



2017 Alternative Report to the Committee on the

Convention on Elimination of all Forms of Discrimination against Women (CEDAW)



LIST OF ABBREVIATIONS

AIDS Acquired Immune Deficiency Syndrome

AGYW Adolescent girls and young women

AYP Adolescents and young people

CEDAW Convention on Elimination of all forms of Discrimination against Women

CSE Comprehensive Sexuality Education

CSO Civil Society Organization

EAP Election Action Plan

FGM Female Genital Mutilation

FIDA Federation of Women Lawyers – Kenya

HIV Human Immunodeficiency Virus

GID Gender Development Index

ICCPR International Convention on Civil and Political Rights

ICJ International Commission of Jurists - Kenya

KDHS Kenya Demographic Health Survey

KELIN Kenya Legal and Ethical Issues Network on HIV and AIDS

KICD Kenya Institute for Curriculum Development

KCSE Kenya Certificate of Secondary Education

KNCHR Kenya National Commission on Human Rights

MoH Ministry of Health

NACC National AIDS Control Council

PIL Public Interest Litigation

PWDs Persons Living With Disabilities

SIL Strategic Impact Litigation

TWG Technical Working Group

UN United Nations

WHO World Health Organization

Table of Contents

LIST OF ABBREVIATIONS	1
INTRODUCTION	4
COMMENTARY ON LAWS AROUND WOMEN'S RIGHTS SINCE THE LAST REVIEW OF K	ENYA BY
THE CEDAW COMMITTEE IN 2011	7
DISCRIMINATION AND VIOLENCE AGAINST WOMEN IN POLITICAL & PUBLIC LIFE	14
HOLDING/SEEKING TO HOLD PUBLIC OFFICE	14
REPRESENTATION IN GOVERNMENT	15
RIGHT TO VOTE	18
ECONOMIC EMPOWERMENT	22
HEALTH	26
UNSAFE ABORTION	26
CONTRACEPTION	32
HIV AND AIDS	35
COMPREHENSIVE SEXUALITY EDUCATION	39
PROGRESS IN IMPLEMENTATION OF CEDAW	45
CONCLUSION	46

INTRODUCTION

- 1. The Kenyan Section of the International Commission of Jurists (ICJ Kenya) and the Kenya Legal and Ethical Issues Network on HIV and AIDS (KELIN) submits this joint alternative report on the Convention on Elimination of All Forms of Discrimination Against Women in response to Kenya's 8th Periodic Report to the Committee on Elimination of Discrimination Against Women (CEDAW).
- 2. The report is presented in order to advise the Committee of the efforts made by the Kenya government towards implementing the Convention. The report adopts a thematic approach and highlights areas of concern with respect to the specific articles and provides corresponding recommendations for Committee's consideration.
- 3. The overall conclusion is that whilst Kenya has endeavored to include the principles of the Convention by enacting requisite legislative and policy frameworks aimed at fulfilling's the state party's obligations, delayed implementation evidenced by administrative gaps in practice still persist as will be enumerated in subsequent paragraphs.
- 4. The report also provides an overview of the gaps in gender equality and non-discrimination in Kenya and highlights some of the prevailing gaps in structures, policy, attitude and practices that continue to impede full achievement of gender equality in leadership, access to basic services, economic development, and employment among other issues. The report includes questions to the CEDAW Committee, which it could subsequently pose to the State during the review process, to inform the resulting recommendations by the Committee for State action. Further, the report makes recommendations on the strategies that the state should explore in mitigating the gaps detailed in the report.

About ICJ Kenya

5. ICJ Kenya¹ is a non-governmental, non-partisan, not for profit, membership organization registered in Kenya. Founded in 1959, it is an autonomous national section of the

¹ For additional information on ICJ Kenya, please visit website www.icj-kenya.org,

International Commission of Jurists, with its own separate board and membership. ICJ Kenya's vision is to be a premier organization promoting a just, free and equitable society. Its mission is to protect human rights, and promote the rule of law and democracy in Kenya and across Africa through the application of legal expertise and international best practices.

About KELIN²

6. KELIN is a human rights public benefits organisation that works towards the full enjoyment of health related human rights for all. KELIN's goal is to advocate for a holistic and rights-based system of service delivery in health and for the full enjoyment of the right to health by all, including the vulnerable, marginalized, and excluded populations. The organisation's mission is to promote and protect health related human rights and this is informed by values that guide our work, programmes and institutional culture which are: integrity, equality and non-discrimination, justice & fairness, excellence, respect and dignity.

Assessing Kenya's Implementation Progress

- 7. Kenya has made significant legislative milestones since the promulgation of the Constitution of Kenya 2010. The preamble of the Constitution envisages a government based on "the essential values of human rights, equality, freedom, democracy, social justice and the rule of law" all of which are principles entrenched in the Convention on Elimination of all forms of Discrimination against Women (CEDAW).
- 8. Article 27(4) further prohibits discrimination on any ground including "race, sex, pregnancy, marital status, health status, ethnic or social origin, color, age, disability, religion, conscience, belief, culture, dress, language or birth." Article 2(6) of the Constitution stipulates that any treaty and convention ratified by Kenya will form part of the laws of Kenya. By this Article and the provisions of the Treaty Making and Ratification Act 2012, the rights enshrined in CEDAW form part of the Kenyan laws;

² For more information about KELIN please see www.kelinkenya.org.

- however evidence indicates that this has not been fully utilized. The government still needs to ensure that the conventions and treaties on women's rights ratified by Kenya are substantively implemented to enable the women to fully benefit from the same.
- 9. CEDAW is an important tool that Kenya should use in applying international human rights standards at the national and county levels and in a wide range of contexts (e.g. political participation, armed conflict, rights in marriage, violence against women, trafficking reproductive rights etc). To this end, Kenya has made commendable strides in policy and legislative reforms that guarantee protection for women against discrimination.
- 10. However, some of the laws have drawback clauses which impede women' full enjoyment of rights and contravene the provisions of the Constitution. Efforts from different stakeholders including the Civil Society Organizations to have these provisions revised before the laws were enacted failed. Further, very little has been done by the State to eliminate gender biases and change social and cultural norms to eliminate stereotypes based on the roles of men and women. The laws that address these stereotypes have not been effectively implemented and there is therefore limited or no precedents from judicial decisions on outlawed retrogressive cultural practices. Notwithstanding continuous efforts to advance principles of equality and non-discrimination, violations of the human rights of women in Kenya remain widespread across communities and cultures. Moreover, there are still instances where women's rights are acknowledged in national policies and laws but not adhered to in social practices. Because of this, there is need to balance advocacy around emerging women's rights issues with the pressing need to make women aware of their human rights. Women who are aware of their human rights are able to claim them in all spheres and access remedies whenever their rights are violated.
- 11. This report acknowledges the milestones that Kenya has achieved as a country since its last review before the CEDAW Committee in March 2011, especially in enacting gender responsive legislation that give effect to the bill of rights in the Constitution of Kenya

2010. The report evaluates how Kenya has responded to the recommendations in the Concluding Observations for Kenya from the 2011 Review Process.

COMMENTARY ON LAWS AROUND WOMEN'S RIGHTS SINCE THE LAST REVIEW OF KENYA BY THE CEDAW COMMITTEE IN 2011

- 12. The new constitutional dispensation was followed by an overhaul of the previous system of government, repeal of retrogressive domestic laws and introduction of new policies, systems and structures to conform to the Constitution. The government further introduced several laws that in effect serve to safeguard the gains for women in Constitution and protect women from discrimination in all spheres including right to access, control, ownership and inheritance of land, rights to political participation and representation in political leadership and protections against harmful cultural practices e.g. Female Genital Mutilation and early child marriages, and protection against sexual and other forms of violations among other rights. These laws include: Marriage Act 2014³, Matrimonial Property Act 2013⁴, Protection against Domestic Violence Act 2015⁵, and Prohibition of Female Genital Mutilation Act 2011⁶ among others.
- 13. Equality before the law and respect for the rule of law is one of the principles entrenched in the Constitution. It provides that "every person is equal before the law and has the right to equal protection and equal benefit of the law."⁷ The Constitution borrows from

³ Marriage Act, 2014 brings together all marriage regimes under one umbrella and provides for equality of rights for parties in legal marriages within the subsistence and at dissolution of marriage. http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/TheMarriage_Act2014.pdf

⁴ Matrimonial Property Act, 2013 which give effect to the equality of rights of spouses to property acquired during the subsistence of legal marriages. http://www.kenyalaw.org/lex/actview.xql?actid=No.%2049%20of%202013

⁵ Protection against Domestic Violence Act, 2015 provides protection against domestic violence, facilitate access to justice for domestic violence victims and provide remedies against perpetrators of domestic violence.

http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/ProtectionAgainstDomesticViolenceAct_2015.pdf

⁶ The Prohibition of Female Genital Mutilation Act, 2011 criminalizes the practice of female genital mutilation and provides a comprehensive legal framework for punishing perpetrators of this harmful cultural

 $[\]frac{http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/ProhibitionofFemaleGenitalMutilationAct_No32of2}{011.pdf}$

⁷ Article 27(1) of the Constitution.

CEDAW the recognition of equality of rights for parties in a marriage, specifically, Articles 15 and 26. It guarantees equal rights for spouses during the subsistence of a marriage and at the dissolution. Further, the Constitution provides for equality of rights in access to, ownership and inheritance of land. Article 27 (4)⁸ prohibits discrimination on any ground including sex and marital status and expressly states that women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres. Article 40⁹ further provides that every person has a right either individually and or in association with others, to acquire and own property in Kenya of any description and in any part of Kenya.

14. In 2011, the CEDAW Committee called upon Kenya to establish a clear legislative framework to protect women's rights to inheritance and ownership of land, and introduce measures to address negative customs and traditional practices, especially in rural areas, which affect full enjoyment of the right to property by women¹⁰. Since then several legislative advancements have been made. There have been attempts by the state to consolidate the laws and policies and reforms structures and practices that affect the equality of rights in access, ownership and inheritance of land and property. In 2012, three laws aimed at harmonizing various land laws were adopted; National Land

__

⁸ Article 27(4) of the Constitution "The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth." http://www.kenyalaw.org/lex/actview.xgl?actid=Const2010

⁹ Article 40 (1) of the Constitution "Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property of any description; and in any part of Kenya. http://www.kenyalaw.org/lex/actview.xql?actid=Const2010

¹⁰ Concluding observations of the Committee on the Elimination of Discrimination against Women – Kenya. CEDAW/C/KEN/CO/7, at para. 42. 'The Committee calls upon the State party to: take the necessary measures to increase and strengthen the participation of women in designing and implementing local development plans, and to pay special attention to the needs of rural women, in particular women heads of household, by ensuring that they participate in decision-making processes and have improved access to health, education, clean water and sanitation services, fertile land and income-generating projects; establish a clear legislative framework to protect women's rights to inheritance and ownership of land; and introduce measures to address negative customs and traditional practices, especially in rural areas, which affect full enjoyment of the right to property https://tbinternet.ohchr.org/layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW/C/KEN/CO/

Commission Act 2012¹¹, Land Act 2012¹² and Land Registration Act 2012¹³. These laws entrench principles of gender equality in access to land and breathe life into Article 68 of the Constitution¹⁴ and overall Chapter Five on land and environment. A significant gain is that the Land Act creates statutory rights to spouses and any other persons who seek to carry out land transactions. The provisions specifically provide that before any land transaction is approved, spousal consent must be given. This has assisted to prevent the sale of matrimonial property without both spouses' consent and gives room for women to be consulted in the case of property transactions.

15. The land Registration Act 2012 includes strong protections for the land rights of spouses by allowing for joint tenancy and including a presumption of joint tenancy for any land obtained for co-ownership and use by both spouses, granting spouses a legal interest in land held in one spouses name where the other has contributed to it through his or her labour, and requiring spousal consent for the disposition of any land or dwelling.¹⁵ This however is impaired by the provisions of the matrimonial property Act and the interpretation of section 7 of the Act as to what exactly entails contribution especially in division of property during the dissolution of property. This has resulted to disparities in judicial pronouncements in several cases in court thus impairing women's access to property.

_

¹¹ National Land Commission Act, 2012 http://www.kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/National_Land_Commission Act No_5_of_2012.pdf

¹² Land Act, 2012 http://bcckenya.org/assets/documents/LandAct6of2012.pdf

¹³ Land Registration Act, 2012 http://extwprlegs1.fao.org/docs/pdf/ken112133a.pdf

¹⁴ Article 68 of the Constitution of Kenya 'Parliament shall revise, consolidate and rationalize existing land laws; revise sectoral land use laws in accordance with the principles set out in Article 60 (1); and enact legislation to give effect to the provisions of this Chapter" http://www.kenyalaw.org/lex/actview.xql?actid=Const2010

¹⁵ Section 91(8) of the Land Registration Act 2012 "the only joint tenancy that shall be capable of being created shall be between spouses, and any joint tenancy other than that between spouses that is purported to be created without the leave of a court shall take effect as a tenancy in common".

- 16. Kenya has equally implemented the Concluding Observations (2008) the Committee on Economic, Social and Cultural Rights¹⁶ by enacting the family laws and they have provided great gains for women in Kenya. However, most of these laws also contain provisions that impede advancement of equality and non-discrimination clauses of the Constitution. The Marriage Act, 2014 for example, requires registration of all marriages, irrespective of the forms of marriage preferred. While this provision creates uniformity, it has locked out cohabitees and the rights that accrued to them with respect to matrimonial property or in instances of inheritance, as they are not recognized as spouses under the Act. The Act also requires parties to a customary marriage to register such a marriage within three years of the union otherwise they are considered voidable.¹⁷ Women who have not registered by the stipulated date risk losing entitlement to share matrimonial property (which may have only been registered in a husband's name) and a Kshs. 5000 fine. Given that 75% of the total Kenyan population lives in rural areas, which are difficult to reach, often with limited access to news/information¹⁸, they are likely not to be aware of legislative changes affecting their property rights and their status. Further, the Act allows only men the legal right to acquire an additional spouse (polygyny) but does not allow women to take multiple husbands and polyandry is criminalized in the Penal Code
- 17. The Matrimonial Property Act, 2013 entrenches equal rights of spouses to property acquired during the subsistence of a marriage. Section 2 defines contribution to acquisition of matrimonial property to include domestic work, childcare, companionship, management of family business and farm work, which roles were ordinarily not

¹⁶ Consideration of reports submitted by states parties under articles 16 and 17 of the covenant (Kenya) by the Committee on Economic, Social and Cultural Rights. E/C.12/KEN/CO/1, at para. 14 'The Committee recommends that the State party repeal article 82 (4) of the Constitution and ensure that the new Constitution guarantees equal rights of women to matrimonial property during marriage and at its dissolution. It also recommends that the State party raise public awareness of the need to abolish laws and customs which discriminate against women and adopt the Marriage, Matrimonial Property and Gender Equality and Affirmative Action Bills." http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2FC.12%2FKEN

¹⁷ The Marriage (Customary Marriage) Rules, 2017, Legal Notice No. 46 under the Marriage Act, 2014 operationalizes these registration provisions.

¹⁸ Kenya Population Data Sheet, 2011 http://www.prb.org/pdf11/kenya-population-data-sheet-2011.pdf

considered as quantifiable contribution.¹⁹ This law also defines matrimonial property to include the matrimonial home, which prior to the law was excluded (Section 6) which is a success for the women of Kenya. However, the same Act requires the spouses to quantify their contribution in the acquisition of matrimonial property for their claims to be validated. This disadvantages women whose contribution in many instances to the acquisition of matrimonial property is non-monetary e.g. taking care of the children cannot be quantified. Efforts by Civil Society Organizations to push for an amendment to this provision and include a requirement of 50/50 distribution of matrimonial property failed before the bill was enacted into law.²⁰ There is also rebuttable presumption that when property is held jointly in the names of both spouses, their interests in the property are equal, while property held in the name of one spouse is presumed held in trust for the other. The legal effect of this trusteeship upon the death of the owner-spouse is unclear, as the Law of Succession Act²¹ limits the property rights of surviving spouses.²².

18. Slow legislative reform has also served as a hindrance to addressing inequality and injustice. The Law of Succession Act, for instance, on paper provides for equality in terms of inheritance (between men and women, boy and girl child, and children regardless of the marital status of their parents) but practically there are some inequities. The Kenyan courts have reiterated this position to include the basis of non-discrimination on the basis of marital status or sex and despite the married daughters having rights to their matrimonial property, there should not be a pre-condition of proving dependency to the deceased father as a basis for entitlement to equal inheritance rights.²³ The

¹⁹ Section 2 of the Matrimonial Property Act, 2013 "In this Act, unless the context otherwise requires, "contribution" means monetary and non-monetary contribution and includes domestic work and management of the matrimonial home; child care; companionship; management of family business or property; and farm work.

²⁰ FIDA-Kenya has lodged a petition to the Constitutional and Human Rights Division of the High Court challenging the constitutionality of the "Contribution" clause".

²¹ Chapter 160 of the Laws of Kenya.

²² Section 35 of the Law of Succession Act "where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to—(a) the personal and household effects of the deceased absolutely; and (b) a life interest in the whole residue of the net intestate estate: Provided that, if the surviving spouse is a widow, that interest shall determine upon her re-marriage to any person.

²³ Naome Wangeci Munene v Joseph Nderitu and Another Succession cause 371/2017.

limitation of the rights of a surviving spouse to property that was jointly owned, some property is excluded from the provisions of the Act such as agricultural land, crops, livestock which can pose as a disadvantage to women in rural areas and muslims are not governed by this legislation.²⁴²⁵ These provisions make it apparent that the Law of Succession Act may not meet the constitutional promise of equality and human dignity in its wholesale exclusion of certain communities to the detriment of their women and girls. However despite this the process of reform has been slow the Law of Succession Amendment Bill was tabled before the National Assembly in 2009. This Bill sought to address a number of equality and equity issues seen in the Law of Succession Act, its interpretation and the practice.²⁶ However, almost 8 years have passed since it was initially tabled and the Amendment Bill has not been passed.

19. The Land Act, 2012 and the Land Registration Act, 2012 have aided women in areas where they have traditionally been granted access to land and property but not titles. However, statistics still indicate that access to and control over land is far from equal in practice between spouses. Only 5% of land title deeds in Kenya are jointly held by women and men, and only 1% of land titles are held by women alone. Women still face serious obstacles in claiming their land and property rights either because they are unaware of their rights or they are unable to lay claim to these rights. Deep-rooted cultural practices are enhanced by stereotypical practices and socialization of women in believing they are not entitled to own or inherit land or any other property. Further, the customary practices in Kenya still grant women secondary rights to land, through

²⁴ Section 32 of the Law of Succession Act also noteworthy is the Court of Appeal decision (which has to date not been overruled) in *Mwathi v Mwathi* (1995-1998) 1 EA 229 on customary law and the applicability of the Law of Succession Act.

²⁵ Bowry P "Succession laws in Kenya need fine-tuning" Standard Digital (Wednesday, September 23 2015) available at https://www.standardmedia.co.ke/article/2000177259/succession-laws-in-kenya-need-fine-tuning.

²⁶ Ross SD and Faulk GT (eds) (2009) "Empowering women with rights to inheritance – A report on amendments to the Law of Succession Act necessary to ensure women's human rights: A human Rights Report and Proposed Legislation" *Georgetown Journal of International Law* Vol. 40 pp 129-289 available at https://www.law.georgetown.edu/academics/law-journals/gjil/upload/4-KenyaReportASFIXED-3.pdf.

²⁷ Gender Issues in Kenya's REDD, Briefing Paper, July 2014. https://www.4cmr.group.cam.ac.uk/filecab/redd-law-project/gender-issues

- relationships to a male relative, and women are rarely able to inherit land in their own right: this is a major driver of poverty and gender inequality.
- 20. Article 159(3) of the Constitution takes cognisance of traditional justice systems but provides that they may not contravene the Bill of Rights or are repugnant to morality and justice. Thus while traditional justice systems have the potential to address inequality there is no guidance on how this could be utilized. Without the operationalization article 159 (2)(c) of the Constitution which provides for the applicability of the customary laws in resolving disputes relating to land and family using the established traditional justice, the process is operating in a vacuum and basing its decisions on several statutes without a definite implementation plan and thus result in low conformity rates for such decisions and limiting the protection of women's rights.

Recommendations

- Facilitate substantive implementation of the non-discrimination laws
- The State should initiate legislative amendments through the Kenya Law Reform Commission and the Attorney General should review legislation that does not stand constitutional muster
- Initiation of awareness programmes by the State that sensitize communities on harmful cultural practices and demystify the gender stereotypes perpetuated by these practices.
- Government to speedily review sections of the law that contain drawback clauses and align them with the Constitution (repeal/amend the provisions of the Marriage Act, Matrimonial Property Act and the Law of Succession Act that further inequalities in marriages and inheritance)
- Enforcement of laws that govern marriages and matrimonial property to set precedents
 that will guide adjudication of cases of a similar manner and guarantee women access to
 substantive equality in exercising their right to access, own and inherit land and
 property.
- Deliberate awareness creation amongst women, local communities, the judiciary, traditional authorities, local chiefs, land administrative bodies, and other relevant actors

- about the land and property rights of women, so as to support their equal rights to land and resources.
- Collection of disaggregated data on women land ownership in order to secure and entrench access to land and land rights.

DISCRIMINATION AND VIOLENCE AGAINST WOMEN IN POLITICAL & PUBLIC LIFE

21. Equality in political and public life is threefold: having an equal right to vote, holding public office, and participating in civil society. In democratic societies, Parliament should mirror the population from which it is drawn which includes men, women, the youth, Persons with Disabilities (PWDs), ethnic and other minorities and marginalized groups. Kenya like a number of other democracies does not reflect this ideal in her Parliament. Article 100 of the Constitution²⁸ seeks to remedy this situation by providing that Parliament shall enact legislation to promote the representation in Parliament of women, Persons with Disabilities, youth, ethnic and other minorities and marginalized communities. An analysis of the different marginalized groups further illustrates the need for policy and legislative intervention.

HOLDING/SEEKING TO HOLD PUBLIC OFFICE

22. According to the 2009 national population census, women constitute 52% of the population and 47% of the registered voters in Kenya²⁹. This numerical strength is however not reflected in their representation in public life generally and Parliament in particular. Historically women have been under-represented in all spheres of life owing the patriarchal nature of the Kenyan society. This is reinforced by deep-rooted historical,

²⁸ Article 100 of the Constitution of Kenya "Parliament shall enact legislation to promote the representation in Parliament of women; persons with disabilities; youth; ethnic and other minorities; and marginalized communities." http://www.kenyalaw.org/lex/actview.xql?actid=Const2010

²⁹ FIDA-Kenya, USAID, National Democratic Institute for International Affairs "Key Gains & Challenges: A Gender Audit of Kenya's 2013 Election Process" (2013) available at https://www.ndi.org/sites/default/files/Kenya-Gender-Audit-2013-Electoral-Process.pdf

social cultural and economic power relations in society, which discriminate against women.

- 23. Kenya's political contests require a huge outlay of social and economic capital yet the processes of economic, social and political capital accumulation do not favour women regardless of their ethnic, religious or economic status. Moreover, the first–past–the-post (single member constituency) electoral system makes the elections overly adversarial as the stakes are extremely high. Some of the male aspirants use unorthodox tactics including violence and intimidation in order to win elections thus scaring off women.
- 24. After the 2013 Elections FIDA-Kenya conducted a gender audit of the electoral process that provided insight to the experiences of women running for public office.³⁰ Some of the key challenges faced by women were: threats and intimidation, underhanded tactics by opponent, propaganda and smear campaigns, cultural beliefs and gender stereotypes among others. Mary Kimwele a candidate for Nairobi Women's Representative shared her harrowing experience:

Normally when I get verbal insults I let them pass, but in pre nomination, we were in Langata and somebody placed a dead body where we were meant to do the nomination – this was directed to the party, or maybe me, I'm not sure but it was to cause fear, police said person was killed elsewhere but the body was deposited in that place – and I was afraid. The polling station had to be moved elsewhere and this was very disruptive, and hurt my nomination process"³¹

Another aspirant, Alice Wahome was shocked to find condoms with her name being distributed within the constituency she was running.³²

REPRESENTATION IN GOVERNMENT

25. The Constitution of Kenya guarantees the right to representation and participation in political leadership for both gender and provides in its Articles 27 (8)³³ and 81(b)³⁴

³⁰ See above at note 29.

³¹ FIDA-Kenya, USAID, National Democratic Institute for International Affairs "Key Gains & Challenges: A Gender Audit of Kenya's 2013 Election Process" (2013) available at https://www.ndi.org/sites/default/files/Kenya-Gender-Audit-2013-Electoral-Process.pdf

³² Mwangi J "Fury as aspirant's branded condoms land in Kandara" The Star, 18 January 2013 available at https://www.the-star.co.ke/news/2013/01/18/fury-as-aspirants-branded-condoms-land-in-kandara_c727532

respectively that not more than two-thirds of the members of elective public bodies shall be of the same gender. This means therefore that women, who had been historically underrepresented in Kenya's political arena now have to make up at least one-third of all elective and appointive positions in public bodies. Following an Advisory opinion sought by the Attorney General at the Supreme Court of Kenya³⁵, the court ruled that the two thirds gender principle should be implemented progressively and gave a deadline of 27th August 2015 for parliament to enact a legislative framework for realization thereof. There were sustained lobbying efforts by Civil Society Organizations impressing upon the State to ensure that a framework giving effect to this constitutional provision is developed before the 2017 general election but there was no political will from legislators to fast track this process.

26. In the absence of a framework for realizations of the two thirds gender principle; the State curtails the enjoyment of the right to participation in politics for the women of Kenya and furthers the systemic inequalities that Kenya women have suffered for decades and further denies Kenyan women the opportunity to get to decision making platforms and influence key decisions that address the plight of women in the country. In *Marilyn Muthoni Kamaru & 2 Others v The Attorney General and another* Petition 566 of 2012, which challenged the composition of the National Cabinet arguing that it contravened Article 27(8) of the Constitution of Kenya in that one gender represented more than two thirds of the cabinet (18 men and 5 women). The following dictum by Onguto J is instructive in contextualising Article 27(8):

"In my view, by this provision, the Constitution ensures that men and women are equal and it destroys the traditional patriarchy contour the Kenyan society has for long been constructed upon. In order to ensure men and women participate in the affairs of the development of the Kenyan society . . "

³³ Article 27(8) of the Constitution of Kenya "In addition to the measures contemplated in clause (6), the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender."

³⁴ Article 81 of the Constitution "the electoral system shall comply with the following principles, (b) not more than two-thirds of the members of elective public bodies shall be of the same gender" http://www.kenyalaw.org/lex/actview.xql?actid=Const2010

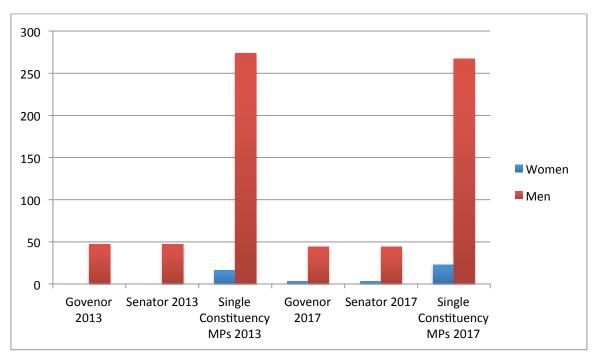
³⁵ Advisory Opinion Application No. 2 of 2012. http://kenyalaw.org/caselaw/cases/view/85286

The Court took cognisance of historical context in coming the decision that the composition of the national cabinet contravened the Constitution and the appointments and approval were made in violation of the Constitution. The declarations were however, suspended for a period of 8 months (the judgment was handed down at the end of 2016 4 years into the Cabinet's term). This judgment quantified the State obligation to observe the two third gender rule and shall be significant as future presidents and national assemblies quite clearly understand their obligation.

- 27. Another significant judicial decision is that of <u>The Centre for Rights Education and Awareness (CREAW) v The Honourable Attorney General and another Petition No. 185 of 2015</u> which challenged the National Assembly's failure to take positive steps for the realization of the gender equity rule in political representation (the two thirds gender rule). The case was against the Attorney General and the Commission on the Implementation of the Constitution ("CIC") which, it was stated, were obliged by the Supreme Court's Advisory Opinion to table a Bill for the implementation of Article 27(8) before the National Assembly.³⁶ The Court found for the Petitioners and compelled the Respondents to table a Bill for the implementation of the principle within 40 days.
- 28. The above judgment was followed by <u>Centre for Rights Education and Awareness & another v Speaker of the National Assembly and five others Petition No. 371 of 2016</u> where the Court found that the National Assembly and the Senate had failed in the constitutional obligation to enact legislation necessary to give effect to the two third gender principles. Parliament was compelled to enact this legislation within 60 days of the judgment that was handed down on 29 March 2017. The National Assembly and the Senate have since this date not enacted legislation as required and the Country went into an election with Parliament having failed to discharge its constitutional mandate. The lengthy history of judicial intervention, beginning in 2012, is indicative of the majority male Legislature's unwillingness to respect, promote and protect the two-thirds gender principle. Despite continuous intervention by the Judiciary the Legislature has failed to enact legislation

³⁶ Supra at note 35.

- that can provide the machinery to address the history of inequity and patriarchy in this country.
- 29. Despite Parliament's inaction there have been some slight gains in representation of women in elective positions since 2013 as tabulated below. The number of women who are governors and senators rose from zero to three respectively in the 2017 elections and there was an increase in the number of members of parliament from 16 women in 2013 to 23 women in 2017.³⁷



RIGHT TO VOTE

30. The right to vote is integral to transparent and open elections in a participatory government. Article 25 of the International Convention on Civil and Political Rights (ICCPR)³⁸ specifies that voting and participation in elections is a universal right not to be

³⁷ UN Women "Strengthening the Electoral Process in Kenya: Increasing Women's Leadership and Participation in the 2017 Elections in Kenya" available at http://daogewe.org/index.php/publications/reports/143-analysis-of-womens-performance-in-kenyas-2017-general-elections-interim-report/file34

³⁸ Article 25 of the International Convention on Civil and Political Rights (ICCPR) 'Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 and without unreasonable restrictions; to vote and to be elected at genuine periodic elections which shall be by

denied on the basis of any "status." On the surface, the Elections Act, 2011³⁹ seem to provide rights to men and women on equal fronts, however, women face unique challenges with regards to voting, which are not adequately addressed. The most recent census determined that women make up 52% of the population, yet they only constituted 47% of registered voters during the 2013 general election. ⁴⁰ This was attributed to several contributing factors that affect women's ability to vote, which include: responsibilities bestowed on women by society, inaccessibility of voting centers and long distances to cover to cast a vote, lack of confidence in the political leadership and the feeling that women issues are not prioritized irrespective of the leaders they vote for. Further, most women are reliant on a presiding officer or the deputy presiding officer in a polling station to understand, interpret, and record their intended vote accordingly. majority of illiterate voters are also more likely to be persuaded to sell their votes, or tricked or intimidated into voting. For example, many women in rural areas are not even aware of how the electoral system works. Some need reassurance that they have a secret ballot and do not have to vote for the candidates recommended by the (male) elders of the community. Political parties are the vehicles through which political participation is gained, often lack the capacity to ensure that women's interests are articulated and addressed in the party. This is apparent in the lack of diversity in the presidential election where there were 14 candidates in total (7 for president and their running mates) only one of which was a woman. Accountability institutions are not consistent in ensuring that power-holders answer to women for failures to protect women's rights or respond to their needs.

universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors. http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx

2011.

The Elections Act, No 24 of http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/ElectionsAct_No24of_2011_New.pdf

⁴⁰ Key Gains and Challenges: A gender Audit of Kenya's 2013 Election Process, FIDA Kenya (2013) https://www.ndi.org/sites/default/files/Kenya-Gender-Audit-2013-Electoral-Process.pdf

- 31. Despite the recently launched Elections Operations Plan (EAP) launched preceding the 2017 elections by the Independent, Electoral and Boundaries Commission⁴¹, there was not sufficient government led voter education programme to sensitize the citizenry on the need to exercise the right to vote and how to exercise that right to select leaders of their choice. Where there was voter education, it was very small scale initiatives by Civil Society Organisations such as International Commission of Jurists, Kenya Human Rights Commission, Inform Action and networks such as *Kura Yangu Sauti Yangu* and Election Observer Group (ELOG), these minimal efforts did not meet the voter education demands. Despite the devolution of voter registration centers, many women still failed to register as voters as they do not have identity cards, which are a prerequisite for registration as a voter. There have not been deliberate efforts by the government to make easier the acquisition of identity cards.
- 32. Violence against women continues to impede women's enjoyment of rights in both public (political and economic) and private (household) spheres. Further, election related violence continues to threaten consolidation of democracy and effective participation of women elections. Following the reply to the list of issues⁴² the government of Kenya acknowledges that violence against women is a growing impediment to the realization of women's rights and that 38% of Kenyan women between the ages of 15- 49 have experienced some form of sexual or physical violence⁴³. Following the just concluded General Elections which was contested resulting in violence, women and children were once again the worst hit by pre and post-election violence in various parts of the country

⁴¹ Election Operations Plan (2015 – 2017) by the Independent Electoral and Boundaries Commission, January 2016. https://www.iebc.or.ke/uploads/resources/MC8LvUGsDx.pdf

⁴² Committee on Elimination of Discrimination Against Women, Sixty-Eighth Session, (23 October-17 November 2017), "List of issues and questions in relation to the eighth periodic of Kenya" available at: http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/KEN/CEDAW_C_KEN_Q_8_Add-1_27728_E.pdf

⁴³ Kenya Demographic Health Survey, 2014 (KDHS)

- including acts of rape, sexual and physical assault, and intimation of women vying for political positions among others.⁴⁴
- 33. The National Police Service Officers' response to demonstrations following the declaration election results also involved excessive use of force, leading to deaths of at least 24 Kenyans and a number of cases of rape incidences and assault on women and children, however it must be noted that the State has not provided official statistics. ⁴⁵ A particularly compelling story was that of Baby Pendo, where it was alleged that Police Officers in Kisumu (an opposition stronghold) battered a six month old baby girl resulting in her being in a comatose state. ⁴⁶ Despite existing evidence of such violations, there has not been deliberate state action to investigate and prosecute the police officers that allegedly perpetrated these acts of violence or to facilitate full access to justice for the victims of pre and post-election violence.

Recommendations:

- The State must immediately put in place a legal framework for realization of the twothirds gender principle for elective and appointive positions in government
- The state should initiate voter education programmes devolved to all the 47 counties targeting all the wards in these counties and create user-friendly voter education tools in the local languages that are easy to understand.
- The state should initiate programmes that target the change of cultural attitudes of communities and community leaders towards inclusion and acceptance of women's leadership as a benefit to the community.

⁴⁴ Supra at note 37. UN Women and Kenya Red Cross Society noted that cases of death and sexual violence had been reported however, the government has still not provided official statistics.

⁴⁵ KNHRC Press statement on August 12th, 2017. "Status update on developing post-election Human Rights Violations." knchr.org/Newsroom/PressStatements.aspx

⁴⁶ Fick M and Houreld K "CORRECTED – Kenya post election deaths raise questions over police brutality" 14 August 2017 available at https://www.cnbc.com/2017/08/14/reuters-america-corrected-kenya-post-election-deaths-raise-questions-over-police-brutality.html.

- The government must recognize the infrastructure and timing constraints associated
 with the current voting process and implement a longer time period for voter
 registration to allow more women to access registration locations.
- More voting poll booths spread among rural areas would incentivize women to register
 and vote as it would reduce the distance they are required to travel, and time taken from
 their day.
- Provide funding to support women participating in the political processes.
- Development of long-term interventions to combat all forms of violence against women in both public and private spheres.
- The State should have police trainings
 that encompass aspects such as
 violence prevention and citizen
 engagement in times of uncertainty
 with the aim of mitigating the force
 used by police is trying to quell riots
 or demonstrations.

ECONOMIC EMPOWERMENT

34. Employment in Kenya comprises three main sectors namely: the formal sector, the informal sector and the smallholder agricultural sector. Half of the labour force is found in the smallholder agricultural sector, while the other half is in the informal and formal sectors.

Questions for the Committee to the State Party Representatives:

- o What is the government's immediate and long-term strategy towards realizing the two thirds gender principle in elective and appointive positions after the 2017 General Elections?
- o Marital rape is a form of violence, which has been prevalent and pervasive. What is the government's response with respect to this? Are there any interventions that the government has undertaken to address this?
- What are the measures that the government has taken in ensuring the victims of post-election violence, majority of whom are women, both from the 2013 and 2017 elections access justice?

The formal sector comprises approximately 13% of the labour force and unemployment is

just above 10% with the rest of the labour force being in the informal sector.⁴⁷ There is not extensive data on the participation of women in the labour market however; there has been an increase of women in the labour force who comprised 30% of the labour force in 2006 as compared to 18% in 1966.48 Within the private sector, women's employment remains either within the traditional female occupations or within the (unpaid) domestic and farming sectors, too often as casual or unskilled workers. For instance, in 2012, only 29.9% of the workers in regular engagement were female while 40.2% of the casual workers were male.⁴⁹ Women's pay in wage employment in the nonagricultural sector varies from one sector to another. The trends in total employment and payment of women in wage employment reveal inequities in access to wage employment by women. It shows that even though there was some growth in the formal sector the employment opportunities were not accessed equally by women as compared to men as would be expected. We could use Board Membership as an instance, a 2012 study by the Kenya Institute of Management indicated that in state corporations women accounted for about 20% of the Board membership while they only accounted for 12% in public listed companies (those listed on the Nairobi Securities Exchange.⁵⁰ A 2014 study showed a slight improvement with women accounting for 26% of Board membership in state corporations and 18% in public listed companies.⁵¹ There was no data availed for private companies. This finding is evidence of a continuing theme of diminishing participation

⁴⁷ Society for International Development (SID), 2010. Kenya's Vision 2030: An Audit from an Income and Gender Inequalities Perspective. Nairobi: Society for International Development available at https://www.sidint.net/sites/www.sidint.net/files/docs/Kenya%20Vision%202030%20Complete.pdf.

⁴⁸ Supra at note 47.

⁴⁹ Friedrich Ebert Stiftung (2013). Position Paper on Kenya Vision 2030 Implementation. http://www.fes-kenya.org/media/publications/Position%20Paper%20on%20Quest%20for%20Inclusive%20Growth%20201
https://www.fes-kenya.org/media/publications/Position%20Paper%20on%20Quest%20for%20Inclusive%20Growth%20201
https://www.fes-kenya.org/media/publications/Position%20Paper%20on%20Quest%20for%20Inclusive%20Growth%20201
https://www.fes-kenya.org/media/publications/Position%20Paper%20on%20Quest%20for%20Inclusive%20Growth%20201
<a href="https://www.fes-kenya.org/media/publications/position/publications/publications/position/publications/position/publications/position/publications/position/publications/position/publication/publication/publication/publication/publication/publication/publication/publication/publication/publication/publication/publication/publ

⁵⁰ Kenya Institute of Management (2012). "Bringing the other half to the boardroom: Case Study of State Corporations and Listed Companies in Kenya"

⁵¹ Institute of Directors Kenya (2014) "Report of the Taskforce of Women Representation on Boards" available

http://www.ifc.org/wps/wcm/connect/12c36f804b5f6654bd05fd08bc54e20b/Kenya_IOD_Report_September_2015.pdf?MOD=AJPERES/. Also see Kenya Institute of Management (2017) "Board Diversity of Publicly Listed Companies in Kenya and the Influence on Financial Performance" available at http://www.potentash.com/wp-content/uploads/2017/07/Board-Diversity-Report-2017-KIM-Research-Dept-1.pdf.

- of women in leadership roles, similar to the national cabinet, governor position, senate seats and as is seen now in board membership the participation or inclusion of women does not mirror the population.
- 35. There have been attempts by the state to address economic disempowerment of women in employment by creating different financing opportunities for women e.g. Women Enterprise Fund⁵², Uwezo Fund⁵³, Youth Enterprise Development Fund⁵⁴ etc. The Constitution requires the recruitment and appointment of women in the public service sector to adhere to the two-thirds gender principle. Government Ministries have developed policies that promote national values on inclusiveness, equality and non-discrimination however; their efficacy of these policies has not been tested.
- 36. In 2013 the government put in place the Public Procurement and Disposal (Preference and Reservation) regulations⁵⁵ whereby 30% of all public procurement is reserved for the youth, women and persons with disabilities, to ensure that these groups which have been disadvantaged over the years are able to bid for provision of government goods and services. The state also facilitated increase in women's representation in public institutions from 32.4% in 2008 to 38% in 2012. At the time, women comprised 33.3% and 26.9% of the positions of Cabinet Secretary and Principal Secretary, respectively. In all other constitutional offices, women comprise 41.7% chairpersons of constitutional commissions while in the independent offices; women comprise 50% of chairpersons.⁵⁶
- 37. However, women still experience challenges in access to employment and economic empowerment. Financing opportunities have been marred with irregularities in their administration; standards for access to these funds are too high for most women to

⁵² Information on this Fund can be found at http://www.wef.co.ke/

⁵³Information on this Fund can be found at http://www.uwezo.go.ke/about-uwezo-fund

⁵⁴ Information on this Fund can be found at http://www.youthfund.go.ke/

⁵⁵ Legal Notice No. 58 The public Procurement and Disposal (Preference and Reservations) Regulations, 2011.

https://kenya.eregulations.org/media/PREFERENCE%20AND%20%20RESERVATIONS_%20REGULATIONS_2.pdf

⁵⁶ Ministry of Devolution and Planning (2013).Millennium Development Goals Status Repot for Kenya, 2013

 $[\]frac{http://www.undp.org/content/dam/undp/library/MDG/english/MDG\%20Country\%20Reports/Kenya/Kenya/Kenya\%20MDG\%202014.pdf?download$

satisfy, the application forms for funding opportunities are not simplified and made available in accessible formats to persons with disabilities and the repayment of government loans are not user-friendly. For example, the Women Enterprise Fund established to empower women economically is largely managed by men who do not understand the needs and priorities of women, and therefore the goal of economic empowerment is often not achieved. Further, the Uwezo Fund (meant to impact women and youth) is complicated to access as it is usually awarded to the politically correct. It has been observed that most of the women have little or no knowledge or awareness of the funds and the benefits. Women have also occasionally feared taking these loans due to steep consequences for failure to repay plus high interest rates.

- 38. Failure to establish set criteria for receiving loans has led loans to remain in dynasties; these funds therefore end up being accessed mostly by elite women as opposed to the indigent women. Further, placement in key decision-making positions in the Public Service remains tilted in favour of men. For instance, women occupy 72% of the lower level positions in the public service.⁵⁷ Other challenges that still contribute to the disparities in access to wage employment between men and women include: limited access to education by women and discriminatory hiring policies, concentration of women in unpaid domestic work which denies them an opportunity to participate in other economic activities, and limited capacity to create jobs in the formal sector among others.
- 39. The 30% procurement rules that was introduced by the government in public procurements is yet to be fully realized. The processes of procurement are stringent and the youths, women and persons living with disabilities have found it difficult to get the tenders. The Huduma Centres are also yet to reach all the counties as they are only based in major towns in the Country.

⁵⁷ FIDA-Kenya (2011) Shadow Statement to the 55th Session of the United Nation Commission on the Status of Women. http://fidakenya.org/2011/03/fida-kenya-shadow-statement-to-the-55th-session-of-the-united-nation-commission-on-the-statusof-women/# ftn1

40. Corruption has also been a barrier of access to specialised funds that are cordoned off to improve the economic situation of women and young people. Applicants seeking to access these funds are sometimes asked to provide bribes in order to access opportunities that should be readily available once requirements are met. 13% of applicants for the Youth Enterprise Development Funds were asked for bribes, 15% in the Women's Enterprise Funds and 14% in the Uwezo Fund.⁵⁸

Recommendations

- Implementation of agricultural programmes that address the difference between men
 and women in the agricultural sector and focus on equality and equity of outcomes
 rather than just equal treatment.
- Improve the management (accessibility, affordability and availability) of the financing opportunities for women and institute awareness programmes on the same
- Ensure that all employers integrate equality principles in their sector policies and that they develop and implement gender and diversity mainstreaming policies in the work place.
- Build women's entrepreneurial skills to enable them to start their own businesses
- Promote the dissemination of information on employment and financing opportunities and women empowerment programmes
- Monitor adherence to the 2/3rds gender principle in employment and 30% preference and reservation scheme in procurement rules to ensure that women benefit

HEALTH

UNSAFE ABORTION

41. The Constitution of Kenya recognises the fundamental right to reproductive health, which is inextricably tied to the right to choose when and if to have children. The Constitution goes further and guarantees the right to safe abortion under article 26(4).

⁵⁸ The Institute for Social Accountability (TISA) "Summary of the Jipeshuguli", February 2017, available at http://www.tisa.or.ke/images/uploads/Summary_of_the_Jipeshuguli_8th_Feb_2017.pdf.

However, these rights are highly illusory as safe abortion is highly stigmatised and criminalised by out-dated legislation despite the constitutional provision and clear standards provided by the National Guidelines on Management of Sexual Violence.⁵⁹

- 42. Almost 8,000 women die during pregnancy and childbirth in Kenya annually and this represents 15% of all the deaths of women aged 15-49.60 Another 160,000 are either injured or disabled because they are unable to access quality healthcare.61 When the data around maternal mortality is disaggregated it is apparent that there are wide regional disparities in maternal mortality within Kenya. The disparities in maternal mortality between counties are considerable, where the county with highest maternal mortality has 20 times the deaths of that with the lowest. The fifteen counties with the highest number of maternal deaths and highest maternal mortality ratio contribute over 60% of the national total, and include the following counties: Mandera, Turkana, Wajir, Nairobi, Migori, Nakuru, Siaya, Kisumu, Homa Bay, Kakamega, Marsabit, Lamu, Garissa, Taita-Taveta, and Isiolo.62
- 43. The main causes of maternal mortality in Kenya are haemorrhage, complications from hypertensive disease in pregnancy, sepsis and abortion complications.⁶³ Abortion complications, as a cause of maternal mortality, is an area of particular interest because it stems from a violation of two rights: the right to reproductive health and the right to a safe and legal abortion.

⁵⁹ The Penal Code, Chapter 63 of the Laws of Kenya.

⁶⁰ Price Water House Coopers "Making a difference through health: How PwC is helping to change lives, Impact Case Studies" (2016) available at https://www.pwc.com/gx/en/healthcare/case-studies/making-a-difference-global-health-kenya-case-study.pdf

⁶¹ Supra at note 60.

⁶² UNFPA "Accelerating the attainment of MDG 5 in Kenya: Focus on the 15 Counties with the Highest Burden of Maternal Death" (Dispatch, 13 August 2015) available at: http://kenya.unfpa.org/news/accelerating-attainment-mdg-5-kenya-focus-15-counties-highest-burden-maternal-deaths

⁶³ Supra at note 62.

44. Unsafe abortion accounts for over 13% of all cases of maternal mortality on Kenya.⁶⁴ A 2012 study⁶⁵ revealed an estimated 464,000 induced abortions occur annually. About half of all the post abortion care clients were less than 25 years of age (48%) with 17% aged 10-19 years old. While Article 26(4) of the Constitution allows for safe abortion on specified

ground, the practice continues to be stigmatised and perceived as illegal.⁶⁶ The Ministry of Health's failure to enact guidelines on safe abortions is a consequence of this stigma, which results in the alarming statistics because abortion remains shrouded in legal uncertainty.⁶⁷

45. There are several factors that have fuelled abortion stigma in Kenya. These include the

Questions for the Committee to the State Party Representatives:

When does the Ministry of Health plan to reinstate the 2013 Standards and Guidelines on the Reduction of Maternal Mortality from Unsafe Abortion in light of overwhelming evidence that unsafe abortion is a driver for high maternal mortality rates in Kenya?

⁶⁴ Mohammed S.F et al "The Estimated Incidence of Induces Abortion in Kenya: A Cross-Sectional Study" BMC Pregnancy Childbirth. 2015; 15: 185.

⁶⁵ This study was conducted by Ministry of Health in collaboration with the African population and Health Research Centre (APHRC) undertook a study titled 'Incidence and complications of unsafe abortion in Kenya This Study is available at https://www.guttmacher.org/sites/default/files/report_pdf/abortion-in-kenya.pdf The analysis indicates that an estimated 464,690 induced abortions occurred in Kenya in 2012, corresponding to an induced abortion rate of 48 abortions per 1000 women of reproductive age (15-49 years), and an induced abortion ratio of 30 abortions per 100 births in 2012. It also estimated that 157,762 women received care for complications of induced and spontaneous abortions in health facilities in the same year.

⁶⁶ Police rely on Section 158-160 of the Penal Code.

⁶⁷ The Standards and Guidelines on the reduction of maternal mortality from unsafe abortion were initially enacted in 2012 and unprocedurally withdrawn in December 2013. Currently, there is an existing case in court to challenge the withdrawal of the Guidelines through petition 266 of 2015 <u>Federation of Women Lawyers-Kenya and 3 Others v Attorney General</u>.

arbitrary withdrawal of the Standards and Guidelines on the Reduction of Maternal Mortality from Unsafe Abortion by the Ministry of Health (MoH) in December 2013.⁶⁸ The MoH's attitude towards safe abortion is further evidenced by their circulars/memo in February 2014 prohibiting medical doctors from attending trainings on safe abortion. Moreover, this hostility has additionally been exacerbated by constant police harassment and intimidation of service providers who are often charged in court under the previously existing, yet out-dated, laws on abortion, namely, sections 158-160 of the Penal Code. This has resulted in those seeking abortion services resorting to crude and unsafe methods, often with dire consequences. Equally, this has led to medical providers refraining from offering the service, even to women who qualify in terms of the Constitution for fear of harassment and imprisonment. Recent cases in court against medical providers also show a general trend of 'entrapment' by police officers that often 'stage' pregnant clients in medical clinics suspected of offering abortion services. The result has been police raids at clinics that often end up with the clinical officers offering a bribe to secure their liberty. These factors prevail against the backdrop of the myriad international and regional human rights frameworks and commitments that Kenya is a party to and the national legal, policy and institutional frameworks that are aimed at enhancing maternal health.

46. To address some of the issues relating to reproductive health, the Reproductive Health Care Bill was tabled before the National Assembly in 2014.⁶⁹ This Bill contained a number of progressive provisions including provisions governing: the termination of pregnancy, comprehensive sexuality education, surrogacy, access to contraceptives and family planning services etc. This Bill was comprehensive addressing a number of reproductive health issues women face in the entire course of their lives. Unfortunately, by the end of the 11th Parliament, the Bill had not been debated to conclusion, passed and

⁶⁸ Chimbi J "Govt urged to release 'safe abortion' guidelines", Wednesday, June 22 2016, Daily Nation, available at http://www.nation.co.ke/news/Govt-urged-to-release-safe-abortion-guidelines/1056-3261678-psus7rz/index.html.

⁶⁹ Reproductive Health Care Bill, 2014 available at http://kenyalaw.org/kl/fileadmin/pdfdownloads/bills/2014/ReproductiveHealthCareBill2014__1_pdf.

become law. Encouragingly, however in the past 5 years County Governments have shown an interest, as the primary duty bearer for the provision of health services, in legislating for reproductive health. Nakuru, Makueni, Nairobi and Kilifi counties each began the legislative process. By the time elections came around both Makueni and Kilifi counties had passed laws to govern health (Maternal, Newborn and Child Health Laws). These two counties are indicative of the divergence in both moral and political stands when it comes to abortion. Termination of pregnancy in Makueni County is allowed in a number of instances including rape, incest, defilement, mental incapacity, risk to the health of the mother and foetal abnormalities. Kilifi County on the other hand claws back on the gains made in the Constitution and limits access to safe abortion to emergency situations. This differentiation in legislation is indicative of the need for the MoH to institute guidelines to offer guidance to counties on the legislative boundaries on access to abortion.

47. The Health Act, 2017 was passed in 2017 with the objective of providing a framework for the realisation of the right to health under Article 43(1) (a).⁷¹ This Act, though fairly new and untested has already raised some slight concern around the question of abortion as a notifiable condition. This Section 6(1) (c) is framed as follows:

"...access to treatment by a trained health professional for conditions occurring during pregnancy including abnormal pregnancy conditions, such as ectopic, abdominal and molar pregnancy, or any medical condition exacerbated by the pregnancy to such an extent that the life or health of the mother is threatened. All such cases shall be regarded as comprising notifiable conditions."

The Act has not defined notifiable condition but this phrase is used in the Public Health Act⁷² and is usually limited to communicable or infectious diseases. While at its early stages it is unclear how notification is intended in the Health Act, it raises concern

Makueni County Maternal Newborn and Child Health Bill, 2017 available at http://kenyalaw.org/kl/fileadmin/pdfdownloads/bills/2017/MakueniCountyMaternalNewbornandChildH ealthBill2017.pdf.

 $^{^{71}}$ The Health Act 21 of 2017 available at http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/HealthActNo.21of2017.pdf.

⁷² Chapter 242 of the Laws of Kenya.

because it is at this point not understood the mischief the State is seeking to cure or address with this provision. Given that in all the cases mentioned access to a safe abortion cannot be equated to a communicable disease and thus a public health issue it raises concern that this may be used to target providers and patients in an already highly stigmatised environment. However, given the Health Act is fairly new it is yet not understood the impact this provision will have.

- 48. While, we have seen impetus in seeking to enact legislation to protect the reproductive rights of women and to address the legal uncertainty around access to safe abortion, in practice there are still concerns around implementation. The Constitution is almost 7 years old and the Penal Code is still used to limit access to safe abortion and therefore, it is apparent that more than legislative enactment is necessary to address maternal mortality caused by unsafe abortion.
- 49. KELIN has been engaged in a series of trainings with police officers on a number is issues including the laws relating to abortion⁷³, dignity after arrest⁷⁴ and the role of the police in sexual and gender based violence.⁷⁵ While the organisation has managed to train almost 200 police officers (those stationed at the gender desk are targeted) and has received approval for the display of IEC material in police station, it must be noted that this is a just a drop in the sea and it is necessary for an overhaul of the police training curriculum to be more cognisant of the Constitution and the Bill of Rights.

Recommendations

• The State should take steps to repeal punitive laws that are contrary to Article 26(4) of the Constitution, specifically Sections 158-160 of the Penal Code.

⁷³ KELIN "Laws on abortion in Kenya" available at http://www.kelinkenya.org/wp-content/uploads/2016/09/5-th-Abortion-Laws-edited-2.pdf.

⁷⁴ KELIN "Preserving dignity during the arrest of women with abortion offences" available at http://www.kelinkenya.org/wp-content/uploads/2016/09/5th-Dignity.pdf.

⁷⁵ KELIN "Protecting victims of sexual violence: the role of the Police" available at http://www.kelinkenya.org/wp-content/uploads/2016/09/5th-Case-Management-of-rape.pdf.

- The Ministry of Health should reinstate and adopt its Standards and Guidelines on Maternal Mortality from Unsafe Abortion, 2013 and disseminate them throughout the country.
- The Ministry of Health should formally withdraw its circular/memo prohibiting medical doctors from attending trainings on safe abortion.
- The State should revise the police training curriculum to take into account constitutional
 provisions such as Article 26(4), be more gender responsive and take cognisance of a
 survivor friendly approach to police services
- Counties that have legislated punitive laws on abortion must be advised to withdraw such Acts
- More comprehensive research on the effect of unsafe abortion on the lives of women should be undertaken to give a more holistic view of the impact of unsafe abortion beyond maternal mortality statistics.

CONTRACEPTION

- 50. The Constitution of Kenya guarantees the right to the highest attainable standard of health. This is read with the right to consumer protection which affords any person the ability to seek life-saving and disease preventing contraceptive cares.⁷⁶ In accordance with Articles 53 and 54 these rights extend to children and persons with disabilities however, there is a notable exclusion of adolescents with disabilities in terms of data relating to sexual health.
- 51. The Kenya Demographic Health Survey 2009 indicates that contraceptive prevalence rate is 46% against the MDG target of 56% in 2015. Of particular concern are marginalized and vulnerable communities such as persons living with disabilities and adolescent girls and young women (AGYW). The KDHS stated those surveyed with disabilities, nearly 80% were married and had little to no access to sexual and reproductive health care including contraceptives.

⁷⁶ Article 43(1) (a) read with Article 46 of the Constitution of Kenya, 2010.

- 52. Despite Kenya's clear obligation the Committee notes that contraceptive prevalence is at just at 46% and Kenya should recognize that:
 - Contraceptives are not targeted to adolescent girls 15-17 whose HIV rates are categorized with adults in most sampling data, which means there is a population with unmet needs that is increasing adult HIV prevalence rates.
 - Condoms are not widely promoted to females as a form of contraceptive. Society is concerned more with young girls and pregnancy than prevention of HIV. Therefore birth control is more readily available, than condoms. While neither is promoted for young adolescent females.
 - Per the 2014 KDHS, of those surveyed between the ages of 15-49, only 40% of women and 44% of men reported using a condom as a contraceptive. The KDHS data is not inclusive if respondent age is not decreased to that of 10years of age. Kenya should seek data concerning knowledge of what are contraceptives, how do they work, what do they prevent and where are they available.
- 53. A number of gaps have been noted in national policies for the prevalence and provision of contraceptives:
 - a) Kenya National Adolescent Sexual and Reproductive Health Policy⁷⁷

This Policy notes that 37% girls aged 15-19 years of age were having sex, yet there is a lack of contraceptive knowledge, adolescent reproductive healthcare service and heightened risk for gender-based violence. The Policy addresses an unmet need for contraceptive education, access and available sexual and reproductive services. However, the policy does not address contraceptives in its roles and responsibilities in an effort to address concerns. AGYW are at risk for increased HIV due to informal living settings (slums), having a disability (Kenya does not have data

⁷⁷ The Ministry of Health "National Reproductive and Sexual Health Policy, 2015" available at http://www.popcouncil.org/uploads/pdfs/2015STEPUP_KenyaNationalAdolSRHPolicy.pdf

specific to adolescent with disabilities although many are exploited) and those already living with HIV may be denied access to education and healthcare which means they also will not receive sexual and reproductive health education being offered in those settings. Contraceptive knowledge will remain low.

b) Ministry of Health's Family Planning Implementation Plan 2012-2016

Urban access to contraceptives is double that of rural areas. They also acknowledge that adolescent have little to no access to contraceptives by service providers because of stigma and bias, but have put in place youth-friendly service points. However, again, these service points are available in more urban than rural areas. Additionally, Kenya is low on promoting access to female condoms and tends to focus more on other contraceptive methods such as the pill or the injection.

Recommendations

- Develop strategies within policy guidelines that directly target increased contraceptive use and access.
- Ensure that appropriate funds are geared towards the provision of contraceptives and that SRHR issues are recognised in the budgeting process
- Surveys should be created and disseminated to adolescent concerning their knowledge of contraceptives and sexual debut.
- For adults, collaboration between the Ministry of Health and employers could help develop informational sessions for employees to learn more about sexual and reproductive health.
- Address disparities in contraceptive provisions in rural areas and address unmet needs by monitoring and evaluating commodities.
- Engage rural communities to develop male and female specific programs regarding sexual health and contraceptive use.

HIV AND AIDS

- 54. In 2015, Kenya had approximately 1,517,707 people living with HIV (775,939 women, 643,598 men and 98,170 children)⁷⁸. The HIV prevalence among adults (15-49 years) is estimated at 5.9% (women, 6.5% and men, 4.7%).⁷⁹The Committee's List of Issues to the 8th periodic report of Kenya specific raises a number of concerns namely that AGYW are disproportionately affected by HIV (8%) nearly double the rate of men (4.3%) in Kenya. The National AIDS Control Council's Progress Report indicates that adolescents and young people (i.e. aged between 15-24) contribute to 51% of all new HIV infections with the number being skewed towards AGYW.⁸⁰ The Kenya AIDS Indicator Survey (KAIS) 2012, 85% of AGYW are sexually active and 66.1% of AGYW have had sex. Despite the early sexual debut and sexual activeness and experiences, the level of knowledge and use of condom and contraceptive use is relatively lower. The level of knowledge on Condom use still remains low, with 21% using Male Condoms. This is extremely risky, since KAIS 2012, 53% of Kenyans do not know their HIV status (16% had never tested, 37% believed they were negative based on self-reporting).
- 55. A number of factors are attributed to the rising epidemic among AGYW:
 - Multiple sexual partnerships and low condom use. A study among AGYW indicates that 62.5% did not use a condom during their last instance of sexual intercourse. Further it is indicated that condom use at the last instance of sexual of sexual intercourse with a non-regular partner stands at 55.5% for women.^{81.}
 - O Gender based violence is another area of concern: the 2014 (KDHS) indicates that 38% of women aged between 15-49 reported having experienced physical violence, while 14% reported having experienced sexual violence.⁸² Levels of violence prior to age 18 as reported by persons between 18-24

⁷⁸ Kenya AIDS progress Report 2016

⁷⁹Kenya HIV Estimates, 2015

⁸⁰ Ministry of Health, and National AIDS Control Council "Kenya AIDS Progress Report 2016" available at: http://nacc.or.ke/wp-content/uploads/2016/11/Kenya-AIDS-Progress-Report_web.pdf

⁸¹ Kenya Demographic health survey page 228-232

⁸² Kenya Demographic Health Survey, 2014 (KDHS)

show that during childhood 32% of women experience sexual violence. Worryingly only 28% of the victims knew where to report the crime and only 10% stated they received assistance in seeking legal justice for sexual violence.⁸³

- Early marriage is also prevalent in the age group with 11% of adolescents girls aged 15-19 being currently married as compared to just 1% of adolescent boys.
- High school dropout rates increasing vulnerability to HIV infection: There is also low transition from primary to secondary school (dropout 23.5% among girls).⁸⁴
- o HIV stigma: HIV related stigma is high in the country estimated at 45% composite index⁸⁵ with geographical variations in counties. Stigma affects to uptake of HIV testing which is key to entry into treatment.
- 56. Sexual and gender based violence have been recognized as factors that increase the vulnerability of AGYW to HIV infection however in the past year we have seen some concerning trends around legislation supposed to protect girls from violence. The Sexual Offences Act, 2006 criminalizes defilement and places the age of consent at 18. However, the same Act through Section 8(5), which provides a defence for persons, accused of abortion in the instance that a child is believed to have behaved as an adult.⁸⁶ This Section has been used in what has been termed the Worst Judgment by Women's Link Worldwide, *Martin Charo v the Republic Criminal Appeal 32 of 2015* where Justice Chitembwe held: "where the child behaves like an adult and willingly sneaks into men's houses for purposes of having sex, the court ought to treat such a child as a grown up who knows what

⁸³ UNICEF. (2012). Violence against Children in Kenya: Findings from a 2010 National Survey. Nairobi: United Nations Children's Fund Kenya Country Office, published online 2012

⁸⁴ Basic Education Statistical Booklet 2014 Page 19

⁸⁵ National HIV and AIDS Stigma and Discrimination Index Summary Report 2014.

⁸⁶ The Section states that: "It is a defence to a charge under this section if—

a) It is proved that such child, deceived the accused person into believing he or she was over the age of eighteen years at the time of the alleged commission of the offence; and

b) The child reasonably believed the child was over the age of eighteen years"

she is doing". This was a case of a 13 year old that was allegedly defiled by an adult man. This case highlighted the dangers of the availability of a defence in a section that should ideally protect children and victims of survivors of violence in that Courts will ignore their duty as upper guardian of the child and the best interests of the child. In recognition of the impact of sexual violence in Kenya and AGYW's vulnerability to HIV infection as a result of it, such provisions and judgments can be a danger to addressing the growing crisis among AGYW.

- 57. The East African Community HIV and AIDS Prevention and Management Act, 2012 (which binds Kenya as a member state), has a number of objectives including promoting a rights based approach to health; promoting public awareness on transmission, means of prevention, management and consequences of HIV; protect the human rights of people living with HIV; promote safety and precaution in practices and procedures that carry the risk of HIV transmission; and positively address and seek to address the conditions that aggravate HIV.⁸⁷ This Act places obligations on Kenya to address HIV related stigma, provide HIV education and information in different forums (media, workplace, learning institutions) and as a healthcare service and prevention measures to be undertaken by the government amongst others. A number of issues have arisen with regard to the HIV response, which have the potential to affect women, and girls who have a higher HIV burden than their counterparts. These are:
- 57.1 The Kenya HIV Testing Service Guidelines (HTS Guidelines) allow for disclosure of HIV status to a sex partner or other person in reliance on Section 24 of the HIV and AIDS Prevention and Control Act, 2006 (HAPCA) that has since been declared unconstitutional.⁸⁸ There exists a high correlation between sexual and other forms of violence against women and girls and their chances of HIV infection and a vicious cycle of increasing vulnerabilities to both SGBV and HIV can be established essentially, just as violence can lead to AIDS, in a community where violence is condoned, AIDS can

⁸⁷ The East African Community HIV and AIDS Prevention and Management Act, 2012 available at http://www.kelinkenya.org/wp-content/uploads/2017/04/EAC-HIV-ACT-2012.pdf.

lead to violence.⁸⁹ Evidence of the latter shows numerous persons reporting experiences of violence following disclosure of HIV status, or even following admission that HIV testing has been sought.⁹⁰ Such guidelines may affect their willingness to go for tests or start treatment.

- 57.2 The HTS guidelines provide for self testing however it is necessary to take cognizance of the environment in Kenya and issues of stigma and discrimination. The 2014 UNAIDS and WHO Technical Update on self-testing state that before self-testing is adopted, countries must consider the fact that human rights and protection laws, policies and regulations that address misuse and abuse (such as coercive testing, violence, discrimination and prosecution) may need to be developed, or adapted, to protect people who self-test. Channels through which misuse or abuse can be reported and monitored also may need to be established (this includes the distribution or sale of HIV self-test kits of poor quality).
- 58. A number of factors render AGYW vulnerable to HIV infection and these must be addresses holistically to effectively respond to the epidemic. AGYW are a population that have been left behind and because of that we have seen their vulnerability and susceptibility increase and the State and the HIV response has to evolve in tandem with emerging issues and seek to curb a growing crisis.

Recommendations

- Increase promotion and accessibility to female condoms and encourage uptake through media campaigns aimed at popularising female condoms and equal power relations in negotiation for safe sex
- Increase measures to prevent and address sexual violence and target the bottlenecks in the criminal justice system that leads to the under-reporting of instances of sexual violence and the low numbers of convictions for sexual offences

⁸⁹ Program on International Health and Human Rights, Harvard School of Public Health, HIV/AIDS and Gender-Based Violence (GBV) Literature Review, 2006

⁹⁰ Program on International Health and Human Rights, Harvard School of Public Health, HIV/AIDS and Gender-Based Violence (GBV) Literature Review, 2006

- Increase community awareness through education and engagement on the detrimental effects of early marriages
- Conduct research on the school dropout rates and their link to HIV infection and develop programmes to intervene by ensuring that children of all ages can stay in school

COMPREHENSIVE SEXUALITY EDUCATION

- 59. In the Concluding observations of the committee on the elimination of discrimination against women 2011 made a recommendation number 37 which in part states that existing sex education programmes are not sufficient enough and may not give enough attention to the prevention of early pregnancy and the control of sexually transmitted infections. Recommendation 38 states that states parties are urged to widely promote education on sexual reproductive health and rights targeted at adolescent girls and boys, with special attention to the prevention of early pregnancy and the control of STI's including HIV and AIDS however in the consideration report submitted by states specifically Kenya's eighth edition, it is still remains silent on the issue of comprehensive sexuality education.
- 60. Adolescents aged 10-19 years constitute about 24% of the country's total population (9.2 million).⁹¹ More than a third of adolescents aged 15-19 are sexually active (37% of females and 41% of males).⁹² In addition the average age of sexual debut in Kenya is fifteen.⁹³ On average, 47% of adolescent girls and young women (15-24) have had sex, with a majority of sexually active youth (over 70%) not engaging in protected sex.⁹⁴ This leads to about 20-50% of adolescents falling pregnant with a median age of 18.5 at the first pregnancy.⁹⁵

^{91 2009} Kenya Population and Housing Census (KPHC).

⁹² Sidze M. E. et al "From Paper to Practice: Sexuality Education Polices and their Implementation Kenya" (eds): Guttmacher Institute and APHRC) (April 2017) available at: http://aphrc.org/wp-content/uploads/2017/04/416_Sex-Ed-Policies_Kenya_4.3.17.pdf.

⁹³ Kenya National Bureau of Statistics et al "Demographic and Health Survey 2015" available at https://dhsprogram.com/pubs/pdf/fr308/fr308.pdf.

⁹⁴ Chiao C, Mishra V. Trends in primary and secondary abstinence among Kenyan youth. AIDS Care. 2009;21(7):881–92. doi: 10.1080/09540120802537856 [PubMed]

- This is indicative that while adolescents are having sex they are not properly equipped to navigate the sexual space.
- 61. A study conducted by UNESCO and UNFPA reviewed comprehensive sexuality education in Kenya and highlighted the strengths and weaknesses of its provision. Some of the strengths noted were that: the content was age appropriate, broadly focused on refusal skills and risk avoidance (delaying the age of sexual debut) and there was an increased focus on gender. The weaknesses were: an emphasis on abstinence, lack of information on: contraceptives, condoms, sex and sexual health. It was noted that key topics were excluded such as sexual violence, condom use and sexual health.
- 62. In addition to this KELIN conducted a baseline survey to assess the current levels of knowledge, awareness and appreciation of sexual health and reproductive health laws, policies and practices among orphaned and vulnerable girls in Kisumu and Homa-Bay Counties. Qualitative interviews were held with a total of 375 orphaned and vulnerable adolescent girls aged between 12-24 years from the 15 constituencies in Kisumu and Homa-Bay Counties, 375 adolescent boys and members of the communities, which AGYW were sampled from. Qualitative findings indicated: early and unprotected sexual activities with multiple sex partners increasing the risk of STIs including HIV infection; knowledge on and access of the range of contraceptive methods available for young people within their reach is limited; and this is compounded by lack of skills on how to deal with peer pressure.
- 63. In the consideration of reports submitted by state parties to committee on the elimination of discrimination against women 2017 under the section on Health, it states one of the issues and questions in relation to the report is that Kenya needs to provide information about whether an age- appropriate programme on sexual and reproductive health and rights for all levels of education to be integrated into curricula in the state party. According to the National AIDS Control Council Approximately 51% of all new HIV infections here in Kenya are among young people and the adolescents. The main mode of transmission of the virus among adolescents and young people is through sexual

- intercourse. This shows that most young people are sexually active emphasizing the need for comprehensive sexuality education
- 64. Kenya, signed the Ministerial Commitment on Comprehensive Sexuality Education and Sexual and Reproductive Health Services for Adolescents and Young people in Eastern and Southern Africa, 2013 in which she committed to scaling up comprehensive rights-based sexuality education beginning in primary school. This Declaration built on a 10-country review of sexuality education curricula by the Population Council in 2012. This yet to be implemented raising a question as to the commitment of Kenya in providing comprehensive sexuality education.
- 65. The provision of SRH information and services to adolescents in Kenya is supported by various health and education policies including the 2004 Policy Framework for Education and Training and the 2004 and 2013 Education Sector Policy on HIV and AIDS. Existing educational policies, however, still emphasize life skills and HIV education, and thus are limited in scope. Kenya's life skills education curriculum was originally developed by the Ministry of Education in 2002 and revised in 2008. The new syllabus promotes general skills for day-to-day living, such as self-appreciation, improving interpersonal relationships, acquiring decision-making skills, respecting other people's rights and coping with stress and emotions. According to standards set by the United Nations and other international agencies, comprehensive sexuality education should cover a range of topics, which fit into five categories identified by the study team: sexual and reproductive physiology; HIV and STI prevention; contraception and unintended pregnancy; values and interpersonal skills; and gender and sexual and reproductive rights. This is not the case with life skills leaving a huge gap in the provision of sexuality education.
- 66. Kenya provides for various policies including; the adolescent package of care which ensures access to contraceptives and the National Adolescent Sexual and Reproductive Health Policy Provides guidance to enhance the SRH status of adolescents in Kenya and contribute toward realization of their full potential in national development but despite such laws advocating for access to contraceptives the adolescents don't know how to use

the contraceptives which makes implementation of the laws challenging. Comprehensive sexuality education bridges that gap ensuring that the policies achieve their intended goal.

- 67. Some of the barriers to effective implementation of sexuality education in schools are: opposition from religious and conservative groups, cultural silence regarding sexuality, lack of teachers well-trained in sexuality education, poorly supported schools, absence of a clear framework for translating policies into practice, and weak regulation and supervision of the implementation of existing policies, lack of involvement of adolescents in creation of the curriculum.
- 68. The Kenyan curriculum is under review by the Kenya Institute of Curriculum Development. The actors involved in the development of the curriculum and policies include teachers, government departments and ministries, United Nations bodies, civil society organizations, activists and professional groups, but not adolescents themselves. The exclusion of the views and experiences of students the intended beneficiaries raises questions as the effectiveness of the developed curriculum.

Recommendations

- Overhaul Ministry of Health's Family Life Skills curriculum to address sexual and reproductive health, to include methods of preventing pregnancy and STI's and STDs including HIV and AIDS.
- Develop a policy for provision of CSE in and out of schools to accommodate AYP not in schools
- Make the curriculum development process more inclusive especially with regard to CSE to ensure there is more robust consultation that shall lead to interventions targeted at meeting the needs of AYP.

Questions for the Committee to the State Party Representatives:

To what extent does the current curriculum development process take into account CSE?

 Recognize that abstinence only approaches are ineffective and update policy and programs to target the education of contraceptives among youth and adolescent.

FAMILY LIFE AND MARRIAGE

- 69. Kenya recognizes five different types of marriages civil, customary, Christian, Muslim and Hindu all of which are now governed by the Marriage Act, 2014. Previously, the legal framework for marriage included seven separate laws. All have been repealed by the Marriage Act, 2014, which consolidates the five marital regimes into a single law with separate Parts establishing the legal framework governing each.
- 70. The Constitution of Kenya 2010 promotes and protects rights related to marriage and family. Article 27 provides for equality and freedom from discrimination in all spheres including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth and provides for full and equal enjoyment of all rights. This has been construed to mean that the parties to the marriage are equal and the element of consent is considered before entering the union, in disposing property or any other decision that affects the family.
- 71. Article 45 provides for equality for all parties of the in marriage, at the time of marriage, during the marriage and at the dissolution of marriage and Article 40 provides women the rights to acquire and own property. The Constitution further provides for enactment of enabling laws to implement these protective constitutional provisions. Kenyan law includes significant gaps when it comes to the distribution of property in cases of divorce; Kenyan courts have had wide discretion in determining the appropriate division of property in divorce and succession cases. Case law has historically been conflicted owing to different understandings by judges of customary law, with which they are likely to be less familiar, as well as a range of interpretations of the term "contribution" in

⁹⁶ Marriage Act 2014 CAP 150: African Christian Marriage and Divorce Act at Cap 151; Matrimonial Causes Act at Cap 152; Subordinate Court (Separation and Maintenance) Act at Cap 153; Marriage and Divorce Registration Act at Cap 155, Mohammedan Marriage Divorce and Succession Act at Cap 156; and Hindu Marriage and Divorce Act at Cap 157.

the context of determining spouses' proportional rights to contested property, this has only been partially filled by the Matrimonial Property Act. And this means that there is need for the repeal or amendment of these laws to ensure exhaustive protection of rights.

- 72. The States Party report indicates that the Law reform commission has undertaken great steps in re-drafting several bills affecting marriage. These include:
 - a) Enact, within two years, the Family Protection Bill 2007, the unified Marriage Bill 2007, the Matrimonial Property Bill 2007 and the Equal Opportunity Bill; ⁹⁷
 - b) Give priority attention to the elaboration of new laws as well as the review and repeal of discriminatory provisions in order to achieve *de jure* equality for women and compliance with the State party's obligations under CEDAW and to this end reduce the prescribed time line in Schedule 5;
 - c) Establish an effective monitoring mechanism to ensure that the Constitutional Implementation Oversight Committee, established by the parliament, is effectively carrying out its mandate;
 - d) Harmonize religious and customary law with Article 16 of the Convention and consider bringing Khadhi courts under the specific equality provision enshrined in the new Constitution.
- 73. These are indeed positive steps towards addressing the various problems affecting the marriage and family life even though this has been due to advocacy efforts by civil society's organizations which include KELIN Kenya.

Recommendations

• The Government should reignite interest in family law reform to ensure that there is no gap between law and practice, specifically through the review of the current Law of succession Act to align to the equality provisions of the constitution of Kenya 2010

⁹⁷ From the discussion on COMMENTARY ON LAWS AROUND WOMEN'S RIGHTS SINCE THE LAST REVIEW OF KENYA BY THE CEDAW COMMITTEE IN 2011 it is apparent that a number of these Bills have been enacted.

- The Government needs to expedite the process of turning the pending bills into law and subsequently ensuring proper implementation so that women can benefit from the provisions therein.
- The Government should consider introducing family law education in schools to deal with cultural issues at early stages as identified in its report as a challenge to family law and marriage.
- The persistence of cultural norms and practices and patriarchal attitudes that tend to discriminate women hinders their rights and government should enact specific laws to ensure the practice of such norms are limited to the extent of their consistency to the constitution and also initiate process of documentation of culture so as to ensure proper application of the practices.

PROGRESS IN IMPLEMENTATION OF CEDAW

74. Despite having ratified CEDAW and other international conventions and treaties, Kenya has not ratified the Optional Protocol to CEDAW despite an express recommendation by the Commitee⁹⁸. This failure has limited the full realization of the rights recognized in CEDAW. Failure to ratify the protocol affects holistic realization of the benefits for women under CEDAW since these two documents complement each other.

By ratifying the Optional Protocol:

- a) The state can engage more deliberately with the CEDAW Committee by receiving and considering communication from the committee that is useful to the realization of the CEDAW provisions.
- b) The state allows Kenyans individually or as a group to seek redress from the CEDAW Committee for violation of rights under CEDAW, in cases where they have exhausted local and regional avenues of redress, there-by offering its citizens the freedoms to seek access to justice from all possible avenues.

⁹⁸ Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCEDAW.aspx

c) The state commits to ensure that individuals under its jurisdictions are not subject to ill treatment or intimidation as a consequence of communicating with CEDAW Committee, thereby affirming its commitment to protect women from discrimination.

CONCLUSION

ICJ Kenya and KELIN applaud the State for the milestones it has covered in reforms of laws, policies, structures and practices that protect women from discrimination and further equality in all spheres. However, the state can still do more. Further, the two organisations commit to working with the government to ensure that the existing inequality gaps are addressed, gender responsive laws are enforced and practices especially driven by culture and belief systems are changed to ensure holistic and substantive equality and non-discrimination for women in Kenya.