporation to happen. For instance, enforcement of some treaty obligations may have budgetary implications, while some may need policy change or development, yet others may require national plans of action. For example, the 1965 International Convention on the Elimination of All Forms of Racial Discrimination, to which Kenya acceded in 2001, is not an instrument whose implementation is possible by the simple enactment of its provisions as domestic law. To a large extent it requires specific measures to be devised and taken by the State in order to give effect to its provisions.

Implications of Articles 2 (5) and 2 (6) of the Constitution

Article 2 (5) of the Constitution provides that the general rules of international law shall form part of the law of Kenya. The question which arises is: in which sources of international law does one find the rules of international law?

In some instances, general rules of international law have been referred to as customary international law and in other instances, as rules and principles recognised by the major civilised traditions of the world. Some courts have looked to non-binding international instruments such as United Nations General Assembly resolutions to

discern general rules of international law.[15] International customary law is, however, generally accepted as the main source of such rules.

Practically, there are very few issues today which are still under the exclusive regulation of customary international law, for example state immunity, state responsibility or the status of foreigners; one would resort to that body of law should a dispute arise regarding any of these issues.

Article 2 (5) would be significant in solving an issue which is not clear either in treaty law or addressing any gaps between treaty law and domestic provisions. It would also be important where certain rules are contained in an international treaty to which Kenya is not a party but which is important in substance and has a large number of contracting parties, if it can be shown that the rules in the treaty are a codification of international customary law.

Article 2 (5) will require judicial interpretation indicating what really general rules of international law are and clarifying methods of ascertaining these rules. The courts may encounter challenges in interpreting what rules will fall within the ambit of Article 2 (5), but must give guidance and develop jurisprudence in this regard.

The implication of Article 2 (6), as observed above, is that it makes Kenya a monist State, thereby departing from the position under the former Constitution, which required domestication before treaties could have binding effect within the country. The introduction of Article 2 (6) also avoids situations where the country signs a treaty more as a ceremonial gesture than because of real commitment to the tenets of the treaty and thereafter shelves its implementation.

15 Different states have adopted different approaches. In continental Europe, most states refer to 'generally recognised principles' of international law in their constitutions (for example Germany, Austria, Estonia, Greece, Portugal and the Russian Federation). Other countries (such as the Republic of South Africa) expressly mention customary international law.

This is true for Kenya which has ratified many treaties but very few have implementing legislation.

Other constitutional provisions though raise the question whether Articles 2 (5) and 2 (6) of the Constitution envisage absolute monism. For instance, with respect to human rights, Article 21 (4) of the Constitution provides that the "*State shall enact and implement legislation to fulfil its international obligations in respect of human rights and fundamental freedoms*." What is the implication of this provision?

In general, international human rights standards should operate directly and immediately within the domestic legal system of each state party. However, not all treaties can become immediately effective. A distinction exists between 'self-executing' and 'non-self-executing' treaties. The former are able to operate automatically within the domestic field without the need for any legislation, while the latter require enabling statutes before they can function inside the country and bind the courts. Some human rights treaties are explicitly non-self-executing. For instance, the Convention on the Prevention and Punishment of the Crime of Genocide of 1948 requires that a state pass legislation in order to make the acts criminalised in the Convention illegal under its domestic law. The Rome Statute of the International Criminal Court of 1998 is another example of a non-self executing treaty as it requires states to adopt implementing legislation mandating the domestic courts to prosecute the crimes proscribed in the Statute. Treaties may be part self-executing. For example, some provisions of the International Covenant on Economic, Social and Cultural Rights are non-self executing because they are programmatic in nature. Some provisions of the International Covenant on Civil and Political Rights (ICCPR) are also sometimes

considered non-self executing - [16] hence, the provision in Article 2 of the ICCPR obliging all state parties to "*legislate* ***where necessary*** *to give effect to the rights recognised in the Covenant…*"

The difficulty of distinguishing between provisions that are self-executing and those which are not can be particularly vexing. Article 21 (4) of the Constitution addresses this problem by ensuring that there will be no excuse in relation to treaties containing guarantees of human rights; the country must take all steps to ensure their implementation and where the treaty provisions are not self executing, implementing legislation must be enacted to make them effective.

2.3 Treaties ratified by Kenya but not domesticated prior to the passing of the Constitution

A second interpretation of Article 21 (4) of the Constitution could be that it is necessary to pass legislation to implement the various human rights treaties that Kenya ratified before promulgation of the Constitution which it had not domesticated.Despite the many human rights treaties which Kenya has over the years ratified, only a few have implementing Statutes. Since the treaties were ratified under the former constitutional order with only the Executive playing a role, Parliament must incorporate them into law through implementing legislation, otherwise they will have become part of the law without legislative involvement, a situation that would not only go against the principle of separation of powers but would be unconstitutional.

Parliament must therefore ensure that the human rights treaties already ratified have implementing statutes, thereby closing any gap in recognition and enforcement of rights created under those statutes.

16 The United States, for example, considers the ICCPR non-self executing and deposited a declaration to that effect at the time it ratified the treaty.

One final matter should be addressed here. Kenya's Executive ratified the 2003 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the Maputo Protocol) on October 8, 2010. Courts may in due course have to determine whether that act of ratification by the Executive was constitutional, since the ratification happened some time following the August 27 promulgation of the Constitution of Kenya 2010. The Executive had for some time been under pressure to ratify the Maputo Protocol, and in principle the ratification was sorely welcome. But the State had already indicated that no human rights instruments would be ratified post-promulgation until a ratifications law had been legislated. Strict interpretation of the Constitution would have to find that the Executive had usurped Parliament's new legislative function of ratifying treaties. This irregularity must be cured by law expeditiously.

2.4 Implementing Article 2 (5) and 2 (6)

Treaty ratification is an executive function recognised by the Vienna Convention on the Law of Treaties of 1969.[17] The Draft Constitutions preceding the promulgated 2010 Constitution specifically provided for parliamentary approval before ratification of treaties. Article 121 (g) of the Bomas Draft Constitution of 2004, Article 115 (g) of the Wako Draft Constitution of 2005, Article 124 (2) of the Harmonised Draft Constitution of 2009, Article 119 of the Revised Harmonised Draft Constitution of 2010, and Article 88 of the Parliamentary Select Committee's Draft Constitution of 2010, expressly recognised the role of Parliament in approving international treaties. Such a clause was, however, not included in the Constitution of Kenya 2010, although its

17 Articles 7(2) of the Vienna Convention on the Law of Treaties recognises that Heads of State, Heads of Government and Ministers for Foreign Affairs can represent their states for the purpose of performing all acts relating to the conclusion of a treaty without having to produce full powers.

import can be discerned in the law-making power which is vested in Parliament.

The effect of ratified treaties is that they become part of Kenyan law, which can only be made by Parliament except in situations where a person or body making such law is authorised by the Constitution or in legislation.[18] Parliament must, therefore, be involved in the process of making or adopting anything that will have the force of law in Kenya. In this regard, Parliament must quickly enact legislation outlining the process of treaty ratification, including the role of the executive branch of Government and its own role.

The law should, as basic minimums, provide for the following:

1. Parliamentary approval as a prerequisite for ratification. This would ensure that no treaty is ratified without involvement of Parliament.
2. Process of seeking approval. The law must clearly spell out the process of seeking parliamentary approval for treaty ratification, who can seek such approval, and what conditions should be met by the person seeking approval. Some of the conditions should be that any treaty whose ratification is sought should be tabled in Parliament together with an analysis/memorandum which notes the reasons why Kenya should become a party to the treaty; the obligations imposed by the treaty; the foreseeable economic, environmental, social and cultural effects of the treaty ratification; its direct financial costs to the country; what consultation has occurred in relation to the treaty and how the treaty will be implemented domestically. Parliament would be able to holistically appreciate the implication of ratifying any treaty before giving approval.

18 Article 94(5) provides that "no person or body, other than parliament, has the power to make provision having the force of law in Kenya except under authority conferred by this Constitution or by Legislation."

3. The law must provide for the process of discussion, the timelines and the options open to Parliament. For example, where Parliament wishes to request amendments, should these be done on the floor of the House or left to the mover of the motion to consider? Other options should include approving the treaty, conditionally or unconditionally; rejecting the treaty wholly or attaching reservations to the treaty.
4. In each instance, the law must state what numbers are required before Parliament can adopt a particular option. This ought to be considered carefully; it may be prudent to provide that any amendments to the treaty may require a simple majority, but that a treaty should be approved for ratification unless rejected by a 2/3^{rds} majority. This would prevent situations where a few parliamentarians control the approval process and frustrate ratification of beneficial international instruments.
5. The process of denunciation and withdrawal from treaties should also be clear and again in seeking to withdraw from a treaty, the requirements should be similar to the approval process, with the party seeking such withdrawal tabling the relevant instrument and an analysis/memorandum explaining the reasons why Kenya should withdraw from the treaty. Again, the motion to withdraw should be passed by a 2/3^{rds} majority.
6. In adherence to the Constitution, avenues for public participation in consideration of treaties to be ratified should be provided.
7. The law should establish a depository of treaties to ensure all treaties ratified by the country are easily accessible to the public. It is currently difficult to get any conclusive record of treaties ratified by Kenya, yet, if they are part of our laws, everyone should be able to access the record.
8. The law should also speak to the transitional process, particularly treaties that are already ratified and not incorporated through

implementing legislation. The law should provide direction and time lines on how such treaties will be implemented.

2.5 The Role of the Courts

The courts are going to play a significant role in implementation of international norms at the domestic level. The courts in this sense must take notice of the new sources of law that should govern the cases that come before them and they will have an obligation not only to apply treaty provisions but to also recognise and apply principles of international law.

It will often fall on the courts to determine and interpret provisions and implications of various conventions. In order to make a correct decision on this, the courts must be aware of the nature and implications of various treaties and of the important role of judicial remedies in their implementation. Judges and magistrates must be conversant with not only the local laws but also the international instruments that Kenya has ratified as well as arising jurisprudence from these instruments.

The Constitution, while providing that treaties ratified by Kenya shall form part of the law of the land, does not establish the hierarchical status of the treaties and international law in the domestic legal system; also it does not state what takes precedence in case of conflict between treaties ratified by Kenya and the general rules of international law on the one hand, and locally-generated domestic law on the other. While the supremacy of the Constitution is proclaimed, the relationship between domestic law and international law is less clear. There is the likelihood that many cases will arise pitting domestic provisions against international provisions and a clear position is thus required. For instance, in the matter of *Ziporrah Wambui Mathara*[19]

19 Bankruptcy Cause No.19 of 2010, available at: http://kenyalaw.org/CaseSearch/view_preview1.ph p?link=401495457776051323365 78, last accessed on 23 March, 2011

the Court observed that the ICCPR is now part of Kenyan law by virtue of Article 2 (6) of the Constitution and held that incarceration of one for failure to pay a civil debt goes against Article 11 of the ICCPR. In this instance, the Court chose to uphold the ICCPR instead of the Civil Procedure Act, Cap. 21, which allows as one of the means of enforcing a judgment, the committal of the judgment debtor to civil jail. This is the correct approach, since, once international instruments are ratified, they become part of Kenyan law. Where the domestic law is not in consonance with norms in the international treaty, then the treaty provisions should be upheld. The courts will however have to make this clear in their jurisprudence, particularly in light of the Bangalore Principles on Domestic Application of Human Rights Norms which the courts have relied on before, proclaiming that where domestic legal provisions are clear the same must be upheld in the event of inconsistency or conflict with provisions of international treaties.[20]

2.6 Conclusion and Recommendations

Articles 2 (5) and (6) introduce far-reaching changes in Kenya's legal system as they open the domestic legal system to international law. There is need to clarify the process of ratification of treaties. Parliament and the Executive must be clear on their roles in ratification of treaties.

Our recommendations are therefore that:

1. Parliament quickly enacts legislation on ratification of treaties, with clear provisions on the entire process of ratification and attendant duties and powers by the different arms of Government as well as public participation in the ratification process.

20 Principle 8 of the Bangalore principles on domestic application of human rights norms provides that "where national law is clear and inconsistent with the international obligations of the State concerned in common law countries the national court is obliged to give effect to national law".

2. A depository of all treaties ratified by Kenya be urgently set up to enable citizens appreciate the law.

3. Sensitisation forums be held with judges and magistrates on their role in applying international law in cases that will so require. This will prepare the Judiciary for the shift towards uniform application of international law and development of jurisprudence in this area.

4. The civil society and Kenya's National Human Rights Institution (NHRI) should put in place enhanced mechanisms to monitor the country's compliance with treaty obligations. They should also be prepared to play a significant role in the ratification process of new treaties. For example, consultation where a human rights treaty is concerned should include the NHRI and nongovernmental organisations working on human rights related issues, while trade agreements should likewise include civil society organisations working on trade-related issues, who should give expert input towards the analysis which is undertaken before approval for ratification is obtained.

3 CHAPTER THREE: REMEDIES

3.1 Introduction

This chapter enumerates and explains the remedies open to an individual seeking redress against violations under the Bill of Rights in the Constitution of Kenya 2010. Its aim is to demystify the remedies and show that an individual may easily use them. As well, the chapter indicates how various public agencies may ensure utmost effectiveness of these remedies.

The right to a fair and public hearing within reasonable time before an independent and impartial tribunal is an integral part of the State's obligation to provide effective remedies. Article 23 (1) of the Constitution of Kenya 2010 gives the High Court jurisdiction to hear and determine applications for redress of a denial, violation, or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. Article 23 (2) mandates Parliament to enact legislation giving original jurisdiction to subordinate courts in appropriate cases to grant remedies for human rights violations.

International human rights law lays down clear rules regarding the responsibility of states vis-à-vis abuses of power that constitute violations of individual rights and freedoms. States have a general duty to ensure the effective protection to individuals or groups against human rights violations, and the most relevant specific legal obligations that this entails are the duty to *prevent* human rights violations; the duty to *provide remedies;* and the duty to *investigate* alleged human rights violations, to *prosecute* those suspected of having committed them and to *punish* those found guilty.[21]

21 Human Rights in Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers, Professional Training series No. 9, OHCHR and IBA, Geneva 2008.

By providing for remedies in the Constitution, Kenya is complying with its international obligations to do so. Article 8 of the 1948 Universal Declaration on Human Rights states that everyone: "has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or law". This right is also incorporated in Article 2, 3 of the 1966 International Covenant on Civil and Political Rights (ICCPR), which provides that anyone whose: "rights or freedoms as herein recognised are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity")paragraph (a)) and that this remedy is to be "determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the state, and to develop the possibilities of judicial remedies" (paragraph (b)).

3.2 The Remedies

Where there is a human rights infringement or threat to a human right, the Constitution provides in Article 22 that an individual or group may apply before a court for any of a number of remedies. Article 23 (3) enumerates the types of remedies that may be available to a litigant. These are:

1. A declaration of rights;
2. An injunction;
3. A conservatory order;
4. A declaration of invalidity of any law that violates any of the rights in the Bill of Rights;
5. An order for compensation; and
6. An order for judicial review.

The specific remedies available will depend on the specific right which has been, or is being threatened to be, infringed and the context of the claim.

1. Declaration that a right has been violated or that a law is incompatible with a right or freedom - Article 23 (3) (a): This remedy is applied for so that a court or judicial tribunal may make a judicial declaration that the decision, order or legislation complained of is incompatible with the applicant's human rights. The declaration itself does not provide redress for the applicant, but in certain circumstances an agency or lower tribunal will be expected to abide by the declaration and rectify the situation.

2. Injunctions and conservatory orders – Article 23 (3) (b) and (c): An injunction can be sought to compel a public body to comply with its statutory duties, to restrain the implementation of unlawful decisions, or to restrain a public body from acting unlawfully. A conservatory order on the other hand is applied for, for the maintenance of a *status quo*, known popularly as a '*stay*' in civil litigation, but which in human rights litigation is meant to conserve a particular situation or state of facts on the basis that to do otherwise would violate a right or freedom. For example, the Human Rights Committee established under the ICCPR issued a conservatory order against Trinidad and Tobago from executing a man on death row on the ground that the delay in his execution by several years had amounted to psychological torture and inhuman treatment.[22] Locally, the High Court in *HCCC Petition No. 65 of 2010, Satorose Ayuma and Others v. The Registered Trustees of the Kenya Railways Staff*

22 Communication No. 80/1994, *Ashby v. Trinidad and Tobago*, CCPR/C/74/D/580/1994

Retirement Benefits Scheme and Two Others, granted a temporary injunction in a constitutional petition brought under the new Bill of Rights restraining the respondents from demolishing, evicting or terminating the applicant's leases pending final determination of the case. The temporary injunction was part of an overall prayer for a conservatory order stopping the respondent from proceeding with evictions of the applicant.

3. Compensation (Article 23 (3) (e):

4. The court may order financial compensation either from the State or other offender for physical and psychological injuries or other harm sustained in connection with a human rights violation. Compensation is one of the few remedies specifically provided for in international conventions such as the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,[23] To which Kenya acceded in 2007. International human rights tribunals such as the European Court of Human Rights have awarded compensation not only to the victim of a human rights violation but also to the victim's next-of-kin. [24]Similarly the Inter-American Court of Human Rights has ordered compensation to a victim's family for: "psychological impact suffered" as a result of the violation.[25] Order for judicial review – Article 23 (3) (f):

23 Article 14 of CAT provides that state parties have a duty to ensure that victims of torture obtain redress and that they have "an enforceable right to a fair and adequate compensation, including the means for as full a rehabilitation as possible."

24 ECHR, Case of Mahmut Kaya v. Turkey, judgment of 28 March 2000.

25 This was in the case of enforced disappearance, I-A Court HR, Velásquez Rodriquez case, Com pensatory damages, judgment of July 21, 1989, Series C, No. 7

The court can make an order:

- Quashing the decision of a public body – *certiorari. In this instance,* the court will not generally substitute its own decision for that of the public body but will simply quash the decision and set it aside (although the court may indicate the correct interpretation of the applicable convention or statute);
- Compelling a public body to comply with its statutory duties – *mandamus. In this instance,* the court is likely to remit the matter back to the public body with a direction to reconsider; or
- Preventing a public body from acting unlawfully in the future - *prohibition*. This remedy can be sought at an earlier stage in respect of an anticipated breach.

3.3 Roles of Different Key Actors in Ensuring Effective Remedies

3.3.1 The Judiciary

Under the Constitution of Kenya, the courts are to develop laws to the extent that such laws ensure the rights or freedoms contained in the Bill of Rights and are to: "adopt the interpretation that most favours enforcement of a right or fundamental freedom" (Article 20 (3). This constitutional *directive* to the courts is of prime importance as without judicial activism in favour of human rights, especially in traditional and conservative judiciaries, human rights litigation would find little success. The Bill of Rights would be of little effect if there is no adequate machinery and intention in the Judiciary for the enforcement of such rights, and if remedies, when granted, are not supervised to ensure compliance. The inclusion of the concept of public interest litigation in the Constitution is one of its richer jurisprudential developments.

There is therefore need to develop the Judiciary's professionalism and technical capacity to recognise and deal with violations of human rights and fundamental freedoms. The Judiciary needs to be educationally and otherwise highly equipped to deal with the complex

human rights situations constantly arising, including adjudication in situations of competing rights and interests. This involves developing human rights jurisprudence, publicising judgments, reaching out to citizens, facilitating the initiation of court proceedings, training judges and staff on international standards and recognising human rights violations during court sessions. Besides high efficiency, the moral quality of judges must be such that they are able to exercise norms of equity and justice at all times. Constant vigil must be kept by the National Human Rights Institution, civil society and all persons interested in human rights to ensure the quality of the Judiciary. Enlightened public opinions must be constantly directed to sustain responsible public debate on all matters relating to the Judiciary. Opportunities must be created for Kenyan judges to meet with the judiciaries of States both regionally and internationally as well as regional and international human rights courts in order that they may learn from each others' experiences regarding adjudication of human rights cases.

Corruption and political interference with the independence of the Judiciary has often impeded its exercise of the function to provide effective remedies. Undue influence and pressure on judges, breaches of transparency, obstacles to accessing justice such as legal costs, lack of adequate funding for the courts and limitations on access to legal services have and will continue to hinder the enjoyment of remedies provided for in the Constitution.

Article 22 (3) of the Constitution provides that the Chief Justice will put in place procedures that promote access to courts. Even though sub-article (4) provides that absence of these rules 'does not limit the right of any person to commence court proceedings', the rules are necessary and vital to provide orderly institution of public interest litigation cases and should be prioritised by the Chief Justice.

3.3.2 The Kenya National Human Rights and Equality Commission

The Constitution in Article 59 (1) establishes the Kenya National Human Rights and Equality Commission (KNHREC), whose mandates include to: "receive and investigate complaints about alleged abuses of human rights and take steps to secure appropriate redress where human rights have been violated" - Article 59 (2) (e). In making this provision operational, the newly established Article 59 Commissions (the Kenya National Commission on Human Rights – established by Act No. 14 of 2011, National Gender and Equality Commission – established by Act No. 15 of 2011, and Commission on Administrative Justice –established by Act No. 23 of 2011) should take cognisance of the challenges that limited the effectiveness of the Kenya National Commission on Human Rights (KNCHR) established by Act No. 9 of 2002. The KNCHR had the power to investigate on its own initiative or upon a complaint made, the violation of any human rights and to issue summons requiring the attendance of any persons before it and the production of any document or record relevant to any investigation it was undertaking. The KNCHR relied on these powers to deal with the thousands of complaints it received over the years. While it had powers of a court under its constituent Act, the Kenya National Commission on Human Rights Act, the High Court declared the tribunal created by the Commission *ultravires*.[26]

3.3.3 The role of the public

Article 22 (2) of the Constitution has made the avenue for seeking redress for human rights abuses open to any individual or organisation acting on its own behalf, as a member of a group or class of persons, in the public interest or an association acting in the interest of one or

26 In KCB V KNCHR, the court while acknowledging that the Commission had powers of a court said that the con stituent Act did not provide the procedure and structure for its creation hence the KNCHR Tribunal is ultravires.

more of its members. By removing the formerly strict requirement that a petitioner have *locus standi* in an application, the Constitution has opened the doors for anyone to bring a petition before the court should there be a violation of any of the rights enshrined therein. But unless the public actively engages in human rights litigation, the rights enshrined in the Bill of Rights will remain paper rights.

3.4 Conclusion

Kenyans expect the courts to apply the remedies set out in the Constitution where appropriate. The Chief Justice must move with speed to make rules to guide the process. The Legislature must enact a law to establish KNHREC and equip it with powers necessary to investigate and secure appropriate redress for violations. Kenyans must no longer be passive rights-holders but active rights-claimers to actualise the Bill of Rights.

4 CHAPTER FOUR: THE LIMITATION CLAUSE IN KENYA'S BILL OF RIGHTS

4.1 Introduction

One of the main criticisms of the Bill of Rights under Kenya's former Constitution was that all the rights it guaranteed were 'subject to provisions of law'. This provided the Legislature with an avenue for severely limiting fundamental rights and freedoms through legislation thereby seriously negating the very rights that the Constitution was meant to protect. The Constitution of Kenya 2010 not only guarantees a wider array of rights but also takes a different approach to limitations by moving away from sweeping claw-back clauses. Instead the Constitution sets up a general limitations clause under Article 24 with clear criteria that have to be met by each limitation before it can be allowed to stand.

Limitation clauses of the nature of Article 24 suspend or restrict guaranteed rights to which they apply and appear in numerous international rights covenants and national constitutions.[27] They are distinct from derogation clauses because they allow states to breach obligations to uphold certain rights for reasons unrelated to war or public emergency.[28] Limitation clauses typically stipulate that the restriction of constitutional or human rights should be done through enacting a 'law' and the said law must be 'necessary' or 'reasonably required' to accomplish certain specified social or public goals.

27 H. Kwasi Prempeh. Marbury in Africa: Judicial Review and the Challenge of Constitutionality in Africa. 80 Tul. L. Rev. 1239 (2006).

28 Sara Stapleton. Ensuring a Fair Trial in the International Criminal Court: Statutory Interpretation and the Impermissibility of Derogation. 31 N.Y.U. J. Int'l L. & Pol. 535 (Winter/Spring 1999).

Derogation, however, refers to exceptional restrictions on the enjoyment of human rights that are imposed upon the declaration of a state of emergency which may include civil war, natural disaster or invasion by a foreign power. In this respect, Article 58 (6) of the Constitution provides that any legislation enacted in consequence of a declaration of a state of emergency may limit a right or fundamental freedom in the Bill of Rights only to the extent that the limitation is strictly required by the emergency. This is further articulated at the international level in Article 4 of the International Covenant on Civil and Political Rights (ICCPR).[29] This provides a narrow set of circumstances under which states may derogate from the strict provisions of the Covenant.[30]

The focus of this chapter is restricted to the limitations outlined in Articles 24-26 of the Constitution and not on derogation of rights upon the declaration of a state of emergency as established in Articles 58 and 132. Accordingly, this chapter will look at the international and domestic framework on limitation of rights; and draw conclusions and recommendations for litigants, government and other human rights actors.

29 Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI)of 16 December 1966. Entry into force 23 March 1976. Available at <http://www2.ohchr.org/english/law/ccpr.htm>

30 For such a derogation to be acceptable, there must be a public emergency which threatens the life of the nation and the existence of which is officially proclaimed. Any measures taken must be to the extent strictly required by the exigencies of the situation. These measures should not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin. In any event no derogation from the following articles may be made: article 6 (right to life),article 7 (prohibition of torture or cruel, inhuman or degrading treatment or punishment, or of medical or scientific experimentation without consent), article 8 paragraphs 1 and 2 (prohibition of slavery, slave-trade and servitude), article 11 (prohibition of imprisonment because of inability to fulfil a contractual obligation), article 15 (the principle of legality in the field of criminal law,i.e. the requirement of both criminal liability and punishment being limited to clear and precise provisions in the law that was in place and applicable at the time the act or omission took place, except in cases where a later law imposes a lighter penalty), article 16 (the recognition of everyone as a person before the law), and article 18 (freedom of thought, conscience and religion).

4.2 Limitation Clauses in International and Regional Human Rights Instruments

The ICCPR incorporates limitation clauses in recognition of the fact that there are circumstances under which the state may limit certain rights that are otherwise protected. It includes limitations on the right to liberty of movement and the freedom to choose a residence (Article 12), the freedom to manifest one's religion or belief (Article 18), the freedom of expression (Article 19), the right to peaceful assembly (Article 21) and the freedom of association (Article 22) when it is necessary to protect national security, public order, public health or morals, or the rights and freedoms of others. Through its General Comments, the Human Rights Committee has provided authoritative interpretation of the appropriate implementation of the limitation clauses in Articles 12, 18 and 19.[31]

Like the ICCPR, the African Charter on Human and Peoples' Rights (ACHPR)[32] imposes restrictions on the rights to conscience and religion (Article 8), the freedom of expression (Article 9), the freedom of association (Article 10), the freedom of assembly (Article 11) and on the right to property (Article 14). It then dedicates Chapter II (articles 27-29) to outline the duties of the individual. It is arguable that this constitutes a further limitation to the rights enshrined therein to the extent demanded by the reciprocal duties owed to the community, to the state and even to the international community.[33]

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31 See General Comments 27, 22 and 10, respectively. The Committee has however not issued General Comments about limitations of the right to peaceful assembly (Article 21) and the freedom of association (Article 22).

32 Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986 available at: http:// www. africa-union.org last accessed on 20 February 2011

33 For instance, article 27(2) provides that "The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest."

It is, therefore, clear about the consensus both at the regional and international levels on the need to balance between rights and limitations. Certain 'core rights' though are not subject to any form of limitation or derogation even in situations of a declared state of emergency. These include the absolute prohibition on slavery, torture, cruel, inhuman and degrading treatment and punishment, the right to a fair trial, and the right to an order of *habeas corpus*.

4.3 Constitutional Limitation of Rights

4.3.1 The former Constitution

One of the major criticisms of the former Constitution was that the rights it guaranteed were all 'subject to claw-back clauses' which fettered the enjoyment of the very rights that the Constitution was meant to protect.

Section 70 provided an outline of the constitutionally protected rights, stating in broad terms that the limitations were designed to ensure that the enjoyment of those rights and freedoms by any individual did not prejudice the rights and freedoms of others or the public interest. Subsequent sections in the Constitution then provided in detail the content of each right including the circumstances under which each right could be limited.

For instance, whereas Section 76 provided for protection against arbitrary search and entry, it also provided that this right could be limited by law to the extent that the said law made provision:

(a) Reasonably required in the interests of defence, public safety, public order, public morality, public health, town and country planning, the development and utilisation of mineral resources, or the development or utilisation of any other property in such a manner as to promote the public benefit;

(b) Reasonably required for the purpose of promoting the rights or freedoms of other persons;

(c) Authorising an officer or agent of the Government of Kenya, or of a local government authority, or of a body corporate established by law for public purposes, to enter on the premises of a person in order to inspect those premises or anything thereon for the purpose of a tax, rate or due or in order to carry out work connected with property lawfully on those premises and that belongs to that Government, authority or body corporate, as the case may be; or

(d) Authorising, for the purpose of enforcing the judgment or order of a court in civil proceedings, the entry upon premises by order of a court, and except so far as that provision or, as the case may be, anything done under the authority thereof is shown not to be reasonably justifiable in a democratic society.

The effect of this provision and many others like it was that there were more exceptions to the right than substantive protections thereof, which in turn severely eroded the content of the right that the Constitution sought to protect. With each right subjected to a raft of exceptions, Chapter Five of the Constitution in actual fact comprised a Bill outlining exceptions to fundamental rights rather than protecting human rights.

4.3.2 Limitation of fundamental rights under the Constitution of Kenya 2010

The Constitution of Kenya brings with it contemporary thinking on various constitutional matters, including the limitation clause. Like the South African, Canadian and Israeli Constitutions, it contains a clause expressly providing standards for justifiable limitations on constitutional rights.

Specifically, article 24 of the Constitution provides that:

(1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-

(a) The nature of the right or fundamental freedom;

(b) The importance of the purpose of the limitation;

(c) The nature and extent of the limitation;

(d) The need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and

(e) The relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

(2) Despite clause (1), a provision in legislation limiting a right or fundamental freedom:-

(a) in the case of a provision enacted or amended on or after the effective date, is not valid unless the legislation specifically expresses the intention to limit that right or fundamental freedom, and the nature and extent of the limitation;

(b) shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation; and

(c) shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.

The above criteria is in essence a codification of what has commonly been referred to as the *Oakes Test* developed by the Canadian Supreme Court in *R. v. Oakes* when it sought to interpret the limitations clause in Section 1 of the Canadian Charter of Rights and Freedoms that allows reasonable limitations on rights and freedoms through legislation if it can be demonstrably justified in a free and democratic society.[34]

The Court observed that the values that underpin a 'free and democratic society' and which should be used as the 'ultimate standard' for interpretation of the limitation clause are values such as respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.

Applying this thinking to Article 24, it becomes clear that any limitation upon a constitutionally protected right must be based on law-any restriction of a right constitutionally protected that has no legal basis is null and of no effect.

When any law is challenged as an unconstitutional limitation of a right, the first inquiry undertaken is whether it infringes a constitutional right. If it is determined not to, the case is closed. If it does infringe a constitutional right, the inquiry proceeds within the limitation clause to ask whether the infringement is justified.

This entails a delicate balancing exercise which involves considering factors that include the nature of the right that is infringed, its value in a democratic society, the public purpose served by the measure that has been challenged, the extent of the intrusion, the proportional relationship between the intrusion of the right and the interest to be

34 [1986] 1 S.C.R. 103

served, and the availability of less restrictive means to achieve the same objective.

For any limitation to pass the test, first, it must be an objective related to concerns which are pressing and substantial in a free and democratic society, and second, it must be shown that the means chosen are reasonable and demonstrably justified. This second element is described as a 'proportionality test' and requires the invoking party to show that the measures adopted are carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations: they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in the first sense, should impair as little as possible the right or freedom in question. Third, there must be proportionality between the effects of the measures which are responsible for limiting the constitutional right or freedom, and the objective which has been identified as of 'sufficient importance'.

Article 24 (2) (c) further reinforces the importance of the proportionality test by incorporating an additional safeguard against what may be termed as 'overkill' or excessive limitation. It does this by providing that any legislation that limits a right or fundamental freedom should not be such as to derogate from the core or essential content of the right.

Therefore, the right to privacy may be justifiably limited by a law that empowers the Police to search one's person if they reasonably believe that the suspect has evidence needed in a criminal trial. However, if such a law also allows the Police to arbitrarily search one's house and go through one's private correspondence without any reasonable cause, then this legislation would be an excessive limitation which derogates from the core content of the right to privacy, and would not pass the limitation-clause test.

The important thing is that in most cases limits on rights must pass the limitation-clause test. Laws limiting rights must specify what right they limit. Rights cannot be limited accidentally.

4.3.3 Application of the Bill of Rights to persons who profess the Muslim religion

In addition to the general limitation outlined in Article 24 (1) and (2), Article 24 (2) introduces a provision with specific reference to persons who profess the Muslim faith. It reads:

The provisions of this **Chapter on equality** shall be qualified to the extent strictly necessary for the application of Muslim law before the Kadhi's Courts to persons who profess the Muslim religion, **in matters relating to personal status**, marriage, divorce and inheritance.

This provision seeks to shield the Kadhi's Courts from challenges on the constitutionality of their decisions on matters of equality, when it comes to the application and interpretation of elements of Muslim law. This is because there are some provisions of Muslim law that restrict the absolute equality between men and women when it comes to matters of inheritance, marriage and personal status. So, what is the exact meaning of the phrase 'to the extent strictly necessary for the application of Muslim law'? Does it oust the provisions of Article 24 (1)?

In interpreting this phrase the rigorous considerations in Article 24 must come into play. This is because Article 24 (2) does not in any way do away with the rigorous requirements of Article 24 (1). Accordingly, any such qualification to the equality provisions in the Constitution must still be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. Moreover, any such limitation based on Muslim law should not be such as to derogate from the core or essential content of the right.

A lot of interpretation and clarification still needs to go into this clause and the challenge is for scholars, litigants and the courts to constructively engage in order to come up with a uniform

understanding of the extent of any such limitations that may be imposed based on Muslim law. In this endeavour, guidance may be sought from Article 259 which provides that the Constitution: "shall be interpreted in a manner that:-

(a) Promotes its purposes, values and principles;
(b) Advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;
(c) Permits the development of the law; and
(d) Contributes to good governance."

Further recourse may be had to the doctrine of purposive interpretation which has been accepted as one of the main tenets of constitutional interpretation. It may be summarised in the words of Samatta C J of Tanzania in *NDYANABO vs. ATTORNEY GENERAL* [35]thus:

First, the Constitution ... is a living instrument, having a soul and consciousness of its own as reflected in the preamble and fundamental objectives and directive principles of state policy. Courts must, therefore, endeavour to avoid crippling it by construing it technically or in a narrow spirit. It must be construed in (tune) with the lofty purposes for which its makers framed it. So construed, the instrument becomes a solid foundation of democracy and the rule of law. As Mr. Justice EO Ayoola, a former Chief Justice of the Gambia stated … 'A timorous and unimaginative exercise of the judicial power of constitutional interpretation leaves the Constitution a stale and sterile document'. Secondly, the provisions touching fundamental rights have to be interpreted in a broad and liberal manner, thereby jealously protecting and developing the dimensions of those rights and ensuring that our people enjoy their rights, our young democracy not only functions but also grows, and the will and dominant aspirations of the people prevail. Restrictions on fundamental rights must be strictly construed."

35 [2001] E.A. 485

4.3.4 Applicability of the Bill of Rights to the Defence Forces and the Police

Another category treated differently by the Constitution when it comes to limitations to their human rights are those serving in the Defence Forces and the National Police Service.
Article 24 (5) provides that:

Despite clause (1) and (2), a provision in legislation may limit the application of the rights or fundamental freedoms in the following provisions to persons serving in the Kenya Defence Forces or the National Police Service—

(a) Article 31 – Privacy;
(b) Article 36 – Freedom of association;
(c) Article 37 – Assembly, demonstration, picketing and petition;
(d) Article 41 – Labour relations;
(e) Article 43 – Economic and social rights; and
(f) Article 49 – Rights of arrested persons.

At first glance, it would appear that this provision strips members of the Defence Forces and Police Service of their rights. However, on closer scrutiny, it becomes evident that Parliament may only pass legislation that ***limits*** the applicability of the listed rights. The question then is: What guides Parliament when passing that legislation? Does Article 24 (5) do away with the strict requirements of Article 24 (1) and (2) for persons in the military and the police? Can Parliament therefore go 'rogue' and unreasonably limit the rights of persons working in these institutions?

The answer to this lies in diverse articles in the Constitution. These include the Preamble that recognises the aspirations of all Kenyans for a government based on human rights, equality, freedom,

democracy, social justice and the rule of law; Article 10 that lists the national values and principles of governance such as democracy, human dignity, human rights and good governance which binds all State organs whenever they enact, apply or interpret law; and most important, Article 20 (4) of the Constitution that enjoins any court, tribunal or other authority to promote the ***values that underlie an open and democratic society based on human dignity, equality, equity and freedom.*** Taken in their totality, these articles operate to rein in Parliament and constrain it to promote values and principles such as human dignity, democracy, freedom and reasonableness, all of which are considerations outlined in the proportionality test in Article 24 (1) and (2).

In essence, therefore, any legislation that limits the rights of those in the military and police will have to be informed by an analysis similar to what is outlined in the general limitation clause in Article 24 (1) and (2). Any limitations to the rights of personnel in the military and the police should therefore be limitations that are strictly necessary as demanded by the sensitive nature of these offices.

4.4 Fundamental Rights and Freedoms that May Not be Limited

Within the human rights framework, certain rights are of such importance that they are peremptory norms of international law from which no derogation is permitted *(jus cogens)*. These norms are recognised by the international community as a whole as being fundamental to the maintenance of an international legal order. These include the absolute prohibition of torture, cruel, inhuman or degrading treatment or punishment, freedom from slavery or servitude, the right to a fair trial and the right to an order of *habeas corpus*.

Article 25 of the Constitution incorporates this consensus and prohibits any form of limitation of these rights. This in practical terms means

that, for example, no justification whatsoever may be raised by the Police Service for subjecting an individual to torture in the course of conducting investigations. This absolute prohibition is operational even in times of a declared state of emergency.

4.5 Conclusion

Throughout this discussion, it has emerged that not all rights are absolute. International human rights instruments and national constitutions provide that rights may be limited depending on particular circumstances. Any limitation must, however, take cognisance of certain values that underpin a free and democratic society based on human dignity, equality and freedom. These are values such as respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society. In this respect, every case must be examined on the basis of its own particular circumstances.

In the Kenyan context, this applies in all circumstances including limitations on the right to equality by persons professing the Muslim faith. Similar considerations apply if and when Parliament considers limiting specific rights of those serving in the military and the police. It is also clear that a number of rights are held in high regard and are inviolable. No one is permitted to torture, to enslave and to deny another person the right to a fair trial. Furthermore, an order of habeas corpus is now explicitly protected by the Constitution. Given these provisions, the courts must be robust in not only protecting these rights, but also providing guidance and authoritative interpretation in cases brought before them. When legislating, Parliament must be appraised of the extent of the limitations to any right it seeks to limit. Kenyans themselves must also be vigilant and resist any attempts to unreasonably limit their fundamental rights.

PART THREE

5 CHAPTER FIVE: PROGRESSIVE REALISATION OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS

5.1 Introduction

This chapter responds to the questions of how policy-makers, law-makers and administrative agencies might ensure that provisions in the Constitution of Kenya 2010 covering economic, social and cultural (ESC) rights may come into full operation. The chapter considers the principle of progressive realisation of rights which is at the heart of effecting ESC rights: how will this principle inform the actions of Kenya's Executive, Legislature, Judiciary as well as devolved governance structures? For example, how will the right to education or the right to the highest attainable standard of health be realised in fact by Kenyans? How will appropriate legislation be crafted? How will it be implemented? And what considerations will courts have as they interpret these rights?

5.2 ESC Rights in the Constitution

Article 19 (1) of the Constitution prefaces the Bill of Rights by stating that it: "... is an integral part of Kenya's democratic State and is the framework for social, economic and cultural policies." The promotion of social justice is a key purpose for the recognition and protection of human rights and fundamental freedoms: Article 19 (2).

The Bill of Rights provides for ESC rights under three classes. Stand-alone ESC rights governed by the principle of progressive realisation of rights are encapsulated in Article 43 of the Constitution. Then, ESC rights are included in the group rights enumerated for women; consumers; children; persons with disabilities; youth; older persons; minorities and marginalised groups; and solidarity rights (rights applying to the

whole community rather than to the individual). Finally, even rights classically understood as civil and political include norms essential to the realisation of ESC rights.

5.2.1 Article 43 rights and their intersection with other ESC rights

Article 43 of the Constitution establishes every person's right to six rights, as follows:

(a) Every person has the right to the highest attainable standard of health. This right includes the right to health care services, including reproductive health care. In addition, denial of emergency medical treatment is prohibited: Article 43 (1) (a) and Article 43 (2). This provision intersects with Article 42 which provides that every person also has the right to a clean and healthy environment.[36] Under Article 53 (1) (c), children have the right to basic health-care. The right to the protection of the health of consumers is also listed specifically in Article 46 (1) (c). The State should deploy affirmative action measures to ensure that minorities and marginalised groups have reasonable access to health services: Article 56 (e).

(b) Every person has the right to accessible and adequate housing, and to reasonable standards of sanitation: Article 43 (1) (b). Article 53 (c) complements this provision with the more imperative provision that children have the right to basic shelter. Persons with disabilities have the right "to reasonable access to all places, public transport and information": Article 54 (1) (c).

(c) Every person has the right to be free from hunger, and to have adequate food of acceptable quality: Article 43 (1) (c). Children have the right to basic nutrition: Article 53 (c).

36 This is a right which while couched in the Constitution as applicable to the individual is also a solidarity right that applies to the whole Kenyan community.

(d) Every person has the right to clean and safe water in adequate quantities: Article 43 (1) (d). Special measures should be put in place to ensure minorities and marginalised groups have reasonable access to water: Article 56 (e).

(e) Every person has the right to social security: Article 43 (1) (e). Persons who are unable to support themselves and their dependants will be provided with appropriate social security.

(f) Every person has the right to education: Article 43 (1) (f). This is particularly so for children who have the right to free and compulsory basic education: Article 53 (b). Persons with disabilities under Article 54 have the right- "to access educational institutions and facilities for persons with disabilities that are integrated into society to the extent compatible with the interests of the person". The State is required to take measures to ensure that the youth access relevant education and training: Article 55 (a). Minorities and marginalised groups should be provided special opportunities in educational and economic fields: Article 56 (b).

A number of other rights classically defined as ESC rights are provided for in the Constitution without being linked expressly to the principle of progressive realisation of rights. Article 41 (2) provides every worker with the rights to: fair remuneration; reasonable working conditions; form, join or participate in the activities and programmes of a trade union; and go on strike. Also, the effect of Article 30 which provides that a person shall not be held in slavery or servitude and that a person shall not be required to perform forced labour develops further these rights to work elements. Children receive particular protection in Article 53 (1) (d) with its provision of their right to be protected from hazardous or exploitative labour. Furthermore, the State should take measures to ensure the youth access employment: Article 55 (c) and will enforce affirmative action programmes so as to provide minorities and marginalised communities' special opportunities to

access employment: Article 56 (c). Finally, the principle of progressive realisation is introduced again in Article 54 (2) when it provides that: "the State shall ensure the progressive implementation of the principle that at least five percent of the members of the public in elective and appointive bodies are persons with disabilities."

Article 44 makes provisions covering cultural rights. It provides in (1) that: "every person has the right to use the language, and to participate in the cultural life, of the person's choice." It recognises specifically the right of a person to enjoy their culture and use their language: sub-article (2) (a). Significantly, though, a number of provisions protect children, youth and persons with disabilities from harmful cultural practices and exploitation, for example Article 55 (d). The State will take special measures to ensure minorities and marginalised groups develop their cultural values, languages and practices: Article 56 (d).

Finally, even those ESC rights not listed in the Constitution, and the attributes of ESC rights excluded from the express rights recognised in the Constitution, will still be part of Kenyan domestic law if they are drawn from the International Covenant on Economic, Social and Cultural Rights (ICESCR) to which Kenya is a party.[37] Rights within ICESCR not specifically listed in the Constitution which therefore are part of domestic law include the right to work (Article 6) of the ICESCR.[38]

5.2.2 Place of ESC rights in civil and political rights

Virtually all civil and political rights have notable ESC rights content:

(a) The concept of equality as framed in the Constitution anticipates substantive rather than formal equality; and Article 27 (1) is framed

37 For the context on this, see chapter two of this report.

38 All the other ICESCR rights are legislated into the Constitution of Kenya, although the content of some of those rights is limited or varied: the right to take part in cultural life (Article 15) corresponds with Article 44 of the Constitution, but the Constitution excludes mention of the right to enjoy the benefits of scientific progress and its application which Article 15 of the ICESCR also covers.

accordingly to confirm this when it provides that: "every person is equal before the law and has the right to equal protection and equal benefit of the law." Reference to 'equal benefit of the law' under this sub-article invites the implicit recognition that the State on occasion must take extra or special measures to ensure parity of results for persons or groups drawn back by circumstances such as hunger, non-literacy or illness. This view is confirmed by Article 27 (6) which explicitly requires the State to take legislative and other measures: "... including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination." Interventions will be had for disadvantage occasioned by past discrimination only where it can be shown that genuine need exists which would be mitigated by a particular benefit (sub-article 7). Finally, Article 27 (3) provides that: "women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres."

(b) Article 26 (a) of the Constitution affirms that every person has the right to life; and Article 28 provides that "every person has inherent dignity and the right to have that dignity respected and protected." The State will not have enforced a person's right to life if she/he dies of hunger. A person cannot be said to live in dignity if she/he has no shelter.[39]

(c) The right to access information as set out in Article 35 assures citizens their right to access information held by the State and information held by another which is required to enabled the exercise of a citizen's rights. Information on school bursaries and

39 The Indian case of Francis Coralie Mullin v. Union Territory of Delhi and others, 1981 AIR 746 1981 SCR (2) 516, makes this precise point when the court notes: "the right to life ... cannot be restricted to mere animal existence. It means something more than just physical survival ... we think that the right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings." available at: http://www.indiankanoon.org/doc/78536/ (accessed on 10 April 2011)

grants relevant to ensure the right to education for a citizen's child will be assured under this right. Second, sub-article (3) requires the State to publish and publicise any important information affecting the nation." Again, it is imperative that the State communicates information on the food situation in the country as a way of enabling this critical economic right.

(d) The rights to freedom of expression (Article 33); association (Article 36); assembly, demonstration, picketing and petition (Article 37); and movement and residence (Article 39), further enable ESC rights. Persons may associate to participate in activities that enhance their rights. People may petition State agencies whenever they feel their rights have been violated; and obviously they will express themselves in the course of such enterprise.

(e) The right to property is protected specifically by Article 40.

5.3 Enabling the Principle of Progressive Realisation of ESC Rights in Policy, Legislative and Administrative Action

5.3.1 The principle

The principle of progressive realisation of rights is based on the acknowledgement that states may not have adequate resources to immediately take all steps needed to assure optimal exercise of ESC rights. This principle was first enunciated in the ICESCR which in Article 2, 1 provides that:

> Each State Party ... undertakes to take steps, ... especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

This concept:

> ... constitutes a recognition of the fact that full realisation of all economic, social and cultural rights will generally not be able to be achieved in a short period of time. ... It is ... a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realisation of economic, social and cultural rights.[40]

5.3.2 Interpreting the principle in the Constitution

Articles 20 (5) and 21 (2) of the Constitution establish the domestic framework within which the principle of progressive realisation of rights will be applied. Article 20 (5) sets out the overall basis which various organs will use to interpret the principle of progressive realisation of rights. It provides that:

> In applying any right under Article 43, if the State claims that it does not have the resources to implement the right, a court, tribunal or other authority shall be guided by the following principles: (a) it is the responsibility of the State to show that the resources are not available; (b) in allocating resources, the State shall give priority to ensuring the widest possible enjoyment of the right or fundamental freedom having regard to prevailing circumstances, including the vulnerability of particular groups or individuals; and (c) the court, tribunal or other authority may not interfere with a decision by a State organ concerning the allocation of available resources, solely on the basis that it would have reached a different conclusion.

The effects of Article 20 (5) are threefold. Sub-article (5) (a) lays the burden of proof on the State where it alleges that it does not have

40 CESCR, General Comment 3, The Nature of States Parties Obligations, para. 9, available at http://www.unhchr.ch/tbs/doc.nsf/0/94bdbaf59b43a424c12563ed0052b664?Opendocument

adequate resources to facilitate the exercise of an Article 43 right. Paragraph (b) directs that the key consideration in resource allocation by the State should be ensuring the widest possible enjoyment of the right or fundamental freedom in the light of prevailing circumstances. Paragraph (c) restrains a court, tribunal or other authority from using the sole basis that it would have arrived at a different decision to change a State organ's decision on allocation of available resources.

On its part, Article 21 (2) provides that: "the State shall take legislative, policy and other measures, including the setting of standards, to achieve the progressive realisation of the rights guaranteed under Article 43." This means the State (including all its organs) is enjoined to take measures for realising ESC rights. This provision therefore covers the executive, legislative and judicial branches of the State; as well as constitutional commissions and independent offices; and county governments.

What, then, is the effect in totality of the principle of progressive realisation? When and how should it apply? Below, the chapter outlines some of the issues which Kenya's constitutional implementation organs should be mulling over now.

In view of Articles 20 (5) and 21 (2), the principle of progressive realisation of rights applies only to Article 43 of the Constitution. The other constitutional provisions covering ESC rights have to be read singularly to determine if they apply fully immediately. For example, Article 53 (1) (b)'s provision of the right to free and compulsory basic education for children is unqualified; so too is Article 54 (1) (b) which provides persons with disabilities the right to access educational institutions appropriately integrated into society. Interpretation of how provisions such as these ones differ from Article 43 provisions which are clearly in the ambit of progressive realization needs to be done by implementers as well as the courts.

The ESC rights established in the Constitution are justiciable: they are not merely aspirational or guiding principles for state policy.[41] Courts can actually make determinations on them. Nonetheless, these rights are not self-executing in the same way as civil and political rights and the State's duty to effect these rights involves reasonable legislative and other measures qualified by the extent to which resources are available.

Availability of resources is a matter which Kenya's courts will determine on a case by case basis after taking account of the Constitution and the country's overall socioeconomic context. In Soobramoney v. Minister of Health (Kwazulu-Natal), Case CCT32/97, the Constitutional Court of South Africa declined to issue an order that dialysis machines available for a particular health programme should be used to maintain the appellant who was in a chronically ill condition. The Court's decision was based on its assessment that these machines which were limited in number would be better utilised to benefit patients who could be cured instead of being used to keep alive a patient who could not be cured. A contrary order would have caused the whole treatment programme to fail since it would be unable to deal with the patient load.

Kenya's Judiciary is empowered by the Constitution to confer on whether the State has in its allocation of resources ensured the widest possible enjoyment of the right or fundamental freedom in the light of prevailing circumstances. A relevant question here is whether the Judiciary will be overstepping its classic role as an interpreter of law if it opts to quash decisions made by the Executive or Legislature

41 For a sense of the character of justiciability discussions prior to passage of the Constitution of Kenya 2010, see Kenya National Commission on Human Rights, Position Paper on Enhancing and Operationalising Economic, Social and Cultural Rights in the Bill of Rights, 2006

on priorities for resource allocation. Relevant considerations include whether a court should have say in how its peer State organs allocate national and county budgets? Can a non-elected judge manage budgets or should that be the prerogative of elected leaders?

Judge Albie Sachs of the South African Constitutional Court frames this as an accountability and appropriateness challenge. He notes that decisions on how to spend money are usually made by democratically elected bodies, and that the community cannot remove a judge who makes a bad resource allocation decision. He then notes though that:

I do not believe this problem can be resolved in a formal, abstract, and categorical way. When it comes to matters of deep principle, our lack of accountability actually becomes a virtue. We are not running for office, and electoral popularity is of no concern to us. We defend deep core values which are part of world jurisprudence and part of the evolving constitutional traditions of our country. Our lack of accountability in these circumstances actually becomes a 'plus.'[42]

The key question in determining if available resources have been allocated properly is whether the measures taken by the State to realise ESC rights are reasonable. In Government of Republic of South Africa v. Grootboom and Others, 2001 (4) SA 46 (CC), the Constitutional Court of South Africa stated that reasonable measures involve the establishment and implementation by the State of a coherent, well coordinated and comprehensive programme directed towards the progressive realisation of the right of access to adequate housing. It further held that in order to comply with its obligations, the State will be required not merely to legislate but also to act in a way that is

42 Sachs, Albie, "Social and Economic Rights: Can they be Made Justiciable?" SMU Law Review, Fall, 2000

designed to achieve the intended result. A programme that excludes a significant segment of society cannot be said to be reasonable.

In the same vein, the Constitutional Court of South Africa in Soobramoney noted that:

The provincial administration which is responsible for health services ... has to make decisions about the funding that should be made available for health care and how such funds should be spent. These choices involve difficult decisions to be taken at the political level in fixing the health budget, and at the functional level in deciding upon the priorities to be met. A court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such mattersAt a more general level, it is a fallacy that courts anyway do not make determinations with budgetary implications when dealing with civil and political rights.[43] This happens all the time: the High Court of Kenya decision in Priscilla Nyokabi Kanyua v. Attorney General et al, Constitutional Petition 1 of 2010, that prisoners should be enabled to vote during the 2010 constitutional referendum caused the Interim Independent Electoral Commission to spend resources setting up polling stations in prisons.

Article 20 (5) (c) restrains a court, tribunal or other authority from using the sole basis that it would have arrived at a different decision to change a State organ's decision on allocation of available resources. This provision at least in part seeks to respond to separation of powers concerns which posit that the Judiciary's focus should be interpreting the law while the Legislature and the Executive determine and execute

43 For a further perspective on the non-validity of the cost argument in categorizing rights as either civil or political or ESC, see: Gutto, Shadrack, "Beyond Justiciability: Challenges of Implementing/ Enforcing Socio-economic Rights in South Africa", Buffalo Human Rights Law Review, 1998

development programmes. The normative and practical context of the 21st century frames the Judiciary as an even better check on the negative actions of the other State organs. The arising judicial powers necessarily are tempered by judiciousness in application: and courts have a variety of options for ensuring effective enforcement of ESC rights without overstepping the mark. They may order the Executive to put in place programmatic measures for remedying an ESC right on which it should report regularly to the courts.[44] They may make declarations on the unconstitutionality of the Executive's or Legislature's actions or inactions.

5.4 Conclusions and Recommendations: How to Effect the Principle of Progressive Realisation

The following guidance on how to effect the principle of progressive realisation of rights may be drawn from this study.

First, ESC rights in the Constitution of Kenya are framed in general terms allowing interpretational flexibility for determining how those constitutional principles will be converted into manageable circumstance-specific policies.[45] Article 43(a)'s provision on the right to the highest attainable standard of health is framed to allow the Executive and Legislature or indeed the Judiciary to determine from time to time what is entailed by that right. State organs should craft policy and law to establish meaning to ESC rights.

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44 In Ain O Salish Kendra (ASK) v. Government and Bangladesh and ORS 19 BLD (1999) 488, the Supreme Court of Bangladesh ordered the government to develop master guidelines or pilot projects for resettling the petitioners who had sought remedies after the government had evicted them from an informal settlement in Dakar. Such plan, the court held, should allow phased EVICTIONS ON THE BASIS OF A PERSON'S ABILITY TO FIND ALTERNATIVE HOUSING.

45 In this, the Constitution of Kenya perhaps draws inspiration from its South African antecedent (see: Nolette, Paul, "Lessons Learnt from the South African Constitutional Court: Toward a Third Way of Judicial Enforcement of Socio-economic Rights", Michigan State University-DCL Journal of International Law, 2003).

Second, though, Kenyan courts will need to determine whether they wish to follow the core content approach; or whether, like South African courts, the Judiciary will follow the reasonable principle approach. The core content approach, also referred to as the minimum core obligations approach: "… entails a definition of the absolute minimum needed, without which the right would be unrecognisable or meaningless.[46] In Kenya it is more or less settled that the core content of the right to education is free and compulsory basic education. A noted danger of this approach is the arising impression that once determined core content will be static and not dynamic, and not amenable to amendment. It is the case though that: "The accepted mandatory minimum level may change over time, for example as science and technology advance".[47] A further danger is the implication that minimum core content may be determined at a global level, whereas in fact minimum core content is best understood when national circumstances are taken account of. The Constitutional Court of South Africa has been reluctant to read core content into ESC rights, taking the view that the Legislature is better positioned to make the sorts of broad policy considerations which generate core content.

Third, therefore, Kenyan courts may opt to apply reasonableness standards while giving content to ESC rights. Speaking about South Africa, Nolette notes that in giving content to what 'reasonable' policies are, the court looks to the problems at hand in their social, economic and historical context as well as the context of the Bill of Rights as a whole. This way, the Legislature's far wider policy-setting

46 International Commission of Jurists, Courts and the Legal Enforcement of Economic, Social and Cultural Rights, Geneva, 2008

47 Ibid

jurisdiction is not usurped by the courts: "...the role of the courts is simply to make suggestions for possible policy alternatives that in general only constrain the government's options within a certain range, rather than directing any one particular outcome".[48]

Fourth, a Kenyan court will be constrained to take account of the country's economic capacities for harnessing resources and concretising development programmes even as it determines the exercise of ESC rights. Many ESC rights are not rights on demand implementable immediately in their fullness: a court will rather ask the Executive to put in place concrete programmes to ensure that an aggrieved individual or community enjoys their ESC rights in due course. The key to this sort of enforcement entails threefold standards: the court will acknowledge progress; it will be concerned by absence of new milestones, the so-called 'stand-still effect'; and it will frown upon retrogression in enjoyment of a right. In relation to education, relevant questions will include: has enrolment capacity in schools increased, is it the same as before, or has it reduced? In certain instances positive ESC rights will be realised through the use of negative rights. For example, where the State's machinery is intent on demolishing a learning institution the court may intervene with appropriate injunctions to stop this from happening.[49]

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48 Nolette, Paul, "Lessons Learnt from the South African Constitutional Court: Toward a Third Way of Judicial Enforcement of Socio-economic Rights", Michigan State University-DCL Journal of International Law, 2003

49 Quite recently, the High Court of Kenya has issued an interim order restraining the state from evicting 1,122 evictees from an area within the Municipal Council of Garissa: Ibrahim Sangor Osman et al and Minister of State for Provincial Administration and Internal Security et al, Constitutional Petition No. 2 of 2011, High Court of Kenya, Embu, 29 March 2011. In another case, the High Court at Nairobi issued an injunction requiring the first respondent not to demolish, evict or terminate the leases of the petitioners before substantive hearing of the petition: Satrose Ayuma et al v. Registered Trustees of Kenya Railways Staff Retirement Benefits Scheme et al, Petition No. 65 of 2010

Fifth, though, certain ESC duties apply immediately, and Kenya's constitutional implementation organs must recognise them as such. Of particular note is the duty prohibiting discrimination and the duty to take steps or adopt measures directed towards the full realisation of the rights contained in the ICESCR.[50] The ICESCR now applies to Kenya directly since it is a monist state.

Sixth, interpretation of the principle of progressive realisation of rights by the Executive, Legislature or Judiciary must be informed by a cardinal ultimate principle: that wherever interpretational challenges arise, State agencies should focus on the spirit of the Constitution and not its letter particularly if the letter of the Constitution tends towards limiting the exercise of rights.

Finally, though, it is essential to stress that implementation of ESC rights should not be made dependent only on interpretation by courts. The Executive and Legislature must seek an understanding of each ESC right and then proceed to establish policy, law or administrative interventions. Human rights indicators should be used to guide implementation of ESC rights. National Human Rights Institutions have the duty to assist State organs in this analysis and capacity building.

50 CESCR, General Comment 3, The Nature of States Parties Obligations, paras 1 and 2, available at http://www.unhchr.ch/tbs/doc.nsf/0/94bdbaf59b43a424c12563ed0052b664?Opendocument

6 CHAPTER SIX: SAFE ABORTION AND THE RIGHT TO REPRODUCTITVE HEALTH

6.1 Introduction

Abortion is an emotive subject. Arguments for and against the practice usually mirror divergent pro-choice and pro-life ideas. Many developing countries have strict laws that criminalise abortion. Underlying these laws is usually the need to control women's ability to make decisions about their sexuality and reproductive health. Such strict laws reflect society's need to regulate morality and women who seek abortion tend to be deemed immoral and criminal. There is however overwhelming evidence that where abortion is criminalised, cases of unsafe abortion are high. Consequently, in those countries, abortion related deaths and injuries register in the high percentile. On the other hand, countries that allow safe abortion register lower abortion related deaths and injuries.

Generally abortion is prohibited under the Constitution of Kenya 2010 but there are clearly spelt out exceptional circumstances under which an abortion can be carried out. It is these conditions that are referred to as safe abortion throughout this chapter. However, this clarity may be only a mirage; the Constitution in Article 26 (2) provides that life begins at conception, essentially giving the unborn foetus the same status as its mother and creating potential contradictions with Article 26 (4) which within certain limits seeks to protect the life of the mother. By providing for safe abortion within the ambit of the right to life, the danger of missing the link between safe abortion and the right to reproductive health care and health generally, which is legislated in Article 43 (1) (a) of the Constitution, is amplified. Yet, safe abortion is a reproductive rights element of the right to reproductive health, making it imperative that the implementation of Article 26 (4) must enable the optimal enjoyment of Article 43 (1) (a).

Reproductive health is defined as: "A state of complete physical, mental and social well-being and not merely the absence of disease or infirmity, in all matters relating to the reproductive system and to its functions and processes"[51]. It is determined by factors such as an individual's lifestyle which is likely to have implications on the nature of medical conditions such a lifestyle predisposes the individual to; laws and policies in place and the extent to which they promote a woman's and man's autonomy and choice in decisions regarding their reproductive health care; and advances in medical knowledge which in turn improve medical care and facilities.

The components that make up reproductive health include access to information on reproductive health services including information on safe abortion, freedom to determine the timing, number and spacing of children, access to appropriate contraceptives and access to necessary reproductive health services (which include safe abortion services). Implicit in these components is the aspect of self determination and bodily integrity: the idea that women and men should have control over their sexual and reproductive faculties unhindered.

Safe abortion is not only a matter of law and policy. It is not sought in a vacuum. There are socio-cultural dimensions that inform decisions to seek termination of pregnancy. Where education and employment are not easily accessible, young women and girls are pushed towards early marriage. Where violence against women is rife, this increases the risk of unwanted pregnancies and unsafe abortion. Understanding these societal dimensions of reproductive health care ensures a holistic approach to the challenges that impede its full realisation.

51 International Conference on Population and Development (ICPD), Cairo, Egypt, http://www.un.org/ecosocdev/geninfo/populatin/icpd.htm#intro, last accessed on 8th August 2011

This chapter examines the framework that regulates the right to abortion and the inherent deficiencies in that law. The constitutional provisions on safe abortion are explored particularly in terms of the extent to which they improve the legal framework and create opportunities for actualising the right. Finally the chapter considers the policy, legislative, administrative and other actions that the country can take to enable women access safe abortion.

6.2 Abortion, the Penal Code and its Consequences

Unsafe abortion is one of the leading causes of maternal mortality in Kenya. A study conducted in 2004 found that 316,560 abortions occurred in the country annually, with an estimated 20,893 women being hospitalised with abortion related-complications in public hospitals[52]. A total of 2,600 women reportedly die annually as a consequence of unsafe abortion[53]. The World Health Organisation defines unsafe abortion as: "A procedure for terminating an unwanted pregnancy either by persons lacking the necessary skills in an environment lacking minimal medical standards or both"[54]. Safe abortion therefore denotes a situation where the medical procedure is performed by qualified medical personnel; with the support of comprehensive infrastructural, policy and legislative interventions.

Unsafe abortion in Kenya was, prior to the enactment of the Constitution of Kenya, 2010, exacerbated by restrictive and somewhat unclear[55] legal provisions that criminalised access to abortion services. This

52 Ipas/ Min. of Health/ KMA/ FIDA Kenya. 2004. A National Assessment of the Magnitude and Consequences of Unsafe Abortion in Kenya. El-Firezo Consultants: Nairobi. Pp 26

53 Center for Reproductive Rights. 2010. In Harm's Way: The Impact of Kenya's Restrictive Abortion Law. Centre for Reproductive Rights: New York. Pp 25

54 World Health Organization. *The prevention and management of unsafe abortion. Report of a Technical Working Group*. Geneva, World Health Organization, 1992 (WHO/MSM/92.5), reported in WHO. 2011. Unsafe abortion: global and regional estimates of the incidence of unsafe abortion and associated mortality in 2008. 6th Ed. WHO: Geneva. Pp 2

55 Ibid pp 31

situation persisted despite: "the recognition that restrictive abortion laws do not reduce the number of abortions but only their safety, and may actually increase the number by denying women access to counseling that may present acceptable alternatives to abortion and reduce repeat abortions"[56].

Sections 158 to 160 of the Penal Code, Cap. 63, spell out offences related to procuration of abortion. Under Section 158, where a woman is assisted to procure an unlawful abortion or miscarriage by a third party, such third party is liable to fourteen years imprisonment. In addition to this criminal sanction, doctors who perform unlawful abortions could face additional penalties under the Medical Practitioners' and Dentists' Board Code of Professional Conduct and Discipline. These penalties include suspension of license or erasure from the register of doctors maintained by the Board[57]. Where a woman performs an unlawful abortion by taking a drug or through other means she could face up to seven years imprisonment upon conviction in terms of Section 159 of the Penal Code. Supplying medicine or drugs intended to procure unlawful abortions or miscarriages is criminalised at Section 160 and the penalty provided is three years' imprisonment.

The procurement of *unlawful* abortions, was therefore, outlawed. But it is also clear that under certain circumstances, abortion was lawful. A reading of Section 240 of the Penal Code implies that abortion was permitted if the operation was performed to preserve the mother's life. The Section though does not spell out the situations that would warrant such intervention.

56 Cook, R., Dickens, M.B. & Fathalla, F.M. 2003. Reproductive health and human rights: Integrating medicine, ethics and law. Clarendon Press: Oxford. Pp. 165

57 Supra note 57

Section 35 (2) of the Sexual Offences Act No. 3 of 2006 mandates the court to make medical treatment orders in relation to victims of sexual offences. The provision suggests that survivors of rape, defilement and incest, among other offences, could have a legitimate claim for medical treatment. There is lack of clarity as to whether this treatment could include termination of pregnancy. The National Guidelines on the Management of Rape/ Sexual Violence in Kenya, 2009, require medical practitioners to examine a survivor of sexual violence to inform her about the option to terminate pregnancy that was the consequence of sexual violence and make referral as appropriate[58]. This has been problematic since this provision lacks clear support in law and has not been fully utilised by medical practitioners who seem to give more credence to their Code of Practice.

The Code of Conduct of Medical Practitioners provides some clarity regarding when the intervention to preserve the mother's life can be undertaken (pursuant to Section 240 of the Penal Code). In the Code of Conduct, the health exception to preserve the mother's life is understood to mean both physical and mental health. The Medical Practitioners and Dentists Board Code of Professional Conduct and Discipline[59] provides thus:

"The Laws of Kenya do not allow for termination of pregnancy 'on demand' and severe penalties are meted out to those found guilty of procuring or attempting to procure an abortion or miscarriage. There is room, however, for carrying out termination when in the opinion of the attending doctors it is necessary in the interest of the health of the mother or the baby. In these circumstances, it is strongly advised that the practitioner consults with at least two senior and experienced colleagues, obtains their opinions in writing and performs the

58 Centre for Reproductive Rights. 2010. In Harm's Way: The Impact of Kenya's Restrictive Abortion Law. Centre for Reproductive Rights: New York. Pp 13

59 See the 2003 revised version of the MPDB Circular No. 4/79

operation openly in hospital if he considers himself competent to do so in the absence of a Gynecologist. In all cases of illegal termination of pregnancies, the sentences shall be suspension or erasure." [60]
Despite the foregoing, there are several procedural aspects to providing abortion services set out in the Code of Conduct that inhibit women's access to the service. For instance, the preference that abortions be performed by gynecologists limits access since such professionals are few and most practice in urban areas. In addition, the Code stipulates that before an abortion is carried out, the doctor must consult with two senior and experienced colleagues. The provisions in the Code also only apply to doctors, presuming that they are the only competent health professionals to procure legal abortions.

In relation to the National Guidelines on the Management of Rape/ Sexual Violence, in case of rape, emergency contraception must be given up to 120 hours after the rape. Where pregnancy occurs on subsequent check up after six weeks, the Guidelines propose that the woman is referred for counseling since such pregnancy is accompanied by enormous emotional effects. Termination of pregnancy could be offered in accordance to the law. These Guidelines are problematic to implement since the law only allowed termination if the mother's health was in danger. One had to then to demonstrate that the pregnancy was such a danger to the mother's health. Nevertheless studies have shown that some medical practitioners are reluctant to use this provision. Some stated that it was tantamount to making abortion available on demand, which was prohibited in the Kenyan law. They pointed out that the emergency contraceptive pill was
actually aimed at ensuring survivors of sexual violence did not fall

60 See Chapter IV of the MPDB code, s. 1. (a) 1.

pregnant thereby having to require an abortion.

Restrictive legal and policy provisions compounded by lack of clarity and threat of criminal prosecutions have left women and girls resorting to unsafe methods of procuring abortions with devastating consequences. Reported complications of unsafe abortion include hemorrhage, sepsis, peritonisis, trauma to the cervix, vagina, uterus, abdominal organs, vaginal/ cervical lacerations, hysterectomy, upper genital tract infections, and spontaneous abortions in subsequent pregnancies. Some of these complications lead to death.

It is significant that each year the Government expends copious amounts of money on post-abortion care. A study conducted in 2004 found that the annual cost of treating incomplete abortions in public hospitals was approximately Kshs. 18.4 million. Approximately Kshs. 11.5 million was spent on treating unsafely induced abortions[61].

6.3 The Constitution and Safe Abortion

Governments the world over have had in place policies and laws aimed at controlling individuals' sexuality and reproductive health faculties. This reflects a desire to regulate what is deemed immoral or bad behaviour. There has however been a radical shift in discourse on sexual and reproductive health. Now there is an emphasis on a rights based approach to the matter and consequently sexual and reproductive health issues are considered as human rights and states are required to put in place measures to ensure their realisation.

Making access to safe abortion an actionable right enables the realisation of other human rights provided for in the Constitution and in other international and regional human rights instruments that Kenya has ratified or acceded to (under article 2 (5) and (6) of the

61 Ipas/ Min. of Health/ KMA/ FIDA Kenya. 2004. A National Assessment of the Magnitude and Consequences of Unsafe Abortion in Kenya. El-Firezo Consultants: Nairobi. Pp 22

Constitution these are now part of Kenyan law). These include the right to life (Article 26 of the Constitution), the right to liberty and security of the person which includes the right to be free from torture, cruel and inhuman treatment or punishment (Article 29), the right to equality and non-discrimination (Article 27), the right of access to information (Article 35), and the right to access the highest attainable standard of health (Article 43 (1) (a). Where safe abortion is not made available to citizens, a host of violations occur. For example, the right to liberty and security of the person is infringed where the State fails to improve services for treatment of unsafe abortion or fails to change restrictive laws to ensure access to family planning and abortion services. Denial of abortion services in circumstances including rape offends the right to be free from inhuman and degrading treatment. Where women are not able to access information on reproductive health and are therefore inhibited from making informed decisions the right of access to information is offended.

Article 26 (4) specifies the situations in which abortion is permitted which are (i) where there is need for emergency treatment and (ii) where the life or health of the mother is in danger. Such abortion can only be performed following advice from a trained health professional. Further, there is the possibility to broaden the situations that would warrant abortion being performed since the Article allows enactment of law for that purpose.Safe abortion as stipulated in the Constitution must be read together with the right to health including reproductive health provided in Article 43 (1) (a). The right must also be read within the context of Article 43 (2) which prohibits denial of emergency medical treatment.

The implication of these provisions is that the State will be under a duty to *inter alia* make information on reproductive health including

safe abortion available; ensure access to contraceptives and other family planning methods; and enable access to reproductive health facilities/ services including safe abortion services. Failure to facilitate these interventions will not only result in human rights violations but will deny women access to services necessary to ensure they enjoy the full range of reproductive health services. The services must be made available, accessible, affordable and of good quality.

6.4 Realising the Right to Safe Abortion

The need to reduce the numbers of women and girls who die or get injured every day trying to procure abortions in unsafe conditions should be the primary concern when the country begins the process of implementing safe abortion and by extension the right to reproductive health care. Its effective implementation will require policy, legislative and administrative reform in the reproductive health sector. These reforms should be geared at averting abortion related morbidity and mortality through avoiding unwanted pregnancy, preventing unsafe pregnancies and ensuring access to post abortion care, thereby reducing the incidence of future unsafe abortion[62].

Some of the concerns that are likely to inform the anticipated reforms include: identifying circumstances that would warrant abortion – apart from those set out in the Constitution; setting out circumstances that would require emergency care under Articles 26 (4) and 43 (2); defining the type of services envisaged in relation to safe abortion; identifying the policy/ legal reforms required to ensure conformity with the Constitution; identifying the medical personnel who may carry out an abortion; and identifying the support mechanisms necessary to facilitate access to the right. The Ministry for Public Health and

62 Interview with Prof. JKG Mati, retired physician (June 2011)

Sanitation through the Department of Reproductive Health has commenced the process of determining circumstances under which safe abortion could be offered in compliance with article 26 (4) of the Constitution. Equally, the regulatory bodies of health providers including doctors, nurses and clinical officers are in the process of reviewing their Code of Professional Conduct and Discipline.

6.4.1 Legal reform

Legal reform will be necessary to enact legislation in consonance with the Constitution. This process should begin with the decriminalisation of abortion.

In 2008, FIDA Kenya and a consortium of reproductive health practitioners developed the Reproductive Health and Rights Bill, whose intent was: "to provide for the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children, the right to information on reproductive health, the right to attain the highest standards of reproductive health and the right to make decisions regarding reproduction free from discrimination, coercion and violence". Among other things, the Bill defined reproductive rights, stipulated the kind of medical personnel who could perform an abortion, and provided for access to information.

South Africa has in place a comprehensive abortion law called the Choice of Termination of Pregnancy Act, 1996. The purpose of the Act is to: "determine the circumstances in which and conditions under which the pregnancy of a woman may be terminated".

That law sets out the circumstances when abortion can be performed. Abortion is allowed upon the request of a woman during the first twelve weeks of gestation. From the thirteenth to twentieth weeks of gestation, abortion is only permitted if a medical practitioner makes

that determination after consultation with the pregnant woman establishing that the continued pregnancy poses risk of injury to her physical or mental health, or the pregnancy would result in foetal abnormality or it was as a result of rape or incest. After the twentieth week, abortion is only permitted when the medical practitioner in consultation with another medical practitioner or registered midwife makes a determination on such need based on the danger to the woman's life, possibility of foetal malformation or injury to the foetus[63].

The law further defines the medical personnel who can perform an abortion; defines the point at which an abortion can be performed; provides for consent in cases where the abortion is requested by a woman of sound mind and in the case of minors or persons with low mental acuity; defines where an abortion can be performed; makes provision on the requirement to make information on safe abortion accessible; provides for confidentiality of the person upon whom an abortion has been performed; and provides penalties in cases where the abortion is performed by unqualified personnel.

In the case of the United States of America, the issue of abortion has been discussed within the realm of the right to privacy. In 1973, the United States Supreme Court in Roe v. Wade[64] struck down the Texas and Georgia criminal abortion laws as a violation of women's right to privacy.

The principal argument of the appellant who was pregnant and unmarried and wished to have a legal abortion performed by a licensed medical practitioner, was that the Texas statutes improperly invaded the right of a pregnant woman to choose to terminate her

63 Section 2, Choice on Termination of Pregnancy Act, No. 96 of 1996, South Africa. available at: http://www.info.gov.za/gazette/acts/1996/a92-96.htmlast accessed on 6 July 2011

64 United States Supreme Court, 410 U. S. 113 (1973)

pregnancy. The law in question legalised abortion where the life of the mother was threatened by the continuation of the pregnancy.

Texas argued that life begins at conception and is present throughout pregnancy and that therefore the State has a compelling interest in protecting that life from and after conception. On this point the Court reached the conclusion that the unborn have never been recognised in the law as persons in the whole sense. However, the Court recognised that the State has an important and legitimate interest in protecting the health of the pregnant woman and that it still has another important and legitimate yet distinct interest in protecting the potentiality of human life. Each grows in substantiality as the woman approaches term and, at a point during the pregnancy, each becomes 'compelling'. In respect to the pregnant mother, the Court determined that 'compelling' point to be at the end of the first trimester because of the medical knowledge that up to this point, mortality in abortion may be less than mortality in normal child birth. In effect before this point, a pregnant woman in consultation with her doctor is free to determine without regulation by the State whether or not to terminate the pregnancy. At this point the only regulation the State may have is that which related to the preservation and protection of maternal health; for instance, requirements regarding the qualifications of who performs the abortion, the facility where it should be performed and so forth.

On the other hand, the 'compelling' point in the State's important and legitimate interest in the potential human life is when the foetus has reached the point of viability-when the foetus is capable of having meaningful life outside of the mother's womb. The Court suggested that State regulation to protect foetal life after viability has both logical and biological justifications and if it wishes, the State

may go as far as to proscribe abortion except when it is necessary to preserve the life or health of the mother.

The Court concluded that laws which made no distinction between abortions performed early in pregnancy and those performed later with the single exception of 'saving' the mother's life are too broad and violate the woman's right to privacy founded in the Fourteenth Amendment's protection of personal liberty and restricts State action in respect of that privacy.

The *Roe v. Wade* decision offers lessons that Kenya may wish to consider. Using the 'compelling' interest argument and the trimester framework, the Court established the principle that the State has legitimate interests from the onset of the pregnancy in protecting the life of the mother and of the foetus that may become a child. However, before the viability of the foetus the State's only 'compelling' interest should be that of preserving and protecting the life of the mother and therefore the State should not place undue obstacles to a woman's right to elect a termination. On the other hand, after foetal viability, the State has every interest to protect the life of the unborn child with allowable exceptions for pregnancies which endanger the life and health of the mother. This approach promotes the right to life by critically weighing what life really is without interpreting the right to life in a restrictive manner. In interpreting the right to life, the State must take positive steps to protect it including the measures necessary to ensure that women do not resort to clandestine abortions which endanger their life and health, especially in the case of poor women. These plus the general issues pointed out in the FIDA Kenya Bill and the South African law can be extrapolated to any anticipated legislation on reproductive health.

While the Constitution explicitly allows safe abortion in two situations – where there is need for emergency treatment and where the life or

health of the mother is in danger – it makes room for enactment of legislation allowing abortion in other circumstances. There is therefore opportunity to broaden the scope of safe abortion. In doing this, Kenya can refer to the safe abortion practices of other countries. Current medical practice can also be used to inform other situations when abortion can be allowed.

In many jurisdictions, additional situations where one is allowed to have an abortion performed on them are in cases of rape or incest, in the case of incurable and serious foetal deformity, where the pregnant woman, owing to a physical or mental deficiency or her minority, is physically as well as mentally unfit to bring up the child[65], or for economic or social conditions[66].

Each of these and perhaps more grounds will be brought to the fore when considering an implementing statute in respect of Article 26 (4) and therefore need to be further considered here. As already mentioned, abortion in the case of rape or incest may already be provided for under the Sexual Offences Act. In considering whether to make abortion available in the case of serious foetal deformity, the case of *Huamán v. Peru*[67] is instructive.

The author of the communication claimed violation of her rights under Articles 2, 3, 6, 7, 17, 24 and 26 of the International Covenant on Civil and Political Rights (ICCPR) by Peru. The author got pregnant in March 2001, aged seventeen. In June 2001, she had a scan which showed she was carrying an anencephalic foetus (one which has no brain or

65 Federal Democratic Republic of Ethiopia (FDRE). 2006. Technical and Procedural Guidelines for Safe Abortion Services in Ethiopia. FDRE: Addis Ababa. Pp 10.

66 Section 2 (b) (iv) Choice on Termination of Pregnancy Act, No. 92 of 1996

67 U.N. Human Rights Committee, U.N. Doc. CCPR/C/85/D/1153/2003 (2005)

lacks a major part thereof). The attending gynecologist and obstetrician informed her of the foetal abnormality and the risks to her life if the pregnancy continued. He also gave her two options: continue with the pregnancy or terminate it. She opted for the latter but the hospital informed her it could not terminate the pregnancy as abortion was against the law. The author was forced to carry the pregnancy to term despite the fact that it was determined by a psychiatrist that carrying to term a pregnancy whose fatal outcome was known had triggered depression in the mother and had severe impact on the development of an adolescent. She gave birth in January 2002 and after four days the baby died after which she fell into a deep state of depression. The Committee admitted all the author's claims except those based on Articles 3 and 26 of the ICCPR because they had not been properly substantiated.

The Committee concluded that Peru's restrictive abortion laws subjected women to inhuman treatment and that Peru had violated the author's rights under Article 7 of the Covenant. Further, the Committee found that refusal to allow a medical intervention to terminate the pregnancy interfered arbitrarily in her private life and was therefore a violation of Article 17. A further violation in regard to Article 24 was found against Peru for failing to provide the author with the special care she needed as a minor.

More difficult will be instances where the consideration for abortion is necessary owing to the physical or mental deficiency or minority status which limits the ability of a mother to bring up the child. Every female of the age of majority has the legal capacity to carry and bear a child and a decision to carry out an abortion solely based on the foregoing grounds would seem discriminatory under Article 27 (4) of the Constitution. Further there is the need to differentiate the ability to carry a healthy pregnancy to term and the challenge of bringing up a child. The former as has been shown in this chapter is a component

of the realisation of the right to reproductive health whereas the other is not. Linked to this is the consideration of abortion based on purely social or economic reasons. Again such a consideration is likely to polarise any positive discussion on abortion for it seems discriminatory based on economic and social status both of which are prohibited grounds for discrimination under Article 27 (4). From the foregoing the immediately strategic priority would be to frame any proposed law on abortion primarily on the promotion of the highest attainable standard of health (including mental health). Thus the country should apply a broad rather than a restrictive approach to safe abortion.

6.4.2 Policy reform

A two pronged approach may be adopted in the case of policy reform. In the first instance, policies on reproductive health will require revisions to ensure they reflect the spirit and letter of the reproductive health provisions in the Constitution. In the alternative, it may be useful to consider whether to have a comprehensive policy on reproductive health or to have an additional policy on safe abortion. Second, guidelines for medical professionals will need to be developed to regulate the conduct of safe abortion in the country. The guidelines will also provide technical assistance to medical personnel who will be involved in provision of safe abortion services. The guidelines that currently exist are mostly targeted at doctors[68], yet nurses and other medical personnel may be able to carry out safe abortion within certain parameters.

Guidelines such as the ones anticipated here exist in Ethiopia and Zambia and these set out the: "procedural and technical procedures

68 The Code of Conduct and Discipline for Medical Practitioners which interprets the abortion provisions in the Penal Code is only applicable to doctors and dentists.

that must be observed in providing safe termination of pregnancy services as permitted by the law"[69]. The issues addressed in the guidelines relate to the type of abortion services that can be provided; the legal provisions for safe abortion services; pre-procedure care; procedures during termination; post-procedure care; referral arrangements; abortion services by level of care; and essential equipment and supplies. However the limitation will be that these will have to comply with the law as set out in article 26 (4).

This will be an extremely important point of reference when the country embarks on the process of developing these guiding principles. In South Africa[70] and Ethiopia[71], licensed midwives and clinical officers are also allowed to carry out non-surgical/ medical abortions and surgical abortions during the first trimester. Other doctors are also allowed to perform surgical abortions. This is the direction that Article 26 (4) of the Constitution has taken the country. Any trained health professional will be allowed to perform the termination procedure in terms of the provision of the law. The proposed guideline will have to stipulate who qualifies to be included in this category. Good and best practices from other countries could be borrowed here. In terms of levels of access, the guidelines must define the type of reproductive health/ abortion services that will be available in the different medical facilities in the country. Medical facilities are graded from level I to VI, with VI representing national facilities, V and IV provincial level facilities and district based facilities, and I-III representing facilities in the community. It will therefore be important to define for instance

69 Ibid

70 Section 3 (2) of the Choice on Termination of Pregnancy Act, 1996 permits registered midwives to perform an abortion when the same is requested by a woman.

71 Federal Democratic Republic of Ethiopia (FDRE). 2006. Technical and Procedural Guidelines for Safe Abortion Services in Ethiopia. FDRE: Addis Ababa. Pp 19: also included are TBA's & public health nurses.

whether surgical abortions will be available at the community level or the type of emergency services that will be available at the different medical centres, etc. These must also be linked to provisions of the Fourth Schedule of the Constitution with national referral facilities and health policy being implemented at the national level with all other health related services obtainable at the county health facilities. The kind of abortion services that will be availed will need to be defined as well. [72]

It will also be in the guidelines that the legal provisions of a possible law on reproductive health or abortion will be interpreted. For example what is meant by abortion being allowed in emergency cases will find expression in such a policy guide. Will such care be available only in relation to potentially fatal medical conditions such as severe pre-eclampsia, eclampsia and ectopic pregnancies and in cases of incomplete abortions? Or are there other situations that will qualify as emergency and therefore require emergency abortion care? The definition of abortion[73] will also find a place in this policy as will the distinction between emergency contraception and abortion.[74]

Again, the anticipated policy guidelines for medical personnel will clearly set out the pre and post abortion procedures that will need to be adhered to. In addition, the guidelines will possibly outline the

72 In Ethiopia there are two kinds of care in relation to termination of pregnancy: woman-centred abortion care and post abortion care. The former is defined as: "a comprehensive approach to providing abortion services that takes into account the various factors that influence a woman's individual mental and physical health needs, her personal circumstances, and her ability to access services".?? At this point the concern is to facilitate the woman to make an informed choice about abortion and access proper medical care. The latter is a comprehensive service for treating women that present to health-care facilities after abortion has occurred spontaneously or after an attempted termination and includes counseling and emergency treatment of incomplete abortions.

73 Abortion is defined as the termination of pregnancy before fetal viability. In Ethiopia abortion services are only available within the first 28 weeks from the last normal menstrual period.

74 Medical abortion is distinguished from emergency contraception with the former understood to be medication that prevents pregnancy unlike abortion which is action taken to terminate a pregnancy.

procedures to be followed during termination. Issues such as when abortion inducing drugs will be administered, the appropriate dosage, follow-up, and in the case of surgical abortions, the type of service offered, will be defined.

Most important though, the guidelines will provide a useful reference point on when medical abortions and surgical abortions can be performed.[75] Hence, how long should one have to wait before an abortion is performed – three days? Seven days?

6.4.3 Administrative reform

Good laws and policies will not be sufficient to ensure access to safe abortion. These will have to be supported by strong administrative structures. Some of the administrative actions that the State will be required to undertake to enable access to safe abortion include providing adequate human and financial resources to reproductive health services; evaluating training needs of the different medical personnel and responding appropriately; enabling information to education on reproductive health; and facilitating access to contraceptives and counseling support.

As already stated, the Government provides a budget for post abortion care. However, because in the current statutory law abortion is considered illegal no investment has been made on improving facilities to make abortion safe or provide equipment and facilities for safe abortion. Budgetary implications of safe abortion will mainly be seen with regard to infrastructure and personnel. In addition, training of medical personnel will require adequate financial support.

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75 In Ethiopia medical abortion is only available during the first nine weeks of gestation. Surgical interventions are then resorted to thereafter. Surgical abortion is nevertheless still available during the first trimester. The period within which abortion is to be carried out will also find definition here.

This will also be required for matters related to access to information and access to contraceptives. Under the Abuja Declaration of 2000, African governments committed to assign 15% of their annual budgets to health including reproductive health. Ensuring adequate budgetary allocation will reflect the Government's commitment to improve the lives of its citizens.

Training needs of medical personnel will have to be determined and effective responses undertaken. Curriculae in the medical training colleges and universities will also need to be reviewed to ensure abortion care is taught. Training gaps exist because of the lack of clarity in the current abortion law. Health practitioners are not taught how to terminate pregnancy[76]. A study conducted by the Centre for Reproductive Rights found differences in the curriculae of various medical schools. For instance some schools teach students that this is a mandatory requirement while in others this is not considered so. The study also found that nurses are not taught about abortion care with the curriculum focusing more on the illegal aspect of the practice. Curriculae in the various schools will need to be reviewed to ensure the different professionals receive information that is similar. The medical profession will also need to ensure in-service training on abortion is undertaken regularly to ensure members of the profession are updated on this aspect of reproductive health care.

Information on reproductive health and safe abortion will need to be available to all. The ministry responsible for health will therefore need to ensure that henceforth all information education and communication material responds to this need. This information will need to be packaged in a manner that appeals to the different segments of the population including the youth and persons with disabilities.

76 Centre for Reproductive Rights. 2010. In Harm's Way: The Impact of Kenya's Restrictive Abortion Law. Centre for Reproductive Rights: New York. Pp 37

Provision of contraceptives and counseling services will also need to be up scaled. This can be fed into the existing reproductive health infrastructure. However, in some cases innovative measures will need to be put in place to ensure that marginalised segments of the population may access them. These include persons living in arid and semiarid areas.

Redress in cases of sexual violence will be an important support mechanism. A stronger message will need to be sent to persons who sexually violate women and girls.

6.5 Conclusion

The need to grant women the option to undergo termination of pregnancy in safe conditions should be a matter of public interest because leaving women to die unnecessarily has implications on a country's development as a critical human resource is removed from the productive process. Protecting women from such deaths should be a priority for the State. The State has key roles to play in ensuring access to the right to reproductive health. The country must invest in educating and sensitising society on the importance of decriminalizing abortion. This is extremely important since the abortion clause in the Constitution was a divisive factor during the constitutional referendum.

7 CHAPTER SEVEN: MAINSTREAMING DISABILITY IN THE IMPLEMENTATION OF THE CONSTITUTION OF KENYA 2010

7.1 Introduction

According to the 2009 national population census, 3.5% of Kenya's population (around 1,350,000) is constituted by persons with disabilities. In fact, the population of persons with disabilities in the country is far higher: the World Bank and the World Health Organisation, in their World Disability Report of 2011, estimate that around 15 % of the world's population comprises persons with disabilities,[77] translating to about 5.8 million people in Kenya. People with disabilities are among the most vulnerable groups in Kenya: they are often uneducated or ill-educated, unemployed, poor, generally on the margins of society and often have their rights violated.

A host of measures have been undertaken internationally and locally to establish policy, legislative and administrative frameworks for redressing and enhancing the rights of persons with disabilities. Internationally, the Convention on the Rights of Persons with Disabilities (CRPD) entered into force on 3 May 2008 as the most comprehensive human rights instrument for persons with disabilities: Kenya signed it on 30 March 2007 and subsequently ratified it on 19 May 2008. Locally, the Constitution of Kenya 2010 contains an expanded Bill of Rights including explicit provisions on the rights of persons with disabilities. Several key statutes have over time been legislated specifically to deal with issues of disability, ranging from the preindependence law, the Kenya Society for the Blind Act of 1956, to the Persons with Disabilities

77 World Report on Disability, World Bank and World Health Organisation, 2011, available at http://whqlibdoc.who.int/publications/2011/9789240685215_eng.pdf (last accessed on 4 July 2011

Act No 14 of 2003. Various policies covering issues of disability have been passed too, including the Special Needs Education Policy of 2010 (this was launched by the Ministry of Education but it has not been passed by Parliament). Thematic policies also capture issues of disability, such as the Education and Training Policy of 2005. The Disability Policy of 2006 though still remains in draft form.

This chapter aims to guide State agencies[78] as they take policy, legislative and administrative measures towards implementation of the Constitution. The key thrust of the chapter is that issues of disability should be included or mainstreamed in general legislation, and State organs should ensure measures responsive to disability are included in all legislation as appropriate. Disability-specific legislation may be passed, but that must not detract from the policy aim of ensuring inclusion of issues of disability in all legislation. The chapter also identifies the key disability-related provisions in the Constitution that require particular attention for purposes of effective implementation. It also identifies key laws that need to be passed that touch on the issues of persons with disabilities.

7.2 General Principles

Article 3 of the CRPD establishes general principles which apply in the Convention. These same general principles should guide development of policy and legislation in relation to persons with disabilities in Kenya; as illustrated hereunder:

78 These include Parliament, the Judiciary, Line Ministries, Kenya Law Reform Commission and the Commission on Implementation of the Constitution

7.2.1 Respect for inherent dignity, individual autonomy and independence of persons

Under this principle, first, policy, law and administrative actions should promote the human rights of persons with disabilities. This should be done for the same reason that human rights are promoted for all other people: because of the inherent and equal worth of each human being. Second, legislation should use language that upholds the dignity of persons with disabilities: words like 'idiots' and 'imbeciles' or 'retarded' which appear in the Penal Code, Cap. 63 and the Persons with Disabilities Act, should no longer be used in statutes.

7.2.2 Non-discrimination and equality of opportunity

Policy, legislation and administrative action should ensure all rights are guaranteed to everyone without distinction, exclusion or restriction based on disability. Discrimination on the basis of disability is any distinction, exclusion or restriction which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise by persons with disabilities, on an equal basis with others, of all human rights and fundamental freedoms, and includes the denial of reasonable accommodation (Article 2 of the CRPD). Reasonable accommodation is a principle that should inform all institutions as they plan their programming for persons with disabilities. This principle is also known as the duty to accommodate or reasonable adjustment, adaptation or measures; or effective or suitable modifications. To afford a person reasonable accommodation means, for example, making adaptations to the arrangements of a work environment, educational establishment, health care facility or transport service in order to remove the barriers that prevent a person with a disability from participating in an activity or accessing services on an equal basis with others. In the case of employment, this might involve physical

changes to premises, acquiring or modifying equipment, providing a reader or interpreter or appropriate training or supervision, adapting testing or assessment procedures, altering standard working hours, or allocating some of the duties of a position to another person.

The Persons with Disabilities Act prohibits discrimination against persons with disabilities. However, this Act does not fully address some aspects of discrimination faced by persons with disabilities. Given the need for greater specificity in issues such as political participation, social security, social support, transport standards and building standards, discrimination against persons with disabilities still needs to be addressed by other laws.

Finally, legislation should be aligned with the Constitution in regard to enabling individuals and groups to raise allegations of discrimination on the ground of disability; procedures for having those claims investigated; and the grant of appropriate remedies. Legislation should not be limited to prohibiting discrimination, but should also require the State and private actors to take positive measures to enable the rights of persons with disabilities.

7.2.3 Full and effective participation and inclusion in society

The principle of participation and inclusion enables persons with disabilities to contribute to society, to make decisions that affect them and to be active in their own lives and within the community. Policy-making and law-making should take account of the principles of inclusion and disability mainstreaming. Inclusion anticipates that the social, economic or political environment should be established in a way that ensures the participation of persons with disabilities on an equal basis with others. Inclusive education, for example, seeks to include children with disabilities into the ordinary school system from the very beginning rather than as an after-thought. Disability mainstreaming is a method for promoting inclusion and addressing

the barriers that exclude disabled people from full and equal participation in society. Policy, law and administrative action should ensure that wherever inclusion is absent disability mainstreaming is effected as a measure for ensuring inclusion.

7.2.4 Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity

The social model of disability focuses on the role of society in labeling people as having a disability. Under the human rights model of disability, disability is not an attribute of an individual, but rather a complex collection of conditions created by the social environment. Policy, legislation and administrative action must be such as to demonstrate respect for difference, and should not require that persons with disabilities change themselves to fit into the existing structures of society. These measures must engender the environmental modifications necessary for the full participation of persons with disabilities in all areas of social life.

7.2.5 Accessibility

The principle of accessibility aims to dismantle the barriers that hinder the enjoyment of rights by persons with disabilities. This concerns not just physical access to places, but also access to information, technologies such as the Internet, communication, and economic and social life. Policy, law and administrative actions should focus on the provision of ramps, sufficiently large and unblocked corridors and doors, the placement of door handles, the availability of information in Braille and easy-to-read formats, the use of sign interpretation/ interpreters, the availability of assistance and support, etc: these can ensure that a person with a disability has access to a workplace, a place of entertainment, a voting booth, transport, a court of law, etc. Without access to information or the ability to move freely, other

rights of persons with disabilities are also restricted. For example, persons with disabilities will be unable to live independently if the State does not take appropriate measures to ensure that they have access to the physical environment, to transportation, to information and communication technology and to other facilities and services open or provided to the public.

7.2.6 Equality between men and women

Every policy and legislation touching on persons with disabilities must recognise that women with disabilities are doubly discriminated against – as disabled people and as women. That is the purport of Article 6 of the CRPD which requires states to take account of that multiple discrimination: the State should take measures to ensure the full development, advancement and empowerment of women so that they may have effective exercise and enjoyment of their human rights.

7.2.7 Respect for the evolving capacities of children with disabilities and for the right of children with disabilities to preserve their identities

Policy and law makers must be alive to the fact that certain groups are exposed to discrimination not only on the basis of disability but also on other grounds. In this category are children with disabilities. Article 7, 2 of the CRPD reaffirms that even for children with disabilities, the child's best-interest principle is a primary driver of policy and action.

7.3 Proposals for Interventions on Disability-specific Provisions in the Constitution

This section sets out key provisions in the Constitution covering issues of disability and identifies policy, legislative and administrative interventions which various State agencies should undertake to

ensure that disability is mainstreamed in the implementation of the Constitution.

1. Article 2 (6) and Article 21 (4)

Article 2 (6) provides that any treaty or convention ratified by Kenya shall form part of the law of Kenya under the Constitution. Article 21 (4) requires the State to enact and implement legislation to fulfill its international obligations in respect of human rights and fundamental freedoms. Since Kenya is a party to the CRPD, by dint of Article 2 (6) the CRPD forms part of the law of Kenya.

The following actions need to be undertaken to ensure that Articles 2 (6) and 21 (4) are implemented:

- Parliament should prioritise passage of a ratifications law.
- The Government should strengthen the capacity of the National Council for Persons with Disabilities (NCPWD) as the focal point for implementation of the CRPD.
- The Government should strengthen the capacity of Kenya's national human rights institution as the focal point for monitoring the CRPD in terms of Article 33, 2 of the CRPD.
- The Persons with Disabilities Act and other relevant laws should be amended to align them with the Constitution and the CRPD.
- The Judiciary should apply the CRPD in relevant cases to ensure that the rights of persons with disabilities are protected and promoted.

2. Articles 7 (3) (b), 54 (d) and 120 (1)

Article 7 (3) (b) requires the State to promote the development and use of Kenyan Sign Language (KSL), Braille and other communication formats and technologies accessible to persons with disabilities. Article 54 (1) d gives a person with disabilities the right to use Sign Language, Braille and other appropriate means of communication. Article 120 (1) recogniSes KSL as an official language of Parliament alongside English and Kiswahili.

The following actions should be taken to promote the development and use of KSL, Braille and other communication formats accessible to persons with disabilities:

- A comprehensive policy on KSL and other accessible communication formats should be developed. KSL, Braille and other communication formats should be standardised. Towards this end, the Kenya Braille Authority and the Kenya Sign Language Institute should be established.
- The Standing Orders of Parliament should be amended to bring them in line with provisions of the Constitution on KSL, Braille and other communication formats.
- Section 39 of the Persons with Disabilities Act which requires television stations to provide Sign Language insets or sub-titles in newscasts and educational programmes should be made operational through passage of regulations.

3. Article 21 (3)

Article 21 (3) places a duty on State organs and public officers to address the needs of vulnerable groups within society including persons with disabilities. In light of this, the following measures should be taken:

- Guidelines should be developed on service delivery by State organs in respect of the needs of persons with disabilities.
- The Government through the NCPWD should standardise and implement coordinated disability mainstreaming throughout its organs.
- Disability mainstreaming training should be undertaken in a structured way at the Kenya Institute of Administration and other Government institutes.
- Disability should be mainstreamed in public service in obedience to minimum constitutional dictates. For example, the public sector should ENFORCE MEASURES FOR RESERVING 5% employment positions for employees with disabilities; measures to ensure accessibility, training, and resourcing of employment positions for persons with disabilities should be put in place.

4. Articles 27 (4), (5), (6), 33 (2) (ii) and 59

Article 27 (4) provides that the State shall not discriminate directly or indirectly on any ground including disability. Article 27 (5) provides that a person shall not discriminate directly or indirectly on any of the grounds specified under sub-article (4). Article 27 (6) requires the State to take legislative and other measures, including affirmative action measures, to give full effect to the article. Article 33 (2) (ii) limits freedom of expression where it extends to advocacy of hatred that is based on any of the grounds of discrimination under Article 27 (4). Article 59 provides for the establishment of the Kenya National Human Rights and Equality Commission (KNHREC) whose functions include promoting respect for human rights in the republic, and promoting equality and equity generally.

The Government should ensure adequate protection against discrimination of persons with disabilities while acknowledging the additional discrimination on gender grounds faced by women with disabilities, and as such take the following measures:

- It should craft and enforce special measures for persons with disabilities in education, employment, politics and all other spheres of life.
- Parliament should enact enabling equality legislation and repeal all discriminatory provisions that are still in statutes.
- The Government should put in place institutions and mechanisms for protecting persons with disabilities. This should be one of the responsibilities of the National Human Rights Institution.
- The Government should, through the NCPWD, create awareness among the public on protection against discrimination, paying attention to the ways in which discrimination affects the different categories of persons with disabilities AS WELL AS youth, women, children and men.

5. Article 54 (1) (a)

Article 54 (1) requires that a person with disability be treated with dignity and respect.

To ensure this right, the Government and its agencies should:

- Undertake concerted awareness raising in relation to dignity and respect of persons with disabilities.
- The ministry responsible for issues of disability should conduct surveys on social perception and attitudes of society towards persons with disabilities. Surveys should also be undertaken on the experiences and lived realities of persons with disabilities.

6. Article 54 (1) (b) and Article 53

Article 54 (1) (b) provides for access to educational institutions and facilities for persons with disabilities. Article 53 (1) (b) provides for the right to education for children with disabilities.

To ensure this right, the following measures should be undertaken:

- Formulation of education policy and legislation specifically for learners with disabilities. Focus should shift from its current emphasis on learners with special needs (who include learners with disabilities but also other groups such as children who are orphaned) to interventions specific to learners with disabilities.
- Increased budgetary allocation for the education of learners with disabilities.

7. Article 54 (1) (c) and 54 (1) (e)

Article 54 (1) (c) provides for reasonable access to all places, public transport and information for persons with disabilities. Article 54 (1) (e) requires access to materials and devices to overcome constrains arising from a person's disability.

The following measures should be put in place to ensure these rights:

- Implementation of Sections 21-24 of the Persons with Disabilities Act, covering accessibility and mobility; public buildings; public service vehicles; and adjustment orders.
- The Ministry of Housing should ensure accessible public buildings and revise building codes to take into account the needs of persons with disabilities.
- The Persons with Disabilities Act should be amended to ensure that adjustment orders can be issued against government buildings to allow access to services for persons with disabilities.

- The Government, through the Ministry of Transport, should ensure that public transport is accessible to persons with disabilities.
- The NCPWD in partnership with the Kenya Bureau of Standards should develop guidelines to ensure the provision of quality assistive devices and equipment for persons with disabilities.

8. Article 54 (2)

Article 54 (2) mandates the State to ensure the progressive realiSation of the principle that at least 5% of the members in elective and appointive bodies are persons with disabilities.

To ensure this, the following measures should be taken:

- Development of policy guidelines on implementation of the 5% principle in relation to elective and appointive bodies. Those guidelines should be informed by the need to build capacities of disabled persons to fill the positions in question.
- Actualisation of Section 13 of the Persons with Disabilities Act which provides that the NCPWD shall endeavour to secure the reservation of 5% of all casual, emergency and contractual positions in employment in the public and private sectors for persons with disabilities. This provision thus far has not been implemented to any extent and reasons for this should be interrogated and remedial measures taken.
- The NCPWD should create a national database with CVs of persons with disabilities.
- The NCPWD should encourage and support through capacity building persons with disabilities to put forward their candidatures for elective and appointive posts.

9. Article 81 (c), 82 (2) (c) and 83 (1) (b)

Article 81 (c) requires that the electoral system ensures the fair representation of persons with disabilities. To realise this, Parliament should enact legislation whose provisions make operational the constitutional provisions on representation of persons with disabilities. The NCPWD should be empowered to roll out programmes to encourage persons with disabilities to participate actively in political parties. Article 82 (2) (c) requires that legislation on elections take into account the special needs of persons with disabilities. Parliament should pass legislation to ensure an accessible and barrier free electoral process. Sections 29 and 30 of the Persons with Disabilities Act on civic rights should also be actualised. Article 83 (1) (b) disqualifies a person of unsound mind from voting. It is under this provision that persons with intellectual disabilities have been stopped from voting under the pretext that they are of unsound mind.

The following measures should be carried out:

- Kenya's electoral law should specifically provide that a voter will not be disenfranchised merely on account of having a disability.
- The Government through the NCPWD should raise awareness on the right to vote amongst persons with disabilities.
- Capacity building tools on how to facilitate voters with disabilities should be developed for officials of electoral bodies.

10. Article 91 (1) (e) and Article 85

Article 91 (1) (e) provides that every political party shall respect the rights of all persons to participate in the political process, including minorities and marginalised groups. Article 85 is on eligibility to stand as an independent candidate.

The following measures should be taken to ensure effective participation of persons with disabilities in the affairs of political parties:

- The political parties law should make the participation of persons with disabilities and other minorities and marginalised groups a criterion for funding.
- The elections law should take into account the needs of persons with disabilities both as voters and as candidates. This should cover issues such as accessibility of ballot papers (tactile or Braille), physical accessibility for persons with physical disabilities etc. Both the Political Parties and Elections laws should be construed in such a way as to ensure realisation of the 5 percent representation rule for persons with disabilities.
- Political parties should put in place measures to encourage effective participation of persons with disabilities in political parties.
- The Government should raise awareness on the need for persons with disabilities to meaningfully participate in political parties and on the option of independent candidatures for persons with disabilities.
- Disabled peoples' organisations should establish networks to facilitate independent candidates.

11. Articles 97, 98 (1) (d) and 100 (b)

Article 97 is on membership to the National Assembly. Article 97 (1 c) provides that the National Assembly consists of, among others, twelve members nominated by parliamentary political parties on a proportional basis in accordance with Article 90 to represent special interests including the youth, persons with disabilities and workers.

Article 98 (1) (d) provides that the Senate consists of, among others, two members being one man and one woman representing persons with disabilities. Article 100 (b) requires that Parliament enacts legislation to promote representation of persons with disabilities, among other groups.

To implement these provisions, the following measures should be undertaken:

- The political parties law should provide a clear framework for making operational party lists and clarifying the distribution of the twelve seats among persons with disabilities, workers and the youth.
- Awareness should be raised on the need for persons with disabilities to participate meaningfully in political parties, or to campaign as independent candidates.

12. Article 232 (1) (i) (iii) and Article 227 (2) (b)

Article 232 (1) (i) (iii) lists as one of the values of public service: affording adequate and equal opportunities for appointment, training and advancement, at all levels of the public service of persons with disabilities. Article 227 (2) (b) requires that in the procurement of public goods and services, procurement policies should provide for the protection or advancement of persons, categories of persons or groups previously disadvantaged by unfair competition or discrimination.

Parliament should enact legislation to make this provision operational.

7.4 Conclusion

In addition to prohibiting discrimination on the basis of disability, the Constitution recognises the special needs of persons with disabilities and restates basic specific rights whose observance will lead to greater enjoyment of human rights and fundamental freedoms by persons with disabilities. It is imperative that the Persons with Disabilities Act is amended to bring it in line with the Constitution and to provide a framework for disability mainstreaming both in the public and private spheres. The NCPWD should build the capacity of and monitor public and private actors in regard to mainstreaming of disability. The Kenya Law Reform Commission and other State agencies involved in the law making process must ensure that laws not only enshrine the rights of persons with disabilities but include sanctions where violations occur. Last, disabled peoples' organisations must build the capacity of their members to enable them engage with the constitutional implementation process.

8 CHAPTER EIGHT: ENFORCING PROVISIONS COVERING THE YOUTH IN ARTICLE 55 OF THE CONSTITUTION

8.1 Introduction

Youth, as a concept, varies from culture to culture and from one society to another. Defining youth globally according to some exact age range is therefore difficult. This is demonstrated by the varying definitions of 'youth' that exist. For example, the demographic definition of youth according to the United Nations is the age group between 15 and 24 years of age[79]. The World Bank, however, focuses on the age range of between 12 to 24 years. The Kenya National Youth Policy 2006 defines the youth as persons resident in Kenya in the age bracket 15 to 30 years. Section 2 of the National Youth Council Act No. 10 of 2009 defines a youth as a person aged between 18 and 35 years. Finally, Article 260 of the Constitution of Kenya 2010 defines 'youth' to mean the collectivity of all individuals in the Republic who have attained the age of 18 years; but have not attained the age of 35 years. Hence the definition of Youth adopted in this chapter is that of the Constitution.

The importance of addressing youth issues is underscored by the Kenya National Dialogue and Reconciliation process following the post election violence of 2007/2008. Agenda Item IV acknowledged the urgency and importance of addressing youth issues. In particular, it identified youth unemployment as one of the key factors behind the post-election violence, noting that youth unemployment threatens social and political stability - the very foundation upon which a nation is built. Addressing youth concerns as a priority is critical in harnessing national stability and generational posterity.

79 This definition was made during preparations for the International Youth Year (1985), and endorsed by the General Assembly (see A/36/215 and resolution 36/28, 1981). (http://www.un.org/esa/socdev/unyin/qanda.htm)

This chapter assesses the legislative, policy and programmatic interventions towards the implementation of Article 55 of the Constitution of Kenya.

8.2 National Policy and Legislative Framework

Kenya does not have one law that comprehensively addresses issues of the youth. Instead, scattered legislation provide for the youth, including the Constitution, the National Youth Council Act No. 10 of 2009 and the National Youth Service Act cap. 208. In addition some ministries have programmes and sectoral youth policies. Often these programmes and policies do not link with each other and there are no proper co-ordination mechanisms to foster effectiveness. This section summarises the key provisions in a cross section of laws and policies.

The National Youth Council Act provides for the establishment of a Youth Council to empower young people. The Council coordinates youth empowerment activities and mobilises resources to support and fund youth programmes.

The National Youth Service Act provides for the establishment of a National Youth Service for the training of young citizens to serve the nation, and the employment of its members in the implementation of tasks of national importance. It prohibits members from engaging in any trade, business or employment, or taking part in any commercial or agricultural undertaking during the period of service except with the approval of the responsible Minister or the Director as the case may be.

Efforts to initiate youth development programmes have been made in policy documents, such as Sessional Paper No. 2 of 1992 on Small Scale and Jua Kali Enterprises, the 1997-2001 Development Plan, National Poverty Eradication Plan 1999-2015, the National Youth Policy of 2006 and Kenya Vision 2030.

The Ministry of Youth Affairs and Sports in collaboration with other stakeholders and the young people of Kenya developed the National Youth Policy of 2006 along with its implementation plan. The youth policy provides a vehicle for public action in response to the challenges faced by Kenya's young people, and suggests ways of tackling those challenges. The policy prioritises youth-centred programmes in areas such as participation and inclusion in national development, employment, health and education, and vocational skills and competencies development.

However, the policy does not offer specific guidelines on the representation of the youth in governance bodies at local, regional and national levels. In some instances, ministries, departments and agencies have formulated their own policies without adequate reference to the National Youth Policy, with the result that youth issues have remained fragmented. In addition, although the National Youth Policy recognises the importance of youth diversity and heterogeneity, it does not cater for youth with disabilities, which creates difficulties in targeted interventions.

8.3 Implementing Article 55 of the Constitution

8.3.1 The Constitution generally

Article 21 (3) of the Constitution of Kenya 2010 identifies the youth as one of the vulnerable groups whose needs State organs and public officers are required to address; and Article 27 (4) prohibits discrimination on the basis of age. Article 55 requires the State to take measures, including affirmative action, to ensure that the youth access relevant education and training; have opportunities to associate, be represented and participate in political, social, economic and other spheres of life; access employment; and are protected from harmful cultural practices and exploitation. With regard to political

participation, Article 97 (1) (c) identifies the youth as part of the twelve members to be nominated by parliamentary political parties to the National Assembly. Article 98 (1) (c) provides that the Senate consists of, among others, two members being one man and one woman representing the youth. Article 177 (1) (c) provides that a county assembly consists of, among others, the youth as prescribed by an Act of Parliament. Finally, Article 100 requires Parliament to enact legislation to promote the representation in Parliament of the youth, among other groups.

The ensuing discussion focuses on the provisions of Article 55 which is the flagship provision for the youth in the Constitution.

8.3.2 Education

Article 55 (a) of the Constitution mandates the State to take measures, including affirmative action programmes, to ensure that the youth access relevant education and training.[80]

The Ministry of Education set up in January 2011 the Task Force on Education to "analyse the implications of the new Constitution on education, training and research for national development."[81] Some of the terms of reference of the Task Force were: to review the education system in Kenya in relation to relevance and responsiveness of curriculum to Kenya Vision 2030, access, equity, quality and transitional issues and molding and mentorship values. This undertaking should lead to changes that will make the education system responsive to the dynamics of local and international labour

80 This is in addition to the following provisions that are also applicable to the youth: the right of every person to education-Article 43 (1) (f); the right of every child to free and compulsory basic education-Article 53 (1) (b); the right of a person with disabilities to access educational institutions and facilities that are integrated into society to the extent compatible with the interests of the person-Article 54 (1) (b); and the State obligation to put in place affirmative action programmes to ensure that minorities and marginalized groups are provided with special opportunities in educational fields-Article 56 (b).

81 The Kenya Gazette, Vol. CXIII-No.11, Nairobi, 28th January, 2011

markets. These reforms will have the greatest impact on the youth as a category for the simple reason that education is the main activity for persons in this age group.

In addition to the curriculum review, one of the other key facets of implementation of the Constitution here is budgetary allocation and utilisation. The net estimate for the Ministry of Education increased from KES 130.4 billion in 2010/11 to KES 137.3 billion in 2011/12[82]. To implement Article 55 (a), this trend should be maintained or increased – at the very least Kenya should not regress.[83] Further, implementing Article 55 (a) requires improving education infrastructure in the country. This entails rationalising the number of public educational institutions at every level in Kenya i.e. primary schools, secondary schools, training colleges and universities and equipping them with adequate teaching and learning resources. Specifically the State should:

- Establish affordable middle level colleges that teach courses relevant to the labour market and improve existing ones;
- Regulate training institutions to ensure they meet adequate academic and technical standards;[84]
- Increase bursary allocations for needy students;
- Engage communities in arid and semiarid areas to determine how best to facilitate access to education for their people;
- Establish adequate special schools and rehabilitation centres to cater for learners with disabilities while facilitating inclusive education to the full extent possible;

82 These amounts include personal emoluments for the Teachers Service Commission

83 See Chapter five for a discussion on the progressive realization of ECOSOC rights

84 In January 2010, the Ministry of Education shut down about 400 'bogus' colleges around the country. If the Ministry is not vigilant in its monitoring, the Colleges will just reopen, and continue with their illegal operations. See: http://allafrica.com/stories/201011260984.html

- Enforce the re-admission policy for girls who drop out of school due to pregnancy;
- Develop links between training institutions and the employment market to ensure such institutions offer relevant skills - this can be through research, internship opportunities and financing;
- Protect informal sector innovations by patenting them; and
- Involve the youth in formulation and review of the education and training policy.

8.3.3 Employment

Article 55 (c) of the Constitution provides that the State shall take measures, including affirmative action programmes, to ensure that the youth access employment. This provision is buttressed further by Article 27 (6) of the Constitution that provides for the formulation of affirmative action programmes to redress disadvantages of past discrimination. The formulation of such programmes will begin to ameliorate the youth unemployment situation which persists[85] despite various efforts to address it. The most notable of these initiatives are the youth employment marshal plan[86] and Kenya Vision 2030[87]. The marshal plan comprises four types of initiatives: the *Kazi Kwa Vijana*

Youth Enterprise Development Fund, the Trees for Jobs Initiative, the Roads 2000 Project, and the Technical Industrial Vocational Education and Training Project.

85 The youth comprise 60 percent of the labour force but 75% of them are unemployed; Source, Kenya National Youth Policy 2006

86 The government, through the Ministry of Youth Affairs and Sports, has initiated a youth employment marshall plan that aims to create 500,000 jobs annually in both the formal and informal sectors, beginning January 2009.

87 The Government has prioritized youth unemployment in its long-term plan, Kenya Vision 2030 and medium-term plan (2008-2012). The Ministry of Youth Affairs has developed its five-year strategic plan in line with the projects and activities aimed at tackling youth unemployment in Kenya Vision 2030 and the medium-term plan.

To implement Article 55 (c), the Government should take the following steps:

- Identify and tackle specific barriers to youth employment;
- Ensure the achievement of regional and gender balance in the beneficiaries of the Youth Enterprise Development Fund;
- Revise sports law to ensure the promotion and development of sports as an avenue for employment;
- Revitalise and broaden the mandate of the National Youth Service, among others, through improved funding;
- Identify and partner with the private sector to ensure increased access to capital and markets;
- Monitor the implementation and impact of the Youth Enterprise and Development Fund;
- Protect intellectual property in line with Article 11 (2) (c) of the Constitution so as to expand the entertainment sector - much of Kenya's entertainment industry is also dominated by the youth, and its expansion would lead to greater employment opportunities for young people; and
- Harness Information and communications technology (ICT) related opportunities arising out of the new fibre-optic cable infrastructure. This can be by encouraging foreign investments in the sub-sector.

8.3.4 Participation in political, social, economic and other spheres of life - Article 55 (b)

This provides that: "The State shall take measures, including affirmative action programmes to ensure that the youth have opportunities to associate, to be represented and participate in political, social, economic and other spheres of life."

Youth participation is the involvement of young people in policy and programme development. With regard to political participation, Article 97 (1) (c) identifies the youth as part of the twelve members to be nominated by parliamentary political parties to the National Assembly. Article 98 (1) (c) provides that the Senate consists of, among others, two members, one of each gender, representing the youth. Article 177 (1) (c) provides that a county assembly consists of, among others, the youth as prescribed by an Act of Parliament. Finally, Article 100 requires Parliament to enact legislation to promote the representation of the youth among other groups.

The legislative framework should include measures to enable youth overcome poor participation in politics. The new law should in effect regulate the political environment, campaign funding and the prevailing negative cultural perceptions of youth among the population which results in youthful leaders being kept off key party positions.

Inseparable from the right to vote is the right of every citizen to be registered and issued with identity documents - Article 12 (1). The issuance of identity cards to the youth is an imperative for one to exercise their right to vote. The State has on numerous occasions faltered in this respect hence disenfranchising the youth.

Other avenues of increasing youth political participation include targeted voter and rights education as well as ensuring increased access to decision-making processes and policy implementation at a local level, such as Constituency Development Funds, governance of schools, health centres, local authority councils and community projects.

On their part, the youth must join, and become active participants in political parties. Related to the above, the youth must use their superior ICT knowledge, for instance, in social media to bridge the resource gap.

8.3.5 Harmful cultural practices and exploitation

Article 55 (e) of the Constitution provides that the State shall take measures, including affirmative action programmes, to ensure that the youth are protected from harmful cultural practices and exploitation. Such harmful cultural practices include female genital mutilation (FGM), early and forced marriages. FGM is a violation of women's sexual and reproductive rights as well as of their physical integrity.

It also engenders high school drop-out rates for girls which in turn lead to lower levels of literacy among female youth. To achieve the protection envisaged, the Government should ensure that there are laws in place against harmful traditional practices and that they are enforced. Whereas FGM has been prohibited since 2002, the practice is still rampant with thousands of girls undergoing circumcision every year. An anti-FGM law has been passed, including a three pronged approach: of protect, support to victims, and public education.

8.4 Conclusion

An enabling legal framework for the improvement of the lives of the youth in Kenya exists, yet the problems besetting the youth persist. One of the major reasons for this is the approach of the various laws, programmes and policies which see the youth as beneficiaries, without including their active participation in their design. Why is this the case? Between the law on paper and the lived realities, the discrepancy is too great. Focus should then be on monitoring implementation, on increasing accountability, and on setting benchmarks and indicators against which to judge the performance of the various implementing

programmes. Past approaches of the various laws, programmes and policies have seen the youth as beneficiaries, without including their active participation in the design of those laws, programmes and policies. This is untenable - every fund created for the youth should have their input – no other way is sustainable.

Further, implementation of Article 55 must be looked at in a wholesome way as it is affected by factors beyond the law. For instance, the availability of resources adequate to fund these programmes is dependent on sealing the loopholes which have for instance led to money for supporting free primary education being stolen or misused by unscrupulous public officials or education institutions.

9 CHAPTER NINE: BUSINESS ENTERPRISES AND THE BILL OF RIGHTS

9.1 Introduction

States have the primary responsibility to protect, respect and fulfil human rights recognized in international law as well as national law, including ensuring that business enterprises respect human rights.[88] While business enterprises and States do not share the same responsibilities in regard to human rights, they are required to respect human rights recognized in international law as well as the national law of the countries within which they operate and which are within the limits of their operations and spheres influence.[89] This is rightly so because business enterprises have many opportunities of interaction with the individual, as an investor; employer; manufacturer and supplier of goods and services; consumer of raw materials inter alia, which provide opportunities for rights violations.

Furthermore, in this interaction the business enterprise is more often than not the more powerful party owing to its financial superiority as well as the legal protection afforded by the doctrine of corporate personhood that shields the owners from personal liability. Consequently, the need to keep this unequal power in check and to ensure that it is not exercised to the detriment of human rights cannot be overstated. This requires the State to put in place effective preventive and adjudicative mechanisms to mitigate and redress abuse by way of legislation, policy, and other regulations that clearly set out expectations for businesses operating within its territory. Moreover, the fact that the delivery of

88 UN Doc. A/HRC 8/16/May 15, 2008, Clarifying the concepts of 'sphere of influence' and 'complicity', Report of the Special Representative of the Secretary General on the issue of Human Rights and Transnational Corporations and Other Business Enterprises

89 UN Doc. A/HRC 8/16/May 15, 2008, Clarifying the concepts of 'sphere of influence' and 'complicity', Report of the Special Representative of the Secretary General on the issue of Human Rights and Transnational Corporations and Other Business Enterprises

key services that impact upon the enjoyment of human rights [and which the State is now obligated to ensure the realization thereof by Article 43], is increasingly in the hands of the private sector. This means that the State must ensure that business enterprises providing such services operate in a manner that is consistent with the Bill of Rights and Kenya's obligations under international human rights law.

The abuse of human rights by businesses in Kenya is not uncommon. There have been allegations of human rights abuse across many business sectors including in the agricultural sector where sexual harassment, poor housing, low remuneration and poor working conditions are common particularly in commercial farms growing tea, coffee and cut flowers. This is also the case within the manufacturing industry, for example, within the Export Processing Zone (EPZ) garment factories. This situation can be traced at least in part to the weak governance, regulatory and enforcement framework which exists in the country. Loopholes remain which have allowed companies to benefit from non-compliance with legal requirements.

Article 20 of the Constitution seeks to change this by providing that the Bill of Rights binds all state organs and all persons. Further, Article 260 of the Constitution of Kenya 2010 defines a 'person' to include a: "company, association or other body of persons whether incorporated or unincorporated." Hence, the Constitution envisages a role for business enterprises with regard to human rights: a departure from the traditional view that only States have obligations in respect to human rights that is in tandem with emerging global norms, which recognise that businesses share in the responsibilities for human rights. For the Kenyan business enterprise, what remains unclear is the extent of these obligations or responsibilities.

Guided by the discussions that have been taking place at the international level and in particular those under the aegis of the United Nations(UN), this chapter spells out the human rights responsibilities for business and those of the State in assisting businesses to meet their responsibilities. Drawing from the 'protect, respect and remedy' framework, and the guiding principles for its implementation, developed by the UN Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, in 2008 and 2011 respectively, the chapter will look at how Article 20 (1) will impact on doing business in Kenya.

9.2 The UN 'Protect, Respect and Remedy' Framework

The framework rests on three pillars. The first is the State duty to protect against human rights abuses by third parties, including business enterprises, through appropriate policies, regulations and adjudication. The second is the corporate responsibility to respect human rights, which means that business enterprises should act with due diligence to avoid infringing on the rights of others and to address adverse impacts with which they are involved. The third is the need for greater access by victims to effective remedies, both judicial and non-judicial.[90] This framework neither creates new international obligations nor does it limit or undermine the State's existing obligations under international human rights law: it simply illustrates how the State can use existing human rights to guide businesses in respecting human rights.

90 http://www.business-humanrights.org/SpecialRepPortal/Home/Protect-Respect-Remedy-Framework/GuidingPrinciples

9.2.1 The state duty to protect human rights

The State has the primary obligation to protect human rights recognised under international and national laws. Where it leaves a private person or third party to violate an individual's rights with impunity, the State's inaction is in itself a violation because it is not complying with the duty to ensure the free and full exercise of the violated rights.[91] The Government, therefore, is obligated to ensure that businesses do not violate human rights.

This obligation is met when the State takes appropriate steps to prevent, investigate, punish and redress abuse by business entities. In its preventative role, the State is expected to pass laws and issue policies to regulate business operations within Kenya but also to ensure that these laws and policies are coherent. Article 20 of the Constitution obliges businesses to respect human rights. However, Article 20 alone will not make businesses human rights compliant and the Government has to provide a roadmap for the application of the Bill of Rights to businesses.

Laws on business establishment

The Kenyan business landscape comprises a myriad of players in terms of business size and complexity of operations. The majority of businesses are informal - what are commonly known as '*jua kali*' businesses; while others are governed by the Companies Act, cap. 486, and the Limited Partnerships Act, cap. 30; and others are State owned enterprises. These businesses by and large are licensed under various statutes that also provide enforcement mechanisms. For instance, a bar and restaurant under sole proprietorship may be simply a registered business under the Registration of Business Names

91 Velasquez Rodriguez case, ...

Act, Cap. 499, but it will be subject to the Alcoholic Drinks Control Act No. 4 of 2010.

It is necessary that all laws and policies that guide the establishment and running of businesses are reviewed because these are responsible for shaping the business or corporate culture in the country. The review will infuse human rights principles into these laws to ensure that what has previously been viewed solely as operational decisions also take into account their human rights impact.

The process of the review has already started and the following bills have been proposed, the Companies Bill 2010, the Partnership Bill 2010 and the Limited Liability Partnership Bill 2010. The Companies Bill comes close to providing a framework under which businesses can gauge their human rights impact. The Bill revises measures on non-financial reporting, company communications with shareholders, and the duties of company directors. It maintains the duty of directors to act in the interest of shareholders and to promote the success of the company. The Bill requires directors to specifically have regard to the consequences that any actions of the company may have in the long term against employees' interests, relationships with suppliers, customers and others, impact on the environment and the community, high standards of business conduct and the need to act fairly between the members of the company. Whereas a specific human rights duty is not proposed for the directors consideration, company boards will be obliged to look at the human side of business and at human rights principles and standards. Furthermore, directors of companies except those subject to the small companies' regime will be expected to produce a report containing a business review to inform shareholders and assist them to assess how the directors have performed their duty to promote the success of the company.

Moreover, the State duty to protect extends to international trade agreements. There are instances where the Government has exempted foreign investors from the operation of some laws, for example, certain labour standards or taxes, as a strategy to attract and keep foreign investments. For example, employees in the EPZs have not been protected from exploitative labour or other unfair practices because laws or regulations exempt EPZs from aspects of the labour laws. Such exceptions expose individuals to human rights violations without the possibility of redress and undermine the State's efforts in improving the enjoyment of human rights by diminishing legislative and policy space. In addition the application of different standards also brings about policy inconsistency and complicates the enforcement process creating opportunities for lapses. Therefore, in concluding international trade agreements, the Government will have to be conscious about the rights and fundamental freedoms recognised under the Bill of Rights as well as by international human rights instruments to which it is a party to ensure that it does not contract out the letter or spirit of the law and compromise the optimal realisation of human rights in the country.

9.2.2 Business responsibility to respect

Businesses do not share the exact responsibilities of States with regard to human rights, but they are required to respect the human rights recognized in international law as well as the national law of the countries within which they operate and which are within the limits of their operations and spheres of influence[92].

92 UN Doc. A/HRC 8/16/May 15, 2008, Clarifying the concepts of 'sphere of influence' and 'complicity', Report of the Special Representative of the Secretary General on the issue of Human Rights and Transnational Corporations and Other Business Enterprises

Laws on the operations of business

These laws are industry related based on the nature of business and general laws on cross-cutting issues that affect more than one business area. The general laws include those that relate to the workplace, for example, those on employment and labour relations; the market place, for example, laws on consumer rights and product safety; and environmental safety. The Government should embark on a process of reviewing the existing laws (and enacting new ones as necessary) to ensure that they are in tandem with the Bill of Rights and with the international human rights conventions to which Kenya is a party.

However, bearing in mind that the Constitution is the supreme law and any law contrary to it is void, business enterprises need to understand how the Bill of Rights alters certain existing laws and to adjust their operations accordingly even before the process of law review is complete. While virtually all the provisions of the Bill of Rights affect business operations in one way or another, we have focused on those that will have the greatest impact.

Article 27 – Equality and freedom from discrimination

Article 27(3) provides that women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres. Furthermore, the Constitution prohibits any person from directly or indirectly discriminating against another[93] on the basis of any of the prohibited grounds which include but are not limited to: race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.[94] Accordingly, business enterprises are required to ensure equality of opportunity

93 Article 27(5) Constitution of Kenya, 2010

94 Article 27(4) Constitution of Kenya, 2010

and treatment in recruitment including complying with the special measures designed to overcome past discrimination against certain groups as contemplated under Article 27(6). However, where the inherent nature of the job necessitates the exclusion of certain categories of persons, the labour laws should provide for the extent of the limitation within the confines of Article 24(1).

Some jurisdictions notably the European Union have adopted directives[95] against employment discrimination that have helped certain categories especially women penetrate professions previously preserved for males as well as substantially narrow the wage gap between the sexes.[96] Theses Directives require member states to amend their laws or implement other measures aimed at ensuring equality of opportunity as well as equality of work conditions. Consequently, several cases have been brought to the Court of Justice of the European Communities against members that have not complied. For instance, in *Johnston v. Chief Constable* (Case 222/84, 1986 E.C.R. 1651, 1676-89 (1986),the complainant challenged a decision of the Royal Ulster Constabulary (RUC) not to renew her contract and to give her training in the handling of firearms and contended that she has suffered discrimination prohibited by the Sex Discrimination Order. The RUC on their part argued that the decision was taken for the purpose of safeguarding national security and protecting public safety and public order. In its judgement, the court

95 On February 9, 1976, the Council of the European Communities issued Directive76/207/EEC, 1976 Equal Treatment Directive that required member states to inter alia put into effect the principle of equal treatment for men and women as regards access to employment including promotion, and to vocational training and as regards working conditions. The Directive was revised in 2002 vide Directive 2002/73/EC. The new Directive increased the scope of the original Directive by adding specific coverage of sexual harassment, defining direct versus indirect discrimination, tightening the exception to the equal treatment requirement, and requiring expanded judicial remedies in member states courts.

96 Women's Human Rights: The International and Comparative Law Casebook, Susan Deller Ross, University of Pennsylvania Press, Page 245

stated inter alia, 'any member state ...may differentiate between male and female members of the police as regards certain policing duties as well as training thereto.

But it may only do so in very limited circumstances; only where the nature or the context of the policing means that the sex of the police officer is a determining factor within the meaning of Article 2(2) of the Directive and even then, only if the treatment of the sexes satisfies the overriding principle of proportionality'- that derogations from the Directive remain within the limits of what is appropriate and necessary for achieving the aim in view.

Similarly Kenya has the Employment Act 11 of 2007 which came onto effect in June 2008 and which defines the fundamental rights of employees and provides for basic conditions of employment. While the Act is fairly robust, it will need to be amended to be in consonance with the Constitution. For instance, the anti-discrimination provisions under Section 5 of the Act will need to include all the prohibited grounds under Article 27(4) of the Constitution.

However, the amendment of law is only one of the measures that need be taken to ensure consonance with the Constitution. For businesses, the immediate impact of Article 27 requires that they audit their operations to ensure that none of their actions results in discrimination direct or indirect. An obvious area is in staff recruitment, retention, promotion, remuneration and the benefits. Any individual or group that has suffered discrimination as a result of a company's operations can seek redress from the courts as provided by the Constitution.

Article 28 – Human dignity

Every person has the inherent dignity and the right to have that dignity respected and protected. The idea of human dignity is central to

human rights and is found in many international and regional human rights instruments. The right to dignity means that every human being has intrinsic worth which ought to be recognised and respected by others. Apart from being a stand-alone right, dignity stands behind many other rights and provides a theoretical basis for the human rights discourse.[97]

Within the context of the corporation the right to dignity encompasses rights such as, non-discrimination, privacy, freedom from slavery or forced labour, fair wages that ensures an adequate standard of living for the worker and his/her family, reasonable working conditions, a safe and healthy working environment and where the employer provides housing, adequate housing, reasonable standards of sanitation, clean and safe water in adequate quantities within the meaning of Article 43 of the Constitution, otherwise to provide the employee with such allowance as to afford him/her to acquire such housing, clean and safe water in adequate quantities as well as social security. The observance of the above rights within a working environment will be what will promote the inherent dignity of the worker.

The Employment Act and in particular Part V on the Rights and Duties in Employment-provide for basic minimum conditions of employment which are a useful pointer to business enterprises on what measures need to be in place to make the working experience a dignifying one. Other aspects of measures that work towards promoting the dignity of workers are also found in the Occupations Safety and Health Act, the Work Injury Benefit Act, the Labour Relations Act and the Labour Institutions Act which need to be interpreted in a way that most favours the enforcement of the rights and fundamental freedoms under the Bill of Rights. It is imperative that business audit the totality of their operations to ensure that they are not in violation of constitutional provisions.

97 Human Dignity and Judicial Interpretation of Human Rights, Christopher McCrudden, The European Journal of International Law, Vol. 19 no.4, 2008

Article 41 – Labour relations

This provides for fair labour practices, fair remuneration, reasonable working conditions, and the right to collective bargaining including the right to go on strike.[98] On their part, employers who include the corporate and other business enterprises have the right to form and organize activities as employers' organizations.[99]

Under the current law, aspects of the above issues are scattered in five legislations, namely: the Employment Act, the Labour Relations Act, the Labour Institutions Act, the Occupational Safety and Health Act, and the Work Injury Benefits Act. While these laws are fairly recent and progressive in terms of human rights protections, there is need to ensure that they are in conformity with the Bill of Rights and Kenya's obligations under international human rights laws especially the International Labour Organization's conventions which also forms part of the laws of Kenya by virtue of Article 2(5 &6) of the Constitution.

Furthermore, this provision is particularly important for employees in the export processing zones who have not been protected from exploitative labour or other unfair practices by virtue of existing laws or regulation that have exempted EPZs from aspects of the labour laws. For such exemptions to hold, they will have to pass the four-part test set out in the limitations clause-Article 24- of the Constitution.

Article 30 – Freedom from slavery, servitude and forced labour

This provision is contravened where a supplier uses forced labour, sweat-like conditions or child labour in order to produce goods at cheap prices on the behest of a client. While in this instance the business enterprise is not directly involved in the operations, the prohibition against the use forced or compulsory labour extends not just to the direct operations

98 Article 41(1,2, 4 & 5), Constitution 2010
99 Article 41(1,3,4 & 5), Constitution 2010

but business enterprises may also be held legally responsible where they are complicit[100] with their suppliers or other partners who grossly violate human rights. Within the Kenyan context workers especially those in the manufacturing and agribusiness sectors complain of denial of overtime pay and the setting of unrealistic targets compelling them to work for longer hours without commensurate compensation which is tantamount to exploitation.[101]

Article 30 is closely related to the right of every child to be protected from hazardous or exploitative labour under Article 53 (1) d and Article 10 of the Constitution and the Children's Act respectively. This protection is also provided under Section 4 of the Employment Act. Nonetheless, child labour continues to be a problem in this country and has been cited one of the major causes associated school drop-out.[102]

Hence in order to comply with Article 30 Kenyan businesses need to review their overtime pay and target rules to ensure that these are not exploitative and do not force workers into slave-like conditions.

Article 43(2)-the right to emergency health care

In Kenya the provision of health care is divided into public and private sector. The public sector is grossly under-resourced in terms of qualified personnel, drugs and maintenance often forcing poor people to pay exorbitant costs for services from the private health care facilities. Another serious concern facing the whole sector is the

100 For a discussion on corporate complicity and legal accountability, please see http://www.icj.org/IMG/Volume_2.pdf, accessed on April 21, 2011

101 The level of exploitation in Kenya's flower farm industry has been described as extreme-a statement by the representative of the Kenya Women Workers Organization at a conference in Nairobi held in May 2011

102 http://www.state.gov/g/drl/rls/hrrpt/2010/af/154352.htm

lack of effective state control in terms of standards setting, monitoring and an effective complaints procedures. The introduction of a Service Charter for Health Care Delivery[103] a joint venture of the two ministries of health, a Citizen's Service Charter[104] developed by each of the two health ministries and a Patients' Rights Charter of 2006 have not helped resuscitate public health from the critical condition that has plagued it. Against this backdrop therefore, the implementation of the right to emergency health care must be in such a way that promotes the general right to health care services and as there no legislation on this subject, the government should propose one. Such a law should answer some of the questions clearly:

1. What is an emergency?
2. What amounts to emergency health care (including the limits)?
3. What are the obligations of private health care providers as relates to emergency medical treatment?
4. What are a patient's rights with regard to emergency medical treatment?
5. What is the state's obligation in the provision of emergency medical treatment?

103 The purpose of the charter is to is 'to provide the public with our core functions and values, information on the range of services we offer, our commitments, principles, obligations, customers' rights and obligations, mechanisms for complaint and redress for any dissatisfied clients and customers.'

104 The Customer Service Charter of Ministry of Public Health and Sanitation's (MoPHS) "Citizens Service Delivery Charter" promises "to provide quality preventive and promotive health services to all our clients with dignity, professionalism and within the shortest time possible. It gives a list of services rendered, the patient responsibilities, user charges, and the expected waiting time. In addition, it spells out health services that are exempt from payment including deliveries in dispensaries and health centers, but it does not mention family planning services. That of the Ministry of Medical Services advises patients that they can complain about unsatisfactory services and where they can do so: "Any service that does not conform to the above standards or an officer who does not live up to the commitment to courtesy and excellence in service delivery should be reported to the Out-Patient Department Nursing Officer in-charge or any Hospital administrator." It says that childbirth is only free in health centers and dispensaries. However, it does not indicate that family planning, antenatal care, and postnatal care are also free.

In addition, the law must guard against discrimination of patients by health care providers based on Article 27(4) of the Constitution and provide penalties for violations and where such violations result to harm, the patient should be able to bring a civil suit for damages. Nonetheless, it is imperative that the State should not use this law to transfer the obligation to provide health care to the private health sector. The State must therefore establish a scheme for reimbursement to hospitals, medical practitioners, ambulances and others. This can be done by setting aside in the annual budget for this purpose.

Article 46 – Consumer rights

This provision empowers the consumer to demand and expect goods and services of reasonable quality from both public and private entities. Reasonable in this case may be taken to mean goods and services that do not bring harm to the consumer. What is most empowering here is that business enterprises are expected to give full information necessary to enable consumers benefit from goods and services which right is also strengthened by Article 35(1) (b)[105]. To help attain this right, implementing legislation should include requirements that seek to improve product labelling to enable the consumer make informed choices when selecting products as well as protection from false, misleading and offensive advertising. The regulations on advertising (Article 46 (2)) are equally intended to protect the business enterprise because it is an attempt to curb unfair competition in the marketplace. In totality, business enterprises shall not produce, distribute, market or advertise harmful or potentially harmful products for use by consumers.

Currently, there exists a myriad of consumer protection laws. These include: the Standards Act protects the consumer from substandard

105 Every citizen has the right of access to.... information held by another person and required for the exercise and protection of any right or fundamental freedom.

goods; the Public Health Act and the Hotels and Restaurants Act that are meant to ascertain sanitary conditions of various establishments; the Pharmacy and Poisons Act under which the drug regulatory body the Pharmacy and Poisons board is established and mandated to among others ensure the safety, quality and efficacy of pharmaceutical products and services; the Food, Drugs and Chemical Substances Act; the Trade Descriptions Act; and the Weights and Measures Act, among others. Unfortunately the Government has not been able to ensure enjoyment of this right because enforcement is lacking.[106] In a bid to consolidate and provide a better protection mechanism, a Consumer Protection Bill was introduced in parliament in 2007 but it has remained just that. The passage of the Bill still remains an essential pre-requisite for securing the rights of consumers. However, the Bill will need to be amended to be in tandem with the constitutional provisions especially those that relate to enforcement of available remedies.

Article 42 – Environment

Business enterprises have an obligation under the Constitution to promote the right to a clean and healthy environment which includes public health and safety standards, protection of biodiversity and genetic resources among others. Whereas the Article 42 gives everyone that right, it is Articles 69 and 70 that explicate on measures that need be put in place for this right to be attained. These provisions buttress the Environmental Management and Co-ordination Act of 1999[107] which seeks to improve national capacity in the management and care for the environment. Moreover, business enterprises are

106 http://www.business-humanrights.org/media/documents/ruggie/corp-law-kenya-oraro-co-for-ruggie-oct-2010.pdf, accessed May 3, 2011

107 Whereas the Environmental Management Act charged the AG under Section 124, with the responsibility of initiating enabling legislation of Kenya's international obligations concerning the management of the environment, these are now part of Kenyan law by virtue of Article 2(5 & 6) and the Act needs to be amended accordingly. Additionally the National Environmental Tribunal established there under should not be left behind in the ongoing judicial reforms and most importantly with Article 22 and 23 of the Constitution.

duty bound[108] to observe the principle of sustainable development in their application or interpretation of the relevant provisions of the Bill of Rights.

In terms of linking business and human rights the Environmental Management and Coordination Act is perhaps the one piece of legislation that clearly demonstrates this link through the requirement for business enterprises to carry out Environmental Impact Assessment Report where their proposed activities are likely to affect the environment. Linked to this are the provisions of the Physical Planning Act that allow citizens to raise objections against any planned construction activities if they are likely to interfere with their right to a clean and healthy environment. The constitutional protection of the aforementioned rights can only make these laws stronger while giving the public more remedies than those in the individual legislations.

Article 29 – Freedom and security of the person

Article 29(c) protects persons from any form of violence from either public or private sources. A possible area of operation that this primarily affects regards, the security arrangements that business enterprises make. In so doing, business enterprises have to ensure the company they engage is one that understands and observes this right at all times because a violation by the security company of this right could also make the contracting company culpable.

This provision is particularly important where business enterprises depend on the state for security services and where in the execution of this duty the state entity in question commits human rights abuses. Reports of such abuse are not uncommon especially in the extraction sector where oil and mining companies have been accused of giving money, arms and other logistical support to government

108 Article 10, the Constitution of Kenya

security forces or other paramilitary groups to attack, maim, kill or cause civilians to disappear. From a practical perspective businesses should ensure that their security operations or those of their external contractors where relevant, adhere to human rights principles.

In addition there are times when in the normal course of business a company violates the right to security of the person. For instance, private airline companies that are used by governments for illegal terrorist renditions as well as *refoulement* of refugees back to territories from which they had fled persecution may find themselves confronted by legal suits for the violation of this right. To avoid this, businesses should identify red flag situations and carry out human rights risk assessment of such cases before engaging in such contracts.

9.2.3 Access to effective remedy

For a long time businesses have used the doctrine of corporate responsibility and their financial power to escape responsibility for human rights violations. Countries competing for foreign investors have sometimes contributed to the bad behaviour of businesses by giving legal exemptions with the effect of lowering or compromising the observance of human rights standards within their operations mainly in the areas of fair labour relations and environmental protection. Some governments have even colluded with businesses in the violation of rights by offering protection to the operations of such businesses even where there are clear violations. In such instances, the victims of such violations cannot expect to get redress from their own government especially if such a government has what the Special Representative for business and human rights calls 'governance gaps'[109].

109 Jan Eijsbouts, Extracts from Ruggie's Law: filling the human rights gap for multinational corporations in international law, Effective Justice Solutions,

This last pillar combines both the State duty to protect and the business responsibility to respect. States must have in place effective, predictable and impartial State-based judicial mechanisms for the enforcement of laws and standards and for deterring abuse. On the other hand, businesses should have operational-level dispute resolution mechanisms that act as early warning systems for problems and that also mitigate or resolve them before abuses occur. Businesses must also respect due process by cooperating and complying with the outcomes of such processes.

State-based judicial mechanisms

Generally, Kenyan courts have upheld fundamental rights and freedoms in cases involving businesses.[110] With the exception of the Industrial Court that deals with labour and employment related matters, the opportunities to create more jurisprudence are yet to be fully exploited by the citizenry. A case in point is in the area of physical planning where there are obvious problems yet the protection of the law has not been felt. While the onus lies on members of the public to bring matters to the courts, the Government has to address the legal barriers that prevent legitimate cases involving business-related human rights abuses from being addressed.

The on-going judicial reforms should address existing barriers like the huge backlog of pending cases and the allegations of corruption in the Judiciary. The challenge brought on by the backlog is that of increased costs in terms of legal fees as well as the amount of time it takes to resolve disputes which often translates to a loss in profits. For most individuals the inordinate amount of time spent in the courts

110 Oraro & Company Advocates, Corporate Law Project: Kenya, http://www.business-humanrights.org/media/documents/ruggie/corp-law-kenya-oraro-co-for-ruggie-oct-2010.pdf, accessed May 3, 2011

coupled with the possibility of justice being compromised makes people shy away from seeking judicial remedies. The Government should aim to bring back confidence in the judicial system for both the citizens and the businesses. The Industrial Court and all other relevant courts and tribunals should be part of the reform process as not all matters will end up at the High Court. Moreover, the anticipated rules of procedure to guide the institution of proceedings under the Bill of Rights (Article 22(3)) will go a long way in easing some of the practical and procedural barriers to accessing judicial remedies.

In addition the Constitution provides State-based non-judicial mechanisms under Article 59 through the national human rights institutions. For instance the Kenya National Commission on Human Rights (KNCHR) has powers to receive and investigate complaints about human rights abuses and to take steps to secure appropriate redress where violations are found to have occurred. An adequately empowered and equipped KNCHR can play a particularly important role in this regard because national human rights institutions are often more accessible than the courts.

Non-State-based non-judicial mechanisms

The Government within the laws on business establishment should require businesses to put in place operational-level grievance mechanisms as a first step in resolving disputes arising out of adverse impacts of their operations resulting in human rights abuses. Within such mechanisms, the complaints to be resolved do not necessarily have to amount to a human rights violation but a legitimate concern which if not addressed could evolve to a violation. The benefit of such a mechanism is the establishment of sustained dialogue with stakeholders which can be used to prevent future harm and to work out solutions quicker when problems occur. However, the existence

of such mechanism should not preclude the rights of the claimants to institute legal proceedings.

9.3 Conclusion and Recommendations

Article 20 of the Constitution unequivocally brings to all businesses operating in Kenya new constitutional responsibilities in respect of human rights. However, business responsibility for human rights needs to go hand in hand with the State duty to protect. The Government needs to put in place statutes, policies and other regulatory frameworks for the effective management of the business and human rights agenda. Specifically, the amendment of the laws on business establishment is an imperative.

First should be the enactment of the draft Companies Bill which proposes increased accountability for human rights for quoted companies through the business review: a non-financial report which increases accountability of the directors. While this is a positive development for human rights, the requirement to submit business reviews appears to be more stringent for quoted companies. Under the Bill only quoted companies have a mandatory duty to include in their reports issues on the environment and the community. However, given that Article 20 imposes an equal obligation on all persons, this requirement should be for all companies or based on the footprint or turnover of a company because the reality is that the greatest violators are private companies.

Furthermore, to promote increased transparency, the Registrar of Companies should cause this report to be published alongside the financial reports. Additionally and to help in the implementation of this clause, the Companies Registrar should prepare guidelines or an outline of the report [using a human rights focus rather than a corporate social responsibility approach], to ensure consistency in

reporting and ease of analysis. In addition, and in order to make the reports useful, the Registrar of Companies should identify a body or person to analyse the reports as well as audit the companies based on their submitted reports.

Second there is the need to build a human rights culture within the business sector. Towards this end, the Government should establish a human rights policy for businesses which all businesses will be required to sign onto. Such a policy should not just be a statement of good intents but should also provide a monitoring system and a clear and accessible complaints mechanism. An additional measure that businesses should take to guard against human rights violations is undertaking human rights risk assessments or human rights due diligence to detect and control negative human rights risks in their operations and relationships.

Third, the ongoing judicial reforms should aim at creating a Judiciary that is effective, impartial and free from corruption and political influence so as to inspire the confidence of the business community and individuals of its reliability as an efficient dispute resolution mechanism.

Fourth Kenyan businesses should be aware of the rights protected under the Constitution and they should avoid causing or contributing to adverse human rights impacts through their own activities and they should address such impacts when they occur. Businesses should ensure that they adhere to human rights principles and standards but also that they put in place preventative measures to avoid the occurrence of adverse human rights impacts within their spheres of influence and redress mechanisms to remedy any human rights violations.

Practically, persons responsible for policies and procedures will need to be appraised of the new dispensation and to initiate audits of their operations and internal policies to ensure that these do not infringe directly or indirectly the rights and freedoms provided under the Bill of Rights. Leadership in this regard will need to be from the highest decision making organ of the business enterprise because it will communicate commitment to meet the constitutional responsibilities. In the case of companies, the involvement of the board of directors is imperative because they are not only responsible for policy but also because under the proposed Companies Bill they will be required to prepare the business review report that, as was previously discussed evaluates the impact of the company in certain areas that are in essence human rights related.

10 CONCLUSION

The Bill of Rights under the Constitution of Kenya 2010 offers a stronger framework for the protection of human rights than the former Constitution. One of the biggest milestones of the 2010 constitution is the recognition and inclusion of economic, social and cultural rights.

The protection of human rights in Kenya is further broadened by the introduction, within the realm of national law, of international human rights treaties and conventions ratified by Kenya. The incorporation of these conventions and treaties will ensure the adoption of international best standards as Kenya move to the implementation phase. In addition the work of the international treaty body mechanisms and the jurisprudence of the various complaints mechanisms will be useful in the interpretation of the protected rights.

The substantial expansion of human rights will however only result into gains if the relevant provisions are fully implemented. The KNCHR in this report has sought to show how the Government should implement the provisions of the Bill of Rights in order to make rights a lived reality for the millions of Kenyans.

The report concludes that while there exists a basic legislative framework to support the protection of human rights, it needs to be urgently reviewed to include the broadened framework of the 2010 Constitution. This should take the form of review of legislation as well as establishment of relevant institutional structures for promotion and protection of these rights. Certain basic rights such as the right to equality and non-discrimination will have to be constantly monitored in every sphere of life; hence the need for a strong institutional monitoring mechanism.

The report also underscores the importance of accessible redress mechanisms as it is through this that people whose rights have been violated can obtain remedies. Ultimately, the Judiciary will play a very big role in advancing the rights protected in the Constitution through interpretation and, in instances of violation, provision of appropriate remedies. The Judiciary though is not the sole custodian of these rights, but should be the very last resort: it is the duty of all Kenyans to respect and protect these rights.

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