

Kenya Civil Society Shadow Report on Economic, Social and Cultural Rights

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Foreword

The promulgation of the 2010 Constitution, brought with it fundamental changes to Kenya's social, political and economic governance structures. Key amongst these includes the introduction of a devolved system of government, introduction of a two-tier system of government with the national government and 47 county governments, reforms to the judiciary, and increased parliamentary oversight over the budgetary process. The constitution tasks the county governments with the responsibility of service delivery to the people including provision of health care, water and sanitation, agriculture improvement of road networks etc. Four years down the line since its promulgation, the majority of poor citizens remain hopeful that their economic, social and cultural rights (ESCRs) will be fully realised through its implementation. The process has however been clouded with conflicting personal interest from the elected leaders; Members of Parliament (MPs), Senators and Members of the County Assemblies (MCAs). The Kenyan Citizens and taxpayers have expressed their disappointment with the weak opposition that is unable to articulate issues of concern in the national assembly and the senate, the ever rising cost of living, the rising wage bill, continued corrupt practices at the national and county governments as well as the minimal delivery of services. Of great concern is the attempt by the national government to derail devolution through inadequate allocation of resources to the 47 county governments. This has resulted in the demand for a referendum by the council of governors and the opposition.

This Parallel/Shadow report provides a situation analysis on economic, social and cultural rights in the country in terms of the state obligations, policies programmes and institutional mechanisms as well as their implementation processes. It is the outcome of the collective effort of civil society organisations that focus their work on ESCRS and coordinated by Eastern Africa Collaboration for Economic, social and Cultural Rights (EACOR).

We would like to thank all the CSOs that participated

in this process especially the core team composed of Pamoja trust, Centre for Economic and Social Rights (Haki Jamii) and EACOR for working with the consultants to prepare the report. Our sincere appreciation goes to the CSOs that formed the thematic groups and provided the preliminary reports on each theme on ESCRs. We would like to thank the team of assistant researchers who gathered data from community-based organisations at the grassroots all over the country. Our special gratitude goes to the consultants for working with core team and producing this report.

We would like to extend our thanks to UNDP Amkeni Wa Kenya, Bread for the World-Protestant Development Services and ICCO Cooperation for their kind cooperation and support to prepare this report. It is our hope that this report will be useful for the UN committee on Economic, Social and Cultural Rights, other relevant agencies and stakeholders to understand and act towards the protection, respect and fulfilment of ESCRs in Kenya.



EACOR Regional Director

Table of Contents

Foreword	1
Table of Contents	2
Abbreviations/Acronyms	3
Executive Summary	4
Part I	9
General Information	9
1.0 Introduction	10
1.1 Background	10
1.2 Objectives	10
1.3 Process and participation (of CSOs)	11
2.0 Status of ESCR	12
2.1 Underlying causes of non-realization of Human Rights	12
Discriminatory Practices in Provision of Services	12
2.2 The implication of devolution on the realization of economic and social cultural rights.	15
2.3 Existing Normative Framework	27
Part II	39
Specific Information Relating to the Implementation of Articles 1-4 and 6-15 of the Covenant	39
Article 1 - Right to Self-Determination	40
Article 2 - Equality of Rights and Protection of Rights	44
Article 3 - Equality of Rights between Men and Women	46
Article 4 - Limitations on economic, social and cultural rights in time of Public emergency	49
Article 6, 7 & 8 - Right to Work, Right to Enjoyment of Just and Favourable Conditions of Work and Right to Form Labour Union	52
Article 9 - Right to social security including Social Insurance	54
Article 10 – Protection and Assistance to Family	56
Article 11 – Right to Adequate Standard of Living	60
Article 12 - Right to Enjoyment of the Highest Attainable Standard of Physical and Mental Health	65
Article 13 and 14 – Right to Education and Provision of Compulsory Education	68
Article 15 – Right to Cultural Life, Scientific Research and Creative Activities	71

Abbreviations | Acronyms

ARV	Anti-Retroviral	PFM	Public Finance Management
ASAL	Arid & Semi-Arid Land	SEBS	Secondary Education Bursary Scheme
CBD	Central Business District	SME	Small and Medium Enterprises
COTU	Central Organization of Trade Unions	SPF	Social Protection Framework
CSOs	Civil Society Organizations	TVET	Technical and Vocational Educational and Training Act
CRA	Commission on Revenue Allocation	TJRC	Truth Justice and Reconciliation Commission
CDF	Constituency Development Fund	CESCR	UN Committee on Economic, Social and Cultural Rights
COK	Constitution of Kenya	UN	United Nations
EAC	East African Community	UNDP	United Nations Development Programme
EACOR	Eastern Africa Collaboration for Economic and Social and Cultural Rights	WSSD	World Summit on Social Development - WSSD
ERS	Economic Recovery Strategy		
ESCRs	Economic, Social and Cultural Rights		
FGDs	Focus Group Discussions		
FPE	Free Primary Education		
GoK	Government of Kenya		
GDP	Gross Domestic Product		
GER	Gross Enrolment Rate		
HRBAD	Human Rights Based Approach to Development		
ICT	Information Communication Technology		
IDPs	Internally Displaced Persons		
ICESCR	International Covenant on Economic, Social and Cultural Rights		
ILO	International Labour Organization		
KIHBS	Kenya Integrated Household Budget Survey		
KNEC	Kenya National Education Council		
KPR	Kenya Police Reservists		
MDGs	Millennium Development Goals		
MOH	Ministry of Health		
MLHUD	Ministry of Lands, Housing and Urban Development		
M&E	Monitoring and Evaluation		
NHIF	National Hospital Insurance Fund		
NHC	National Housing Corporation		
NLC	National Land Commission		
NER	Net Enrolment Rate		
NFECs	Non-Formal Education Centres		
NGOs	Non-Governmental Organizations		
NSAs	Non-State Actors		
NSSF	National Social Security Fund		
OVC	Orphans and Vulnerable Children		
PWDs	Persons with Disabilities		
PCR	Primary Completion Rate		

Executive Summary

This is a Parallel Report to Kenya's second national report on Economic, Social and Cultural Rights, which was submitted to the UN Committee on Economic, Social and Cultural Rights (CESCR) in 2013.

The report is divided into three parts: a general introduction, information on specific articles of the covenant, and special recommendations. The report reviews and analyses state policies, legislation, programs, and institutional arrangements, as well as their implementation.

The objective of this Parallel Report is:

- To provide an overview of the status of Economic, Social and Cultural Rights (ESCRs) by highlighting ESCRs issues that need to be addressed in Kenya,
- Provide the CESCR with a parallel comprehensive picture of the Government of Kenya's (GoK) compliance with the covenant on ESCRs,
- Draw international attention to specific violations of economic, social and cultural rights in Kenya,
- Obtain pronouncements of the CESCR on these violations through the concluding remarks, and
- Create awareness in the local arena on the GoK performance on progressive realisation of ESCRs.

Furthermore, the report aims to give the Civil Society Organizations (CSOs) in Kenya relevant information to strengthen their joint efforts and activities as well as educate local population on the status of ESCRs to raise awareness on the existence of these rights at the local level.

A diverse group of (CSOs) were engaged in preparation of this report. The report was prepared in consultation with EACOR member organisations and members of Housing Coalition through workshops organised at the national level in Nairobi.

EACOR with support from UNDP Amkeni wa Kenya project and other development partners engaged consultants and research assistants who helped gather data from the grassroots through Focus group discussions (FGDs), and key informant sessions with community based organisations and self-help groups.

The data gathered was analysed by the consultants and the results merged with the material that had emerged from the thematic groups. The consultants worked together with the core team to prepare the report.

Overall, the implementation of the ICESCR in Kenya though progressive leaves a lot of room for improvement. The realisation of the Covenant in practice remains out of reach for most of the Kenyan people, despite legal and policy provisions made by the state. Many laws and policies are not translated into practice due to issues ranging from lack of political will, weak capacity, and limited resources. Legal provisions and policies that discriminate against women and also minority groups are still in force despite the passing of a progressive and transformative constitution in 2010.

Based on the overall analysis, the report provides the following key recommendations to the state:

Article 1

- The National Government should demonstrate greater political will in ensuring the implementation of devolution through the transfer of all the functions and responsibilities devolved to the County Governments under Schedule Four of the Constitution of Kenya. The Government should also allocate adequate funds to the County Governments to enable them implement these functions.
- The National and County Governments should take measures to raise awareness on the meaning and implications of the right to

self-determination to disabuse citizens of the misconception that it is synonymous with ethnic exclusion. These measures should be institutionalized with an effective implementation mechanism, as well as monitoring and adaptation to address emerging concerns of people at all levels of society.

- The National and County Governments must desist from enacting laws that in effect claw back the tenets of devolution and the right to self-determination. Instead, they should endeavour to enact laws and promulgate policies and programmes that will see enhanced spaces for participatory governance by all people.
- The National and County Governments should forge enduring solutions to address the root causes of the calls for referenda to amend the constitution of Kenya barely two years since its promulgation. The National Government and County Governments must also address with finality the issues causing ethnic balkanization in the counties and the clamour for secession. They must therefore, adopt a bottom-up approach to governance, address public grievances through effective mechanisms and by promoting peaceful coexistence.
- The National Government and County Governments should put in place mechanisms and programmes to remedy the vertical and horizontal inequalities in resource allocation by adopting affirmative action approaches to benefit the poor and marginalized people.
- The National and County Governments must take special steps to ensure the equality of people by bringing excluded groups into all sectors and by reducing discrimination and inequality and by amending all legal provisions that discriminate vulnerable and marginalized sections of the society especially women, youth, persons living with HIV/AIDS and persons living with disabilities.

Article 2

- There is a need to legislate to provide

comprehensive protection from discrimination across all grounds and in all areas of life regulated by law.

- In addition, the State must ensure that this is supplemented by concerted action to improve access to justice where protections exist, through public education, training, legal assistance, strengthening specialised bodies and a review of procedures governing cases of discrimination.
- The State should review discriminatory laws and repeal or amend them to bring them into line with the new Constitution and Kenya's legal obligations under international law.
- Again, this must be matched by efforts to ensure that discrimination by state actors is addressed.
- Finally, the government must take steps to promote substantive equality and to address the principal root causes of discrimination and inequality in Kenya through positive action and other measures.

Article 3

- The Kenyan Parliament should repeal discriminatory and unconstitutional provisions from the Matrimonial Property Act and the Marriage Act to ensure that women have equal rights and opportunity before the law.
- The Kenyan Parliament should pass the Prevention of Domestic Violence Bill (2013) which is currently in Parliament in its third reading.
- The State should ensure the proper interpretation and implementation of the third gender rule in order to raise the representation of women in Parliament, the judiciary and senior civil service positions.

Article 4

- The constitution and other legislative frameworks need to recognize ESCRs as fundamental and ensure their full realization by providing implementation timelines. The normative frameworks must also assign clear cut duties to county assemblies regarding the

- enforcement and realization of these rights.
- The government should take effective measures to address the demands of people from various groups towards more inclusive state policies, programmes, and structures.
- The government should take all necessary measures to strengthen law enforcement agencies, particularly the National Police Service, with adequate resources and trainings as well as accountability mechanisms.
- New laws should be promulgated to address organized crime, establish accountability of state mechanisms, and promote transparency and integrity across state affairs.

Article 6, 7 & 8 (Labour Rights)

- The State should put positive measures to ensure (strict) enforcement of labour standards;
- The State should increase the number of effective labour inspections to monitor unfair labour practices and exploitation of children and marginalized groups particularly in the informal sector;
- The State should institute and implement training and promotion opportunities for workers in both the formal and informal sector;
- The State should protect trade union freedom and prevent interference in the management and operation of trade unions, and remove excessive restrictions on the right to strike in law and in practice, including in Export Processing Zones;
- The State should further facilitate the role of trade unions through stringent enforcement of labour legislation to harmonise the working relations with employers
- The State should also implement policies and laws instrumental in combating and addressing sexual harassment and racial discrimination in the workplace;

Article 9

- The State should define the appropriate program mix within safety nets to effectively

reach the highest population of the poor and vulnerable;

- The State should also improve coordination among safety net programs to reduce fragmentation and duplication;
- Financing should be increased to safety nets in the face of a tight fiscal environment;
- The State should also expand contributory program coverage to the informal sector while also addressing problems of adequacy and financial sustainability.

Article 10

- Kenya needs a conducive legislative, policy and institutional environment to guarantee social assistance. Current social assistance schemes are operating without specific legislation or regulation. They do not flow from, emanate or derive from a clear, central, coordinated policy locus.
- The State should establish a single Authority to give clear policy direction and oversight and improve co-ordination, prospects for unified beneficiary registration and linkage with other national databases i.e. Identification Cards, Birth and Death Certificates.
- Kenya needs comprehensive legal measures to address issues such as child marriage, child labour and forced marriage. The State has a responsibility to maintain family and female genital mutilation with greater impact.
- State policies and programmes should be formulated and implemented to encourage modification of socio-cultural patterns that are discriminatory and exploitative against women, children, and other marginalized communities.

Article 11

- Kenya needs to promote and safeguard a free, democratic and just society in order to provide a peaceful, stable and enabling economic, social, political and cultural environment in which individuals can feed themselves and their families in freedom and dignity.

- In order to achieve the progressive realization of the right to adequate food in the context of national food security, Kenya should promote broad-based economic development that is supportive of her food security policies. Kenya should establish policy goals and benchmarks based on the food security needs of her population.
- Kenya, in consultation with relevant stakeholders and pursuant to her national laws, should adopt a national human rights based strategy for the progressive realization of the right to adequate food in the context of national food security as part of an overarching national development strategy, including poverty reduction strategies.
- Kenya should, in accordance with her national law and priorities, as well as her international commitments, improve the functioning of her markets, in particular agricultural and food markets, in order to promote both economic growth and sustainable development, inter alia, by mobilizing domestic savings, both public and private, by developing appropriate credit policies, by generating sustainable adequate levels of national productive investment through credits in concessional terms and by increasing human capacities.
- Kenya should assess the mandate and performance of relevant public institutions and, where necessary, establish, reform or improve her organization and structure to contribute to the progressive realization of the right to adequate food in the context of national food security.
- Kenya needs to apply a multi-stakeholder approach to national food security to identify the roles of and involve all relevant stakeholders, encompassing civil society and the private sector, drawing together their know-how with a view to facilitating the efficient use of resources.
- Kenya needs to enact robust legislative and policy frameworks on the realization of the right to food and freedom from hunger as enshrined in the Constitution. That will facilitate the progressive realization of the right to food in the context of national food security.
- Kenya should facilitate sustainable, non-discriminatory and secure access and utilization of resources consistent with her national law and with international law and protect the assets that are important for people's livelihoods. Kenya should respect and protect the rights of individuals with respect to resources such as land, water, forests, fisheries and livestock without any discrimination. Therefore land reforms and other policy reforms are necessary to secure efficient and equitable access to land and to strengthen pro-poor growth. Special attention should be given to groups such as pastoralists and indigenous people and their relation to natural resources. Kenya should also facilitate universal access to decent work for her population in accordance with the provisions of her domestic laws and international obligations enshrined in various international conventions including ILO Conventions.
- Kenya should take measures to ensure that all food, whether locally produced or imported, freely available or sold on markets, is safe and consistent with national food safety standards.
- Kenya should take measures to maintain, adapt or strengthen dietary diversity and healthy eating habits and food preparation, as well as feeding patterns, including breastfeeding, while ensuring that changes in availability and access to food supply do not negatively affect dietary composition and intake.
- The State should distinguish the amount allocated for water and sanitation from the estimate for environment, water, irrigation and housing in order to enhance it as a priority.
- The State should adopt the draft National Water Policy and enact the Water Bill, 2014.
- The State should undertake a research on the people suffering from fluorosis and come up with a policy on compensation of citizens suffering from the said disease
- The Government should revise the National Housing Policy and the Draft Housing Bill to,

make reasonable provisions, within its available resources, to ensure adequate access to housing especially for the most vulnerable and marginalized groups

- The state agencies tasked with implementing aspects of housing should as a matter of priority reform their data collection and information sharing system
- The state should implement the TJRC and Ndungu land report, this should be spear headed by the NLC.
- The state should support NLC in order for the Commission to execute its mandate as not only provided by the Constitution but as had been envisaged

Article 12

- The State should increase budgetary allocation to health and health services in accordance with the Abuja declaration. This can be done through a Constitutional amendment that will increase the devolution fund to a minimum of 45% of the National budget
- Both the national and county governments must complement each other in order to achieve better health care services.¹
- The State should reinstate the Ministry of Health (MOH) Standards and Guidelines, 2012
- The State should enhance programmes and policies relating to sexual and reproductive healthcare for women

Article 13 & 14

- The Government should address the transition rates of girls from secondary schools to university
- The State should also increase Budgetary allocation for special needs education
- Funding should also be increased for alternative education for children to implement the policy on alternative provision of basic education and training for children in urban slums and other informal settlements.

- The State should reduce the student teacher ratio in public schools instead of introduction of laptops in schools.
- Budgetary allocation for free primary education and free day secondary education should also be increased.

Article 15

- The State should recognize the role of science and indigenous technologies in the development of the nation and in turn establish science based institutions/ galleries where interested citizens can engage and participate in innovations.
- The State should further establish mechanisms to legally recognize and register intellectual property rights of the people of Kenya. This protects the origin and ownership of products both locally and internationally.
- A clear policy and guidelines on creative arts/ industries should be developed.
- The Government should device a deliberate move to convert and promote creative industries into lucrative commercial activities both locally and internationally.
- The Government to ensure protection of indigenous seeds and plant varieties, their genetic and diverse characteristics and their use by the communities of Kenya

¹ See http://www.heraf.or.ke/index.php?option=com_docman&Itemid=417?option=com_docman&Itemid=417. Accessed on 20th May, 2014

Part I

General Information

1.0 Introduction

This is a Parallel Report to Kenya's second national report on Economic, Social and Cultural Rights, which was submitted to the UN Committee on Economic, Social and Cultural Rights (CESCR) in 2013.

The report is divided into three parts: a general introduction, information on specific articles of the covenant, and special recommendations. The report reviews and analyses state policies, legislation, programs, and institutional arrangements, as well as their implementation.

1.1 Background

Eastern Africa Collaboration for Economic and Social and Cultural Rights (EACOR) is a registered Non-Governmental organisation (NGO) consisting of church based and non-church based civil society organisations that work on Economic, Social and Cultural Rights (ESCRs) in Eastern Africa. EACOR is committed towards creation of a world where everyone enjoys human rights and lives in dignity. It seeks to achieve this by facilitating the realisation of Economic, Social and Cultural Rights in Eastern Africa through capacity enhancement of church based and non-church based civil society organisations in Eastern Africa to undertake rights based approaches to development, collaborative lobbying and advocacy for mainstreaming of ESCRs in policy formulation and implementation and in monitoring governments compliance with the International Covenant on Economic, Social and Cultural Rights (ICESCRs).

EACOR's work in Kenya is centred around: lobby and advocacy for policy change to ensure that ESCRs are entrenched in major policy documents; monitoring implementation of the ICESCRs for progressive realization of ESCRs, capacity enhancement of the citizens (rights-holders) through civic education (awareness creation) and training to demand for service delivery from the duty bearers. During the clamour for the new constitutional dispensation in Kenya, EACOR worked with its member organizations, networks and other CSOs and ensured the entrenchment of ESCRs in the 2010 constitution.

The Republic of Kenya ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR) on 3 January 1976. It is yet to ratify the Optional Protocol to International Covenant on Economic, Social and Cultural Rights of 10th December 2008². The Government of the Republic of Kenya submits progress reports to the CESCR, in conformity with Article 16 of the ICESCR on the *'...measures which they have adopted and the progress made in achieving the observance of the rights recognized herein.'*³

1.2 Objectives

In 2013, the Government of Kenya prepared its second national report on ESCRs, which has been submitted, to the CESCR.

The objective of this Parallel Report is:

- to provide an overview of the status of Economic, Social and Cultural Rights (ESCRs) by highlighting ESCRs issues that need to be addressed in Kenya,
- provide the CESCR with a parallel comprehensive picture of the Government of Kenya's (GoK) compliance with the covenant on ESCRs,
- draw international attention to specific violations of economic, social and cultural rights in Kenya, obtain pronouncements of the CESCR on these violations through the concluding remarks, and
- create awareness in the local and international arena on the GoK performance on progressive realisation of ESCRs.

Furthermore, the report aims to give the Civil Society Organizations (CSOs) in Kenya relevant information to strengthen their joint efforts and activities as well as educate local population on the status of ESCRs to raise awareness on the existence of these rights at the local level.

² www.ohchr.org

³ Article 16(1) ICESCR

1.3 Process and participation (of CSOs)

A diverse group of CSOs have been engaged in preparation of this report. Preliminary meetings and training were carried out in 2013. During these meetings it was decided that EACOR and Pamoja trust would take the role of coordinating the report writing process. The report was prepared in consultation with EACOR member organisations and members of Housing Coalition through workshops organised at the national level in Nairobi. The CSOs were organised in thematic groups along the various ESCRS themes including housing, water and sanitation, education, women's ESCRs, and labour rights. Through this process, various issues were generated and presented in thematic reports. A core group was appointed that synthesised the reports generated from the thematic groups.

EACOR with support from UNDP Amkeni wakenya project and other development partners engaged consultants and research assistants who helped gather data from the grassroots through Focus group discussions (FGDs), and key informant session with community based organisations and self-help groups.

The data gathered was analysed by the consultants and the results merged with the material that had emerged from the thematic groups. The consultants worked together with the core team to prepare the report.

2.0 Status of ESCR

2.1 Underlying causes of non-realization of Human Rights

The 2010 Constitution of Kenya provides a basis for the pursuit of Economic, Social and cultural rights (ESCRs) in the Bill of rights. Article 41, 42 and 43 provides for labour rights, clean and healthy environment, health, adequate food, clean and safe water, education and social security. Entrenchment of these rights in the constitution translates their realisation to a constitutional obligation for the state. In the current two tier-governance structure this state obligation is the responsibility of both the national government and the 47 county governments. This is well illustrated in the Fourth Schedule to the Constitution which illustrates the roles of the national and county governments in provision of services including: health, education, housing, water and sanitation, agriculture, roads and infrastructure, social and cultural activities, among other vital services. The effective realisation of these rights is thus dependent on the implementation of national and county government functions.

Currently the country is going through a transition period (5 years) as provided for in the constitution where various functions that were undertaken previously by the central government are to be transferred and devolved to the county governments. This process is not yet finalised and the county governments have not yet assumed their full roles and responsibilities. Moreover the constitution is vague with regard to rationalisation of resources and this has resulted in a number of court cases such as the one by the health sector workers, where the courts have been asked to interpret the constitutional provision regarding the role of national and county governments in the health sector. With respect to some rights; health, housing, the constitution specifies that the national government's role is that of policy formulation with the implementation being left to the county governments. Therefore service delivery in most of the sectors is clearly a function of the county government who are expected to address disparities

and inequalities that resulted from the former centralised governance system.

The county governments are state organs which must take legislative, policy and other measures, including the setting of standards, to achieve the progressive realisation of the rights guaranteed under Article 43⁴ as stated in Article 21(2) of the constitution. They are therefore served with the responsibility of legislating relevant laws and policies which would lead to realisation of ESCRs. The County Governments Act 2012 requires the county governments to develop five year county integrated development plans and citizens' participation is an important requirement in the process of developing the county plans. The Act also requires counties to protect the rights to self-fulfilment and promote the pursuit of equity in resource allocation within the county.

Non realization of ESCRS in Kenya is mainly a result of a number of systemic factors that include discriminatory practices in provision of services, corruption, poor planning/poor prioritization in budget allocations / Ineffective application of the rule of law, Poor infrastructure / Poor Rural Road Networks and Ineffective Urban Public Transport System.

Discriminatory Practices in Provision of Services

Statistics and information by the World Bank reveal huge disparities in terms of access to the most basic services such as health, education and other public services. In a 2011 report⁴ the World Bank states that Mandera County, which borders Somalia, has the poorest access to services. The Report establishes that there are ten times as many people per bed in public hospitals than the best served counties (Isiolo, Nyeri and Elgeyo Marakwet). According to the report, whereas 8 in 10 children are delivered in a health facility in Kirinyaga in central Kenya, only 1 in 20 children in Wajir County in the north are delivered in a health facility. Furthermore, 79 percent of children in Wajir County are at risk of chronic malnutrition compared to 16 percent in Mombasa County down in

⁴ A World Bank Report on the Kenyan Economic Overview. Accessed from www.worldbank.org/en/country/kenyaoverview on 25th August 2014.

the coast.

Additionally, economic activity in Kenya is concentrated in a few large urban areas – with Nairobi alone contributing almost 60 percent of Kenya's GDP⁵. The implication of this misnomer is the concentration of infrastructure and basic services around urban areas.

Corruption

The pervasive nature of corruption in Kenya is a known fact. There is lack of political will to deal with corruption that is both open and very present. The World Bank in a report titled *Energising the Economy and Creating Jobs* produced in 2012⁶ state that Kenya's corruption acts as a chokehold on the private sector. Most transactions involving government, from obtaining contracts to paying taxes, seem to have a corrupt element. The Bank estimates that if the private sector could redirect the money it now spends on corruption to creating jobs, it could create 250,000 jobs, sufficient to hire most unemployed urban Kenyans between the age of 15 and 34. In addition the report illustrates that in a focus group discussion young Kenyans, find that nepotism, tribalism, demands for bribes, and sexual harassment as major barriers to obtaining a job. Young people coming from wealthier and connected families are seen as having large advantages in finding work, regardless of skills and qualifications than those from poor backgrounds.

According to a recent report from a survey carried out by Transparency International and released in July 2013. A significant percentage of the respondents felt that the police (95 per cent), political parties (53 per cent), the legislature (68 per cent) and military (43 per cent), public officials and civil servants (59 per cent), the judiciary (58 per cent) are corrupt or are extremely corrupt institutions. Reality at the ground reveal that every day police officers set up road blocks and collect bribes from public transport. Every day police officers arrest innocent poor and marginalized people and extort money from them on made up charges. Those interviewed also indicated that Kenyans civilians are forced to pay bribes not only to

the police but also to access various services including health care, education, registration of permits and other essential services

In Effective application of the Rule of Law:

In effective application of the rule of law and inability to apply existing law affects poor and marginalized groups as they become vulnerable to extortion from state authorities and also a target of criminals. They have no place to turn to access justice and have to depend on alternative methods of accessing justice including arming themselves, forming neighbourhood vigilante groups or hiring private security guards Northern Kenya”.

Poor Infrastructure/ Poor Rural Road Networks and Ineffective Urban Public Transport System:

In Kenya currently there is poor road networks and transport to small holder agricultural sector while most of the large scale agricultural sector is well linked to main networks. The poor state of the road infrastructure amongst the small holder is the primary constraint to effective marketing and distribution of the agricultural products produced by the small holders. As result a lot of food goes to waste and cannot access markets. The situation with regard to rural water and health facilities is grave in Arid and Semi-Arid areas, which cover 70% of the country. Distances to basic services are enormous and this is exacerbated by absence of infrastructure and transport services. Pastoralist Communities in Northern Kenya still trek their livestock up to 1,000 kms along poor roads to access markets and water. This affects their economic livelihoods and their access to basic rights. The fishing communities in Lake Victoria are threatened with presence of water hyacinth in Lake Victoria and absence of well-developed landing sites and infrastructure to transport their produce.

Presently only private transport has permission to enter into all areas of the Central Business District (CBD) in Nairobi while public transport may not. Unlike international good practice, more roads are reserved for private vehicles and public transport

⁵ Cosgrove, C., L. Hannigan, S. Kidd, and A. McPherson (2011). "A Qualitative Review of Targeting Methodologies in the Kenya Hunger Safety Net Programme (HSNP)," Development Pathways.

⁶ (<http://siteresources.worldbank.org/INTAFRICA/Resources/257994-1335471959878/kenya-economic-update-december-2012.pdf>)

vehicles may not access many roads. This reduces opportunities for older people, women, children and people with disabilities who do not own private vehicles to access equal opportunities to access economic, social and cultural goods and services available within the city. In some rural areas most transport is through walking as there is limited public transport; where it is available it may be through Lorries. This reduces opportunities for older people, women, children and people with disabilities who do not own private vehicles to access equal opportunities to access economic, social and cultural goods and services.

Stalled Land Reforms

Land has been at the heart of conflicts in Kenya. That is the reason the reform process envisaged under Agenda Four of the Serena Accord included resolution of historical land problems. The National Land Commission is the lead agency in land matters, working with the Ministry of Lands, Housing and Urban Development (MLHUD) and county-level institutions. The Commission has developed a five-year National Strategic Plan to guide implementation of the National Land Policy (NLP).

Its five strategic focus areas are:

- Devolution of land management (to run land administrative and management functions at the county level)
- Land Registration
- Natural Resource Management
- National Land Information Management System
- Resolution of Land-related disputes.

The NLC needs political good will and respect of its mandate from the executive and legislature to undertake this important role.

A recent report by the Truth, Justice and Reconciliation Commission (TJRC)⁷ concludes that there is a close link between land injustices and ethnic violence in Kenya. Land-related injustices can take many forms, including the illegal takeover of individual and community-owned land by public and private institutions; members of specific ethnic

groups being favoured to benefit from settlement schemes at the expense of others; forceful eviction; and land grabbing by government officials. All post-independence government regimes have failed to address these injustices in an honest and adequate way.

Following the new discovery of oil and gas in the region, in addition to the Lamu Port Southern Sudan-Ethiopia Transport (LAPSSET) project, interest in land around Lamu has heightened – putting the local communities at risk. Approximately 70% of land in the County, all public land, is finding its way into private ownership, with government officials facilitating the process. This raises more questions than answers. The process through which the 22 companies whose titles were recently revoked by the president ended up acquiring that land, effectively turning the locals into squatters, needs to be clearly investigated, as this might heighten conflict in the region.

To address this recurring problem, which seems to drive the nation towards a failed state, the best strategy will be to begin addressing the land question in Kenya comprehensively. The Lamu case should just be the beginning and not the end. This should be expanded to cover all regions in the country, and should take into account land issues during colonial times, independence as well as the post-independence period⁸.

The land question should be addressed meaningfully and conclusively. The new constitution clearly provides an opportunity for redress on land issues. The National Land Commission needs to move rapidly and all stakeholders – including IDPs and those who lay claim to land based on historical injustices – should be given a platform. Kenyans should avoid politicisation of the land question. Implementing various commissions' reports – including the TJRC and Ndung'u Land Report – should form the basis of addressing these matters once and for all. This will help bury the ethnic animosity that has caused havoc in this country⁹.

⁷ TJRC Report, May 2013 <http://www.kenyamoja.com/tjrc-report/>

⁸ Gatimu, Sebastian, "The role of land issues in Kenya's rising insecurity – Lamu violence", 2014

⁹ As above

Privatization of public services

While Structural Adjustment Programmes were implemented in Kenya over a decade ago, some of the principles still define how programmes intended for poverty reduction and realizing of social and economic rights is administered. Typical stabilization policies included the principle of liberalization of markets, privatization of all or part of state-owned enterprises. This has led to the privatization of public enterprises allowing for differential treatment of citizens based on their ability to pay. Private wings on public hospitals are better equipped, have shorter waiting periods before treatment but use public resources. This increases the inequity in access to health as resources that are available are disproportionately focused on people who may be able to pay an extra fee. There are situations where whole roads have been “privatized” in Nairobi with barriers limiting access to people who live in, usually, upper class neighbourhoods. The roads are public property, but have been un-procedurally privatized. In relation to education, public schools that have performed well and created better opportunities for their students have increased their fees so much, that they are defacto, private schools.

2.2 The implication of devolution on the realization of economic and social cultural rights.

Article 203 (2) of the Constitution of Kenya 2010 stipulates that at least 15 percent of nationally-generated revenue must be allocated to county governments. Essentially, resources, powers and functions have been devolved to county governments, which started functioning in 2013, in

an attempt to ensure equitable development. This therefore means that about Kenya shillings the National Treasury shall disburse 210 billion to the county governments in the financial year 2013-2014.

This means that, now, more than ever, Kenyans are presented with an opportunity to address regional and local inequalities. Nonetheless, statistics and information by the World Bank reveal huge disparities in terms of access to the most basic services such as health, education and other public services. In a 2011 report¹⁰, the World Bank states that Mandera County, which borders Somalia, has the poorest access to services. The Report establishes that there are ten

times as many people per bed in public hospitals than the best served counties (Isiolo, Nyeri and Elgeyo Marakwet).

According to the report, whereas 8 in 10 children are delivered in a health facility in Kirinyaga in central Kenya, only 1 in 20 children in Wajir County in the north are delivered in a health facility. Furthermore, 79 percent of children in Wajir County are at risk of chronic malnutrition compared to 16 percent in Mombasa County down on the coast.

Additionally, economic activity in Kenya is concentrated in a few large urban areas – with Nairobi alone contributing almost 60 percent of Kenya’s GDP¹¹. The implication of this misnomer is the concentration of infrastructure and basic services around urban areas.

The first priority is to ensure that all people are able to access the same quality of services regardless of their location. Past ministerial budgets reveal grossly skewed

allocations in terms of funding services such as

Participants in the KIIs and FGDs in the Eastern Part of Kenya identified the following opportunities for public participation in governance: The respondents were able to identify various policies as follows that provide for public participation and which every citizen must ride on. Such identified were:-The constitution, the Public Finance and Management Act, and the County Government. proposals were considered.

However the respondents pointed out that, only a percentage like 20% understands this and mostly those who work closely with Civil Society Organizations. For example in Kitui, the county government called for public consultations on Budget Estimates for 2014/ 2015 financial year and the public and representatives participated by giving views, however only about 20% of the views were incorporated

¹⁰ A World Bank Report on the Kenyan Economic Overview. Accessed from www.worldbank.org/en/country/kenyaoverview on 25th August 2014

¹¹ Cosgrove, C., L. Hannigan, S. Kidd, and A. McPherson (2011). “A Qualitative Review of Targeting Methodologies in the Kenya Hunger Safety Net Programme (HSNP),” Development Pathways.

education and health, which led to the alarming inequalities in service provision.

Therefore, perhaps the best solution is to allocate specific resources and capacity to Mandera, Wajir and other poor and marginalised counties to ensure that they are brought to par with other regions in terms of access to basic services. The national government needs to address the inequalities directly through national macroeconomic allocations that will have a redistributive effect.

National and county budgetary allocations towards the realization of economic and social cultural rights.

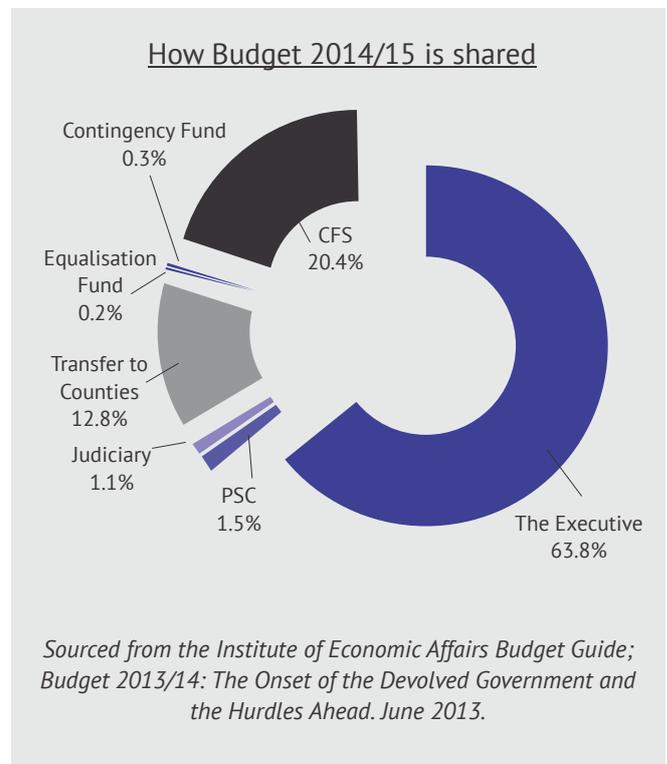
Economic, social and cultural rights are the legal obligations of the world's governments, set forth in a variety of human rights accords. Public budgets are mechanisms for allocating public resources and, therefore, often the chief instruments through which governments either comply or fail to comply with these rights. They also are the means by which governments provide for basic necessities that relate to human rights. Public budgets are more than a collection of numbers, they are a declaration of a community's or nation's priorities. From a human rights perspective, budgets are the concrete means by which governments either fulfil or violate human rights requirements.

Article 43 of the Constitution of Kenya provides that "Every person has the right—

- a) To the highest attainable standard of health, which includes the right to health care services, including reproductive health care;
- b) To accessible and adequate housing, and to reasonable standards of sanitation;
- c) To be free from hunger, and to have adequate food of acceptable quality;
- d) To clean and safe water in adequate quantities;
- e) To social security; and
- f) To education.

The overview of the 2013-2014 national budget displayed hereunder highlights milestones achieved by the Kenyan Government in the forward march towards the progressive realization of economic and social rights enshrined in the constitution. However,

budgetary gaps have also come to the fore and will be discussed.



Sector specific issues

76% is proposed to be spent to the 10 Medium Term Expenditure Framework (MTEF) sectors and in turn, the respective Ministries, Departments and Agencies (MDAs) out of Ksh 1.54 trillion national government budget. The big spenders are the education sector, 20%, Energy, Infrastructure and ICT, 16.6%, Public Administration and International relations 12.6%¹².

Notably, the development funds portions in sector allocations are meagre and most of the monies are channelled towards recurrent expenditure. Additionally, corruption seems to have ballooned into sickening proportions with every mega development project being dogged by plausible allegations of bribery, tribalism, nepotism and other forms of abuse of office.

Public spending in the social sector should be focused on addressing equity concerns or inequalities in Arid and Semi Arid Lands (ASALs) and in urban informal settlements for better outcomes. There is need for MDAs especially in health,

¹² Institute of Economic Affairs Budget Guide; Budget 2013/14: The Onset of the Devolved Government and the Hurdles Ahead. June 2013.

agriculture, roads, energy land and housing, to ensure that their policies and strategies are aligned to the constitution with respect to devolved functions for clarity and elimination of confusion.

There is need for elaborate mechanism for consultation and collaboration between the two levels of government especially in agriculture and health but also in roads, housing, land and energy sector, to facilitate smooth service delivery.

Education, health and the infrastructure sectors together account for over 40% of the national budget and hence a source of fiscal pressure in the medium term. There is need to emphasize on the scope for improving quality of spending for better outcomes. The National Government should institute techniques or mechanisms to subject proposals for establishment of Funds or infrastructure projects to cost effectiveness or cost benefit analysis. This test should be the basis of informing the worthiness of selection of projects or for instance informing the need of creating a Fund.

The Right to Housing.

The right to housing and its realization are essential for ensuring a life of dignity, security and privacy. A house is a focal point where personal and social relationships are fostered. It is for this reason, among others, that adequate housing is one of the internationally recognized human rights.

The Constitution 2010 further obligates the government to “take legislative, policy and other measures, including the setting of standards to achieve the progressive realization” of the right. One

In most of the case study reports especially the Coast and Eastern Kenya Reports, respondents decried the stagnation of services infrastructure such as health and education facilities. They were of the view that the construction of new facilities and provision of new equipment is not growing in tandem with the annual budget. They were of the view that whereas the national and county governments are spending colossal amounts in salary payments, public servants are offering dismal services which are worsened by their propensity to abscond from work.

While the 2012/2013 budget devolved a number of activities like the district government estates and provincial housing, it is strange that when it comes to slum upgrading only Kshs 180 million development expenditure is devolved, while 10 times that amount (Kshs 1.8 billion) is to remain at national level. In the 2013/2014 budget, it is not even possible to determine how much was allocated for the devolved functions.

such measure is allocation of resources. In allocating resources, the Constitution, requires that the government must give priority to “ensuring the widest possible enjoyment of the right” and further provides that where the government claims not to have the resources to implement the right then it must show that the resources are not available.

The Government of Kenya has committed itself to addressing the housing needs, especially of the poor, through a number of policy and programmatic interventions. These include the National Housing Policy, the Kenya Slum Upgrading and Prevention Policy and the ongoing Slum Upgrading and Prevention Policy, among others. Despite these efforts, millions of Kenyans continue to live in squalid conditions in both urban and rural areas. The Constitution has now added a sense of urgency in dealing with the inadequate housing conditions in the country. To date there has been little attempt to focus specifically on the issue of resource allocation and use in the housing sector.

Access to decent housing is a constitutional obligation enshrined in Article 43 of the Constitution of Kenya 2010. The Article specifically provides that every person has the right to “accessible and adequate housing and reasonable standard of sanitation”. Therefore the national and county governments are expected to ensure that adequate budgetary allocations are made to provide housing, especially for those in desperate need.

Despite the recognition of housing as a fundamental human right, the Kenyan housing sector is characterized by deteriorating housing conditions countrywide, primarily caused by demand that has overrun the supply, particularly in urban areas. The

shortage in housing manifests itself through overcrowding, proliferation of slums and informal settlements in urban areas and poor quality housing in rural areas. The annual housing demand in urban areas is estimated at over 150,000 units. Supply on the other hand is estimated at 40,000 units per annum resulting in a supply gap of approximately 110,000 housing units¹³. Delivery of housing to the poor and low income citizens is further exacerbated by disparity and imbalance in housing demand mitigation among income groups. As at May 2011, more than 80% of new houses produced were for high and upper middle income earners yet the greatest demand is for low income and lower middle income earners¹⁴.

As with many previous governments the current government adopted the Millennium Development Goals (MDGs) in its manifesto. Specifically, target 7D which hopes to achieve a significant improvement in the lives of at least 100 million slum dwellers by 2020 (UN). Surprisingly the 2013/2014 budget allocates about Kshs 3 billion to the Ministry of Lands, Housing and Urban Development. This amounts to about 0.18% of the total budget, a paltry amount at best.

While the 2012/2013 budget devolved a number of activities like the district government estates and provincial housing, it is strange that when it comes to slum upgrading only Kshs 180 million development expenditure is devolved, while 10 times that amount (Kshs 1.8 billion) is to remain at national level. In the 2013/2014 budget, it is not even possible to determine how much was allocated for the devolved functions.

- An overview of 2013-2014 National budget

These are the cross-cutting challenges hindering service delivery in all the counties as collated by the research assistants who undertook KII and FGD interviews in the Counties:

Poor governance / poor leadership which has resulted to poor service delivery

Political influence which leads to diversion of resources to other non-priority issues

Lack of information and if availed it's not timely
Corruption where service delivery is more directed to those close to the bearers.

Low participation due to lack of information in decision making in matters affecting them.

Failure to enforce existing laws

Insecurity

Non responsive leadership at county and national level

reveals the following gains and challenges in the implementation of the right to housing in Kenya.

- That allocation for the year 2013/2014 is slightly more than the combined allocation to the program from fiscal year 2008/2009 to fiscal year 2012/2013. This is commendable.
- That, within three years, the government will bring into operation 50 housing cooperatives, provide 10 informal settlements with infrastructure investments; open up 20 km trunk sewerage lines; construct 860 housing units through the National Housing Corporation (NHC); build 500 houses for civil servants, and construct and hand over 400 housing units at Kibera Soweto East village Zone A¹⁵.
- The budget for housing does not indicate any concrete evidence of devolution as most of the funding is still pegged to national agencies like the National Housing Corporation.
- The budgetary allocation is still way below the 5% of the National Revenue envisaged in the Housing Act for housing development and acute housing shortage still persists with the poor bearing the brunt.
- That capacity issues manifested by financial absorptive capacity remain a challenge.
- That review of annual audit reports by the Auditor General demonstrate that spending of budgetary allocations to the sector are perennially beleaguered with myriads of challenges including; perpetual annual under-

¹³ Report: An Assessment by Stakeholders of Government's Performance in Implementation of UPR Recommendations, September 2011

¹⁴ ibid

¹⁵ Kibera is one of the largest slums in the world and is situated in Nairobi, Kenya.

expenditure, under-collection of earmarked Appropriations-In-Aid, unsupported expenditure, expenditure and pending bills that have not been vouched for and outright corruption.

- That there is lack of transparency in budget information from the housing sector. A review of budget information for housing from fiscal year 2007/08 reveals that detailed documents on housing financing are not available to the public. The readily available information is just estimates of expenditure books; which are highly aggregated and written in technical and sophisticated budget language.
- That it is difficult to fully analyse the 2013/14 budget as it is highly aggregated, without any details of expenditure in the mentioned sectoral allocations.
- That the 2013/14 budget does not reflect the devolved functions of the county governments in the provision of housing as required by the Constitution.
- That the budget information is not in line with the constitutional requirements for transparency, accountability and fairness.

To address the above gaps the following are recommended:

- That the slum upgrading should be made a stand-alone program.
- That the budget presentation – both language and format – be simplified to ensure meaningful and effective public participation.
- That a clear framework and guidelines for public participation in budgeting for the housing sector be developed and implemented.
- That the budget for housing should clearly reflect and incorporate the devolved functions of the county governments in the delivery of housing and the budgetary allocation for the National Housing Corporation should reflect this
- That the collection of revenue from the housing sector should be more efficient, reduce leakages and fraud, improve the

budget absorptive capacity, and implement an urgent program on staff transformation and change management.

- That key stakeholders in the housing sector be more proactive if the progressive realization of the right to accessible and adequate housing is to be achieved.
- That annual progress reports on the achievement of the indicators be publicly released to enhance accountability in the sector.

The role of county governments in delivering Economic and Social rights

The Kenya constitution, and the County Governments Act, behove the implementation of Article 43 of the Constitution on both the National and County Governments. The County Governments Act says that counties must have development plans that give “the percentage of households with access to basic services contemplated under Article 43 of the Bill of Rights of the Constitution”.

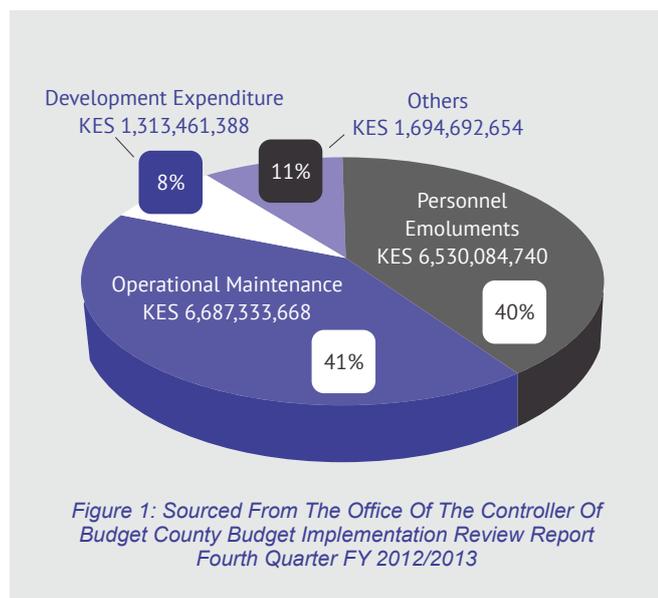
Typical local government (councils) services fall within the realm of economic social and cultural rights: water and sanitation services, housing, solid waste management, and in some cases education. Under the devolved system Schedule 4 of the Constitution distributes functions between the national and county government. A close analysis of the list reveals that these functions relate to human rights and thus in fulfilling what may be seen as mere functional responsibilities county governments will in effect be delivering on rights. Furthermore the Constitution is clear, that in respect to some rights; health, housing, language, education the national government’s role is that of policy formulation with the implementation being left to the county governments.

However, Schedule 4 only serves as a broad guideline: the national government will need to identify and relinquish control of those functions that may be performed by the county government. Examples of these are basic services such as water and sanitation and solid waste management which require decentralised and efficient services that respond to the unique needs of the different communities.

But the obligation of counties to ensure such access is not expressly spelled out. The implications of the constitution are clear: as organs of state the county governments must not only respect but must “protect, promote and fulfil” all rights and specially “take legislative, policy and other measures, including the setting of standards, to achieve the progressive realisation of the rights guaranteed under Article 43”.

In the financial year 2012/2013, the 47 Counties were allocated Kshs. 9,783,568,690 from the National Government, and collected Kshs. 6,756,063,084 from local sources amounting to Kshs. 16,539,631,774. In addition, the Counties received Kshs. 2,894,833,400 from the Transition Authority towards infrastructure development and civil works. A total of 18 counties received Kshs 3,762,711,595 as Local Authority Transfer Fund (LATF).¹⁶

The county expenditure by spending unit is shown in the chart hereunder.



Largely, Counties have raised outrageous budgets with unbelievable budgetary allocations to non-core functions such as foreign travel expenditure for the members of the Executive and County Assemblies¹⁷. These misallocations have not only affected counties’ functional delivery of services but have as well contributed to the increased violation of economic

and social rights in the country. The Governors with the County Assemblies being reduced to rubberstamps are monopolizing expenditure decisions.

Low absorption of development funds given to the counties by the Transition Authority is worth mentioning. Diminished local revenue collections coupled with weak reporting frameworks also posed a great challenge to the financial operations in the counties. The risk is real of county government emulating the national government, whose budget has hitherto been dominated by personnel emoluments, especially in labour-intensive sectors such as health and education.

The performance by county government of their functions under the Constitution will in effect lead to the actual fulfilment of human rights. As the government closest to the people, the county government will need to be sufficiently resourced to ensure that citizens have access to rights.

But at the end, the success or failure of our new governance model will be determined by how it is implemented. This calls for the implementers to understand the aspirations of the Kenyan people as captured by Article 10 on our national values and principles.

Another area of concern is with what to do about inherited unequal development, which county level resources would be unable to handle in the short to medium term. Since the national government retains such a large share of national revenue, it is imperative that it develops a time bound programme for upgrading the basic social and physical infrastructure needs upon which counties can then build on. Non-state actors can assist in this task by highlighting the inequalities and the deprivations that exist in the places where they work, which government research or investigations might not easily reach. Related to this, the concept of marginalization and the framework for its management should be defined to enable a re-assessment of the size and role of the Equalization

¹⁶Office of the Controller of Budget County Budget Implementation Review Report Fourth Quarter for year 2012/2013

¹⁷Controller of Budget has raised concerns over the outrageous budgetary allocations on non-core activities by most counties, saying such allocations would soon be subjected to interrogation by her office. The Controller of Budget is mandated by the Constitution to oversee the implementation of the budgets of national and county governments, authorising withdrawals from public funds, the Consolidated Fund, the County Revenue Fund and the Equalisation Fund.

Fund.

An analysis of 2012/2013 county governments' budgets in 5 counties namely Laikipia, Busia, Homa Bay, Uasin Gishu and Nairobi by a consortium of non-state actors highlighted additional major challenges in these budgets, with a bearing on the delivery of economic and social rights related services at county level. These findings are largely reflective of the budgeting processes in most of the counties and therefore provide a uniform launch pad for reforms. They include:

1. County governments are not explaining how their budgets comply with the "fiscal responsibility principles" in the Public Finance Management (PFM) Act, which include limits on the share of spending for recurrent expenditure in the medium term, the share of spending on wages, the size of the debt, and so on.
2. Counties are failing to provide information on programmes below the ministry or department level. This reflects the fact that they used line-item budgeting rather than programme-based budgets in the first year.
3. Some county budgets seem to focus on functions that are national without explanation, while a number of county budgets also ignore areas that are county functions as per the constitution.
4. Few counties have planned adequately for disasters. The PFM Act recommends that counties do this by opening a County Emergency fund which can spend up to 2% of revenues each year on emergencies, but most counties have not done so.
5. In many cases, counties have not provided unit costs for major items, but simply block figures that make it impossible to know how many of particular items will be purchased, or at what cost.
6. Many counties have budget lines that are unclear. The lack of narrative and notes explaining these budget lines can lead to confusion about government priorities.
7. Counties must set aside funds for public participation in planning and budgeting, but

most do not seem to have done so, or at least we are unable to find it, given the budget lines used.

Important considerations in county finances management for the realization of economic and social rights

Adherence to the constitution and provided legal framework

The Constitution is the supreme law of Kenya and it binds all persons and all state organs at the national and county levels. The success or failure of devolution will depend almost entirely on political goodwill and the full and proper implementation of the constitution. In order to succeed, county government officers must follow the law. They can only do so if they understand its provisions and those of other legal frameworks implementing it. Impunity is a problem in Kenya only because those entrusted with power choose to ignore the laid down laws and procedures and get away with it.

Building the capacity of county staff

Counties in concert with the National Government must ensure that all county governments' officials not only understand what needs to be done, but possess the necessary skills to deliver services to the electorate. The capacity building and training should specifically focus on budgeting, project management, adherence to procurement procedures, and development of requisite legal framework to support revenue growth.

Counties also need to undertake human resource assessment and job evaluation to ascertain labour requirements and align former local authority workers to the County structure.

Forging partnerships

County governments must seek strategic partnerships to benefit the people both nationally and internationally. This can be done through the establishment of strategic partnership units that constantly scope for innovative and unique ideas that can enhance efficiency and effectiveness.

The units' successes will depend on their ability to

¹⁸ Learning By Doing: Toward Better County Budgets in 2014/15 A Joint Brief by Institute of Economic Affairs, TISA, International Budget Partnership, WALINET, World Vision Kenya, ARTICLE 19, and I Choose Life – Africa <http://internationalbudget.org/wp-content/uploads/Joint-Synthesis-Paper-on-County-Budgets.pdf> accessed on 18/8/2014

reach out to the corporate sector, work with CSOs, religious institutions, other non-state actors, development partners and community groups to further the interest of the county and achieve the desired vision.

Ensuring fiscal discipline and prudence

The county governments are being entrusted with billions of taxpayers' funds. The Commission on Revenue Allocation (CRA) formula provides a weight of 2% for revenue allocated to a given county on the basis of fiscal responsibility. County Governments must retain strong internal audit functions and act on recommendations of the auditor general. They must involve citizens in enforcing fiscal discipline and open up channels that receive information on indiscipline to prevent the decentralization of corruption and abuse of office.

Provision of information

In Kenya, lack of transparency and accountability in the management of public resources coupled with the absence of public information on actual government revenue and expenditure has directly contributed to corruption, ineptitude and inadequate public service delivery for the taxpayers. The budget process has been shrouded in mystery with little or no citizen engagement in its preparation. Article 35 of the constitution provides for the right to access to information held by the state and the county governments must live to this expectation. The governments must continually inform the public about the state of affairs in the county by publishing and publicizing information that affects them on a regular basis.

Devolution cannot be introduced into an information or managerial capacity vacuum. The local population must be politically mature, have access to adequate information and be aware of their rights and channels by which they can exercise them. It is when citizens exercise accountability that devolution can be said to have achieved its optimum. It is therefore imperative that local communities be empowered on their roles and responsibilities as a key ingredient in building an effective system of devolution.

Enabling citizen participation

Article 174 of the constitution gives the powers of

self-governance to the people and enhances the participation of the people in the exercise of the powers of the State and in making decisions affecting them. Citizen participation is not a favour but a constitutional obligation that the governor must adhere to. It must however be clearly defined by the county government in agreement with the citizens to achieve satisfactory results. Popular participation in decision making and exercising scrutiny must be enabled as birthed in the following principles:

1. Public consultations should be open to the widest spectrum of citizens and taxpayers, without discrimination.
2. Safeguards should to be established to prevent consultative forums from being dominated by any one political group, organized interest, or politician.
3. Public consultations must have clear and specific purposes, and these purposes should generally be; to seek feedback on government plans, budgets and budget implementation, to seek specific preferences over a defined set of priorities, such as prioritizing a list of capital investments, and to present and seek feedback on audit reports and queries raised by auditors.
4. The timeline and venues for public consultations should be made known at least two weeks in advance of the consultation to ensure that people can prepare themselves to participate.
5. Public consultations must set aside dedicated time for public feedback and questions.
6. Public participation in the planning and budget process should occur at all stages in this process, including formulation, enactment, implementation, and oversight/evaluation.
7. The public must have access to all relevant plan and budget documents in a timely fashion, meaning at least two weeks before any decisions are taken about draft plans or budgets.
8. All plan and budget documents should contain an executive summary and a narrative explanation of tables and figures.
9. Citizens should be able to provide input into public consultations through direct

- participation, through representatives, and through written comments
10. Where the public is asked for input, there should be a feedback mechanism so that citizens know whether or not their inputs were received, and whether and why they were or were not incorporated into the relevant plans or budgets

Formulation of strategy: alignment of county strategy to national development plans.

The County Fiscal Strategy Paper and the County Budget Review and Outlook Paper provide a solid ground for sound budget planning for the county. These are, however, not enough for long term planning. Counties must develop in a participatory manner, the integrated development plan, spatial development plan, county sectoral plan and urban areas and cities plan. They must establish a baseline and conduct a SWOT analysis to define the strategy and align it to the Vision 2030 by providing details of how the county will contribute to the key pillars of economic, social, political and macro enablers. The strategy must be developed with input of all stakeholders to ensure ownership and shared with the public.

Minimization of waste and maximization of revenue

Article 209(3) of the constitution mandates counties to generate own revenues. This ability is limited by area available, population, physical infrastructure, poverty levels and natural resources among other factors. Unfortunately the revenue sources availed to the counties are similar to those initially available to local authorities. The revenue from the National Government to is insufficient to finance all county operations and capital investments. Therefore, county governments must innovate and adopt revenue collection and deployment models that build on efficiency, effectiveness and optimization.

Investing in monitoring and evaluation

County governments have to entrench monitoring and evaluation systems for performance tracking. The systems should incorporate key performance indicators and means of verifying that are publicly made available for collaborative monitoring. Citizens should be included in the M&E committee to play a

central role in verification of project implementation at the community level. M&E reports must be periodically produced and shared in scheduled public forums for review and public deliberations. These may be produced alongside the county quarterly report.

Decentralized Funds.

The Constituency Development Fund (CDF):

Since establishment in 2003 through an Act of Parliament the government of Kenya has cumulatively allocated a whopping KSh.107 Billion to CDF. The CDF was established to fight poverty at the grassroots level. To achieve this goal the CDF was structured to ensure that constituencies receive 2.5% of the Government annual ordinary revenue, besides monies to be received from other sources by the CDF Board.

Over the years, it has emerged that the core problem with CDF is directly attributable to a weak legal framework and near absent oversight mechanisms that limit citizen participation in decision making and project implementation. Members of Parliament, the de-facto patrons of CDF, had taken advantage of the legal loopholes to use CDF as a political tool.

The 2013 Act aims at re-aligning CDF to the Constitution. All the provisions regarding citizen participation remain virtually the same, with a few administrative changes introduced. It attempts to curtail the role of MPs as administrators, limiting them to mobilizing community meetings and coordination of selection of committee members by citizens. The administration of CDF will now fall in the hands of a Board official dispatched to the constituency, while MPs exercise oversight over projects. The new Act reduces the number of CDF Committee members down to 10 from 15, while at the same time providing for citizens to nominate who sits in the CDF committees. The MP still sits on the committee ex-officio with voting powers.

Lessons from CDF:

Notwithstanding the constitutional and legal ambiguities, CDF stands out as perhaps the most

focused attempt to address inequality and target poverty at the local level. It has been responsible for the transformation of communities all over the country. CDF has built classrooms, health centres and dispensaries, roads, police posts, bridges, dug boreholes and provided water, supplied electricity, irrigated farms and educated children from poor and vulnerable families. Indeed no other fund has been responsible for transforming infrastructure among rural populations in Kenya. In instances where political goodwill existed, the MP was development conscious and citizens effectively involved, CDF has played a pivotal role in socio-economic transformation of those communities.

The CDF structure and management model is fairly straight forward and this makes it easy to track project proposals, disbursements and expenditures. It is also easy to monitor project implementation. The “locking” of funds to specific projects limits the extent to which they may be diverted to other purposes without the express approval of the CDF Board. This has made citizen oversight by CSOs possible.

In as much as CDF has been lauded a demonstrable model of resource decentralization and the precursor of devolution in Kenya, it has not been devoid of an array of challenges. They include mismanagement of funds, poor project planning and implementation, lack of technical capacity and politicization of the fund. The most salient challenges to the fund are discussed hereunder.

- Proliferation of capital projects: CDF is increasingly being used to fund capital projects, that is, ‘social’ infrastructure e.g. schools, clinics etc. However, the failure to allocate sufficient and continuous operational and maintenance funds for these projects is threatening their sustainability. This has contributed to the existence of so many white elephants in most of the constituencies.
- CDF management is weak: this is characterized by deficient popular participation in the planning and selection of development projects by the beneficiaries. A

study by the Institute of Economic Affairs-Kenya entitled “Kenyan’s Verdict: A Citizens Report Card on the Constituencies Development Fund (CDF)”¹⁹ established that beneficiary opinions about the management of CDF were less positive than their opinions on planning and selection of projects. About half of beneficiaries were either dissatisfied or had no opinion on overall cost of projects, composition of CDF management committees and dispute and conflict resolution mechanisms. There was evidence of micro-management of Community Development Committees by MPs. In most cases their personal assistants run the show, sometimes in total disregard of the committees and communities opinion.

- Logistical Constraints: Lack of means of transportation at the constituency level limits effective monitoring and evaluation of the projects. In addition, lack of adequate remuneration for the project and location committees makes it impossible to attract the most qualified personnel to oversee the projects.
- Limited skills in project planning: Inadequate knowledge of project planning among community and committee members and the general lack of training and capacity building, constrains the project planning. Illiteracy among Community Development Committees’ members also limits their capacity to implement projects and ability to prepare work plan hence causing project delays. The lack of strategic plans to guide development in the constituencies does not help the process of project prioritization.

Equalization Fund

Currently, the disparities in the development status between different regions of Kenya are gaping. This state of affairs has been blamed on past policies that ignored areas not deemed as ‘productive’ a term whose definition was based on agricultural potential. Recognising this, the Constitution in Article 204 establishes an equalization fund, to be financed by

¹⁹ Institute of Economic Affairs Report of 2009.

one-half per cent (0.005 percent) of nationally collected revenues. The purpose of this fund is 'to provide basic services including water, roads, health facilities and electricity to marginalised areas to the extent necessary to bring the quality of those services in those areas to the level generally enjoyed by the rest of the nation, so far as possible'. The fund will be maintained for a period of twenty years after which the National Assembly may extend the period.

However, in addition to the fiscal resources to be provided to the county, there is need to build the capacity of the county governments to handle the new responsibilities. Experience garnered from the current local authorities demonstrates that local authorities do not have the capacity to handle what they are already doing. Councils have been dogged by poor revenue collection, public fights and quarrels, poor management of staff and assets to name but a few. Thus moving forward, there is urgent need to build the capacity of personnel and political leadership at the county level to deliver on the new additional responsibilities.

Moreover, one of the most important shared institutions is that of law making at the national level. The law making process must be for the common good: the interests of the smaller counties must not be overlooked. Nevertheless, there is a real opportunity for elected members to be more involved in the law making process than has been the case in the past. Article 96 (1) gives one of the functions of the senate as to represent the interests of the county governments. Most importantly, senators must be aware of the burden they will be passing on to the county governments through legislation and hence make sure there are commensurate resources to match their obligations.

Other targeted decentralized grants include the Free Primary Education Programme, the Secondary Education Bursary Scheme (SEBS), the Constituency Aids Fund, the Youth Enterprise Fund, the Rural Electrification Programme and the secondary school tuition fee waiver. Despite the introduction of these funds, political decentralization remained inevitable.

Indeed in 2007, one of the key issues on the election platform was whether Kenya should go into a regional form of government thereby indicating that fiscal decentralisation efforts may not be addressing pertinent issues of political and economic development adequately. This is supported by study findings of a few funds, that although some devolved funds have enhanced service delivery, poor governance frameworks erode optimal service uptake.²⁰

Women's Enterprise Fund

Women Enterprise Fund is a Semi-Autonomous Government Agency in the Ministry of Devolution and Planning (formerly in the Ministry of Gender, Children & Social Development) established in August 2007, to provide accessible and affordable credit to support women start and/or expand business for wealth and employment creation.

The Fund also provides business support services such as capacity building, marketing, promotion of linkages and infrastructure support. It is a flagship project under the social pillar in Vision 2030 and therefore a demonstration of the Kenya Government's commitment to the realization of the Millennium Development Goal on Gender Equality and Women Empowerment (MDG 3).

This Fund has enabled many women especially the most vulnerable including persons living with HIV and AIDS access cheap collateral free credit. These women who support large families on incomes of less than USD 60 a month have been enabled to save and borrow sufficient funds against those savings to embark on life changing economic ventures. The impact of the empowerment of these vulnerable women reverberates through the whole community social fabric as women are the unifying pillar in most families in Kenya.

Components of Effective and Efficient Fiscal Decentralisation

There are essentially four pillars of fiscal

²⁰ Gikonyo, W. (2006). Decentralised Funds in Kenya, Working Paper. Nairobi: Hanns Seidel Foundation. Institute of Economic Affairs and the Kenya National Commission on Human Rights. (2006). Kenyans Verdict: Citizen Report Card on the Constituencies Development Fund (CDF), Nairobi: Institute of Economic Affairs. Oyugi, L. N. (2005). Fiscal Decentralisation in Kenya: The Case of Local Authority Transfer Fund, IPAR Discussion Paper No. 069/2005. Nairobi: The Institute of Policy Analysis and Research.

decentralisation. These are a money transfer to a local unit, the power of a local unit to raise tax, the power of a local unit to borrow and the power of a local unit to make decisions and implement them. Experiences around the world show that efficient and effective fiscal decentralisation must exist in tandem with responsibility over resources, autonomy and incentives, macroeconomic stability, simplicity, minimal administrative costs, equalisation, consistency with national trade and development strategies, cooperation at all levels of government and legal and constitutional mandates.²¹ These elements can be referred to as the building blocks of fiscal decentralisation. If done, this will mitigate risk and loss to public finance management and effectiveness in Kenya in both the immediate and long terms.

Vision 2030

Kenya Vision 2030 is the new country's development blueprint covering the period 2008 to 2030. It aims at making Kenya a newly industrializing, "middle income country providing high quality life for all its citizens by the year 2030". The Vision has been developed through an all-inclusive stakeholder consultative process, involving Kenyans from all parts of the country. The vision is based on three "pillars" namely; the economic pillar, the social pillar and the political pillar. This vision's programme plan comes after the successful implementation of the Economic Recovery Strategy for Wealth and Employment Creation (ERS) which has seen the country's economy back on the path to rapid growth since 2002, when GDP grew at 0.6% rising to 6.1% in 2006.²² The blue print is founded on three pillars namely the political pillar, the social pillar and the economic pillar.

The economic pillar aims at providing prosperity of all Kenyans through an economic development programme aimed at achieving an average Gross Domestic Product (GDP) growth rate of 10 % per annum the next 25 years.

The social pillar seeks to build "a just and cohesive society with social equity in a clean and secure environment". The political pillar aims at realising a democratic political system founded on issue-based politics that respects the rule of law, and protects the rights and freedoms of every individual in the Kenyan society. The Kenya Vision 2030 is to be implemented in successive five-year Medium Term plans with the first such plan covering the period 2008 – 2012.

Generally, the vision 2030 blue print comprises programmes that will spur economic growth and reduce the gap between the rich and the poor. The programmes cut across trade, tourism, manufacturing, health, education, water and sanitation, housing development, the environment, marginalized and vulnerable groups such as women, youth and persons living with disabilities and equity and poverty eradication among other components of economic and social rights.

The implementation of vision 2030 will fundamentally improve the enjoyment of economic and social rights in Kenya. It is therefore very imperative that the National Government ensures a seamless implementation of the blue print unimpeded by bureaucracy, corruption, breakdown of the rule of law amongst other tenements of bad governance.

Social Protection in Kenya.

There is broad consensus among policy makers in Africa that social protection is a powerful way to fight poverty and promote inclusive growth. The African Union's Social Policy Framework (SPF), which was endorsed by all African heads of state in 2009 explains that social protection includes "social security measures and furthering income security; and also the pursuit of an integrated policy approach that has a strong developmental focus, such as job creation..."²³ The SPF commits governments to progressively realizing a minimum package of basic

²¹Kenneth Davey.(2003).Fiscal Decentralisation.<http://unpan1.un.org/intradoc/groups/public/documents/UNTC/UNPAN017650.pdf>

²²Republic of Kenya (2008).“Kenya Vision 2030:A Globally Competitive and Prosperous Kenya,”Government of Kenya,Nairobi.

²³Alviar, C. and R. Pearson (2009).“Cash Transfers for Vulnerable Children in Kenya: From Political Choice to Scale Up.”Social and Economic Policy Working Paper, UNICEF, New York.

social protection that covers: essential health care and benefits for children, informal workers, the unemployed, the elderly, and people with disabilities. This approach is echoed in the United Nation's Social Protection Floor Initiative. Across Africa, social protection has become a mainstay in poverty reduction strategies and many countries have developed a social protection strategy.

Social protection in Kenya is defined as *“policies and actions, including legislative measures, that enhance the capacity of and opportunities for the poor and vulnerable to improve and sustain their lives, livelihoods, and welfare, that enable income-earners and their dependants to maintain a reasonable level of income through decent work, and that ensure access to affordable health care, social security, and social assistance.”*²⁴

However, the coverage of its social insurance contributory schemes such as the National Health Insurance Fund (NHIF) and the National Social Security Fund (NSSF) safety net programmes in the form of cash transfers to orphaned and vulnerable children (OVC) and the elderly has tended to be low and their effectiveness limited. The main form of safety net support offered to poor and vulnerable populations has been humanitarian relief (often in the form of food aid), which had been mobilized by the government and the international community in response to crises, such as drought and floods. In many parts of the country, most notably Turkana and other Arid and Semi-Arid Lands (ASAL), this type of response has become common, with emergency food relief being provided to poor populations on an annual basis. This suggests that this instrument had evolved into a regular response to chronic poverty and food insecurity. Concurrently, the long established National Health Insurance Fund (NHIF) and National Social Security Fund (NSSF) have provided coverage mainly to formal sector workers, representing 8 percent of the population.²⁵

²⁴ ISSA (2008). “Application of Performance Contracting in Social Security Administration in Kenya – A Case of the National Social Security Fund,” International Social Security Association, Geneva

²⁵ IDS (2011). “Lessons from Social Protection Programme Implementation in Kenya, Zambia, and Mongolia,” Research Report 2011(69), Institute of Development Studies, Brighton, UK.

²⁶ The National Social Assistance Act is based on Article 43 of the Constitution that expressly guarantees all Kenyans their economic, social, and cultural rights, including basic rights to health, education, food, and decent livelihoods. It explicitly asserts the right “of every person... to social security” and binds the State in Article 43(3) to “provide appropriate social security to persons who are unable to support themselves and their dependants.” This implies social protection in its totality: social assistance; social security; and health insurance.

While lauding the advances made through these contributory and safety net social security programmes including the enactment of the National Social Assistance Act of 2012²⁶, it is worthwhile to note that scaling up of social security both vertically and horizontally is inevitable. More so, the current social security framework is fragmented and disjointed resulting in the duplication of programmes and inefficiencies.

The following areas are subsequently ripe for reform:

- Define the appropriate programme mix within safety nets to effectively reach the highest population of the poor and vulnerable;
- Involve Communities in identification of the poor using participator processes
- Improve coordination among safety net programmes to reduce fragmentation and duplication;
- Increase financing to safety nets in the face of a tight fiscal environment;
- Expand contributory programme coverage to the informal sector while also addressing problems of adequacy and financial sustainability.

2.3 Existing Normative Framework

The Kenya Constitution, 2010

On 27th August 2010, Kenya promulgated a transformative constitution with the objective of fighting poverty and inequality as well as improving the standards of living of all people in Kenya.

For the first time in its history, Kenya entrenched socio-economic rights as part of a comprehensive Bill of Rights within its Constitution. The main provisions

on socio-economic rights in the Constitution are contained in Article 21(2), which espouses the standard of progressive realisation, Article 43, which encompasses the rights to health, housing, food, water, social security and education, and Article 53(1), which provides for children's rights to free and compulsory education as well as basic nutrition, shelter and healthcare. The importance of work in the realisation of improved standards of living, and thus the transformation of the socio-economic practices, fair remuneration, fair working conditions, the formation of and participation in trade unions, and the right to strike conditions of individuals and families, is also acknowledged by the Constitution in its espousal of an array of labour relation rights such as the rights to fair labour practices, fair remuneration, fair working conditions, the formation of and participation in trade unions, and the right to strike²⁷.

The importance of these rights in enhancing the realisation of the egalitarian transformation of the Kenyan society was aptly captured by the High Court of Kenya in the case of John Kabui Mwai and Others v The Attorney General and 2 others as follows²⁸:

In our view, the inclusion of economic, social and cultural rights in the Constitution is aimed at advancing the socio-economic needs of the people of Kenya, including those who are poor, in order to uplift their human dignity. The protection of these rights is an indication of the fact that, the Constitution's transformative agenda looks beyond merely guaranteeing abstract equality. There is a commitment to transform Kenya from a society based on socio-economic deprivation to one based on equal and equitable distribution of resources. This is borne out by Articles 6(3) and 10(2) (b). The realisation of socio-economic rights means the realization

*of the conditions of the poor and less advantaged and the beginning of a generation that is free from socio-economic need*²⁹.

One of the most enduring challenges for the realisation of economic and social rights has been the standard that was adopted at the international level for their realisation. Due to the supposedly vague and resource-dependant nature of economic and social rights, the standard of progressive realisation³⁰ to the maximum of available resources was adopted for their realisation. The standard was first entrenched in Article 2(1) of the ICESCR³¹. The Constitution of Kenya similarly entrenches the same standard in Article 21(2) which provides that, '[t]he State shall take legislative, policy and other measures, including setting of standards, to achieve the progressive realisation of the rights guaranteed under Article 43'.

The obligation to take steps, which is an immediate obligation, requires the State to put in place legislative, policy and programmatic framework in the context of a national strategic plan for the realisation of the entrenched economic and social rights. These steps must be deliberate, concrete, targeted, adequately financed and capable of realising the entrenched rights³². Apart from the adoption and implementation of a national strategy for the realisation of economic and social rights, the State must also put in place sufficient, practical, accessible, affordable, timely and effective remedies, both judicial and administrative, for the protection and enforcement of economic and social rights should there be violations³³.

In the Kenyan context, the Constitution accords a margin of appreciation to the government in its adoption of measures and the allocation of resources in the realisation of economic and social rights by providing as follows³⁴:

²⁷Orago NW, "Limitation Of Socio-Economic Rights In The 2010 Kenyan Constitution : A Proposal For The Adoption Of A Proportionality Approach In The Judicial Adjudication Of Socio-Economic Rights Disputes, PER / PELJ 2013(16)5

²⁸ John Kabui Mwai & 3 Others v Kenya National Examination Council & 2 Others, High Court of Kenya at Nairobi, Petition No. 15 of 2011, 6

²⁹EachRights, 'A Compendium on economic and social rights cases' pg. 4 (July 2014)

³⁰EachRights, 'A Compendium on economic and social rights cases' pg. 4 (July 2014)

³¹Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

³²ICESCR General Comment No. 3, paras 2 & 4

³³ICESCR General Comment No. 3, para 5; and General Comment No. 9, para 9.

³⁴The Constitution of Kenya, 2010, Article 20(5) (c).

[T]he court, tribunal or other authority may not interfere with a decision by a State organ concerning the allocation of available resources, solely on the basis that it would have reached a different conclusion.

However, this discretion of the government to rely on the unavailability of resources as a defence for the non-realisation of economic and social rights is not absolute, and is constrained by the Constitution itself which places the onus on the government to demonstrate the unavailability of resources³⁵. The Constitution further requires the government to prioritise its resources in the realisation of its economic and social rights obligations in relation to vulnerable groups by providing as follows³⁶: [I]n allocating resources, the State shall give priority to ensuring the widest possible enjoyment of the right or fundamental freedom having regard to prevailing circumstances, including the vulnerability of particular groups or individuals. The duty to prioritise the essential needs of these vulnerable and marginalised groups is further emphasised by the Constitution as follows³⁷:

All State organs and all public officers have the duty to address the needs of vulnerable groups within society, including women, older members of society, persons with disabilities, children, youth, members of minority or marginalised communities, and members of particular ethnic, religious or cultural communities.

The requirement that the socio-economic needs of marginalised and vulnerable groups be prioritised is further reflected in Article 53 of the Constitution, which is not made subject to the standard of progressive realisation.

The Economic and Social Obligations of the State

Kenya is a multi-party democratic state with three arms of Government – the legislature, the executive, and the judiciary. The 2010 Constitution made a number of changes to Kenya's political and governance structures, including the introduction of

a devolved government. The powers of the Government under the Constitution of Kenya 2010 are divided into 3 functions: executive function at national and county levels, legislative function at national and county levels and the judicial function.

The Executive is the arm of government that implements government laws and policies, a role neither performed by the Judiciary, nor the Legislature. Under the constitutional principle of separation of powers, each organ of government has a discrete and defined area of power.

Under the Constitution of Kenya 2010, the main function of the legislature is to protect the Constitution, promote democratic governance and make laws. The legislature (Parliament) is divided into two chambers- the National Assembly and the Senate.

The National Assembly enacts legislation that may cover both National and County issues. The National Assembly also plays an important, but not exclusive, role in the financial control of Government expenditure. The National Assembly determines the allocation of revenue between the national and county governments. The establishment of the Consolidated Fund, into which all revenue of the Government must be paid, secures the National Assembly's control over revenue and expenditure. However, Parliament may authorize the establishment of other funds for specified purposes, and may also provide that some of the revenue need not be paid into any established fund but may be retained by the authority, which received it, for offsetting the expenses of that authority. The National Assembly also acts as a control and critic of the Government. It reviews the conduct of the President, the Deputy President and other state officers and initiates the process of their removal from office.

The Senate represents the counties and serves to protect the interests of the counties and their governments. The Senate considers debates and approves Bills that concern counties. The Senate

³⁵ The Constitution of Kenya, 2010, Article 20(5)(a)

³⁶ The Constitution of Kenya, 2010, Article 20(5) (b).

³⁷ The Constitution of Kenya, 2010, Article 21(3).

determines the allocation of revenue among counties and exercises oversight over national revenue allocated to the county governments. The Senate also participates in oversight of state officers by considering and determining resolutions to remove the President and Deputy-president from office.

The Judiciary consists of the Courts and all officers of the Courts including, the Chief Justice, the Attorney General, Judges and Magistrates. The judiciary determines disputes which arise between individuals, and those arising between individuals and the State.

One of the issues for judicial reforms intended to be resolved by the New Constitution was the need to have a more independent, transparent and accountable judiciary. The New Constitution attempts to address this concern by creating a more inclusive and accountable Judicial Service Commission as an independent mechanism for appointment of judges. Under art 171 of the New Constitution, other than the Chief Justice, the Attorney General and representatives of each of the superior courts, the Judicial Service Commission is equally representative of magistrates, the Law Society of Kenya, a statutory body that regulates advocates, the Public Service Commission and other lay persons.

The economic and social obligations of the state are contained in Article 21 of the Constitution, which contains the State's duty to observe, respect, protect, promote and fulfil the rights in the Bill of Rights ³⁸.

The State must make efforts towards the realisation of the entire continuum of obligation as they are interrelated & interdependent ³⁹.

i. Obligation to observe – all levels, arms and organs of the State should take into account the fundamental rights entrenched in the Constitution in all spheres of governance, especially in the development of its

- legislative, policy and programmatic frameworks that may have adverse consequences for the enjoyment of rights ⁴⁰.
- ii. Obligation to respect – this is defined as the obligation to respect human rights as, requiring the State to refrain from interfering with the existing fundamental rights of rights-holders; to respect the right-holders autonomy, freedom and resources; as well as the liberty of their actions in using the resources available to them individually and collectively in the realization of their fundamental rights ⁴¹.
- iii. Obligation to protect – This entails the responsibility of the State to protect rights-holders against political, economic and social interferences of their rights by third parties which lead to the violation of their fundamental rights ⁴². The State is this under a duty to put in place effective legislative, policy, administrative and regulatory structures to ensure that third parties do not violate the rights of right-holders and further requires the State to put in place effective judicial and other remedial measures for the vindication of rights in instances of violation ⁴³. The obligation to protect can be used together with the horizontal application of the Constitution ⁴⁴, in enhancing the protection of rights-holders from the violation of their rights by third parties, be they private individuals or multi-national corporations ⁴⁵.
- iv. Obligation to promote – this requires the State to put in place the necessary legislative, policy and programmatic framework aimed at creating a conducive environment for the free enjoyment and exercise of fundamental rights. This conducive environment for the enjoyment of rights is to be achieved through human rights education, advocacy and awareness, the promotion of tolerance and peaceful co-existence between different

⁴⁰ EachRights, 'A Compendium on economic and social rights cases' pg. 4 (July 2014)

⁴¹ Social and Economic Rights Action Centre (SERAC) and Another v Nigeria (2001) AHRLR 60 (ACHPR) 2001, para 44. para 45.

⁴² SERAC case, para 46

⁴³ EachRights, 'A Compendium on economic and social rights cases' pg. 4 (July 2014)

⁴⁴ This is enforcement of the bill of rights by and against a private citizen, a public or a government entity

⁴⁵ EachRights, 'A Compendium on economic and social rights cases' pg. 4 (July 2014)

- groups or communities⁴⁶.
- v. Obligation to fulfil – this requires the State to move its machinery towards the actual realisation of the rights in question⁴⁷. It is divided into two: the obligation to facilitate and the obligation to provide. The obligation to facilitate requires the State to take steps, through the adoption of national strategic plans, for the realisation of the entrenched socio-economic right. It thus requires the State to put in place conducive legislative, policy and programmatic framework to enable people meet their own socio-economic needs using their own resources as well as for private actors to work together with the State in public-private partnerships for the realisation of the entrenched economic and social rights⁴⁸. The duty to provide on the other hand requires the State to provide the actual socio-economic goods and services to poor, vulnerable and marginalised groups who are unable to meet their socio-economic needs using their own resources due to circumstances beyond their control. The duty will for example, require the State to provide adequate food to people in arid and semi-arid areas facing starvation due to drought and famine⁴⁹.

Legislative Framework

The promulgation of the new constitution brought with it significant changes to the legal and administrative landscape of the country. The new Constitution however is still a 'work in progress', which requires significant legislation in order for the gains thereunder to be fully realized. There are at least 49 pieces of legislation required in order to fully implement the Constitution. The Constitution provides for the legislation that is required to be passed and indicates timelines within which legislation should be passed, the shortest being one (1) year and the longest being five (5) years.

Legislation on key areas of the Bill of Rights such as legislation on consumer protection; fair

administrative action; right to a fair hearing and rights of detained persons are required to be passed within four (4) years from the promulgation of the Constitution.

Legislation that has been passed by Parliament are as follows:

- a) The Marriage Act of 2014
- b) The Matrimonial Property Act, 2013
- c) Kenya Citizens and Foreign Nationals Management Service Act, 2011
- d) The National Gender and Equality Commission Act, 2011
- e) The Kenya Citizenship and Immigration Act, 2011
- f) The Kenya National Commission on Human Rights Act, 2011
- g) The Consumer Protection Act, 2012
- h) The Treaty Making and Ratification Act, 2012
- i) Social Assistance Act (No. 2 of 2013)

Legislation that is still pending are as follows:

- a) The Health Bill, 2014
- b) The Persons with Disabilities (Amendment) bill, 2013
- c) The Victim Protection Bill, 2013
- d) The Access to Information Bill, 2013
- e) National Registration and Identification Bill, 2012
- f) The Refugee Bill, 2012
- g) The Data Protection Bill, 2012
- h) The Protection against Domestic Violence Bill, 2013

Role of Judiciary

The Constitution of Kenya promulgated by the Kenya people in August 2010, gave the courts a prominent role as the guardians of the Constitution and as the main body charged with the protection of the entrenched fundamental rights and freedoms. This was affirmed in the High Court Case of Republic vs. Independent Electoral and Boundaries Commission where the Court stated that: '[t]he Judiciary acts as the

⁴⁶As above

⁴⁷SERAC case, para 47.

⁴⁸EachRights, 'A Compendium on economic and social rights cases' pg. 4 (July 2014)

⁴⁹As above

repository and watchdog and is enjoined to enforce and defend the Constitution.

Judicial restructuring is but one of the structural and governance changes that the 2010 constitution seeks to introduce. It should be noted that the 2010 Constitution constructs a juridically, administratively and politically empowered and independent judiciary that is to implement, enforce and offer an authoritative interpretation of the constitution⁵⁰. In this role, the judiciary will be instrumental in adjudicating the constitutionality and legality of executive, parliamentary, and even judicial⁵¹ processes and the exercise of power.

The Judiciary, like the Executive and the Legislature, has an important role to play in protecting economic, social and cultural rights. It is the duty of judicial officers to ensure that the State meets its obligations to observe, respect, protect, promote and to fulfil socio-economic and cultural rights by ensuring that the State refrains from interfering with the enjoyment of these rights; prevents others from interfering with the enjoyment of these rights and adopts appropriate positive measures towards the full realization of these rights. But most importantly, the Judiciary plays a role in giving meaning and effect to the substantive values and ethos that socio-economic and cultural rights underlie in the specific national contexts of our countries. Socio-economic and cultural rights jurisprudence is often referred to as 'the jurisprudence of basic needs for all'. It is a jurisprudence that seeks to nurture and achieve social justice, equity and substantive equality for the people in our countries.

The entrenchment of justifiable economic and social rights in the Constitution gives the courts a prominent role in their realisation. The courts have a dual role as a forum where societal voices, especially those marginalised in the normal political processes, can articulate their needs and hold the government accountable for the realisation of those needs; as well as a facilitator of societal dialogue on the meaning, content, scope and the extent of the

obligations arising from the entrenched economic and social rights.

Despite this clear role entrenched in Articles 22 and 23 of the Constitution, economic and social rights adjudication has, to a degree been constrained by traditional mind-sets that hold onto an ideological distinction between civil, political and economic and social rights, terming the latter rights as non-justiciable⁵².

The supposed non-justiciability of economic and social rights has been based on three interrelated and often overstated arguments: vagueness and resource dependant nature of economic and social rights; separation of powers concerns and the counter-majoritarian character of judicial adjudication of economic and social rights; and the lack of judicial competence and capacity to adjudicate polycentric matters that require the balancing of competing social concerns, especially those that implicate policy and budgets⁵³.

The justiciability of economic and social rights and the competence of judicial officers to adjudicate them have been affirmed at the international level and comparative national jurisdictions. The challenge is therefore upon the Kenyan Courts in the adjudication of economic and social rights cases with the aim of achieving the egalitarian transformative aspirations of the Constitution of Kenya, 2010?

Emerging Jurisprudence – Realization of economic and social rights

Under the previous constitution, cases on economic and social rights were few and far in between perhaps because there were no provisions in the Bill of Rights or anywhere else in the Constitution guaranteeing or protecting SER. Claims of violation of SER were brought under the Bill of Rights provisions on the civil and political rights that were expressly protected.

There were some 'sparks' of transformational decisions such as the decision in *Diana Ndele*

⁵⁰Ben Sihanya (2011) "The Presidency and Public Authority in Kenya's New Constitutional Order," Constitution Working Paper series No. 2 Society for International Development (SID) Eastern & Central Africa, Nairobi. op.cit.

⁵¹For example, through review and appeal functions, the higher judiciary checks the exercise of (Judicial) power by the lower judiciary.

⁵²See for example the case of *Charo wa Yaa v Jama Abdi Noor & 5 others*, High Court of Kenya at Mombasa Misc. Civil Application No. 8

⁵³EachRights, 'A Compendium on economic and social rights cases' pg.4 (July 2014)

Wambua v Paul Makau Wambua⁵⁴, in which the Court applied international law and defined 'basic education' to include higher education, the courts largely adopted a conservative jurisprudential stance.

Almost five years since the promulgation of the Constitution, progress is apparent in the economic and social rights jurisprudence emanating from the Kenyan courts, especially at the level of the High Court. The jurisprudence indicates a slow but a sure progression towards the protection of economic and social rights.

The jurisprudence indicates a slow but a sure progression towards the protection of economic and social rights, with some specific courts showing more propensity towards an enhanced realisation of economic and social rights as fundamental rights despite the challenges of the standard of progressive realisation, while other more conservative courts struggling to accept that economic and social rights are rights.

Progress is especially apparent in relation to housing rights, in relation to the protection from forced evictions. Despite the difficult start in the Charo wa Yaa v Jama Abdi Noor & 4 others⁵⁵ case where the court held that the right to housing as contained in article 21(3) of the Constitution is '*not a final product for dispensation but is an aspirational right, which the State is to endeavour to render progressively*'. The reasoning and decision in Charo shows the failure by the Court to appreciate that with the entrenchment of SER in the Constitution, these rights, though subject to progressive realisation, are no longer aspirational. The courts cannot dismiss SER under the constitution as aspirational or run away from enforcing them simply because of the challenge of enforcement.

The jurisprudence has steadily developed through the Susan Waithera Kariuki & 4 Others v The Town Clerk, City Council of Nairobi & 2 others⁵⁶, the Ibrahim

Sangor Osman & 1121 others v the Minister of State for State for Provincial Administration and Internal Security⁵⁷ & 3 others case, the Mitu-Bell case and culminating in the merits ruling of the Satrose Ayuma and 11 Others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 2 others⁵⁸ (Muthurwa) case. The Courts addressed the clash between property rights and housing rights. It held that in the clash, it is necessary to ensure that the enjoyment of fundamental rights and freedoms by an individual does not prejudice the rights and fundamental freedoms of others. In the Court's judgment, the government should put in place legal guidelines on forced eviction and displacement of people from informal settlements so that when people have to be evicted from such settlement, it is done without violating their constitutional rights and without extreme suffering and indignity.

The emerging transformative agenda was clearly articulated in the John Kabui Mwai⁵⁹ in which the court stated that the one of the fundamental values of the Constitution is transformation of the realities of the deprived which calls for courts to move beyond abstract or formal equality to substantive equality. The Court stated as follows:

The inclusion of economic, social and cultural rights in the Constitution is aimed at advancing the socio-economic needs of the people of Kenya, including those who are poor, in order to uplift their human dignity. The protection of these rights is an indication of the fact that the Constitution's transformative agenda looks beyond merely guaranteeing abstract equality. There is a commitment to transform Kenya from a society based on socio-economic deprivation to one based on equal and equitable distribution of resource. This is borne out by Articles 6(3) and 10(2) (b).

Progression in the development of the jurisprudence in eviction cases, and the propensity of the courts to rely on international and comparative law, can be predicated on the reality of the high number of illegal

⁵⁴High Court Civil Case No. 30 of 2003

⁵⁵High Court of Kenya at Mombasa Miscellaneous Civil Application No. 8 of 2011 (unreported).

⁵⁶Petition No. 66 of 2010 [2011] eKLR.

⁵⁷High Court of Kenya at Embu, Petition No. 2 of 2011 (unreported)

⁵⁸Petition No. 65 of 2010 [2011] eKLR.

⁵⁹Petition No. 15 of 2011 [2011] eKLR.

and forced evictions being undertaken in Kenya and the adverse impact these evictions have on the lives, properties and well-being of those affected by the evictions. Due to the reality that evictions lead to the violation of several fundamental rights of evicted persons, the courts have been more ready to balance housing rights vis-à-vis property rights to ensure that, procedural protection is provided to squatters or people living in informal settlements in instances where evictions cannot be avoided. In their decision in these evictions cases, the courts have been consistent in calling for the enactment of a legislative framework and the development of guidelines on evictions, as well as the development of a legislative, policy and programmatic framework for the provision of housing rights to all Kenyans.

The other economic and social rights have not been subjected to a continuous litigation and the courts have thus not had an opportunity to develop a clear jurisprudence on the same. In few instances where petitions have been filed in court, the litigators have not litigated the cases with due seriousness, leading to those cases being thrown out of court, with adverse consequences for the specific persons whose rights had been violated as well as other similarly placed individuals. It is recommended that economic and social rights litigators undertake cooperative and coordinated litigation on economic and social rights cases, especially at this nascent stage when the courts are still developing the basic jurisprudential framework for the judicial protection of economic and social rights, to ensure that sufficient research and preparation is undertaken, and adequate litigational rigour is applied in the litigation of such cases.

Role of Constitutional Commissions

The following are the pertinent Constitutional Commissions:

1. Commission on Implementation of the Constitution (CIC)
2. Kenya National Human Rights Commission (KNCHR)
3. National Gender and Equality Commission (NGEC)
4. Commission on Administrative Justice (CAJ)

5. Commission on Revenue Allocation (CRA)
6. Kenya Law Reform Commission (KLRC)
7. Judicial Service Commission (JSC)
8. Teachers Service Commission (TSC)
9. Ethics and Anti-Corruption Commission (EAC)
10. National Land Commission (NLC)

Role of the Commission on Implementation of the Constitution (CIC)

Article 43 rights cannot be realized in the absence of specific legal framework. In the absence of this framework, these rights remain blanket rights.

- Hence, CIC has the overall mandate to monitor, facilitate and oversee making of relevant and specific laws in accordance with Article 43 of the COK.
- These rights are administrative in nature. This means that CIC must ensure that the specific laws enacted are stream-lined to capture the administrative provisions and structures.
- CIC must ensure timely formulation of certain rules and regulations resting with the relevant cabinet secretaries (E.g. Ministry of Education, Ministry of Health and Ministry of Water). This curbs the transitional gaps which hamper implementation by relevant State bodies.
- CIC must fast-track the making and passing of these laws.
- They must work closely and in a timely manner with KNCHR, CAJ, NGEC and all relevant Constitutional Commissions to ensure that the spirit and letter of Article 43 COK and other Human Rights is adequately provided for.

Role of the Kenya National Human Rights Commission (KNCHR)

Constitutionally, KNCHR is the principal and overall custodian of promotion, protection and preservation of Human Rights in Kenya. All other Commissions must exercise their legal powers in liaison and coordination with this Commission. This not only ensures that each of the mandated Commission observes its Human Rights related obligations, but it

ensures a comprehensive human rights legal framework capable of measuring Kenya's performance against existing or foreseen inadequacies.

Specifically, In relation to Article 43 COK, S.8 KNCHR Act 2011 provides that KNCHR shall:

- Promote respect for human rights and develop a culture of human rights in the Republic. (This should be done by initial engagement in the law making process)
- Promote the protection and observance of human rights in public and private institutions.(Monitor compliance of the law by all relevant legal and administrative institutions)
- Monitor, investigate and report on the observance of human rights in all spheres of life in the Republic. (This report should be used to bench mark State reports at both the international and national level).
- Receive and investigate complaints about alleged abuses of human rights, except those relating to the violation of the principle of equality and freedom from discriminations under the gender and equality commission, and take steps to secure appropriate redress where human rights have been violated. (Ensure meaningful and realistic engagement with the Kenyan citizenry).
- On its own initiative or on the basis of complaints investigate or research matter in respect of human rights, and make recommendations to improve the functioning of State organs.
- Act as the principal organ of the State in ensuring compliance with obligations under international and regional treaties and conventions relating to human rights except those that relate to the rights of special interest groups protected under the law relating to equality and non-discrimination. (This is shared with NGEC, hence must collaborate to ensure an accurate status of implementation).
- Formulate, implement and oversee programmes intended to raise public awareness of the rights and obligations of a

citizen under the Constitution. (Create informed demand for these rights by the Kenyan citizenry).

- *Work with the National Gender and Equality Commission and the Commission on Administrative Justice to ensure efficiency, effectiveness and complementarity in their activities and to establish mechanisms for referrals and collaboration;*

From the above functions, it is clear that KNCHR must work closely with all other State bodies such as CAJ and NGEC whose functions are exemplified herein.

Role of the National Gender and Equality Commission (NGEC)

The establishment of NGEC is as a result of Article 59 COK and NGEC Act 2011. One of the key guiding principles of NGEC is specific to ensuring that human rights are indivisible, interdependent, inter-related and of equal importance for the dignity of all human beings.

In relation to realization and implementation of Economic and Social Rights S. 8 NGEC Act 2011 provides as follows:

- NGEC shall act as the principal organ of the State in ensuring compliance with all treaties and conventions ratified by Kenya relating to issues of equality and freedom from discrimination and relating to special interest groups including minorities and marginalized persons, women, persons with disabilities, and children.
- NGEC shall work with other relevant institutions in the development of standards for the implementation of policies for the progressive realization of the economic and social rights specified in Article 43 of the Constitution and other written laws.
- NGEC shall receive and evaluate annual reports on progress made by public institutions and other sectors on compliance with constitutional and statutory requirements on the implementation of the principles of equality and freedom from discrimination.

- *NGEC work with the National Commission on Human Rights, the Commission on Administrative Justice and other related institutions to ensure efficiency, effectiveness and complementarity in their activities and to establish mechanisms for referrals and collaboration in the protection and promotion of rights related to the principle of equality and freedom from discrimination.*
- NGEC shall establish, consistent with data protection legislation, databases on issues relating to equality and freedom from discrimination for different affected interest groups and produce periodic reports for national, regional and international reporting on progress in the realization of equality and freedom from discrimination for these interest groups.

Role of Kenya Law Reform Commission (KLRC)

KLRC is one of the strategic and leading Commissions to filter the intent of the making and passing of laws under Article 43. As earlier observed, these rights are administrative in nature thus KLRC must work with CIC and Office of the Attorney General in tabling administrative procedures material specific to these rights.

- S. 6(1) (a) (iv) of KLRC Act 2013 confers a key mandate and obligation by KLRC to ensure the respect for and observance of treaty obligations in relation to international instruments that constitute part of the law of Kenya by virtue of Article 2(5) and (6) of the Constitution; - *This means that the intent captured under the International Convention on Economic, Social and Cultural Rights is adequately domesticated in our operational laws under Article 43 of the COK.*
- Ensure that the letter and the spirit of Article 43 of the Constitution is provided for adequately while making and passing the specific laws. (S.6(1)(a)(i) of KLRC Act 2013)
- Ensure that laws pertaining to Article 43 systematically develop in compliance with the values and principles enshrined in the Constitution (S.6(1)(a)(ii) of KLRC Act 2013)
- Work with the Attorney-General and the

Commission for the Implementation of the Constitution in preparing for tabling, in Parliament, the legislation and administrative procedures required to implement the Constitution;

Role of the Commission on Revenue Allocation (CRA)

Beautiful laws without resources remain just beautiful laws.

The principal function of this Commission under Article 215 COK is to make recommendations concerning the basis for the equitable sharing of revenue raised by the national government.

Globally, the right to social security depends solely on the revenue raised in a country. Therefore, if these rights was to see the light of day in Kenya, this Commission must make deliberate recommendations to reserve such adequate or progressive revenue as required under the mandated level of Government (National or County) in efforts towards promoting and enjoyment of these rights such as the right to adequate housing of reasonable sanitation, social security, adequate food etc.

Role of the Commission on Administrative Justice (CAJ)

The establishment of CAJ is as a result of Article 59(4) and CAJ Act 2011. This is the ombudsman or the public watchdog of the State bodies charged to dispel specific action in realization and dispensing of economic and social rights in Kenya.

Economic and Social Rights are largely if not solely administrative in nature. They demand that such rights are adequately and timely provided to the citizens. In essence, a number of administrative bodies would be charged to ensure that these rights are accorded to citizens. For example the social security offices are public in nature and thus any decision or action made in these State / Public offices are directly under the watch of CAJ which should ensure that there are no malpractices or omissions in discharging these rights.

This means that CAJ has a huge role to play in ensuring that these rights are actually enjoyed by

Kenyans. It must actively engage the public to investigate the tickling down of these services. Mostly importantly, CAJ has the mandate to investigate all malpractices and omissions and whose report would inform the State and citizens how well or bad we are performing.

Role of the Judicial Service Commission (JSC)

This Commission is critical because it's the representative of the judiciary (one of the arms of a Government) Judicial Service Act 2011 provides that the Commission and the judiciary shall support and sustain a judicial process that is committed to the protection of the people and of their human rights,

The judicial precedents must be those that are indicative of respecting, upholding and guaranteeing these rights when denial and/or violations occur.

Role of the Teachers Service Commission (TSC)

The right to education can only be fully realized when teachers are adequately trained and deployed. Hence this right is dependent on the presence of able, competent and adequate teachers. This means that all the relevant State bodies charged with ensuring the right to education to Kenyans must work hand in hand with this Commission.

Role of the Ethics and Anti-corruption Commission (EAC)

Having formulated a legal and administrative framework on realization of these rights, EAC must be keen to ensure that these provisions are complied with devoid any resource related malpractices. As noted above, the nature of these rights demand State resources. Therefore, all State/public officers entrusted to implement administration of these rights must exercise due-diligence leadership and integrity values stipulated under Article 10 of the COK.

Role of the National Land Commission (NLC)

Article 67 of the COK establishes NLC whose primary role is to manage public land in Kenya. The right to housing and reasonable standards of sanitation is

dependent on adequate land that is properly planned and delineated. NLC is mandated among other functions to settle the landless in Kenya (Land Act 2012). This will be successfully achieved if all the responsible organs such as the line ministry in charge of housing work in a coordinated manner.

Role of the Civil Society Organizations in Kenya (CSOs)

Globally, the primary role of CSOs is to act as a benchmark entities to measure and complement State performance in delivery of products and services to its citizens.

The role of CSOs ought to be a *two-pronged approach: International and national approach*. Internationally, CSOs must engage and participate with the Commissions and other State organs in the ratification process of treaties and covenants. Secondly, they must actively and intellectually engage specific Human Rights mechanisms or bodies mandated to oversee implementation and monitoring of Human Rights performance of signatories (States who have consented to international instruments).

The Human Rights Council (HRC) is the top-ranked United Nations organ mandated to monitor observance of Human Rights Treaties by State signatories. This is done through the Universal Progress Review (UPR) tool where each State signatory is required to report on their performance against each treaty or Covenant. Therefore, CSOs must then ensure that they understand HRC engagement process. This enhances comprehensive and credible review on the progress made in Kenya against the Covenant.

CSOs must also work closely with the Committee on Economics, Social and Cultural Rights (CESCR) the human rights body under the umbrella of the Office of the High Commissioner for Human Rights (OHCHR) at the United Nations (UN). As indicated above, Since Kenya has not ratified the optional protocol to international Covenant to Economic, Social and Cultural Rights, fruitful engagement in monitoring and documenting progress may be limited. This is because individual complaints appear to be within

the purview of those States that have ratified the Optional Protocol of December 2008⁶⁰.

In conclusion, at the national level, CSOs primary duty must be geared towards enhancing coordination of all State bodies mandated with realization of Article 43 of the COK. This is done effectively by providing conducive and timely engagement process with all stakeholders (Relevant State bodies, key CSOs partners and the general public). This is currently being done. However, the timeliness by which CSOs engage State bodies is wanting.

It must also be understood that the custodian of promoting, protecting and preservation for all citizens rest with the Kenyan State. Hence, CSOs working in the area of Human Rights in Kenya must be seen to put to task the State bodies into performance and to accordingly complement by fusing their technical expertise and resources in form of State- deliberated and agreed partnerships. This ensures not periodic realization but a sustainable national system engraved with the values and principles of Human Rights in Kenya.

⁶⁰www.ohchr.org “The Committee on Economic, Social and Cultural Rights (CESCR) may consider individual communications alleging violations of the International Covenant on Economic, Social and Cultural Rights by States parties to the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights”.

Part II

Specific Information Relating to the
Implementation of Articles 1-4 and
6-15 of the Covenant

Article 1 - Right to Self-Determination

Situation

The 2010 Constitution of Kenya provides a normative framework for progressive restructuring and the devolution of state power and resources⁶¹. It establishes two levels of governance namely the National Government and forty seven County Governments. In many respects devolution has opened the space and accommodated regional preferences and diversity. It has also provided a framework for the better management of resources and delivery of services. In this respect devolution has manifested different facets:

- i. It has become a response to demands of ethnic groups and minorities for a bigger share in the governmental process.
- ii. It has been seen as a policy to accommodate/consolidate ethnic, regional, and religious diversity.
- iii. Devolution has triumphed as a means of protecting ethnic interests and identities.
- iv. It has been lauded as a mechanism for promoting good governance, separation of powers, creating more levels of checks and balances upon the Government, ensuring efficiency and effectiveness in service delivery, transparency and accountability and securing greater participation by the people in the governmental process.
- v. It is also viewed as a strategy for reconciling large scale political organization with ethnic, linguistic and historical diversity.

The principle of devolution ensures that services are delivered to and near the people. The people are given an opportunity to decide on most of their affairs (govern themselves) and power to rule, govern

and manage resources and institutions. It is such ideals of devolution that made Kenyans to demand that devolution to be concluded in the new constitution.

Kenya has made some progress on the promotion of the right to self-determination by enshrining the right in the Constitution and enacting various enabling legislations⁶² to facilitate devolution's roll out. Kenya has also ratified the ILO Convention No. 169, constitutional provisions for enhanced representation in the National Bicameral Parliament and County Assemblies for people from different ethnic communities, and the declaration of a secular and republic nation. The same principles have been enshrined in the Constitution of Kenya 2010 which has gone an extra mile in transforming Kenya into a dualist democracy vide Article 2 (6) of the Constitution.

Devolution has seen the transfer of governance responsibilities and functions to county governments and the allocation of resources to carry out the devolved functions.

However, access to resources by poor, vulnerable, and marginalized groups has remained alive. The disparities in development and access to the most basic services such as health, education, water and sanitation are still gaping⁶³. The issue of land ownership remains a thorn in the side of efforts by various stakeholders to promote peace and cohesion in the country. Land related disenfranchisement is the main cause behind secessionist clamour by indigenous tribes along the Kenyan coast⁶⁴.

National IDs are used to access many goods and services. However the government treats IDs as de-

⁶¹ Chapter Eleven of the Constitution of Kenya.

⁶² These are legislations touching on devolution such as the County Governments Act and legislations touching on representation such as the Political Parties Act of 2011 and the Elections Act.

⁶³ Okwi, P.O., G. Ndenge, P. Kristjanson, M. Arunga, A. Notenbaert, A. Omolo, N. Henninger, T. Benson, P. Kariuki, and J. Owuor (2006). "Geographic Determinants of Poverty in Rural Kenya: A National and Provincial Analysis," A Report prepared for the Rockefeller Foundation, Nairobi, Kenya. April.

⁶⁴ A militant group known as the Mombasa Republican Council (MRC) has mushroomed at the Coastal region of Kenya and is galvanizing support from the local community along land grievances.

facto proof of citizenship and thus it is difficult to access. A study by HelpAge indicates that 25% of all people in Wajir, Marsabit, Mandera and Turkana have no IDs. The lack of IDs limits ability of people to travel for fear of arrest, one may not open a bank account, own a phone or set up a business, one may not get a formal job, access government scholarships or funds or social protection measures.

Furthermore, a birth certificate provides state recognition of that child's existence. Without it, the child is often denied education and health benefits, as well as basic human rights. Kenya has an ineffective system of registration of births and deaths (Plan Kenya estimates about half of all children born have no birth certificate). Within the first six months of a child's birth, the assistant chief starts the paper-based process for registering a child. The certificate, which is paid for, must then be retrieved from the district civil registrar's office. Many poor parents see no need to pay for that cost. If the child is registered after six months of birth, as is normally the case, the process becomes more tedious. The parent must travel to see the assistant chief, the area chief, the sub county administrator, and finally, the county civil registrar. At each one of these stops, forms must be filled out. Late registration attracts higher charges. Many parents from poorer households may not afford this. The highest cost is however the cost of transport and time away from work that is the real problem.

Perceptions of ethnic exclusion in governance participation at the national level, skewed employment in favour of the ethnic groups wielding national political power at the moment and inadequacy of fiduciary allocations to county governments from the National Treasury are festering⁶⁵. Consequently, popular and loud calls for constitutional amendments to further devolve political power and resources to the counties are on the rise. Currently, a two-pronged referenda clamour is being spearheaded by the Coalition for Reforms and Democracy (CORD)⁶⁶ and the Council of

Governors.

However, it is not expressly evident how the county governments will employ the prospective expansion of devolved responsibilities and resources to augment the right to self-determination. County Governments have been accused of discriminating ethnic minorities within their jurisdictions with regard to resource allocation, representation in governance structures and general employment⁶⁷. Elements of devolved corruption and budgetary inefficiencies are crippling the delivery of crucial services such as health and education. One of the seemingly valid questions being propagated to quieten the calls for constitutional amendments is how the County Governments will be able to absorb and account for increased financial allocations against the backdrop of existing challenges.

Critical areas of concern

Understanding: The understanding of the right to self-determination still remains elusive to a wide range of the Kenyan people. It has been largely misconstrued as a tool for the exclusion of ethnic minorities in the counties. Currently, there are well orchestrated violent campaigns to rid the Kenyan Coast of ethnic and religious minorities by indigenous ethnic communities⁶⁸.

People first: People have to be the centre of development, politics, and social and cultural affairs. They must have access within their own country and be able to enjoy their own languages, religion and culture. However, the implementation of this right is still wobbly despite the existence of very robust constitutional and legislative frameworks. The enactment of an amendment to the County Governments Act to create a County Development Board⁶⁹ chaired by the Senator appears to be an affront to devolution in the form of an attempt by the national government to re-centralize devolved functions.

⁶⁵The current clamour for constitutional reforms in Kenya emanate from these grievances.

⁶⁶This is the official opposition party in Kenya which is actually a conglomerate of political parties that coalesced in 2012 with the aim of capturing the Presidency in the 2013 General Election.

⁶⁷One of the driving forces behind the prevailing labour unrest in the health sector in Kenya is the victimization of "outsiders" by County Governments.

⁶⁸ibid

⁶⁹The County Governors have been relegated to the position of County Development Boards' secretaries.

Lasting solutions: The current approach to addressing the right to self-determination has been purely reactive. The demands of various groups are addressed through dialogue and material hand-outs only when the situation reaches an extreme. This is demonstrable in the way the GoK has responded to the clamour for self-determination in Lamu ⁷⁰ with the issuance of land title deeds to indigenous communities and promises to address land disenfranchisement and other injustices in the area.

Lack of political goodwill at the national level, the existence of highly polarized ethnic politics and the absence of government mechanisms to seek ways to ensure long-term solutions to the problems facing the people have hindered implementation of the right to self-determination.

Equality and inclusion: The right to self-determination is taken as a fundamental for various groups who seek equality and inclusion in access to resources and representation in state affairs and in the political arena. The Constitution of Kenya vide Article 27 protects this right and additionally proscribes discrimination. However, the violation of the rights to equality and inclusion and non-discrimination are highly prevalent both at the public and private spheres of the Kenyan economy. It is not uncommon to find private entities that exclude members of certain communities from employment despite the existence of a national cohesion framework.

Planning and implementation: Proper planning for quality representation, services and benefits to the people are not systematically addressed by the National and County Governments in Kenya. Both levels of Government have adopted a top-down approach in planning with participation by members of the public in the making of major decisions remaining a mirage. This is happening against the backdrop of the glaring fact that popular participation in public decision making processes and information dissemination by the governments to the public are constitutional rights.

Recommendations

- The National Government should demonstrate greater political will in ensuring the implementation of devolution through the transfer of all the functions and responsibilities devolved to the County Governments under Schedule Four of the Constitution of Kenya. The Government should also allocate adequate funds to the County Governments to enable them implement these functions.
- The National and County Governments should take measures to raise awareness on the meaning and implications of the right to self-determination to disabuse citizens of the misconception that it is synonymous with ethnic exclusion. These measures should be institutionalized with an effective implementation mechanism, as well as monitoring and adaptation to address emerging concerns of people at all levels of society.
- The National and County Governments must desist from enacting laws that in effect claw back the tenets of devolution and the right to self-determination. Instead, they should endeavour to enact laws and promulgate policies and programmes that will see enhanced spaces for participatory governance by all people.
- The National and County Governments should forge enduring solutions to address the root causes of the calls for referenda to amend the constitution of Kenya barely two years since its promulgation. The National Government and County Governments must also address with finality the issues causing ethnic balkanization in the counties and the clamour for secession. They must therefore, adopt a bottom-up approach to governance, address public grievances through effective mechanisms and by promoting peaceful coexistence.
- The National Government and County Governments should put in place mechanisms and programmes to remedy the

⁷⁰Lamu is a County in the Coastal area of Kenya.

vertical and horizontal inequalities in resource allocation by adopting affirmative action approaches to benefit the poor and marginalized people.

- The National and County Governments must take special steps to ensure the equality of people by bringing excluded groups into all sectors and by reducing discrimination and inequality and by amending all legal provisions that discriminate vulnerable and marginalized sections of the society especially women, youth, persons living with HIV/AIDS and persons living with disabilities.

Article 2 - Equality of Rights and Protection of Rights

Situation

The right to equality and non-discrimination as expressed in Article 27 of the new Constitution represents a substantial improvement on the right as provided in Article 82 of the previous Constitution. The new Constitution significantly expands the list of protected grounds from that found in the previous Constitution. Article 27(4) prohibits discrimination on an extensive list of specified grounds: “race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth”). The list grants substantially increased protection to women, who are likely to benefit from protection on grounds of pregnancy and marital status. In addition, it prohibits discrimination on grounds of disability and age, neither of which is included in the list of protected grounds in the previous Constitution. Discrimination against LGBTI persons remains a serious problem in Kenya. Male homosexual sex is illegal and gay men report being harassed by police seeking to black-mail or extort money from them.

Further, Article 27 (4) does not provide an explicit protection for discrimination on grounds of albinism, something which has caused concern among those advocating greater protection for people with albinism. Ms Mumbi Ngugi of the Albinism Foundation of East Africa believes that the Constitution could have included a specific ground of “genetic inheritance” to cover people with albinism, whom she says suffer discrimination in employment and education, and as a result of denial of reasonable accommodation for their visual impairments.

Critical Areas of Concern

There is a clear pattern of lack of realisation of the rights to equality and non-discrimination. Legal protections from discrimination in Kenya are inconsistent, with levels of protection varying between grounds and across areas of life, gaps in

protection and direct contradiction between legal provisions in some areas of life. Thus, there is a clear need to extend legal protections to ensure that all persons in Kenya have adequate protection from discrimination on all eligible grounds and in all areas of life regulated by law. Even where rights are available, enforcement is weak, knowledge of legal rights is poor among both right-holders and duty-bearers and access to justice is problematic.

Poverty and ethnicity, are central to an understanding of discrimination and inequality in Kenya, both because of the scale of their impact as distinct causes of discrimination, and because of their cross-cutting nature, which results in multiple discrimination for many of those suffering disadvantage because of another aspect of their identity.

It's most obvious in respect of ethnicity, where there are evidenced patterns of both direct and indirect discrimination against particular ethnic groups, there is evidence in other areas as well. Women, for example, are subject to a range of discriminatory laws and laws which are open to discriminatory application, a situation which has only recently begun to change with the introduction of the new Constitution. Laws interpreted as criminalising same sex intimacy between men discriminate directly against gay and bisexual men, and give rise to extortion and other problems at the hands of state actors.

Recommendations

The conclusion of this analysis is a clear recommendation for Kenya to do more to tackle discrimination and inequality.

- There is a need to legislate to provide comprehensive protection from discrimination across all grounds and in all areas of life regulated by law.
- In addition, the State must ensure that this is

supplemented by concerted action to improve access to justice where protections exist, through public education, training, legal assistance, strengthening specialised bodies and a review of procedures governing cases of discrimination.

- The State should review discriminatory laws and repeal or amend them to bring them into line with the new Constitution and Kenya's legal obligations under international law.
- Again, this must be matched by efforts to ensure that discrimination by state actors is addressed.
- Finally, the government must take steps to promote substantive equality and to address the principal root causes of discrimination and inequality in Kenya through positive action and other measures.

Article 3 - Equality of Rights between Men and Women

Situation

Article 27 (3) of the Constitution provides a broad guarantee of equal treatment of women and men “including the right to equal opportunities in political, economic, cultural and social activities”. Elsewhere in the Constitution, gender equality features prominently: equal rights for men and women are guaranteed during a marriage and at its dissolution; equality between male and female parents and spouses is guaranteed in the acquisition of citizenship through birth and marriage; and the “elimination of gender discrimination in law, customs and practices” related to land is included among the principles of land policy.

Article 27 (6) creates a duty of affirmative action, a concept which is defined in Article 260, which states that “the State shall take legislative and other measures, including but not limited to affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups as a result of past discrimination.”

There is also controversy regarding the application of the one third gender rule; the relevant (public) bodies must have at least one third of each gender. This is our positive restatement of the two thirds doctrine. The 2010 Constitution, in a bid to promote gender equality, makes provisions to the effect that not more than two thirds of members of elective or appointive bodies should be of the same gender. This is a fundamental right entrenched in Article 27 of the 2010 Constitution which is on equality and freedom from discrimination. Article 27(8) states: “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.”

The gender controversy has played out in at least four contexts.

The first instance involved the controversial presidential nominees to the office of the Attorney-General (A-G), Chief Justice (CJ), Director of Public Prosecutions (DPP) and Controller of Budget. The second instance involved Supreme Court appointees. A petition was filed in court challenging the five nominations and seeking the “correct” interpretation, full tenure, meaning and effect of Article 27 of the constitution of Kenya 2010 and the proper approach to the interpretation of the constitution.

The court dismissed the petition stating that: “The purpose of Article 27(8), in our view, is to provide or place a future obligation upon the State to address historical or traditional injustices that may have been encountered or visited upon a particular segment of the people of Kenya.”

The Court added that: “It is the responsibility of the Government by designing policies and programmes and seeking the intervention of Parliament through legislation to provide an appropriate and just remedy to an individual whose guaranteed rights or freedoms have been infringed or denied. We think that the rights under Article 27(8) have not crystallized and can only crystallize when the State takes legislatives [sic: legislative] or other measures or when it fails to put in place legislative or other measures, programmes and police [sic: policy] designed to redress any disadvantaged within the time set by the Fifth Schedule to the Constitution 2010.”

It further opined that: “The Government may proceed step by step and if an evil is particularly experienced in a particular area, it is required to address it through policies, programmes and legislative process... It is also our view that Article 27 as a whole or in part does not address or impose a duty upon the Judicial Service Commission in the performance of its constitutional, statutory and administrative functions. We think any claim on Article 27 can only be sustained against the Government with specific complaints and after it has failed to take legislative and other measures or after inadequate mechanisms

by the State. To say Article 27 gives an immediate and enforceable right to any particular gender in so far as the two thirds principal [sic: principle] is concerned is unrealistic and unreasonable. The issue in dispute remains an abstract principle, which can only be achieved through an enabling legislation by Parliament. We cannot in our estimation give what is not contained or found or intended by the drafters.” This case was important since it comprehensively dealt with the equality and freedom from discrimination provisions (i.e. Article 27 etc.) of the 2010 Constitution.

A third controversy, which remains unsolved, is the application of the gender rule in the composition of Parliament. It has been argued that it would be difficult to design a formula that shall ensure that the next National Assembly complies with the two-thirds gender rule as provided for by Articles 27, 81, and 97. Article 97 restricts the membership of the National Assembly to 290 members whereas Article 81 states that not more than two-thirds of the members of elective public bodies should be of the same gender.

Critical Areas of Concern

The Matrimonial Property Act, which was duly gazetted into law on 10th January 2014, is discriminatory and a retrogressive step for women's rights to land and property in Kenya. The Act, in brief, defines matrimonial property as only property that is jointly owned by the spouse, and disallows women the right to marital property upon the death or divorce of their spouse by requiring them to prove their contribution to the acquisition of the property during the marriage.

Because few Kenyan women own or jointly own property with their spouses, and given that many Kenyan women do not work in paid employment, many are unable to contribute financially in the acquisition of matrimonial property. They however contribute through the daily domestic chores they perform to maintain their families yet this Act does not recognise this contribution.- In effect the Act strips women of rights to family property, including the very homes in which they and their children live in, when they are unable to prove financial contribution. Furthermore it violates the

constitutional provision in Article 45(3) which states *“Parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage”*

In late March 2014, Kenyan MPs voted to include a provision in the new Marriage Bill that formally permits polygamy, but omits the critical long existing cultural context that permitted first wives to weigh in or veto a husband's choice. In effect, the new clause permits men in Kenya to take as many wives as they desire without wife's consent, violating the Constitution and undermining the rights of women. The proposed concept of polygamy under the Marriage Bill is extremely demeaning to Kenyan women and waters down the gains the country has made against inequality. Instead of indoctrinating archaic notions of patriarchy that perpetuate a culture of violence and discrimination against women, it is imperative that the prevailing legal framework adequately protects a woman's right to assert control over her own life and family circumstances. These two pieces of legislation are retrogressive in nature and in clear violation of Kenya's 2010 constitution, which gives significant prominence to human rights and international law, and entrenches the rights and fundamental freedoms of all, including the right to equality and freedom from discrimination. They are also contrary to Kenya's legal obligations embodied in regional and international instruments. Kenya has ratified – and thus is bound by - the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (“the Maputo Protocol”), the African Charter on Human and Peoples' Rights, the International Covenant on Civil and Political Rights (ICCPR), and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).

Recommendations

- The Kenyan Parliament to repeal discriminatory and unconstitutional provisions from the 2014 Matrimonial Property Act to ensure that women have equal rights and opportunity before the law.
- The Kenyan Parliament should pass the Prevention of Domestic Violence Bill (2013)

which is currently in Parliament in its third reading.

- The State should ensure the proper interpretation and implementation of the third gender rule in order to raise the representation of women in Parliament, the judiciary and senior civil service positions.

Article 4 - Limitations on economic, social and cultural rights in time of Public emergency

The Constitution of Kenya 2010 guarantees that certain rights, such as freedom from torture and cruel, inhuman or degrading treatment or punishment; freedom from slavery or servitude; the right to a fair trial; and the right to an order of *habeas corpus*⁷¹ as inalienable, even during states of emergency. Article 24 limits certain rights anyway. ESC rights are not identified as non-derogable and can be curtailed in times of emergency. The Inspector General of Police declared a state of Emergency in Lamu and Tana River Counties allegedly as a measure to counteract the acts of terrorism and violence being perpetrated in those areas up to date. The declaration was made arbitrarily and in contravention of the Constitution of Kenya during the month of Ramadan when persons who subscribe to the Islamic faith are undergoing a fast. This essentially interfered with the resident's rights to fend for themselves and exercise their religious faith in free spaces. Had the Leader of Majority in the National Assembly who is a Moslem and very powerful within the ruling coalition's ranks not intervened, the abuse of the economic and social cultural rights of these communities would have been aggravated.

The National Government also arrested and detained without trial masses of Somalis under the guise of combating terrorism. The country is currently being targeted by the Al Shaabab terrorists with the aim of coercing it into withdrawing its forces from Somalia. Men, women and children of Somali origin were indiscriminately rounded up and held within detention centres ostensibly to enable the National Government screen them and deport non-citizens. Notably, many Somalis of Kenyan extraction who have been deliberately denied registration documents by the regime were rounded up and dumped into deplorable living conditions in detention centres. During the exercise, police officers

unnecessarily harassed Kenyans of the Somali origin by forcing entry into their houses at night and extorting hefty bribes from them for "protection".

Currently the Kenyan political and socio-economic landscape is marked by persisting high political temperature, increased impunity, a deteriorating rule of law, spiralling corruption⁷², heightened insecurity, operations of various armed groups in some counties⁷³, and inter-ethnic and intra-ethnic rifts leading to loss of life and property, ethnic tensions and internal displacement amongst other ills. This has resulted in a de facto state of emergency in those areas.

Despite commitments to inclusiveness in the Constitution of Kenya and other legislative frameworks⁷⁴, social exclusion has remained a major problem. Women, youth, persons living with disabilities, ethnic minorities and other marginalized groups continued to be severely under-represented in most of the political parties' governing committees, state structures, local authorities, and other entities within public and private sectors.

Failure by the National Government to address governance and labour issues has seen an increase in protests, rallies, and strikes by various aggrieved persons including civil servants leading to critical deprivation of public services. Currently, doctors and nurses in most counties are on strike for non-payment of salaries and poor handling of issues affecting them by authorities. This go-slow has led to the deaths of hordes of people who remain unattended in public hospitals and cannot afford to seek medication in private hospitals.

Key issues highlighted in mass action are normally lack of political participation, representation, self-determination, and autonomy. In fact, one of the main

⁷¹ Article 25 of the Constitution of Kenya 2010.

⁷² The President of Kenya has publicly chided personnel in his office for being the catalysts of the pervasive corruption deterring economic growth in the country.

⁷³ The Mombasa Republican Army which champions the secession of the 10 mile coastal strip under the clarion call that "The Coast is not Kenya", the re-emergence of other outlawed organized criminal gangs in the coastal region and the inland are cases in point.

⁷⁴ For example the Elections Act and the Political Parties Act of 2011.

drivers of the prevailing clamour for the amendment of the constitution through a referendum by the Opposition Coalition is ethnic exclusion in employment at the National Government.

Frequent calls for strikes, blockades to roads and transport, forceful closures of schools, hospitals, businesses, and other enterprises by various political parties and armed groups resulted in violations of rights followed by economic and social losses in the country. The actions of armed groups created chaos among the people in affected areas resulted in violations of their rights to housing, access to health, work, personal safety and security, and education, among other rights.

The Kenyan economy has been scathed by the actions mentioned above leading to the loss of enterprise and employment. Due to insecurity caused by ethnic strife and terrorism, various countries in Europe and the US have published security alerts warning their citizens not to visit Kenya. This has drastically affected tourism which is one of the main pillars of the Kenyan economy leading to massive revenue and job losses.

Critical areas of concern

The recognition of ESC Rights as fundamental human rights: The Constitution of Kenya 2010 recognizes Economic, Social and Cultural rights as fundamental human rights by enshrining them in the Bill of Rights. These rights include health, water and sanitation, housing and education. The National and County Governments have however adopted a relaxed approach in their implementation simply because they require massive resources to actualize. The common defence is that their realization is supposed to be progressive. However, a wide framework of legislation has been put in place to facilitate the implementation of these rights. Moreover, under the constitution, ESC rights are not absolute and can be curtailed.⁷⁵ The popular dichotomy that civil and political rights are superior to economic and social cultural rights is greatly impeding the implementation of ESC rights. Nonetheless, it's inarguable that human rights are inter-dependent,

indivisible and inalienable.

Addressing diverse demands: Kenya is on the verge of holding referenda with a view to amend the constitution. However, the process seems to be driven by the interests of a few within the Council of Governors and the CORD Coalition. This moment offers a grand opportunity for the inclusion of the voice of women, the poor, the marginalized and other vulnerable sections of the society.

Maintaining law and order: This period was a difficult one with respect to law and order in Kenya, particularly in the Coastal, Northern regions of Kenya and Nairobi. The country continues to experience serious security challenges up date with terrorists even targeting law enforcement agents themselves. Major causes for this are the government's failure to maintain law and order and the emergence of terrorist cells and other organized outlawed criminal gangs. The National Government has failed to enter into dialogue with the Opposition thereby causing the heightened political tension. The net effect of all these factors has been the deterioration of general stability.

Recommendations

- The constitution and other legislative frameworks need to recognize ESC rights as fundamental and ensure their full realization by providing implementation timelines. The normative frameworks must also assign clear cut duties to county assemblies regarding the enforcement and realization of these rights.
- The government should take effective measures to address the demands of people from various groups towards more inclusive state policies, programmes, and structures.
- The government should take all necessary measures to strengthen law enforcement agencies, particularly the National Police Service, with adequate resources and trainings as well as accountability mechanisms.
- New laws should be promulgated to address organized crime, establish accountability of

⁷⁵ Article 24 of the Constitution of Kenya 2010.

state mechanisms, and promote transparency and integrity across state affairs.

Article 6, 7 & 8 - Right to Work, Right to Enjoyment of Just and Favourable Conditions of Work and Right to Form Labour Union

Situation

Article 41 of the Constitution covers Labour relations and states as follows:

- (1) Every person has the right to fair labour practices.
- (2) Every worker has the right
 - (a) to fair remuneration;
 - (b) to reasonable working conditions;
 - (c) to form, join or participate in the activities and programmes of a trade union; and
 - (d) to go on strike.
- (3) Every employer has the right
 - (a) to form and join an employers' organisation; and
 - (b) to participate in the activities and programmes of an employers' organisation.
- (4) Every trade union and every employers' organisation has the right
 - (a) to determine its own administration, programmes and activities;
 - (b) to organise; and
 - (c) to form and join a federation.
- (5) Every trade union, employers' organisation and employer has the right to engage in collective bargaining.

In Kenya, 80% of the country's unemployed population is between 15 and 34 years old, according to a study by the UN Development Programme (pdf). That translates into more than 1.8 million unemployed young people.

The proportion of workers with a formal job decreased from about 13 percent in the early 1970s to 9 percent in 2010. Young people joining the labour market early – say, between 15 and 16 years of age – start with high unemployment rates of above 20 percent, but rates are even higher for older age groups and are highest for young people aged 18 to 20 years. After that age, unemployment rates decrease rapidly. Young people aged around 25 and

30 years old show an unemployment rate of 25 percent and 15 percent, respectively, and as young people approach adulthood, rates get closer to 10 percent. According to this, not only is Kenya's employment challenge a youth issue, it is a more pronounced issue among those younger than 25 years of age.⁷⁶

Focusing on trade unions, these were established to protect the working life of workers. The primary function of a trade union is to promote and protect the interest of its members; improve working and living conditions and to represent workers' interests. In Kenya, COTU is the umbrella governing trade unions. Currently trade unions are facing various challenges and hence weakening of the unions. Some of the problems being faced by trade unions in Kenya are challenged by globalization, revolution in production technologies and new management styles. Splintering, changing mentality, mismanagement of funds, lack of innovation and visionary leadership are a big handicap. Most unions are grappling with the democratization of social and political arena besides government interference. There is need for redefining the role of unions beyond the workplace needs, reaching out to segments currently excluded and last but not least, training.

Critical Areas of Concern

There have been measures put in place to increase employment levels of the youth and women: Availability of finances as start-up loans; and for women further affirmative action clauses in laws. There is however nothing that has been done to increase employment opportunities for persons with disabilities, refugees and internally displaced persons and other disadvantaged and marginalized groups.

The Government of Kenya has extended social security coverage to all Kenyan workers, and converted traditional provident fund scheme into a mandatory national social insurance pension scheme.

⁷⁶ UNDP (2013) Kenya's Youth Unemployment Challenge. UNDP New York

This scheme, is guided by the minimum standards of ILO Convention No. 102 and world-wide agreed principles of social security. There is very little contribution to NSSF by informal workers. Also, in an attempt to achieve universal coverage, the government proposes the National Social Health Insurance Fund (NSHIF) to give people access to high quality hospital care and pool risks among the rich and the poor. Even so, Kenya has not achieved universal coverage in health care through NHIF since membership remains low.

Labour officers are few and are yet to effectively combat a multitude of labour rights violations which is highest amongst domestic workers in urban areas and agricultural workers.

There is also not yet a data collection system to monitor unemployment and informal sector employment (these include child labour and non-adherence to social security laws).

While minimum wages are increased and adjusted annually, according to the current regulation of wages amendment order of 2013, minimum wage for a house servant is 211 KES per day (USD 2.5 per day). Assuming that they have a family of 5.1, this amount is not enough for adequate standards of living. The minimum wage standard is also not enforced and as a result so many informal workers are actually paid less or not paid at all. Work permits are also not issued to refugees though there are nearly half a million refugees located in Dadaab refugee camp and a further 101,000 live in Kakuma camp.

Trade unions have also fallen short of achieving their set objectives due to challenges that are both external and internal. There are many challenges affecting trade unions in Kenya which include financial constraints emanating from loss of membership, splitting of unions and mismanagement, government and employer intervention in trade union activities and controlling of their affairs, the differentiated and changing composition of workers that has had a general effect on weakening trade unions and advancements in technology have made it possible for the new units of production to be geographically dispersed hence it is no longer necessary for staff to be physically located in the same place, thereby reducing the workforce and in turn union membership.

Recommendations

- (Strict) Enforcement of labour standards;
- The State should increase the number of effective labour inspections to monitor unfair labour practices and exploitation of children and marginalized groups particularly in the informal sector
- Training and promotion opportunities for workers;
- The State should protect trade union freedom and prevent interference in the management and operation of trade unions, and remove excessive restrictions on the right to strike in law and in practice, including in Export Processing Zones
- The State should further facilitate the role of trade unions through stringent enforcement of labour legislation to harmonise the working relations with employers
- The State should also implement policies and laws instrumental in combating and addressing sexual harassment and racial discrimination in the workplace

Article 9 - Right to Social Security Including Social Insurance

Situation

There is broad consensus among policy makers in Africa that social protection is a powerful way to fight poverty and promote inclusive growth. The African Union's Social Policy Framework (SPF), which was endorsed by all African heads of state in 2009 explains that social protection includes "social security measures and furthering income security; and also the pursuit of an integrated policy approach that has a strong developmental focus, such as job creation..."⁷⁷ The SPF commits governments to progressively realizing a minimum package of basic social protection that covers: essential health care and benefits for children, informal workers, the unemployed, the elderly, and people with disabilities. This approach is echoed in the United Nation's Social Protection Floor Initiative. Across Africa, social protection has become a mainstay in poverty reduction strategies and many countries have developed a social protection strategy.

Social protection in Kenya is defined as "*policies and actions, including legislative measures, that enhance the capacity of and opportunities for the poor and vulnerable to improve and sustain their lives, livelihoods, and welfare, that enable income-earners and their dependants to maintain a reasonable level of income through decent work, and that ensure access to affordable health care, social security, and social assistance.*"⁷⁸

However, the coverage of its social insurance contributory schemes such as the National Health Insurance Fund (NHIF) and the National Social Security Fund (NSSF) safety net programmes in the form of cash transfers to orphaned and vulnerable

children (OVC) and the elderly has tended to be low and their effectiveness limited. The main form of safety net support offered to poor and vulnerable populations has been humanitarian relief (often in the form of food aid), which had been mobilized by the government and the international community in response to crises, such as drought and floods. In many parts of the country, most notably Turkana and other Arid and Semi-Arid Lands (ASAL), this type of response has become common, with emergency food relief being provided to poor populations on an annual basis. This suggests that this instrument had evolved into a regular response to chronic poverty and food insecurity. Concurrently, the long established National Health Insurance Fund (NHIF) and National Social Security Fund (NSSF) have provided coverage mainly to formal sector workers, representing 8 percent of the population.⁷⁹

While lauding the advances made through these contributory and safety net social security programmes including the enactment of the National Social Assistance Act of 2012⁸⁰, it is worthwhile to note that scaling up of social security both vertically and horizontally is inevitable. More so, the current social security framework is fragmented and disjointed resulting in the duplication of programmes and inefficiencies.

The following areas are subsequently ripe for reform:

- The State should define the appropriate program mix within safety nets to effectively reach the highest population of the poor and vulnerable;
- The State should also improve coordination among safety net programs to reduce

⁷⁷ Alviar, C. and R. Pearson (2009). "Cash Transfers for Vulnerable Children in Kenya: From Political Choice to Scale Up." Social and Economic Policy Working Paper, UNICEF, New York.

⁷⁸ ISSA (2008). "Application of Performance Contracting in Social Security Administration in Kenya - A Case of the National Social Security Fund," International Social Security Association, Geneva.

⁷⁹ IDS (2011). "Lessons from Social Protection Programme Implementation in Kenya, Zambia, and Mongolia," Research Report 2011(69), Institute of Development Studies, Brighton, UK.

⁸⁰ The National Social Assistance Act is based on Article 43 of the Constitution that expressly guarantees all Kenyans their economic, social, and cultural rights, including basic rights to health, education, food, and decent livelihoods. It explicitly asserts the right "of every person... to social security" and binds the State in Article 43(3) to "provide appropriate social security to persons who are unable to support themselves and their dependants." This implies social protection in its totality: social assistance; social security; and health insurance.

- fragmentation and duplication;
- Financing should be increased to safety nets in the face of a tight fiscal environment;
- The State should also expand contributory program coverage to the informal sector while also addressing problems of adequacy and financial sustainability.

Article 10 – Protection and Assistance to Family

Situation

The National Social Assistance Act is based on Article 43 of the Constitution that expressly guarantees all Kenyans their economic, social, and cultural rights, including basic rights to health, education, food, and decent livelihoods. It explicitly asserts the right “of every person... to social security” and binds the State in Article 43(3) to “provide appropriate social security to persons who are unable to support themselves and their dependants.” This implies social protection in its totality: social assistance; social security; and health insurance.

Further the Constitution recognizes the family as the natural and fundamental unit of society and the necessary basis of social order vide Article 45 (1). In the same breath, the Constitution vests equal rights in spouses within a marriage and lay the platform for the enactment of laws such as the Marriage Act and the Domestic Violence law to ensure protection within the context of a family. Additionally, the Constitution, through Article 53 recognizes the role of children within the institution of marriage by protecting and promoting child rights.

The Constitution also emphasizes the application of international agreements ratified by Kenya. Through Article 2(6) of the Constitution of 2010, Kenya has transformed into a dualist democracy with international law becoming enforceable without the requirement of domestication. Kenya is a signatory to the Universal Declaration of Human Rights (1948), which recognizes social protection as a fundamental human right for all citizens of the world. Other international instruments adopted by the country include the:

- International Covenant on Economic, Social, and Cultural Rights (1967),
- UN Convention on the Elimination of All Forms of Discrimination Against Women (1979)
- UN Convention on the Rights of the Child (1990)
- UN Convention on the Rights of Persons with Disabilities (2006)
- African Charter on the Rights and Welfare of the Child (1990),
- International Labour Organization (ILO)
- Convention on the Worst Forms of Child Labour (1999),
- ILO Minimum Age Convention (1973) that deals with the minimum age for employment, and the
- African Charter on Human and People’s Rights (1981).
- Kenya is also a signatory to several ILO Conventions and Regional Protocols on migrant labour.

The UN/ILO Social Protection Floor Initiative (SPF) adopts a lifecycle approach to social protection. It guarantees a universal minimum package of social transfers and services consisting of: access to education and essential health services, income security through family or child benefits, unemployment benefits, disability benefits, and income security in old age (both contributory and non-contributory pensions). The World Summit on Social Development (WSSD) of 2000 has also played an influential role in shaping the social protection agenda in Kenya.

At the regional level, Kenya as an East African Community (EAC) Partner State, is party to the wide-ranging provisions on the harmonization and coordination of social security that guide the actions of the Partner States.

The Government and its development partners are currently implementing several social assistance interventions targeted to specific categories of beneficiaries. These interventions are summarized in Table 1.

Category	Example of Programs	Type and Numbers of Beneficiaries	Main Characteristics
Cash Transfers	Orphans and Vulnerable Children Cash Transfers CT-OVC, Older Persons Cash Transfer (OPCT), Hunger Safety Net Program (HSNP), Urban Food Subsidy	CT-OVC–412,470 children	Some of these programs are pilots aimed at drawing lessons for scale-up
Food Distribution	School feeding, Expanded school feeding, General emergency relief	- Regular school feeding –803,669 children - Expanded school feeding –346,000 children - General food relief –2,180,058 people	Relief has characterized government interventions during drought and famine, mainly in ASAL areas. School feeding programs are intended to keep children in school during food shortages.
Public Works	<i>Kazi kwa vijana</i> (KKV)	KKV –297,861 young people	This program was established in 2008 to absorb young people into the job market but management and logistical shortcomings have been noted.
Grants	<i>Njaa Marufuku</i> : People with severe disabilities, Safe motherhood Health vouchers	<i>Njaa Marufuku</i> – 12,180 groups People with severe disabilities– 4,200 Health vouchers for safe motherhood – 59,982 women	<i>The Njaa Marufuku</i> grants are one-off payments. Home-grown school feeding funds are transferred to schools to enable them to generate income for their members.

The Jubilee Coalition Government currently in office has launched a revolving fund for women and the youth known as the Uwezo Fund but which has not been operationalized yet. Additionally, there are cash transfers to the elderly at a pilot phase, the youth fund and the women fund.⁸¹

Key Issues

i. Rights Based

It is an obligation of State as cited in Article 43 Kenyan Constitution. It states that every person has the right to the highest attainable standard of health, which include the right to health care services, including reproductive health care, the right to accessible and adequate housing, and to reasonable

⁸¹The youth fund and the women's fund offer credit to women and youth at reduced interest rates and relaxed repayment plans.

standards of sanitation, a right to be free from hunger, and to have adequate food of acceptable quality, a right to clean and safe water in adequate quantities, a right to security and a right to education.

ii. Economic growth and development

Kenya has higher poverty rate than neighbouring countries. Kenya currently has 50% of its total population below the poverty line. Social Assistance will permit families to be included in economic growth hence growth redistribution.

iii. Food Crisis

People not able to put food on the table as there is a volatile rise in energy and food prices and families have been forced to cut back on their needs and wants.

iv. HIV/AIDS Pandemic

There is increased number of orphans in Kenya, currently the number stands at 2.4m orphans and half of them are orphaned when their parents die from HIV/AIDS. This has led to a culture of Child-headed households where the eldest child is forced to take care of his/her siblings thus missing out on education. There has also been lack of access to ARVs, insufficient food for those infected by HIV/AIDS thus increasing the number of deaths.

v. Poverty, Vulnerability and Inequalities

Kenya's poverty rate has remained unchanged since 1981 as it stood at 48% and currently it stands at 46%. For a more equitable society, the poorest must be integrated into national development and involved in decision making at all levels. Efforts must be made to share benefits of growth. Extension of social assistance could assist Kenya in progress towards MDG1 which seeks to eradicate extreme poverty and hunger and possibly MDG 4 which seeks to reduce child mortality rates and & MDG 5 which seeks to improve maternal health.

vi. Poor Older Persons

Statistics show that 5% of the population is aged 60 years and above and among the poorest in the country as they are regarded as economically inactive, unproductive hence first victims of retrenchment. Lack of consistent and reliable social security support force older persons to retreat as destitute in urban

settlements and rural settings.

vii. Persons with Severe Disabilities

Persons with disabilities (PWDs) make up 10% of the population and 80% of PWDs live in a vicious circle of poverty due to exclusion from education and employment opportunities.

viii. Collapsed Social Networks

Communities have no capacity to take care of all vulnerable groups as people are only able to take care of themselves and do not have extra to spare.

ix. Member of Parliament as social security

Community members rely on the Member of Parliament representing their area for all their needs, including food, school fees and medical care. This has created a culture of dependency on leaders. The constituents literally beg from their MPs and other leaders- a culture commonly known in some areas as "gonya". It dehumanizes the poor who end up hero worshipping their leaders. It also gives the leaders the opportunity to misuse the youth – who they hire for acts of thugery during their campaigns.

Challenges to social assistance programs

- Reviews of social assistance programmes conducted by the Government and development partners in 2005 and 2012 have highlighted the inadequacy of the existing interventions. For instance, while repeated distribution of food to poor families in arid and semi-arid lands (ASALs) has kept people alive, it has not reduced poverty.
- Even though the Government spends about 0.9 percent of its GDP on social assistance, most of the financing of these programmes comes from its development partners (estimated at 90 percent).
- Non-state actors (NSAs), such as NGOs, implement a range of social protection interventions although most of these are limited in scope and coverage. The NSAs face three key challenges: inadequate resources; a lack of coordination; and the inability to sustain their programmes if and when donor funding is withdrawn.

Informal community support and extended families provide a significant form of social assistance in Kenya. There are two main types of such safety nets: membership of traditional solidarity networks (the family, kinship groups, and neighbourhoods); and membership of cooperative or social welfare associations (including self-help groups, rotating savings and credit associations, and cultural associations). There are over 300,000 such cooperative groups nationally, which provide a range of services, including loans, food, education, health, and funeral assistance. Such safety nets face three main challenges: limited productive resources that are under the control of households and communities; low levels of income; and high levels of dependency, which have worsened as a result of HIV/AIDS and the financial, fuel, and food crises.

Despite the lack of a specific regulatory framework for social assistance schemes, the existing programmes are guided by three broad categories of legislation and policy, namely sector specific, vulnerability, and locality-based laws and policies.

Sector-specific legislation is aimed at guiding the implementation of interventions for the welfare of poor and vulnerable members of society. These cover the education sector (for example, the Education Act, 2007), the health sector (for example, the HIV Prevention and Control Act, 2006), and agriculture (for example, the Strategy for Revitalizing Agriculture, 2004-2014). The National Food Security and Nutrition Policy (2007) covers programmes that increase access to food and improve nutrition as well as measures to ensure food sufficiency and security.

The main focus of vulnerability-focused laws and policies is to protect the rights of the disadvantaged and to ensure their enjoyment of these rights. These include the National Children's Policy (2010) and the Children's Act (2001), the National Policy on Older Persons and Aging (2009), the National Policy on Youth (2006), the National Gender and Development Policy (2000), and the Persons with Disabilities Act (2003). The main problem with most of these laws and policies is that they are not in tune with the country's Constitution and its rights-based framework. As a result, they fail to include important elements for protecting the economic, social, and

cultural (ESC) rights of Kenyans. Furthermore, there are challenges in relation to effective targeting mechanisms, appropriate legal framework, and adequate, sustained earmarked funding from the State budget. Also, vulnerability-focused programmes tend to have only limited geographic coverage.

As for locality-based laws and policies, the National Policy for the Sustainable Development of Arid and Semi-Arid Lands (2007) calls for specific interventions to bring the economic development level of the ASALs up to the levels that prevail in other parts of the country after many decades of negligible economic development. The deprived circumstances experienced by many of the urban poor are also a key focus of the Government, as reflected in such interventions as slum upgrading.

Recommendations.

- Kenya needs a conducive legislative, policy and institutional environment to guarantee social assistance. Current social assistance schemes are operating without specific legislation or regulation. They do not flow from, emanate or derive from a clear, central, coordinated policy locus.
- Establish a single Authority to give clear policy direction and oversight and improve co-ordination, prospects for unified beneficiary registration and linkage with other national databases i.e. Identification Cards, Birth and Death Certificates.
- Kenya needs comprehensive legal measures to address issues such as child marriage, child labour and forced marriage. The State has a responsibility to maintain family and female genital mutilation with greater impact.
- State policies and programmes should be formulated and implemented to encourage modification of socio-cultural patterns that are discriminatory and exploitative against women, children, and other marginalized communities.

Article 11 – Right to Adequate Standard of Living

Situation

Right to Food

Article 43 (1) (c) of the Constitution of Kenya 2010 provides that every person has the right to be free from hunger, and to have adequate food of acceptable quality. This provision reflects the principles and obligations contained in the International Covenant on Economic Social and Cultural Rights, a binding instrument for Kenya since 1972. With regard to implementation and enforcement measures, the Constitution explicitly mentions the “fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights” (article 21) and foresees different types of claim mechanisms in case of a right being denied (article 22).

The contents of Article 43 as well as other provisions in the new Constitution by giving these rights the highest legal recognition at national level is definitely a significant step from a human rights perspective as it also includes the human rights principles of human dignity, equality, equity and freedom and non-discrimination as well as the obligation to give priority to the most vulnerable segments of the population.

The starvation and malnutrition currently endured by 3.5 million Kenyans results from a violation of the human right to food.⁸² This is as a result of the failure by Government remedy extreme weather events such as drought and floods, which impact significantly on access to food by local populations. Pastoralists from the drought-stricken northern Kenya take refuge in the Tana Delta, one of the last regions where people have access to water.⁸³ This exacerbates the existing conflicts between local peasants and pastoralists, leading to further water shortages, greater pressure on arable land and grazing grounds, and higher food insecurity.

Droughts are recurrent events in Kenya. However, their frequency is increasing as a consequence of climate change. The food situation in Kenya is deteriorating due to widespread and systematic violations of the human right to food. The hunger situation is further exacerbated by drought.

The main human rights violations related to the right to food include failure to provide an operative national strategic plan encompassing disaster preparedness; failure to provide the necessary budget allocations to guarantee the right to food and to ensure that resources are not misdirected or misappropriated i.e. action against corruption; failure to carry out agrarian reform including redistribution of lands; and the failure to create an institutional environment for the implementation of sustainable agriculture by peasant farmers, including women, youth and minority groups.

The response by the Government has always been reactionary and knee jerk through the perennial proliferation of food aid in affected areas. However, this “solution” has not in any way alleviated extreme hunger as famine continues to ravage some parts of the country year in year out. If the right to food is enforced, recurrent droughts will no longer turn into recurrent famines.

Water & Sanitation

The 2009 Kenya Population and Housing Census data provides a basis for the discussion on access to water and sanitation at the regional level. Based on this data, the national water access coverage was 48.5 percent. Only 27.9 percent of the population had access to piped water while 37.2 percent obtained their water from springs, wells or boreholes that were either improved or unimproved. Generally, where the principal source of water is a stream, access to improved water sources is considered low. Over 29 percent received their water supply from sources like streams, lakes, ponds and others considered as

⁸² <http://www.fian.org/resources/documents/others/kenyas-hunger-crisis-the-result-of-right-to-food-violations/pdf>

⁸³ *ibid*

unsafe. A paltry 5.9 percent received their water from water vendors.⁸⁴ The national sanitation coverage to be nearly 70 percent, with urban sanitation coverage was at about 73 percent and rural sanitation coverage approximately 67 percent.⁸⁵ Urban sewerage coverage was about 21 percent whereas total rural sewerage coverage was less than 1 percent of the total rural population.

The Constitution⁸⁷ recognises the right to water and sanitation. Despite this provision, access to safe water and sanitation is still extremely inadequate⁸⁸ and few Kenyans access piped water.⁸⁹ A case in point is Nyanza⁹⁰ which is located close to Lake Victoria and still there is lack of clean, safe water and lack of access to piped water, during and FGD discussion, the community intimated that they use different methods to treat their water including but not limited to use of herbs (mti-mboga and safu), Exposing water to sunlight, Sieving water in a pot, Fetching water early in the morning, allowing water to settle after fetching and praying to God before drinking water. In peri-urban places including but not limited to informal settlements like Mathare, Kibera, Korokocho, Mowlem and Innercore, the FGDs conducted indicate that water is sold to residence at a cost of Kshs 20 per 20 litres of water, which is quite expensive. Further, water rationing has continued to characterize these areas for a long period of two weeks to a month. Furthermore, the government has been putting excess chlorine in piped water where there is access to piped water in peri-urban areas, the said chlorine

has a number of effects including but not limited to the following;

- i. *Effects on teeth (Dental Fluorosis):* Dental fluorosis is a health, psychological and social problem.
- ii. *Effects on bones (Skeletal Fluorosis):* Excessive intake of fluoride will manifest itself in a musculoskeletal disease with a high morbidity.⁹¹ Skeletal fluorosis first causes pain in different joints, then limits joint movement, leading to stiffness and skeletal crippling. The weight of evidence supports the conclusion that lifetime exposure to fluoride at drinking water concentrations of 4 mg/L and higher is likely to increase fracture rates in the population, compared with exposure to fluoride at 1 mg/L, particularly in some susceptible demographic groups that are prone to accumulating fluoride into their bones.⁹²
- iii. *Effects on the stomach linings:* Most patients suffering from skeletal fluorosis show side effects from the high fluorine dose such as ruptures of the stomach lining and nausea.⁹³
- iv. *Effects on the thyroid gland:* There is an association between endemic goitre and fluoride exposure.⁹⁴ Fluoride's suppressive effect on the thyroid is more severe when iodine is deficient, and fluoride is associated with lower levels of iodine.⁹⁵
- v. *Effects on Kidneys:* Kidneys can be injured due

⁸⁴ Ministry of Devolution and Planning. 2013. Comprehensive Public Expenditure Review 2013: Eye on Budget - Spending for Results. Government of Kenya, Nairobi.

⁸⁵ Ministry of Devolution and Planning. 2013. Comprehensive Public Expenditure Review 2013: Eye on Budget - Spending for Results. Government of Kenya, Nairobi.

⁸⁶ Ministry of Devolution and Planning. 2013. Comprehensive Public Expenditure Review 2013: Eye on Budget - Spending for Results. Government of Kenya, Nairobi.

⁸⁷ Article 43(1) (d).

⁸⁸ Joint monitoring programme by WHO and UNICEF in 2012 indicated that access to safe water in Kenya was 59% while access to improved sanitation was 32%.

⁸⁹ Estimates by World Bank put nationally piped water coverage at between 42% and 59%, which leaves millions of citizens without easily accessible water.

⁹⁰ This is located in the Western part of Kenya, currently has four Counties; Kisumu, Homabay, Siaya and Migori Counties

⁹¹ National Research Council (2006). Fluoride in Drinking Water: A Scientific Review of EPA's Standards. Washington, DC: National Academies Press.

⁹² National Research Council (2006). *ibid*

⁹³ Gönnewicht, Daniela (2005). "Untersuchung eines Zusammenhanges von Fluoridkonzentrationen in privaten Trinkwasserversorgungsanlagen und Kariesentwicklung im Raum Ascheberg (Südliches Münsterland/Westfalen)"

⁹⁴ Obel A O. Goitre and fluorosis in Kenya. East Afr Med J. 1982 Jun; 59(6):363-5. No abstract available." In: East Afr Med J. 1982 Jun; 59(6):363-5. E Afr Med J; 1982.

⁹⁵ Strunecá A, Strunecá O, Patočka J (2002). "Fluoride plus aluminium: useful tools in laboratory investigations, but messengers of false information". *Physiol Res* 51 (6): 557-64.

to high levels of fluorine. (Fluoride induced nephrotoxicity). Chronic ingestion in excess of 12 mg/day can cause adverse effects, and an intake that high is possible when fluoride levels are around 4 mg/L.⁹⁶

- vi. *Effects on the Penal gland:* fluoride is likely to cause decreased melatonin production and to have other effects on normal pineal function, which in turn could contribute to a variety of effects in humans.⁹⁷
- vii. *Effects on Diabetes:* The conclusion from the available studies is that sufficient fluoride exposure appears to bring about increases in blood glucose or impaired glucose tolerance in some individuals and to increase the severity of some types of diabetes.⁹⁸
- viii. *Effect on IQ of children:* Studies found that the average IQ of children in the high-fluoride area was significantly lower than that of children in the low-fluoride area.⁹⁹
- ix. *Effects on the liver:* Because the liver is the primary organ for de-fluorinating toxic organo-fluorides, there is a concern that added fluoride body burden that would be experienced in areas where the drinking water had fluoride at 4 mg/L might interfere with the activity of the cytochrome P450 complex.¹⁰⁰
- x. *Effects of fluoride on people who are immunocompromised:* From an immunologic standpoint, individuals who are immunocompromised (e.g., AIDS, transplant, and bone-marrow-replacement patients) could be at greater risk of the immunologic effects of fluoride.¹⁰¹

The government currently is in the process of reviewing the legal framework on water to align the sector with constitutional provisions on access to

water and sanitation.¹⁰² The reduction of budgetary allocations¹⁰³ by the government and the lumping of water as part of the budget earmarked for environment, water, irrigation and housing is a threat to the progressive realization of the right to water and sanitation.

Right to Housing

The right to housing is guaranteed under the Constitution¹⁰⁴ however, notwithstanding this, more than 34% of Kenya's total population live in metropolitan areas and of this, more than 71% are confined in informal settlements. Nonetheless the state adopted a National Housing Policy in which it promised to progressively realize the right to housing for all of its citizens. Conversely, the government has failed to provide accessible and affordable housing to millions of Kenyans which has led to a few individuals determining the cost of not only land but also housing. This has made housing extremely expensive in Kenya as a clique of rich Kenyans are running the real estate sector and in that regard, controls it, in terms of determining the market price which is more often overrated. Further, there is a weak, out-dated institutional framework to facilitate housing development for low-income people and a lack of appropriate legal framework and guidelines for informal settlement activities. Statistical data and other information relevant for planning and decision making purposes are not available

Right to land

Right to ownership of Land is provided for in the Constitution 2010

⁹⁶ National Research Council (2006). Ibid

⁹⁷ National Research Council (2006). Ibid.

⁹⁸ National Research Council (2006). Ibid

⁹⁹ Zhao, L.B., G.H. Liang, D.N. Zhang, and X.R. Wu. 1996. Effect of a high fluoride water supply on children's intelligence. *Fluoride* 29(4):190-192.

¹⁰⁰ Kharasch, E.D., and D.C. Hankins. 1996. P450-dependent and non-enzymatic human liver microsomal defluorination of fluoromethyl-2, 2-difluoro-1-(trifluoromethyl) vinyl ether (compound A), a sevoflurane degradation product. *Drug Metab. Dispos.* 24(6):649-654.

¹⁰¹ National Research Council (2006). Ibid

¹⁰² A call for memoranda on the Water Bill, 2014 was published for submission to the Clerk of the National Assembly by May 7, 2014.

¹⁰³ The sector experienced a reduction in budgets from KES 38.6 billion in 2010/2011 to KES 28.8 billion in 2011/2012.

¹⁰⁴ Article 43(1)(b) guarantees the right to accessible and adequate housing and a reasonable standard of sanitation

Critical Areas of Concern

During the last reporting, The Committee indicated that the State party address disparities in the enjoyment of economic, social and cultural rights, including in access to land, which particularly affect poor people in urban areas and minority and indigenous communities in rural areas, e.g. by adopting the Draft National Land Policy, establishing land inspectorates to monitor discriminatory allocation of land, and implementing the recommendations of the Ndung'u Commission of Inquiry into Illegal/Irregular Allocation of Public Land. It also recommended that the State party establish a tribunal on post-election violence to bring perpetrators to justice, as well as a Truth, Justice and Reconciliation Commission to address broader historical injustices, and that it foster dialogue and promote comprehensive reconciliation among its different ethnic groups.

With the enactment of the new Constitution and the adoption of the National Land Policy, most of the problems associated with land in Kenya are yet to be resolved. The new Constitution (Chapter 5 Sections 60 – 68) points out that all land in Kenya belongs to the people collectively as a nation, communities and individuals. The Kenyan parliament approved nine members of a National Land Commission. Their job was to implement provisions of the 2010 constitution intended to guarantee equal access to land, ensure that land benefits local communities, and prevents public lands being carved up by those in positions of power. The commission was also to examine past injustices over ownership and advice on a new programme for registering land titles. However, this is yet to be undertaken due to the fact that the Ministry of Lands and the NLC has been wrangling in public over roles. This has led to disharmony between the Ministry and NLC. Consequently the wrangles have ended up in Supreme Court for interpretation on each role. This is a clear indication of the fact that the government is not completely honest on dealing with the land historical injustices.

After months of bloodshed during the post-election violence, the Waki Commission, set up to investigate the causes of the violence, reported that one of the major factors was the failure of past administrations

to address land disputes. However, since the new constitution of 2010 and a National Land Policy passed a year earlier, little further progress has been made. The land commission seems to be held in constant state of flux, and there seems to be limited political will to let it undertake its role. There is also very limited interest by the state to implement the Ndungu Commission report as recommended by the Committee. Illegal allocation of land still continue to haunt the country, last month the President released a list of 22 companies that was illegally allocated land in Lamu and subsequently revoked the titles. However, there has been discussion as to the Political Will and sincerity in dealing with the land issue to date. The Ndungu Land report, the TJRC report still remains unimplemented.

Recommendations

- Kenya needs to promote and safeguard a free, democratic and just society in order to provide a peaceful, stable and enabling economic, social, political and cultural environment in which individuals can feed themselves and their families in freedom and dignity.
- In order to achieve the progressive realization of the right to adequate food in the context of national food security, Kenya should promote broad-based economic development that is supportive of her food security policies. Kenya should establish policy goals and benchmarks based on the food security needs of her population.
- Kenya, in consultation with relevant stakeholders and pursuant to her national laws, should adopt a national human-rights based strategy for the progressive realization of the right to adequate food in the context of national food security as part of an overarching national development strategy, including poverty reduction strategies.
- Kenya should, in accordance with her national law and priorities, as well as her international commitments, improve the functioning of her markets, in particular agricultural and food markets, in order to promote both economic growth and sustainable development, inter alia, by

mobilizing domestic savings, both public and private, by developing appropriate credit policies, by generating sustainable adequate levels of national productive investment through credits in concessional terms and by increasing human capacities.

- Kenya should assess the mandate and performance of relevant public institutions and, where necessary, establish, reform or improve her organization and structure to contribute to the progressive realization of the right to adequate food in the context of national food security.
- Kenya needs to apply a multi-stakeholder approach to national food security to identify the roles of and involve all relevant stakeholders, encompassing civil society and the private sector, drawing together their know-how with a view to facilitating the efficient use of resources.
- Kenya needs to enact robust legislative and policy frameworks on the realization of the right to food and freedom from hunger as enshrined in the Constitution. That will facilitate the progressive realization of the right to food in the context of national food security.
- Kenya should facilitate sustainable, non-discriminatory and secure access and utilization of resources consistent with her national law and with international law and protect the assets that are important for people's livelihoods. Kenya should respect and protect the rights of individuals with respect to resources such as land, water, forests, fisheries and livestock without any discrimination. Therefore land reforms and other policy reforms are necessary to secure efficient and equitable access to land and to strengthen pro-poor growth. Special attention should be given to groups such as pastoralists and indigenous people and their relation to natural resources. Kenya should also facilitate universal access to decent work for her population in accordance with the provisions of her domestic laws and international obligations enshrined in various international conventions including ILO Conventions.
- Kenya should take measures to ensure that all food, whether locally produced or imported, freely available or sold on markets, is safe and consistent with national food safety standards.
- Kenya should take measures to maintain, adapt or strengthen dietary diversity and healthy eating habits and food preparation, as well as feeding patterns, including breastfeeding, while ensuring that changes in availability and access to food supply do not negatively affect dietary composition and intake.
- The State should distinguish the amount allocated for water and sanitation from the estimate for environment, water, irrigation and housing in order to enhance it as a priority.
- The State should adopt the draft National Water Policy and enact the Water Bill, 2014.
- The State should undertake a research on the people suffering from fluorosis and come up with a policy on compensation of citizens suffering from the said disease
- The Government should revise the National Housing Policy and the Draft Housing Bill to, make reasonable provisions, within its available resources, to ensure adequate access to housing especially for the most vulnerable and marginalized groups
- The state agencies tasked with implementing aspects of housing should as a matter of priority reform their data collection and information sharing system
- The state should implement the TJRC and Ndungu land report, this should be spear headed by the NLC.
- The state should support NLC in order for the Commission to execute its mandate as not only provided by the Constitution but as had been envisaged

Article 12 - Right to Enjoyment of the Highest Attainable Standard of Physical and Mental Health

Situation

Access to affordable and quality health care remains a major challenge for most Kenyans. There are however improvements in access; During the first nine months of fiscal 2011/12, nearly 27.9 million individuals used primary health services compared to 25.8 million in fiscal 2010/11.¹⁰⁵ The sector realized a reduction in the under five-mortality rate from 115 per 1,000 live births in 2003 to 74 per 1,000 live births in 2008/09, and in the infant mortality rate from 77 per 1,000 live births to 52 per 1,000 live births in the same period. The sector also saw increased immunization coverage for infants less than one year of age from 71 percent in 2008 to 77 percent in 2011.¹⁰⁶ However, the maternal mortality rate has deteriorated from 414 per 100,000 live births in 2003 to 488 deaths per 100,000 live births in 2008/09. Births attended by skilled health personnel declined from 51 percent in 2007 to 43 percent in 2010/11 despite considerable funding for the programmes.¹⁰⁷

Health is a right, but also important to realizing other human rights: At the household level it is clear that good health improves the capacity to learn and work,

which dramatically improves income and welfare.¹⁰⁸

¹⁰⁹ Ill health is concentrated among the poor, but the poorest 20 percent lay claim to just 14 percent of government health care expenditure compared to 27 percent of the benefit received by the richest 20 percent. Both the quality and efficiency of public health services remain low.¹¹⁰ According to Kenyan health statistics, the prevalence and incidence of sickness for the country's 38 million people are similar for the poor and the non-poor.¹¹¹ However, the response to sickness is markedly different across different socioeconomic groups. An estimated 23 percent of the sick do not seek conventional medical care.¹¹²

Further research is required to link such findings to a number of potential factors: the lack of available allopathic providers, discrimination in the provision of services, the inability of the poor to afford services, or the lack of trust that the poor place in conventional health workers.¹¹³ Only 54.8 percent of children from the poorest quintile have received a measles vaccine compared with 88 percent of the wealthiest, and the prevalence of stunting in the poorest quintile is 44.2 percent compared to 24.5 percent in the wealthiest quintile.¹¹⁴

¹⁰⁵ Ramana, Gandham NV; Chepkoech, Rose; Walelign, Netsanet. 2013. Improving Universal Primary Health Care by Kenya: A Case Study of the Health Sector Services Fund. World Bank, Washington DC.

¹⁰⁶ Ministry of Devolution and Planning. 2013. Comprehensive Public Expenditure Review 2013: Eye on Budget - Spending for Results. Government of Kenya, Nairobi.

¹⁰⁷ Ministry of Devolution and Planning. 2013. Comprehensive Public Expenditure Review 2013: Eye on Budget - Spending for Results. Government of Kenya, Nairobi.

¹⁰⁸ Spence M. and M. Lewis. (Eds) (2009) Health and Growth. Washington, D.C. World Bank

¹⁰⁹ Ministry of Devolution and Planning. 2013. Comprehensive Public Expenditure Review 2013: Eye on Budget - Spending for Results. Government of Kenya, Nairobi.

¹¹⁰ Ministry of Devolution and Planning. 2013. Comprehensive Public Expenditure Review 2013: Eye on Budget - Spending for Results. Government of Kenya, Nairobi.

¹¹¹ David M Ndetei, Lincoln Khasakhala, Jacob O Omolo (2008) Incentives for health worker retention in Kenya: An assessment of current practice Africa Mental Health Foundation (AMHF), Institute of Policy Analysis and Research (IPAR), Kenya

¹¹² Lambert, John; Leonard, Kenneth; Mungai, Geoffrey; Oindi-Ogaja, Elizabeth; Gatheru, Gladys; Mirangi, Mirangi; Owara, Jennifer; Herbst, Christopher H.; Ramana, GNV; Lemiere, Christophe. 2011. The Contribution of Traditional Herbal Medicine Practitioners to Kenyan Health Care Delivery: Results from Community Health-seeking Behavior Vignettes and a Traditional Herbal Medicine Practitioner Survey. World Bank, Washington, DC.

¹¹³ Lambert, John; Leonard, Kenneth; Mungai, Geoffrey; Oindi-Ogaja, Elizabeth; Gatheru, Gladys; Mirangi, Mirangi; Owara, Jennifer; Herbst, Christopher H.; Ramana, GNV; Lemiere, Christophe. 2011. The Contribution of Traditional Herbal Medicine Practitioners to Kenyan Health Care Delivery: Results from Community Health-seeking Behavior Vignettes and a Traditional Herbal Medicine Practitioner Survey. World Bank, Washington, DC.

¹¹⁴ World Bank (2008), "Kenya Poverty and Inequality Assessment, Volume I: Synthesis Report," Poverty Reduction and Economic Management Unit, Africa Region, World Bank, Washington D.C.

Kenyan Ministry of Health Data show that there are 35,642 conventional health workers (1,203 doctors, 2,186 clinical officers, 4,259 public health officers, 3,482 registered nurses, 12,664 enrolled nurses and others).¹¹⁵ Assuming a population of 38 million Kenyans, there is a doctor-patient ratio of 1 to 33,000 and a nurse-patient ratio of 1 to 2,600.

Given the estimated 40,000 THMPs, there is a THMP-patient ratio of 1 to 950.¹¹⁶ Fundamental to delivering quality education and health services is the role of frontline service providers—teachers, nurses and doctors. If these providers exert effort and have the right skills, more resources for education and health can indeed have beneficial outcomes.¹¹⁷ Only 58% of public health providers could correctly diagnose at least 4 out of 5 very common conditions (like diarrhoea with dehydration and malaria with anaemia). Public providers followed less than half (44%) of the correct treatment actions needed for management of maternal and neonatal complications. Provider competence was correlated with level of training.¹¹⁸ While many guidelines and policies exist, there is no systematic approach to assessing, monitoring, and improving the performance of health services, at least not according to consistent, defined standards.¹¹⁹ Health workers are unevenly distributed around the country, with greater numbers in hospitals and in urban and non-arid areas. Counties with the highest poverty rates have the fewest deliveries in a health facility and lower access to qualified medical assistance, including birth. This includes counties such as Wajir,

Mandera, Turkana, West Pokot, and Kilifi, which are underserved in social services including health facilities, medical supplies, personnel and where the nearest health facility of any type is over 50 km away.¹²⁰ Counties in the northern parts of Kenya and the coast (excluding Mombasa) have the lowest numbers of health personnel.¹²¹ Skilled assistance during birth occurs in only about 5 percent of cases in Wajir, compared to 88 percent in Kirinyaga.¹²² Although the recruitment of health workers addressed the shortfalls in human resources, policies to attract them to underserved areas mostly remain ineffective.¹²³

Meanwhile, Kenya's new Constitution mandated devolution of responsibility to deliver essential health services to counties and provided for an equity-based resource allocation for counties covering all sectors. The national health strategy was drafted prior to the Constitution of Kenya 2010 and is yet to reflect the challenge of addressing the issues of basic economic and social rights in the health sector or the introduction of devolved responsibility to county governments. The National Health Sector Strategic Plan II (2005-2010), the ministries of health strategic plans (2008-2012) and the Kenya Vision 2030 all pre-date the Constitution and all focus on the themes of access, effectiveness and affordability. The National Health Policy Framework (2012-2030) aims to provide comprehensive support for six distinct phases of the human life cycle, mainly through scaling up community-based care and expanding the role of grassroots level health workers, but this framework is not yet aligned to the roles and

¹¹⁵ Africa Health Workforce Observatory, —Human Resources for Health Country Profile Kenya (AHWO, March 2009).

¹¹⁶ This figure was provided by the National Council of Association for Alternative, Complementary Medicine and Research, Nairobi. (as cited in Lambert, John; Leonard, Kenneth; Mungai, Geoffrey; Omindi-Ogaja, Elizabeth; Gatheru, Gladys; Mirangi, Mirangi; Owara, Jennifer; Herbst, Christopher H.; Ramana, GNV; Lemiere, Christophe. 2011. The Contribution of Traditional Herbal Medicine Practitioners to Kenyan Health Care Delivery: Results from Community Health-seeking Behavior Vignettes and a Traditional Herbal Medicine Practitioner Survey. World Bank, Washington, DC.)

¹¹⁷ Hanushek, E. (2003) "The Failure of Input-Based Schooling Policies," *Economic Journal*, 113(February): F64–F98.

¹¹⁸ Martin, Gayle H.; Pimhidzai, Obert. 2013. Education and Health Services in Kenya: Data for Results and Accountability. World Bank, Washington, DC.

¹¹⁹ Ramana, Gandham NV; Chepkoech, Rose; Walelign, Netsanet. 2013. Improving Universal Primary Health Care by Kenya: A Case Study of the Health Sector Services Fund. World Bank, Washington DC.

¹²⁰ Ministry of Devolution and Planning. 2013. Comprehensive Public Expenditure Review 2013: Eye on Budget - Spending for Results. Government of Kenya, Nairobi.

¹²¹ Ministry of Devolution and Planning. 2013. Comprehensive Public Expenditure Review 2013: Eye on Budget - Spending for Results. Government of Kenya, Nairobi.

¹²² Ministry of Devolution and Planning. 2013. Comprehensive Public Expenditure Review 2013: Eye on Budget - Spending for Results. Government of Kenya, Nairobi.

¹²³ Ramana, Gandham NV; Chepkoech, Rose; Walelign, Netsanet. 2013. Improving Universal Primary Health Care by Kenya: A Case Study of the Health Sector Services Fund. World Bank, Washington DC.

responsibilities of national and county level governments.

Mental Health

In Kenya, mental health is acted upon on the periphery with society stigma attached to it.

To date, the Mental Health Act Chapter 248 of the Laws of Kenya governs Mental Health. This Act is largely out of touch with requirements and necessities of mental health. Currently, we have a draft Mental Health Care Bill (2012) formulated through concerted efforts by all stakeholders in the health sector. The Bill takes cognizance and incorporates the provisions of the Constitution of Kenya, the Convention on the Rights of People with Disabilities and the international best practices on mental health. It provides for the care, treatment and rehabilitation of persons who are mentally ill. It seeks to ensure that the best interests of the person with mental illness are adhered to. In addition, it establishes procedures for admission, treatment and discharge of persons with mental illness as well as care and administration of property of persons who are mentally ill. The Bill establishes the Mental Health Care Review Board to administer and coordinate matters related to mental health and seeks to repeal the Mental Health Act, Chapter 248 of the Laws of Kenya (1989).

Mental Health Institutions in Kenya:

Mental health in the public sector is offered from the district level 4 upwards hospitals with numerous referrals to Mathari and Kenyatta Hospital. General hospital at the district and provincial level across Kenya receive and attempt to treat patients suffering from variant mental disorders and diseases. However, there is only one national teaching and referral namely Mathari hospital mental health facility purely designated for mental health treatment. There is an upcoming one called Moi Referral and teaching hospital.

Capacity of Mathari hospital:

Mathari hospital is the main national referral hospital purely on mental health. Apart from the walk-in patients, it has to cater for such referrals from the general hospitals at both the district and province level. It suffers from the following:

- Insufficient financial budgets
- Under staffing of trained mental health personnel (Doctors and nurses)
- Limited health supplies
- Inadequate mental health equipment- such as diagnosis machines.

Since 2013, the State has been in the process of devolving the provision of health services as stipulated in the Constitution¹²⁴ and the entire health sector to the County governments. However, the process has been rushed thereby compromising the provision of health services to the citizens. Further, the County governments have limited capacity to manage the provision of healthcare services hence, health services have remained inaccessible, unaffordable and of low quality. Unsafe abortion is still a leading cause of maternal mortality and morbidity.¹²⁵

Recommendations

- Increase budgetary allocation to health and health services in accordance with the Abuja declaration. These can be done through a Constitutional amendment that will increase the devolution fund to a minimum of 45 percent of the National budget
- Both the national and county governments must complement each other in order to achieve better health care services.¹²⁶
- The State should reinstate the MOH Standards and Guidelines, 2012
- Enhance programmes and policies relating to sexual and reproductive healthcare for women

¹²⁴ Schedule 4 of the Constitution of Kenya

¹²⁵ Incidence and Complications of Unsafe Abortion in Kenya: Key Findings of a National Study (Nairobi, Kenya: African Population and Health Research Center, Ministry of Health, Kenya, Ipas, and Guttmacher Institute 2013)

¹²⁶ See http://www.heraf.or.ke/index.php?option=com_docman&Itemid=417?option=com_docman&Itemid=417. Accessed on 20th May, 2014

Article 13 and 14 – Right to Education and Provision of Compulsory Education

Right to Education

The number of public and private primary schools increased from 6,058 in 1963 to 28,567 in 2011, while the number of secondary schools has increased from 151 to 7,297 over the same period. The number of universities has also increased, from 1 in 1963 to 22 chartered public universities, 10 public university colleges, 17 private universities with full charter and 10 with interim authority, five constituent colleges of private universities and a number of tertiary institutions.¹²⁷ The abolition of school fees and levies removed one of the major barriers to access to education for children of parents with limited resources and reversed a trend of declining enrolment rates. The number of pupils in public primary schools increased from 5.9 million in December 2002 to 6.9 million in January 2003 and to 7.1 million in December 2004. In 2006, there were about 7.6 million pupils enrolled in public primary schools, non-formal schools (NFSs), and non-formal education centres (NFECS).¹²⁸

The Constitution of Kenya, the Basic Education Act of 2013, the Technical and Vocational Educational and Training Act (TVET) of 2013, the Universities Act No. 42 of 2012, the KNEC Act of 2012, Vision 2030 and Sessional Paper No. 14 of 2012 largely guide the education sector. According to the Bill of Rights of the Constitution, basic education is a fundamental human right. The Constitution guarantees every child free and compulsory basic education.¹²⁹ Kenyans with higher education tend to find jobs in the formal sector. According to the KIHBS, about three-quarters of undergraduates and 81 percent of post graduates have formal sector jobs, as opposed to 14 percent of those with secondary education and 5 percent of those with primary education. Also, the crude risk of unemployment decreases as education attainment

increased.

Likewise, for urban wages, there appears to be a significant premium for higher education, especially for men.¹³⁰ Before the constitution was passed, on Monday, January 6, 2003, when schools across the country opened, the response to the FPE policy was overwhelming. Some public primary schools, especially in urban slum areas, found it difficult to cope with the large numbers of pupils seeking admission. In one instance, Kimani Maruge Ng'ang'a, an 82-year-old man, took advantage of the FPE policy and enrolled in standard 1 at Kapkeduiwo Primary School in Uasin Gichu District. He became the world's oldest student to enrol in primary school. After the introduction of FPE in 2003, the gross enrolment rate (GER) increased from 88.2 percent to 102.8 percent in 2003, rising to 104.8 percent in 2004 (table 4.3). The GER for boys and girls increased considerably from 88.9 and 87.5 percent, respectively, in 2002 to 108.0 and 101.6 percent, respectively, in 2004. In 2004, Western Province recorded the highest GER of 134.2 percent, followed by Nyanza Province (121.8) and Eastern Province (119.0). North Eastern and Nairobi Provinces recorded the lowest GER of 26.6 and 43.2 percent, respectively.

The low enrolment in Nairobi can be attributed to the high number (60 percent) of Nairobi Province residents who live in slum areas. The majority of children in these slum areas attend non-formal schools¹³¹ as their particular socioeconomic background puts multiple demands on their time. Pressure to supplement family incomes prevents these children from attending formal schools. After the introduction of FPE in 2003, the primary completion rate (PCR) increased to 68.2 percent from 62.8 percent in 2002 and rose further to 76.2 percent in 2004.¹³² Despite these statistics, there have been

¹²⁷ Ministry of Devolution and Planning. 2013. Comprehensive Public Expenditure Review 2013: Eye on Budget - Spending for Results. Government of Kenya, Nairobi.

¹²⁸ World Bank. 2009. Abolishing School Fees in Africa: Lessons from Ethiopia, Ghana, Kenya, Malawi, and Mozambique. World Bank.

¹²⁹ Ministry of Devolution and Planning. 2013. Comprehensive Public Expenditure Review 2013: Eye on Budget - Spending for Results. Government of Kenya, Nairobi.

¹³⁰ World Bank. 2009. Kenya - Poverty and Inequality Assessment: Executive Summary and Synthesis Report. World Bank.

¹³¹ World Bank. 2009. Abolishing School Fees in Africa: Lessons from Ethiopia, Ghana, Kenya, Malawi, and Mozambique. World Bank.

¹³² World Bank. 2009. Abolishing School Fees in Africa: Lessons from Ethiopia, Ghana, Kenya, Malawi, and Mozambique. World Bank.

inequities in education provision. Children living in households in the poorer quintiles are less likely to attend school, tend to achieve lower levels of grade advancement, are less likely to benefit from vaccination programmes, and have poorer health outcomes than their better-off counterparts.¹³³ The net enrolment rate (NER) for secondary schooling is only 6 percent for those in the bottom quintile compared with 52 percent for those in the top quintile.¹³⁴ The gap in educational attainment between rural and urban areas is sizeable: 83 percent of the urban population has a primary education or higher compared with 70 percent in the rural areas. But the national gender gap is small: 75 percent of men and 72 percent of women have at least a primary education.¹³⁵

More significant, though, is the difference between the north-eastern region, where only three out of 10 rural women have ever attended school, and the rest of Kenya. Female literacy rates were below 10 percent in Manderu; Turkana and Wajir districts.¹³⁶ High NER levels are observed in counties such as Nyeri, Kiambu, Kisumu and Nairobi. On the other hand, low NER, of less than 10 percent, is typical of northern Kenya, including Garissa, Manderu and Wajir counties.¹³⁷ County enrolment rates range from 5 to 10 percent in the north and some parts of the coast to around 50 percent in Kiambu and Nairobi. There is also a wider gender gap between boys and girls at secondary school; the gender parity index was 0.86 in 2011—with no improvement over the last five years. Female literacy rates were below 10 percent in northern counties—Manderu, Turkana and Wajir—but

as high as 90 percent in Nairobi and Uasin Gishu counties.¹³⁸ Girls are much less likely to go on to secondary school in counties from the northern part of Kenya (Garissa, Manderu, Samburu, Turkana, Wajir, and West Pokot).¹³⁹ The arid and semiarid lands face unique teacher imbalance problems. Teachers do not favour these remote and climatically hostile areas. The situation is particularly bad in areas prone to insecurity, such as Wajir, Turkana, Manderu, West Pokot and East Baringo. Because these areas are highly unpopular destinations for teachers, it is still common to find primary schools with only one teacher for all classes. The average PTR in West Pokot and East Baringo is 20 compared to an average of 45 in the highly densely populated areas.¹⁴⁰

Many better off Kenyans take their children to private schools due to the better quality of education. Just a third (35%) of public school teachers showed mastery of the curriculum they teach. Seniority and years of training among teachers did not correlate with better teacher competence.¹⁴¹ A public school child receives 1 hour 9 minutes less teaching than her private school counterpart. The implication is that for every term, a child in a public school receives 20 days less of teaching time.¹⁴² In public and private schools teachers are roughly equally likely to show up at school. The main difference is that public teachers may be at school, but are 50% less likely to be in class teaching. Further, in Northern Kenya, and pastoralist's communities' area, you find teachers armed with guns as a number are Kenya Police Reservists (KPR) or others arm themselves for purposes of protection of their lives and/or property. Furthermore, the State is

¹³³ World Bank. 2013. Kenya National Safety Net Program for Results: Technical Assessment. Washington, DC.

¹³⁴ World Bank. 2013. Kenya National Safety Net Program for Results: Technical Assessment. Washington, DC.

¹³⁵ Ministry of Devolution and Planning. 2013. Comprehensive Public Expenditure Review 2013: Eye on Budget - Spending for Results. Government of Kenya, Nairobi.

¹³⁶ Ministry of Devolution and Planning. 2013. Comprehensive Public Expenditure Review 2013: Eye on Budget - Spending for Results. Government of Kenya, Nairobi.

¹³⁷ Ministry of Devolution and Planning. 2013. Comprehensive Public Expenditure Review 2013: Eye on Budget - Spending for Results. Government of Kenya, Nairobi.

¹³⁸ Ministry of Devolution and Planning. 2013. Comprehensive Public Expenditure Review 2013: Eye on Budget - Spending for Results. Government of Kenya, Nairobi.

¹³⁹ Ministry of Devolution and Planning. 2013. Comprehensive Public Expenditure Review 2013: Eye on Budget - Spending for Results. Government of Kenya, Nairobi.

¹⁴⁰ World Bank. 2009. Abolishing School Fees in Africa: Lessons from Ethiopia, Ghana, Kenya, Malawi, and Mozambique. World Bank.

¹⁴¹ Martin, Gayle H.; Pimhidzai, Obert. 2013. Education and Health Services in Kenya: Data for Results and Accountability. World Bank, Washington, DC.

¹⁴² Martin, Gayle H.; Pimhidzai, Obert. 2013. Education and Health Services in Kenya: Data for Results and Accountability. World Bank, Washington, DC.

introducing “free laptops” in primary school as provided for in their manifesto. This project has been castigated by a number of stake holders in the Education sector as a number of schools still do not have access to electricity, very high ratio of teacher to students and the issues raised above still pose a grave challenge.

The state has however made positive steps in the realization of the right to education, which is anchored in the constitution. Though the state ought to be commended for sustaining the free primary education and free day secondary education the sector is facing numerous challenges including; insufficient allocation of funds¹⁴³, increase in student teacher ratio¹⁴⁴, insufficient budgetary allocation of funds to special need education, low transition rate of girls from primary school to secondary school¹⁴⁵. Poor remuneration of teachers and university lecturers¹⁴⁶ has had a negative effect on the quality of education since most of the time the teachers and Lecturers are engaged in industrial action. The high cost of university education is likely to lock out many students from accessing education. Issues concerning the girl child in relation to access to education in comparison with boys are still a major challenge. These issues range from sanitation including but not limited to access to Sanitary Pads and how lack thereof would affect not only attendance, performance but also reduces confidence levels. Further more, as indicated above, lack of access to toilets and water for the girl child is still a major challenge, which affects the quality of education.

Recommendations

- The Government should address the transition rates of girls from secondary schools to university
- The State should also increase Budgetary allocation for special needs education
- Funding should also be increased for alternative education for children to implement the policy on alternative

provision of basic education and training for children in urban slums and other informal settlements.

- The State should reduce the student teacher ratio in public schools instead of introduction of laptops in schools.
- Budgetary allocation for free primary education and free day secondary education should also be increased.

¹⁴³ www.ieakenya.or.ke/publications/doc.../277-budget-guide-2013-

¹⁴⁴ <http://jeteraps.scholarlinkresearch.org/articles/Challenges%20and%20Reforms%20Facing%20Kenyan.pdf>

¹⁴⁵ *ibid*

¹⁴⁶ <http://repec.iza.org/dp2844.pdf>

Article 15 – Right to Cultural Life, Scientific Research and Creative Activities

The preamble of the COK recognizes that the people of Kenya are proud of their ethnic, cultural and religious diversity and determined to live in peace and unity as one indivisible sovereign nation.

Article 11 of the COK recognizes culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation.

Further, the right to culture is guaranteed under Article 44 of the COK, which states that every person has the right to use the language and to participate in the cultural life of the person's choice. This includes the right to form, join and maintain cultural and linguistic associations and other organs of civil society.

However, the right to cultural life is limited under Article 2(4) of the COK that provides that any customary law not consistent with the Constitution is void to the extent of the inconsistency. This means that while we pride ourselves as a country with cultural diversity, this may not be so where practices and beliefs appear to contradict or go against the Constitution as a whole.

This right remains to be promoted, protected and preserved by adopting the following recommendations.

Recommendations (as per our Constitution)

- i. State should recognize the role of science and indigenous technologies in the development of the nation. Establish science based institutions/ galleries where interested citizens can engage and participate in innovations.
- ii. Establish mechanisms to legally recognize and register intellectual property rights of the people of Kenya- This protects the origin and ownership of products both locally and internationally.
- iii. A clear policy and guidelines on creative arts/ industries should be developed.
- iv. The Government should device a deliberate move to convert and promote creative industries into lucrative commercial activities both locally and internationally.
- v. The government to ensure protection of indigenous seeds and plant varieties, their genetic and diverse characteristics and their use by the communities of Kenya.