

Impact of international human rights monitoring mechanisms in Kenya

by

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Declaration

I declare that this thesis, which I hereby submit for the degree of Doctor Legum (LLD), at the University of Pretoria, is my own work and has not been previously submitted by me for a degree at this, or any other tertiary institution.

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List of acronyms

African Charter	African Charter on Human and Peoples' Rights
African Commission	African Commission on Human and Peoples' Rights
African Committee on the Child	African Committee of Experts on the Rights and Welfare of the Child
African Commission SM	African Commission Working Group on Indigenous Populations/ Communities
African Court	African Court on Human and Peoples' Rights
APR Forum	African Peer Review Forum
APR Panel	African Peer Review Panel
APRM	African Peer Review Mechanism
ASEAN	Association of South East Asian Nations
AU	African Union
AU Assembly	AU Heads of State and Government
AU Court of Justice	Court of Justice of the African Union
AU ECOSOC	AU Economic, Social and Cultural Council
EAC	East African Community
EACJ	East African Court of Justice
EAC Treaty	Treaty for the Establishment of the East African Community
ECOWAS Court	Economic Community of West African States Court of Justice
CAT	Convention Against Torture and Other Cruel, Inhuman and Degrading Punishment or Treatment
CAT Committee	UN Committee on the Convention Against Torture
CED Committee	UN Committee on Enforced Disappearances
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CEDAW Committee	UN Committee on the Elimination of All Forms of Discrimination against Women

CERD	International Convention on Elimination of All Forms of Racial Discrimination
CERD Committee	UN Committee on the Convention on Elimination of All Forms of Racial Discrimination
CESCR Committee	UN Committee on Economic, Social and Cultural Rights
Charter on Children	African Charter on the Rights and Welfare of the Child
CLAN	Child Legal Aid Network
COFEK	Consumer Federation of Kenya
COHRE	Centre for Housing Rights and Evictions
Committee of Experts	Committee of Experts on the Constitutional Review
COMESA Court	Common Market for East and Southern Africa Court of Justice
Council	Human Rights Council
Court Rules	2010 Rules of Procedure of the African Court on Human and Peoples' Rights
CPED	Convention on Protection of All Persons from Enforced Disappearances
CRC	Convention on the Rights of the Child
CRC Committee	UN Committee on the Convention of the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
CRPD Committee	UN Committee on the Convention on the Rights of Persons with Disabilities
CWM Committee	UN Committee on the Rights of All Migrant Workers and Members of their Families
Haki Jamii	Economic and Social Rights Centre
HRC Committee	UN Human Rights Committee
ICC	International Criminal Court
ICC Statute	Statute of the International Criminal Court
ICCPR	International Covenant on Civil and Political Rights

ICESCR	International Covenant on Economic, Social and Cultural Rights
ICRMW	International Convention on the Rights of All Migrant Workers and Members of their Families
ILO	International Labour Organization
IMLU	Independent Medico-Legal Unit
Independent Policing Authority	Independent Policing Oversight Authority
Internally Displaced Persons Act	Prevention, Protection and Assistance to Internally Displaced Persons and Communities Act
KES	Kenya shillings
LAPSSET	Lamu Port – South Sudan-Ethiopia Transport
NEPAD	New Partnership for Africa's Development
NGOs	Non-governmental Organisations
OAU	Organization of African Unity
OAU Charter	Charter of the Organization of African Unity
OMCT	World Organisation Against Torture
P3 Form	Kenya Police Medical Report Form
Parliamentary Committee	Parliamentary Select Committee on the Review of the Constitution
Protocol and Statute of the African Court	Protocol and Statute of the African Court of Justice and Human Rights
Protocol on the African Court	Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court of Human and Peoples' Rights
Protocol on the Rights of Women	Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa
SPT	Sub-Committee on the Prevention of Torture
SR EJK	UN Special Rapporteur on Extra Judicial, Summary or Arbitrary Killings
SR ECSR	UN Special Rapporteur on the right to adequate housing as a component of the right to adequate standard of living

SR F O & E	UN Special Rapporteur on Freedom of Opinion and Expression
SR Housing	UN Special Rapporteur on Right to Adequate Housing
SR IDPs	UN Special Rapporteur on Internally Displaced Persons
SR IPs	UN Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous Persons
SR TOT	UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment
SR STC	UN Special Rapporteur on Sale of children, child prostitution and child pornography
SR Suppression of Terrorism	UN Special Rapporteur on promotion and protection of human rights while countering terrorism
TACKLE	Tackling Child Labour through Education
Review Act, 2001	Constitution of Kenya Review Act, 2001
Review Act, 2008	Constitution of Kenya Review Act, 2008
Review Commission	Constitution of Kenya Review Commission
Rules of Procedure 2010	Rules of Procedure of the African Commission on Human and Peoples' Rights, 2010
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organization
Universal Declaration	Universal Declaration of Human Rights
UPR	Universal Periodic Review

Summary of the thesis

This research titled 'Impact of international human rights monitoring mechanisms in Kenya' explores the influence of the findings of international monitoring mechanisms in Kenya. The research demonstrates that the findings have had limited impact on national legislation, executive policy, court decisions and the constitution making process. Further, the research illustrates that the key factors accounting for impact of the findings of monitoring mechanisms are internalisation in the political, legal and social order, domestic structures and processes and non-state actors. In addition, the research explores the limited impact of the findings despite their legal internalisation through the Kenya Constitution, 2010 and demonstrates that it is as a result of incomplete internalisation in the political and social order. The research adds to existing literature on impact of international human rights monitoring mechanisms and also to the literature on state compliance with international law through theory testing.

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Chapter 1

Introduction

1 Background to the research

The last six decades have been characterized by a dramatic increase in the number of international human rights treaties and state parties to these treaties. Despite this seeming improvement in numbers, human rights violations remain endemic. This gap between the increasing number of international human rights treaties and the actual human rights practices is a great contradiction. These human rights treaties have failed to count where they matter most: implementation at the national level, fueling intense debate on the impact of international human rights regimes.

It is noteworthy that the question of national level implementation of treaty standards was not lost to the United Nations (UN) at the birth of the UN human rights system. It was agreed that global monitoring would be through establishment of treaty specific bodies to monitor compliance with the treaty standards primarily through examination of state reports premised on the assumption that the reports would lead to 'constructive dialogue' between the state and the treaty body.¹ It was further agreed that inter-state and individual complaints procedure would be accorded lesser priority in compliance monitoring while the treaty bodies' decision making power would not constitute a judicial determination.² Additionally, the treaty bodies have over time adopted the practice of issuing general comments consisting of authoritative interpretations of human rights treaty provisions.³ Further, the Commission on Human Rights (now replaced by the Human Rights Council) has over the years established a series of non-treaty based monitoring mechanisms. These mechanisms comprise of country specific procedures to deal with gross and systematic human rights violations both publicly and on confidential basis (the 1235 and 1503 procedures respectively); and special procedures made up of either individual special rapporteurs or working groups addressing both thematic and country specific issues.⁴ Instructively, these special procedures were retained under the Human Rights Council, with a new more efficient and victim-centred complaints procedure being established following review of the 1503 procedure.⁵ As of October 2015, the UN

¹ J Crawford 'The UN human rights treaty system: A system in crisis' in P Alston & J Crawford (eds) *The future of UN human rights treaty monitoring* (2000) 1 writing on the evolution of the UN treaty system. See also AF Bayefsky *The UN human rights treaty system: universality at the crossroads* (2001) 11 commenting on the international human rights implementation mechanism.

² Crawford (n 1 above) 1.

³ C Blake 'Normative instruments of international human rights law: locating the general comments' (2008) *Centre for Human Rights and Global Justice Working Paper No. 17* Commenting generally on the history of general comments in the UN human rights treaty system.

⁴ H Keller & G Ulfstein *UN human rights treaty bodies: law and legitimacy* (2012) 1-2. See also E Stamatopolou 'The development of the United Nations mechanisms for the protection and promotion of human rights' (1998) 55 *Wash. & Lee L. Rev.* 687-696 commenting on the establishment of the 1503 procedure. See also H Steiner & P Alston (eds) *International human rights law in context, law, politics and morals* (2000) 754 discussing the 1503 procedure as a consequence of the 1235 procedure following a protest by states that confidential communications could not be passed on to the UN due to the public nature of the 1235 procedure. Over the years the 1503 procedure has surpassed the 1235 procedure in use as its confidential nature makes it more appealing to states.

⁵ Office of the High Commissioner for Human Rights, Human Rights Council complaint procedure, <http://www.ohchr.org/EN/HRBodies/HRC/Pages/Complaint.aspx> (accessed 22 October 2015).

system has 41 thematic and 14 country procedures.⁶ The newest addition to the non-treaty based monitoring mechanisms is the Universal Periodic Review established by the Human Rights Council in 2006 to consider human rights situations in all states.⁷ State reporting before an international committee remains the key standard compliance monitoring mechanism in the UN human rights regime, while the complaints procedure is optional as it requires states to recognize the competence of monitoring bodies to adjudicate complaints from their citizens.⁸

Similarly, regional organisations also established human rights monitoring mechanisms. The Council of Europe set up the model regional human rights monitoring mechanism characterized by supervisory institutions with the individual complaints system as the primary monitoring mechanism and with lesser priority accorded to state reporting.⁹

The Inter-American and the African systems largely adopted the original model set up by the European system both characterized by a quasi-judicial Commission, later complemented by a judicial but part-time Court.¹⁰ In addition to the above fully fledged regional mechanisms are the upcoming Arab and South-East Asia human rights systems.¹¹ The Charter for the Association of South East Asian Nations (ASEAN) was adopted in 2007 and incorporates in its mandate protection and promotion of human rights and fundamental freedoms in regard to member state obligations. The Charter also provides for establishment of an ASEAN human rights body.¹² The Arab human rights system is founded on the Arab Charter on Human Rights which entered into force in 2008. The Charter establishes state reporting as the primary supervisory mechanism without any provision for the individual or inter-state complaints procedure. The Arab human rights committee is charged with monitoring implementation of the Charter.¹³

⁶ Office of the High Commissioner for Human Rights, Special Procedures of the Human Rights Council <http://www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx> (accessed 22 October 2015).

⁷ Office of the High Commissioner for Human Rights, Human Rights Council Universal Periodic Review <http://www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx> (accessed 16 December 2012).

⁸ W Kalin 'Examination of state reports' in Keller & Ulfstein (n 4 above) 16 on examination of state reports under the UN human rights treaty bodies and pointing out that the core UN treaties provide for mandatory reporting for all state parties unlike the optional complaints procedure. Currently the optional complaint mechanisms exists for eight of the treaty body committees: Committee on Civil and Political Rights, Committee on the Elimination of Racial Discrimination, Committee Against Torture, Committee on the Elimination of Discrimination Against Women, Committee on the Rights of Persons with Disabilities, Committee on Enforced Disappearances, Committee on the Rights of the Child and Committee on Economic, Social and Cultural Rights. Provisions relating to individual complaints for the Committee on the Rights of All Migrant Workers and Members of their Families are yet to become operative as of October 2015.

⁹ Crawford (n 1 above) 2.

¹⁰ 'Organization of American states' <http://www.oas.org/en/iachr/mandate/what.asp> on the Inter-American Human Rights System. See also 'African Commission on Human and Peoples' Rights' <http://www.achpr.org/> on the African Commission on Human and Peoples' Rights and 'African Court on Human and Peoples' Rights' <http://www.african-court.org/en/> on the African Court (accessed 27 December 2012); See F Viljoen *International human rights law in Africa* (2012) on the African human rights system. Notably, although the judges of the African Court on Human and Peoples' Rights work on a part time basis, the president of the court works full time. See DJ Harris & S Livingstone *The Inter-American system of human rights* (1998) on the Inter-American human rights system.

¹¹ European Parliament 'The role of regional human rights mechanisms' (2010) 19-20 <http://www.europarl.europa.eu/committees/en/droi/studiesdownload.html?languageDocument=EN&file=33385> (accessed 16 March 2013).

¹² C Heyns & M Killander 'Towards minimum standards for regional human rights systems' in Cogan et al (eds)(2010) *Looking to the future: essays in international law in honour of W Michael Reisman* 27- 31.

¹³ Heyns & Killander (n 12 above) 31-32.

The African human rights system is based on the African Charter on Human and Peoples' Rights (African Charter), adopted in 1981 and entered into force in 1986.¹⁴ The African Charter establishes the African Commission on Human and Peoples' Rights (African Commission) as a quasi-judicial supervisory body while a 1998 additional Protocol to the African Charter establishes a part-time African Court on Human and Peoples' Rights (African Court) as a second complementary and supervisory mechanism.¹⁵ Evaluation of the African human rights systems points to the limited number of cases submitted to the African Court for adjudication.¹⁶ This has been attributed to the failure of states to make a declaration granting individuals direct access to the African Court and the temporal jurisdiction which limits the African Court's jurisdiction to matters arising after the state has become a party to the establishing Protocol or making of the declaration.¹⁷ In addition to the African Court and the African Commission, is the African Peer Review Mechanism (APRM), under the rubric of the New Partnership for Africa's Development (NEPAD), a voluntary self monitoring mechanism that enables African member states to peer assess their performance in four thematic areas including democratic and political governance which encompasses aspects of human rights protection.¹⁸

At the Africa sub-regional level, various human rights monitoring mechanisms exist under various inter-governmental organizations. These include the East African Court of Justice (EACJ), the Economic Community of West African States Court of Justice (ECOWAS Court) and the Common Market for Eastern and Southern Africa Court of Justice (COMESA Court).¹⁹ Of these sub-regional courts, only the ECOWAS Court has express jurisdiction over human rights violations through a 2005 supplemental Protocol.²⁰ As for the East African Court, although the establishing treaty makes reference to human rights jurisdiction, it defers

¹⁴ African Charter on Human and Peoples' Rights, adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev.5, 21 I.L.M. 58 (1982) entered into force on 21 October 1986.

¹⁵ Protocol on the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights, 10 June 1998, entered in force 25 January 2004. The African Court was established in 2006. While the judges serve on a part-time basis, the president of the African Court serves on a full time basis. Subsequent developments seek to transform the African Court into the African Court of Justice Human and Peoples' Rights, in which the Africa Court, as currently constituted, will be subsumed as a human rights section. This discussion is more fully taken up in Chapter 2, section 4.4.

¹⁶ F Viljoen *International human rights law in Africa* (2012) 459-460.

¹⁷ As above.

¹⁸ African Peer Review Mechanism <http://aprm-au.org/about-aprm> (accessed 12 January 2013); See also Unpublished: UM Killander 'The role of the African Peer Review Mechanism in inducing compliance with human rights' unpublished LLD Thesis, University of Pretoria, 2009.

¹⁹ East African Court of Justice <http://www.eacj.org/> (accessed 13 January 2013); ECOWAS Court of Justice <http://www.courtecowas.org/> (accessed 13 January 2013); COMESA Court of Justice <http://www.comesa.int/> (accessed 5 March 2013). See also S Ebobrah & A Tanoh *A compendium of African sub regional human rights documents* (2010).

²⁰ See Community Court of Justice, Supplementary Protocol, 19 January 2005, http://www.courtecowas.org/site2012/pdf_files/supplementary_protocol.pdf (accessed 13 July 2015).

conferment to a later date.²¹ A protocol to extend the EACJ's jurisdiction to human rights has been under consideration by the political organs of the East African Community since 2004.²²

These monitoring mechanisms constitute both adjudicative and non-adjudicative processes through which to measure state compliance with international and regional human rights treaties. At the UN level, the adjudicative processes comprise of the individual and inter-state complaints procedure while the non-adjudicative processes are the state reporting process, the UPR and the country visits of the special procedures. At the African level, the adjudicative processes consist of the African Court and the African Commission and the African Committee of Experts on the Rights and Welfare of the Child (African Committee on the Child) in consideration of individual complaints. The non-adjudicative processes are the state reporting processes, the special mechanisms of the African Commission and the APRM mechanism. In regard to the East African sub-regional level, the EACJ constitutes an adjudicative process. Turning to Kenya, Kenya is subject to a number of the above discussed monitoring mechanisms at the UN, African and East-African sub-regional level.

As of December 2014, Kenya had submitted 16 state reports to the UN treaty monitoring bodies from which 15 concluding observations have been adopted.²³ On the charter based mechanisms, Kenya has received eight special rapporteur missions and 25 requests for responses in respect of communications transmitted to the government by special rapporteurs.²⁴ Kenya also participated in the Universal Periodic Review in May 2010 with the state accepting 128 recommendations brought out during the interactive dialogue while seven recommendations were rejected.²⁵ The state has however not accepted any of the individual complaint procedures in the UN system.

At the African regional level and in relation to the non-adjudicative procedures, Kenya submitted its initial state report to the African Commission in June 2006 leading to adoption of one concluding observation.²⁶ The combined eight to eleventh report was submitted in March 2015, five years late.²⁷ Similarly, the initial report to the African Committee on the Child was submitted in 2008 resulting in adoption of one concluding observation.²⁸ On the special mechanisms of the African Commission, Kenya has received two missions from 1996 to April

²¹ Treaty for the Establishment of the East African Court of Justice Article 27 (2): 'The Court shall have such other original, appellate, human rights and other jurisdiction as will be determined by the Council at a suitable subsequent date. To this end, the Partner States shall conclude a protocol to operationalise the extended jurisdiction.'

²² East African Community, EAC news 'Council of Ministers to discuss extended jurisdiction for EACJ' http://www.eac.int/index.php?option=com_content&view=article&id=1038:council-of-ministers-to-discuss-extended-jurisdiction-for-eacj&catid=146:press-releases&Itemid=194 (accessed 13 July 2015).

²³ Office of the High Commissioner for Human Rights, Kenya homepage, reporting status <http://www.ohchr.org/en/countries/AfricaRegion/Pages/KEIndex.aspx> (accessed 22 October 2015).

²⁴ Office of the High Commissioner for Human Rights, Kenya homepage, Kenya and UN Charter based bodies, http://ap.ohchr.org/documents/dpage_e.aspx?c=95&su=101 (accessed 22 October 2015).

²⁵ As above.

²⁶ African Commission on Human and Peoples Rights, States state reporting <http://www.achpr.org/states/reports-and-concluding-observations/> (accessed 29 March 2013).

²⁷ African Commission on Human and Peoples' Rights, 32nd and 33rd Activity Reports <http://www.achpr.org/activity-reports/> (accessed 2 April 2015).

²⁸ African Committee of Experts on the Rights and Welfare of the Child, State reports and committee recommendations <http://acerwc.org/state-reports/> (accessed 29 March 2013).

2013.²⁹ Kenya has also acceded to the African Peer Review Mechanism (APRM) and was peer reviewed in June 2006 resulting in ten recommendations specific to promotion and protection of civil and political and economic, social and cultural rights enshrined in African and international human rights instruments.³⁰ The second country peer review had not taken place as of December 2014.

On the adjudicative procedures, the African Commission in November 2000 and November 2009 issued final merit decisions against Kenya.³¹ Similarly, the African Committee on the Child in March 2011 issued a final merit decision on a communication against Kenya.³² Additionally, in March 2013, the African Court issued an order for provisional measures in a case against Kenya referred to the court by the African Commission.³³ At the sub-regional level, there is striking trend to engage the East African Court of Justice (EACJ). As of December 2014, seven cases essentially touching on rule of law and human rights issues had been filed against Kenya at the EACJ.³⁴ Final judgments and rulings have been issued in all the cases.³⁵

2 Problem statement

This research stems from a single puzzle: what is the impact of the above outlined international human rights monitoring mechanisms in Kenya?

For a considerable number of years, scholars have dealt with the question of the impact of international and regional human rights systems. At the UN level, Heyns and Viljoen find that treaty monitoring bodies 'have had a very limited demonstrable impact' at the domestic level.³⁶ In relation to the individual complaints procedure of the Human Rights Committee, Alebeek and Nollkaemper note that in 2002 the Human Rights Committee indicated that in only 30% of its follow-up replies demonstrate willingness by the state to implement its Views or offer an appropriate remedy. A 2010 follow-up study based on 2009 individual petitions data, found

²⁹African Commission on Human and Peoples' Rights, Special Mechanisms <http://www.achpr.org/mechanisms/> (accessed 2 April 2013).

³⁰African Peer Review Mechanism country report on Kenya, Ministry of State for Planning, National Development and Vision 2030 www.planning.go.ke/ (accessed 2 April 2013).

³¹ *John D. Ouko v Kenya* (2000) AHRLR135 (ACHPR 2000); Communication 276/03 *Centre for Minority Rights and Development (CEMIRIDE) on behalf of the Endorois Council Welfare v Kenya*, Twenty Seventh Annual Activity Report (ACHPR).

³² *Institute of human rights and development in Africa (IHRDA) and Open Society Justice Initiative (on behalf of children of Nubian descent in Kenya) v Kenya African Committee of Experts on the Rights and Welfare of the Child* <http://acerwc.org/communications/> (accessed 2 April 2013).

³³ *African Commission on Human and Peoples' Rights v The Republic of Kenya*, application 006/2012, African Court on Human and Peoples' Rights, provisional measures, 15 March 2013.

³⁴ *Prof Peter Anyang' Nyongo and others v The Attorney General of the Republic of Kenya and others*, reference no. 1 of 2006 East African Court of Justice; *East African Law Society and others v The Attorney General of the Republic of Kenya and others*, reference no. 3 of 2007 East African Court of Justice; *Emmanuel Mwakisha Mjawasi and 748 others v The Attorney General of the Republic of Kenya*, reference no. 2 of 2010 East African Court of Justice; *Mary Ariviza and Okotch Mondo v The Attorney General Republic of Kenya and the Secretary General of the East African Community*, reference no. 7 of 2010 East African Court of Justice; *Independent Medico-Legal Unit v The Attorney General the Republic of Kenya*, reference no. 3 of 2010 East African Court of Justice; *Omar Awadh Omar and 6 others v The Attorney General of the Republic of Kenya and others*, reference no. 4 of 2011 East African Court of Justice; *Mbugua Mureithi wa Nyambura v The Attorney General of the Republic of Uganda and the Attorney General of the Republic of Kenya*, reference no. 11 of 2011.

³⁵ East African Court of Justice, court decisions, http://eacj.org/?page_id=2414 (accessed 26 July 2015).

³⁶ CH Heyns & F Viljoen *The impact of the United Nations human rights treaties on the domestic level* (2002) 6.

that compliance with the Views of the Committee stood at slightly above 12% and seemingly declining over time.³⁷ Similarly, in relation to the concluding observations of UN treaty monitoring bodies, a 2014 cross-country study in Finland, Netherlands and New Zealand found that the recommendations have limited domestic impact in influencing human rights practices.³⁸ On the UN special procedures, a 2010 study observes that only 18% of government responses to communications transmitted to them indicate willingness to address the merits of alleged violation or establish the validity of the allegation.³⁹ At the African regional level, a study on the compliance with the recommendations of the African Commission finds on the overall lack of state compliance.⁴⁰ Moreover, the 2010 Open Society Justice Initiative study on implementation of the decisions of international and regional human rights systems puts the rate of full implementation of final merit decisions of the African Commission on individual communications at 12%.⁴¹

These studies reveal that monitoring mechanisms have limited and almost insignificant impact on national human rights practices generally. Implicit in these studies is the overriding question of state compliance with international law and broader questions on how international law and international institutions influence state practices.

This research approaches the puzzle of the impact of international human rights monitoring mechanisms in Kenya from a theoretical perspective. It does so by reference to theories that attempt to explain why and when states obey international law. The theoretical approach of the research is mainly explanatory: to describe and explain impact of monitoring mechanisms at the national level and how impact should be conceived, with suggestions on strategies for maximising impact.

The research considers judgments and decisions arising from the adjudicative procedures; and concluding observations and recommendations from the non-adjudicative procedures of international, regional and sub-regional monitoring mechanisms in relation to Kenya between 1981 and 2014. Kenya's documented participation in the international and regional human rights monitoring mechanisms traces back to 1981.⁴² Further, taking into account Kenya's Constitution promulgated in August 2010, the research assesses the impact of monitoring mechanisms on the constitution-making process between 1997 and 2010 and the drafting of the Constitution of Kenya 2010.

³⁷ R Alebeek & A Nollkaemper 'The legal status of decisions by human rights treaty bodies in national law' in H Keller & G Ulfstein (n 4 above) 356-357.

³⁸ J Krommendijk *The domestic impact and effectiveness of the process of state reporting under UN human rights treaties in the Netherlands, New Zealand and Finland: paper pushing or policy promoting?* (2014) 368-375.

³⁹ T Piconne, *Catalysts for Rights: the unique contribution of the UN's independent expert on human rights* (2010) 22.

⁴⁰ F Viljoen & L Louw 'State compliance with the recommendations of the African Commission on Human and Peoples' Rights 1994-2004' (2007) 101 *American Journal of International Law* 1.

⁴¹ Open Society Justice Initiative 'From judgement to justice: implementing international and regional human rights decisions' (2010) 94.

⁴² Kenya's initial state report on the Covenant on Civil and Political Rights was considered by the Human Rights Committee on 30 March 1981. See Office of the High Commissioner for Human Rights, Kenya homepage, Kenya and UN treaty bodies, http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=En&CountryID=90 (accessed 13 July 2015).

3 Research questions

The overarching question for this research is: How do the theoretical explanations of state compliance with international law correlate with the impact of international human rights monitoring mechanisms in Kenya?

The sub-questions are: (i) What impact have monitoring mechanisms had on human rights practices in Kenya; (ii) How do we assess the relevant compliance theories based on Kenya's case study; and (iii) What strategies can be applied to maximize internalisation of human rights norms at the national level to enhance the impact of monitoring mechanisms in Kenya.

These questions lie within the broader debate on legitimacy, efficiency and functioning of the international human rights monitoring system. Studies on legitimacy point to the democratic deficit of international human rights monitoring bodies and question their authority to adopt decisions beyond the democratic institutions of the state.⁴³ These studies nonetheless suggest that the legitimacy challenges can be addressed by practices such as exhaustion of local remedies, the doctrine of margin of appreciation and adherence to procedural fairness.⁴⁴ Linked to legitimacy are the interrelated questions of the efficiency and effectiveness of the international human rights monitoring system. The on-going UN human rights treaty body reform aims to strengthen the legitimacy, effectiveness and efficiency of the treaty body system.⁴⁵ This research assumes the legitimacy of the international human rights monitoring system, while conceding the need for reform. A detailed analysis on the legitimacy, efficiency and functioning of the international human rights monitoring bodies is outside the scope of this research.

To address the research questions, the research gathers evidence relevant to assess impact and then identifies, from international law state compliance theories, the theoretical framework that best guides a systematic study of the impact of monitoring mechanisms in Kenya. The research also attempts to explore the extent to which the lessons learnt from the Kenyan case study could be of wider application with regard to national implementation of human rights norms.

4 Significance of the study

Taken as a whole this research contributes to the existing literature in three ways. First, the research offers new insights into the topic of impact of international human rights monitoring mechanisms by drawing from international law compliance theories to explain impact. Second, applying a theoretical approach, the research provides causal explanations of empirical facts and a basis for proposals to maximise national level impact. Third, the research offers new understanding by re-orienting the debate to “domestic constituencies” to maximize compliance

⁴³ Keller & Ulfstein (n 4 above) 6-7; S Wheatley 'The legitimate authority of IHR bodies' in A Follesdall et al (eds) *The legitimacy of international human rights regimes: legal, political and philosophical perspectives* (2014) 84-116; A Follesdall 'The legitimacy deficits of the human rights judiciary: elements and implications of a normative theory' (2013) 14 *Theoretical inquiries in law* 339-360; R Bellamy 'The democratic legitimacy of international human rights conventions: political constitutionalism and the European Convention on Human Rights' (2015) 25 *EJIL* 1019-1042.

⁴⁴ Keller & Ulfstein (n 4 above) 7-8; Follesdall (n 43 above) 359.

⁴⁵ See Office of the High Commissioner for Human Rights, Treaty body strengthening, <http://www.ohchr.org/EN/HRBodies/HRTD/Pages/TBStrengthening.aspx> (accessed 12 November 2015).

at the national level. This research differs from and adds to the existing literature on the impact of the international, regional and sub-regional human rights monitoring regimes.

5 Terminology and theoretical framework

5.1 Impact

Heyns and Viljoen in their study on the impact of UN human rights treaties on the domestic level define impact as ‘any influence the treaties may have had in ensuring realization of the norms they espouse in individual countries.’ The influence, Heyns and Viljoen state, could be as a result of engagement with monitoring mechanisms or internalization of treaty norms at national level. The study assessed impact of the treaty norms through adoption or review of legislation or constitutions or court judgments, policy formulation and implementation of concluding observations. The study also assessed impact through infiltration of the treaty norms in individual countries through media coverage and education programmes.⁴⁶

Further, the study on the impact of the African Charter and Women’s Protocol on selected African states defines impact as both state compliance with the African Charter and Women’s Protocol and ‘more indirect forms of influence’.⁴⁷

Viljoen and Louw in their study on the extent of states compliance with the recommendations of the African Commission draw a distinction between ‘direct impact’ and ‘indirect impact’ of human rights treaties and law.⁴⁸ The study defines ‘direct impact’ as immediately demonstrable expressed for instance by implementation of a finding of a treaty monitoring body. ‘Indirect impact’ on the other hand is defined as incremental and occurring over time.⁴⁹

Okafor in his study on the domestic impact of the African human rights system in Nigeria, South Africa and certain other African countries adopts a broader view of impact which extends the measurement of impact beyond state compliance with the decisions of monitoring regimes.⁵⁰ He demonstrates that with or without direct state compliance with decisions of monitoring regimes, the African system has achieved domestic impact by influencing the thinking processes and actions of key domestic actors.⁵¹ Okafor examines ‘the influence of the African system’ in relation to its influence on national courts, executive action and policy making, legislative processes and as deployed by civil society activists.⁵²

Krommendijk in his study on domestic impact of state reporting under the UN treaty bodies defines impact as the use and discussions of the reporting process and concluding observations at the domestic level by parliament, courts, national human rights institutions, ombudsman institutions, non-governmental organisations and the media.⁵³

⁴⁶ Heyns & Viljoen (n 36 above) 1 - 2.

⁴⁷ Centre for Human Rights ‘Impact of the African Charter and the Women’s Protocol in Selected African States’ (2012) 7.

⁴⁸ Viljoen & Louw (n 40 above) 1.

⁴⁹ As above.

⁵⁰ OC Okafor *The African human rights system, activist forces and international institutions* (2007) 3-5; See also 91-93.

⁵¹ Okafor (n 50 above) 98-137.

⁵² Okafor (n 50 above) 7.

⁵³ Krommendijk (n 38 above) 25.

This research defines impact as influence of the judgments, decisions, concluding observations and recommendations of monitoring mechanisms on domestic processes and the actions of key domestic actors leading to changes in human rights practices in Kenya. Impact is thus assessed through the influence of the monitoring mechanisms' judgements, decisions, concluding observations and recommendations on: national courts, executive action and policy making, law making, activities of non-state actors and the 1997-2010 constitution-making process. Influence will be observed in national courts decisions and judgments, analysis of government policies including policy statements, analysis of domestic legislative action including the hansard proceedings, reports of civil society organisations and analysis of archival documents of the constitution-making process.

5.2 Compliance and implementation

International law literature distinguishes between the terms compliance and implementation. Compliance is defined as behaviour or conduct that is consistent with a specified rule, driven by motivations such as avoidance of sanctions, reputation or obedience deriving from internalisation of the rule.⁵⁴ Implementation, on the other hand, is defined as taking specific action in response to international commitments such as enactment of domestic laws and enforcement of rules.⁵⁵ Accordingly, compliance can occur without implementation, for instance if states behaviour is already consistent with a given commitment.⁵⁶ International human rights law defines implementation as 'moving from a legal commitment, that is, acceptance of an international human rights obligation, to realization by adoption of appropriate measures and ultimately the enjoyment by all of the rights enshrined under the related obligations.'⁵⁷

This research is concerned with Kenya's response to monitoring mechanisms, thus it envisages taking specific action in relation to judgments, decisions, concluding observations and recommendations of monitoring mechanisms. The focus is therefore on implementation and not compliance.

Implementation in this research is defined as taking action that is responsive to the judgments, decisions, concluding observations and recommendations of monitoring mechanisms to improve enjoyment of human rights. The research nonetheless uses the term compliance to the extent that it is used in international law contextual literature, for instance when examining international law theories of state compliance. In analysing the empirical evidence of implementation, the research does not view implementation as necessarily binary - either full or complete non-implementation - but rather locates it along a continuum.

Viljoen and Louw in their influential study on compliance with the decisions of the African Commission identify five broad categories of compliance as: full compliance, non-compliance,

⁵⁴ K Raustiala & AM Slaughter 'International law, international relations and compliance' in W Carleas et al *The handbook of international relations* (2002) 539.

⁵⁵ As above.

⁵⁶ As above.

⁵⁷ Office of the High Commissioner for Human Rights, human rights documents, 'Report of the High Commissioner for Human Rights on implementation of economic, social and cultural rights' E/2009/90, 8 June 2009, para 3, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N09/362/90/PDF/N0936290.pdf?OpenElement> (accessed 24 October 2015).

partial compliance, situational compliance and unclear cases.⁵⁸ Full compliance denotes instances in which a state has complied with all the recommendations or unequivocally expressed political will to comply or has already undertaken significant steps in the process of compliance.⁵⁹ Noncompliance designates instances in which a state has not implemented the recommendations and has also challenged them on legal and factual basis.⁶⁰ Partial compliance denotes instances in which the state implemented some but not all aspects of the recommendations.⁶¹ Situational compliance refers to both full and partial compliance and infers instances in which responsive changes occurred not as a result of deliberate government action on the recommendations but, circumstances within the state leading to compliance.⁶² According to the study situational compliance does not connote 'compliance'.

Hawkins and Jacoby in their study on partial compliance with the judgements of the Inter-American Court of Human Rights and the European Court of Human Rights describe four types of partial compliance.⁶³ These are: split decisions, state substitution, slow motion compliance and ambiguity compliance amid complexity.⁶⁴ Split decisions signify compliance with part of the overall decision but not the other part, while state substitution implies the state circumvents the specific court order and implements and offers a different response.⁶⁵ Slow motion compliance is characterized as when the state takes remedial action based on the court's decision but does not fulfil the requirement completely and in some instances indicates that it will fulfil the requirement.⁶⁶ Finally, ambiguity compliance amidst complexity signifies instances in which state compliance is challenging as it is difficult to determine compliance with certainty due to complexity of the requirement and also when compliance is beyond a state's capabilities.⁶⁷

This research borrows from these studies and modifies the above categorisation of compliance to denote implementation based on the empirical assessment of implementation. Accordingly, the following broad categories of implementation are adopted:

- 'Fully implemented' connoting that the action taken is to a large extent responsive to the judgment, decision, recommendation or concluding observation.
- 'Partially implemented' connoting that the action taken is to some extent responsive to the judgment, decision, recommendation or concluding observation or it does not implement certain aspects of the decision or recommendation.
Example: Legislative framework put in place but does not encompass all the provisions contemplated in the recommendation.
- 'Not implemented' connoting that no action has been undertaken in regard to the particular decision, recommendation or concluding observation or where action taken by the state was contrary to the finding.

⁵⁸ Viljoen & Louw (n 40 above) 5.

⁵⁹ As above.

⁶⁰ As above.

⁶¹ Viljoen & Louw (n 40 above) 6.

⁶² As above.

⁶³ D Hawkins & W Jacoby 'Partial compliance: a comparison of the European and Inter-American Courts of Human Rights' (2010) 6 *Journal of International Law and International Relations* 77-83.

⁶⁴ As above.

⁶⁵ Hawkins & Jacoby (n 63 above) 77-78.

⁶⁶ Hawkins & Jacoby (n 63 above) 79-80.

⁶⁷ Hawkins & Jacoby (n 63 above) 81.

Example: Prohibition of the death penalty which instead the Constitution, 2010 contains a death penalty saving clause.

Partial implementation is classified as both a stable end in the response to the judgments, decisions or recommendations of monitoring mechanisms and as a pathway towards full implementation. Partial implementation is thus further sub-categorised as follows:

- Split implementation: the findings and recommendations have been implemented in part but not other parts of it. Split implementation represents an end point in the state's action in that the state does not intend to take further measures in regard to the particular findings or recommendations. An example is enactment of legislation which does not meet all the requirements set out by the monitoring mechanism.
- State substitution: the state implements an alternative response other than what was recommended by the monitoring mechanism. In this instance the action taken is arguably responsive to the spirit of the finding but is not the specific terms of the finding.
- Slow motion implementation: responsive action has been initiated or the state has indicated that it will implement the recommendation.

These categorisations of partial implementation are not mutually exclusive.

Under full and partial implementation, a further sub-category of situational implementation is drawn to denote instances in which implementation occurs as a result of change of circumstances within the state. For instance, findings and recommendations that have been implemented through the constitution review process which mandated numerous legal and institutional reforms.

In applying these categories of implementation, the research is organised such that the empirical assessment of implementation is first limited to the broad categories of full, partial and non-implementation. The specific categories of partial implementation are later applied in the overall analysis of implementation and impact in chapter eight.

5.3 Findings and recommendations

This research concerns impact of the judgments, decisions, concluding observations and recommendations of international monitoring mechanisms in Kenya. A distinction is made between adjudicative and non-adjudicative monitoring procedures. 'Findings', as used in this research, emanate from adjudicative monitoring processes such as adjudication of international courts and quasi-judicial bodies in consideration of individual complaints. Therefore, 'findings' include judgments and rulings of international courts including provisional measures and decisions of quasi-judicial bodies in relation to individual complaints. Conversely, 'recommendations' in this research emanate from non-adjudicative monitoring processes such as the Universal Periodic Review, special procedures and state reporting. 'Recommendations' thus include concluding observations of treaty monitoring committees, recommendations of special procedures and of the Universal Periodic Review.

5.4 Theoretical framework

The question of why and when states comply with international law is of fundamental interest to international legal scholarship. A number of theories are advanced in international law and international relations literature in answer to this question. Under traditional legal theories, the managerial theory of compliance developed by Chayes and Chayes theorizes that states are generally inclined to comply with their international obligations. Non compliance is inadvertent and due interpretive ambiguity in the nature of obligations, resources constraints or time lags between commitment and performance. The theory rejects sanctions and punitive enforcement measures and instead advocates for collective management of non-compliance through facilitative and forward looking measures.⁶⁸ The legitimacy theory posits that states comply with rules which they perceive as legitimate or a product of a fair procedure. The theory identifies determinacy, symbolic validation, adherence and coherence as factors that influence state compliance with international obligations. Compliance is achieved where the factors exist and poor where the factors are non-existent.⁶⁹ The transnational legal process theory propounded by Koh holds that compliance is achieved when states internalize and incorporate the norms in their domestic systems. Central to this theory are the sequential components of interaction, interpretation and internalization. Koh argues that compliance is achieved through the interaction of public and private actors in a variety of public, private, domestic and international fora which make and interpret international law norms ultimately leading to internalization of the norms at the domestic level.⁷⁰ In international relations theories, the realist theory views states as unitary actors pursuing their own interests. Therefore power determines the outcome of international relations and compliance occurs when the self-interest of states and exercise of power coincide. The theory does not hold much expectation for the international human rights regime since human rights are not the mainstay of international high politics.⁷¹ The institutionalist theory also views states as unitary actors and argues that states join and comply with international regimes for reputation, reciprocity and other mutual benefits of cooperation. It is arguable if the theory would result in more compliance in human rights regimes since not much mutual benefit derives from compliance with human rights obligations.⁷² The liberalist theory is not state centric in its outlook but perceives the state as comprising of different actors pursuing diverse interests. The theory argues that domestic entities such as courts, parliaments and civil society organizations may lead a State to comply with its international obligations by applying pressure and influence on the states actions.⁷³

The research reviews these theories and applies them in the context of the assessment of Kenya's implementation of findings and recommendations of monitoring mechanisms to identify the theory that offers the best framework to explore the impact of monitoring mechanisms in Kenya.

⁶⁸ A Guzman 'A compliance based theory of international law' (2002)90 *Cal. L. Rev.*1830–1833.

⁶⁹ Guzman (n 68 above) 1834.

⁷⁰ H Koh 'Transnational legal process theory' (1996)75 *Neb. L. Rev.* 183.

⁷¹ E Neumayer 'Do international human rights treaties improve respect for human rights?'(2005)49 *Journal of Conflict Resolution* 926.

⁷² Neumayer (n 71 above) 927.

⁷³ Neumayer (n 71 above) 930.

6 Literature review

There are numerous research studies on the effects of the international and regional human rights regime on national level human rights practices. Review of existing literature reveals scarcity of literature that specifically addresses the impact of international and regional monitoring mechanisms on human rights practices at national level.

A recent book edited by Keller and Ulfstein⁷⁴ is one of the guiding texts on the effectiveness of the UN human rights treaty system. The book conducts a review of the UN human rights treaty bodies' legal structure, decisions and functions, effectiveness and legitimacy. The discussion on effectiveness of the UN treaty bodies however, centres much on efficiency of the system at the international level without much focus on the impact of monitoring mechanisms at national level.

The book edited by Alston and Crawford⁷⁵ is significant on the subject of the UN treaty monitoring system. The book focuses on the procedures of different UN treaty monitoring bodies and national influences and responses to the work of these bodies. The book however does not focus on implementation or impact of the monitoring mechanisms at national level. Bayefsky's⁷⁶ book is also worth mentioning. The book examines the UN human rights treaty system generally without any country perspectives and focusses on efficiency at the international level.

A study by Heyns and Viljoen on the domestic impact of the UN human rights treaties in twenty countries is significant on the domestic impact of the UN human rights treaty system.⁷⁷ The study assessed the impact of the UN treaties and the monitoring bodies in identified countries, representative of all the regions of the world, with a view to identifying the weaknesses and strengths of the treaty system to inform reform. The main study findings indicated that international enforcement mechanisms have limited demonstrable impact on human rights practices at national level. Further, the study found that states routinely failed to implement concluding observations and views of monitoring mechanisms. The study proposed the need to build domestic constituencies for international treaties to have any national level impact. However, the study did not cover Kenya as a representative case study and focussed solely on the UN system treaty bodies and their supervisory mechanisms. This research conducts an in-depth country study of Kenya focusing on the UN treaty bodies' supervisory mechanisms, non-charter based supervisory mechanisms and the African and the East African sub-regional human rights monitoring mechanisms.

In the specific context of state reporting, the most significant work is a 2014 study on the domestic impact and effectiveness of state reporting under the six UN treaty bodies in Netherlands, New Zealand and Finland.⁷⁸ The study assessed the extent to which domestic legislation and policies had been changed as a result of the recommendations of UN treaty bodies.⁷⁹

⁷⁴ Keller & Ulfstein (n 4 above).

⁷⁵ Alston & Crawford (n 1 above).

⁷⁶ Bayefsky (n 1 above).

⁷⁷ Heyns & Viljoen (n 36 above).

⁷⁸ Krommendijk (n 38 above).

⁷⁹ As above.

In regard to special procedures of the UN human rights system, there are a number of works focussing on the UN special procedures. A book by Nifosi on the *UN special procedures in the field of human rights* focuses on the history, practices and impact of the UN special procedures.⁸⁰ Another book by Ramcharan on the protective mandate of the UN human rights special procedures reviews the evolution, history, successes and weakness of the special procedures from an international human rights protection perspective.⁸¹ None of these two books conducts an in-depth assessment of the national level impact of Kenya's engagement with the UN special procedures either in the form of country visits or communications transmitted to the government. Perhaps the most notable work is a study by Piconne assessing the impact of the work of special procedures on national human rights practices.⁸² The study evaluated the activities of special procedures particularly in regard to recommendations issued to governments and communications received between 2004 and 2008 in over 140 countries and whether these activities had any effect on state human rights practices. The main findings were that country visits are the most effective tool of influence within the special procedures and have a direct impact in bringing to attention serious human rights violations at national level while written communications from the special rapporteurs transmitting allegations of human rights violations to governments have limited impact on national human rights practices.⁸³ However, the study reflects a global picture without any in-depth country assessment.

On the Universal Periodic Review (UPR), a 2015 book by Charlesworth and Larking provides a comprehensive review of the UPR based on its first full cycle 2008-2012.⁸⁴ The book examines the successes and failures of the UPR and its effects on human rights practices in the US and Indonesia.⁸⁵ A book by Sen reviews and provides an analysis of the UPR experiences of select Commonwealth countries that participated in the process in 2008. The book does not however address the issue of impact of the process on national level human rights practices.⁸⁶ Further scholarly works on the UPR by Davies review the establishment of the Human Rights Council and the introduction of the UPR. The article dwells on the potential of the UPR mechanism to promote compliance with human rights and concludes that the mechanism may not necessarily achieve the compliance pressure required to persuade states to better their human rights practices. This article merely highlights practical examples of what may impede the potential of the mechanism in inducing state compliance without any discussion on the impact of the mechanism at national level.⁸⁷

At the regional level, significant studies have been conducted on the impact of the African regional human rights system. A seminal study by Viljoen and Louw on state compliance with the recommendations of African Commission reviews implementation of recommendations in regard to communications submitted pursuant to the African Charter between 1994 and

⁸⁰ I Nifosi *The UN special procedures in the field of human rights* (2007).

⁸¹ BG Ramcharan *The protection roles of the UN human rights special procedures* (2009).

⁸² Piconne (n 39 above).

⁸³ As above.

⁸⁴ H Charlesworth & E Larking *Human rights and the Universal Periodic Review: rituals and ritualism* (2014).

⁸⁵ As above.

⁸⁶ P Sen *Universal periodic review of human rights: Towards best practice* (2009).

⁸⁷ M Davies, 'Rhetorical inaction: Compliance and the Human Rights Council of the United Nations' (2010) 35 *Alternatives: Global, Local, Political* 449-468.

2004.⁸⁸ The study also comparatively looked at compliance with the recommendations of petitions submitted to the UN Human Rights Committee, European Court of Human Rights and the Inter-American human rights system and sought to develop a framework for state compliance with the recommendations of the African system based on these experiences. The study found on the overall lack of compliance with the decisions of the African Commission and that the most predictive factor in regard to compliance was political will. Moving forward the study proposed establishment of follow-up mechanisms by the African Commission.⁸⁹ This study however only assessed state compliance in regard to communications without assessing the impact of state reporting to the African Commission and its special mechanisms.

Further, in relation to the African Commission a 2015 study examines implementation of the decisions on individual complaints, concluding observations, provisional measures, resolutions, recommendations arising from its protective and promotional missions and one advisory opinion.⁹⁰ It also examines the processes of implementation and the factors that influence implementation. The study does not however focus on implementation in particular states or with particular findings but confronts implementation from a general perspective.⁹¹

In relation to the African system is a 2012 study on the impact of the African Charter and Women's Protocol on Selected African States.⁹² The research assessed the positive influences of the African Charter and Women's Protocol since ratification on state practices in regard to legislation, policy reform and formulation, court judgments, awareness-raising among NGOs, influence on academic writings and teaching in law schools among others. The main findings of the study in relation to Kenya indicate that the African Charter and the Women's Protocol have had an impact on legislation in Kenya including the review of the 2010 Constitution, policy formulation and court judgments. However, the study found Kenya wanting in regard to compliance with the state reporting requirements, requests from special mechanisms and implementation of decisions on communications.⁹³ While the study covered Kenya as a representative case study, the research did not specifically focus on Kenya's engagement with the African human rights system monitoring mechanisms and the impact of the findings at national level.

At the sub-regional level, review of existing literature does not reveal any studies focussing on the impact of the East African Court of Justice.

None of the above listed works answers the question on the impact of the international, regional and sub-regional human rights monitoring in relation to Kenya. Further, only the study on the impact and effectiveness of the process of state reporting under the UN treaty bodies examines the issue from a theoretical perspective. This research answers this question by conducting an in-depth country assessment of the extent to which the findings and recommendations of the monitoring mechanisms have influenced changes in national human rights practices while drawing from theoretical approaches to explain impact.

⁸⁸ Viljoen & Louw (n 40 above).

⁸⁹ As above.

⁹⁰ R Murray & D Long *The implementation of the findings of the African Commission on Human and Peoples' Rights* (2015).

⁹¹ As above.

⁹² Centre for Human Rights (n 47 above).

⁹³ As above.

7 Methodology

The research adopts a theoretical and empirical analysis of the impact of the international and regional monitoring mechanisms in Kenya. The primary aim of the research was to assess the extent to which the findings and recommendations of international and regional monitoring mechanisms have influenced Kenya's human rights practices. The research was carried out mainly through desk research reviewing documents from the UN human rights system, African human rights system and the East Africa sub-regional human rights system. Essentially, the research conducted an analysis of the judgments and decisions of international courts and quasi-judicial bodies; and recommendations and concluding observations of treaty monitoring bodies, special procedures and the Universal Peer Review and reviewed their implementation against Kenya's legislation, executive action, policy making, court judgments, works and publications of non-governmental organizations and the academia. This was done with a view to establishing the extent to which these findings and recommendations have been implemented and their influence on domestic processes and the actions of key domestic actors.

In view of the difficulty of establishing correlation between the findings and recommendations of monitoring mechanisms and domestic process and actions of key domestic actors, qualitative interviews were conducted to supplement the documentary analysis. This is particularly in view of the fact that since 2010 Kenya has undertaken constitutional and legal reforms following the promulgation of the Constitution, 2010. The interviews served a dual purpose: as a source of data on correlation and to direct further reading where necessary. The results of the interviews are in-built into the documentary analysis in chapters three, four, five, six and the overall analysis in chapter eight.

The research methodology thus employed documentary analysis of documents to obtain relevant data, key informant interviews and participant observation. The key informant interviews entailed in-depth qualitative interviews with senior government officials, non-state actors and individual experts who possess firsthand knowledge on monitoring mechanisms processes and outcomes in Kenya and are involved in legislative and constitutional reform, policy making and judicial work. The interviews were semi-structured with interview guides used to elicit discussions on relevant information. The mode of interview was face to face with each interviewee met and interviewed individually. In addition, a number of follow-up interviews were conducted through telephone for clarification and to obtain further information, where necessary. The interviewees were identified through purposive sampling of senior government officials, human rights activists and individual experts with information on human rights monitoring in Kenya. Given the technical nature of international human rights monitoring, the purposive method of sampling interviewees was preferred as random sampling techniques would have resulted in interviews with persons from whom little data would be obtained. Observation was applied in instances in which implementation of the findings and recommendations could be deduced from observed phenomena. Review and analysis of reports was carried out to establish the extent of implementation of findings and recommendations and their influence on the actions of key domestic actors. The research also reviewed archival documents of the constitution-making process between 1997 and 2010 to establish the extent to which the findings and recommendations informed the process. Interviews were also conducted with key experts in the constitution-making process to

establish correlation and gain more insights on the influence of the findings and recommendations.

8 Overview of the chapters

Chapter one is the background of the study, overview of the research problem, the research methodology and demarcates the scope of the research. The chapter also reviews existing literature and outlines the limitations of the study.

Chapter two traces the emergence of the UN human rights system, the African human rights system and the sub-regional human rights monitoring mechanisms. It (i) traces the evolution of the human rights monitoring mechanisms under the UN auspices, the African system and the sub-regional human rights systems; (ii) analyses international and regional monitoring mechanisms as part of international human rights law; and (iii) analyses Kenya's constitutional and legal framework to locate the place of the findings and recommendations of monitoring mechanisms in the national order. This analysis is necessary to ascertain how the constitutional and legal structure could integrate human rights treaty norms for increased internalization.

In chapters three, four and five an in-depth case study of Kenya is undertaken to assess the status and extent of implementation of the findings and recommendations of the monitoring mechanisms. The findings and recommendations are categorised into three thematic areas each comprising a chapter of the study. Chapter three reviews and analyses personal liberty and physical integrity rights and political rights; chapter four economic, social and cultural rights and chapter five rights of collective groups which comprises rights of women, children and collective groups. Throughout these chapters an attempt is made to illustrate how the findings and recommendations of monitoring mechanisms have influenced actions of key domestic actors for example through legislative reform, policy development and court decisions with additional insights being drawn from interviews with relevant state and non-state actors to supplement the documentary analysis. In addition, in chapters three and five a review of the implementation of findings arising out of adversarial monitoring processes is conducted.

Chapter six similarly comprises an in-depth review of documents relating to the constitution review process in Kenya from 1997 to 2010 to establish the extent to which the findings and mechanisms of monitoring mechanisms influenced the process.

Chapter seven focuses on broader question of state compliance with international law. The chapter examines select theories of state compliance with international law and international relations. The chapter then evaluates the theories and identifies the compliance theory that is best suited for Kenya's case study with a view to enhancing internalisation of human rights standards at national level.

Chapter eight conducts an overall analysis of the documentary and empirical outcomes of the study by identifying the factors that have influenced implementation, the pathways to implementation and the perceived roles of different actors both national and transnational. It also conducts an analysis of impact specifically in relation to the findings arising from the adjudicative monitoring processes. Finally, the chapter discusses the theoretical implications of the observations of the analysis.

Chapter nine concludes the research by drawing together the most pertinent observations of the research. It highlights opportunities extant for the internalisation of the findings and recommendations of monitoring mechanisms in Kenya by developing a blueprint to maximize internalisation.

9 Limitations of the study

This research examines the impact of the findings and recommendations of international monitoring mechanisms, defined as the influence of the judgments, decisions, concluding observations and recommendations on domestic processes and actions of key state actors. The focus is thus narrower and does not include action taken by the state on the basis of its international human rights obligations.

Although the definitions of impact and implementation in the research connote enjoyment of human rights, the level of assessment undertaken in the research only extends to measures adopted by domestic actors in response to the findings and recommendations. To determine on the ground enjoyment of rights, more comprehensive research would require to be undertaken.

The research is concerned with UN, regional and sub-regional human rights monitoring mechanisms at the state accountability level. Recent advances have witnessed the emergence of the individual criminal accountability model to monitor and enforce state compliance with human rights norms alongside the state accountability model.⁹⁴ At the global level, the International Criminal Court typifies the institutionalisation of human rights monitoring mechanisms under the individual criminal accountability model.⁹⁵ Nonetheless, the International Criminal Court does not constitute the standard human rights monitoring mechanisms under the UN system hence, it is considered outside the scope of this research. However, recommendations on Kenya relating to the Kenyan situation before the International Criminal Court are assessed for implementation in chapter three.

This research is aware of the difficulty of attempting to establish the precise causal links between the findings and recommendations of monitoring mechanisms and actions of domestic actors. Such an analysis would be impossible due to the fact that states are motivated to change their human rights practices by multiple factors. Further, Kenya has since 2003 and more recently in 2010 following the promulgation of the Constitution, 2010 undergone massive legal and policy reforms. However, the influence of the findings and recommendations is measurable with some confidence by supplementing documentary analysis with qualitative interviews to determine to what extent findings and recommendations have influenced domestic processes and actions of key domestic actors.

The research acknowledges that the overall impact of the findings of monitoring mechanisms would require long observation, therefore later developments may change the conclusions of this research.

⁹⁴ K Sikkink 'The justice cascade: human rights prosecutions and the change in world politics' (2010), 15, https://bc.sas.upenn.edu/system/files/Sikkink_04.08.10.pdf (accessed 31 December 2014).

⁹⁵ Sikkink (n 94 above) 19-20.

10 Assumptions underlying the research

The study is cognizant that structural problems of the international and regional monitoring architecture, such as lack of mechanisms to follow-up on recommendations, views, observations and decisions significant time lapse between the state participation in the monitoring processes and in issuance of recommendations and decisions, partly contribute to the ineffectiveness and limited impact of the monitoring mechanisms.

Chapter 2

International, regional and sub-regional human rights monitoring mechanisms

1 Introduction

The preceding chapter has provided a synopsis of studies dedicated to the impact of international monitoring mechanisms on national level human rights practices. While these studies largely find that international monitoring mechanisms have limited impact on national human rights practices, this question of impact is still open to empirical investigation.

This chapter reviews the literature on monitoring mechanisms at the international, regional and sub-regional levels applicable to Kenya. The chapter begins by placing the study in proper historical context by tracing historical antecedents of the various strands of international law from which international human rights protection developed. The chapter then reviews international, regional and sub-regional monitoring mechanisms to which Kenya is subject to while discussing the impact that these monitoring mechanisms have had at the national level. Finally, the chapter reviews Kenya's constitutional and legal framework with a view to locating the place of the findings and recommendations of monitoring mechanisms in the national legal order.

2 Precursors of international protection of human rights

The history of international protection of human rights is often told from the perspective of the United Nations and its foundational document, the Charter of the United Nations. The picture that emerges on examination of historical records is however more complex. Antecedents trace the notion of recognition and acceptance of human rights protection as a matter of international responsibility to periods predating the first and the second world wars. This recognition and acceptance was manifested in scattered legal principles and institutional arrangements that were limited in scope.¹

In particular the international protection of human rights draws from: humanitarian intervention, state responsibility for injuries to aliens, protection of minorities, international humanitarian law and finally and perhaps most importantly: the League of Nations systems.² The doctrine of humanitarian intervention recognised as lawful the use of force by one or more states to bring to an end serious and large-scale violation of rights by a state on its own nationals.³ On state responsibility for injuries to aliens, states were required to treat foreigners in accordance with certain minimum standards of civilization or justice which sought to protect the rights of foreigners.⁴ Equally, the conclusion of international

¹ T Buergenthal 'The evolving international human rights system' (2006) 100 *Am J. Int'l L* 783-807. For instance the Berlin Treaty of 1878 required several countries to recognize the religious freedoms of their nationals while the Minorities Treaty of 1919 committed the signatory countries to the just and equal treatment of racial, religious and linguistic minorities. Similarly the creation of the International Labour Organisation (ILO) in 1919 had as its central mission the attainment of fair and humane conditions of labour for men, women and children.

² T Buergenthal *et al International human rights in a nutshell* (2009) 1. See also FG Isa 'International protection of human rights' in FG Isa & K Feyter (eds) *International protection of human rights: achievements and challenges* (2006) 19 -20.

³ Buergenthal (n 2 above) 3. See also Isa & Feyter (n 2 above) 20.

⁴ Isa & Feyter (n 2 above) 21; See also W Kalin & J Kunzli *The law of international human rights protection* (2009) 7 for a discussion on why the aliens protection system could not qualify as human rights protection

agreements such as the Geneva Convention of 1864 and the Hague Conventions of 1899 and 1907 formed the basis for protection of peoples' rights in armed conflict which laid the foundation for international humanitarian law in its present day form.⁵

The League of Nations, set up in 1919 after the First World War, bears on the development of the international human rights system in three ways. Firstly, through the Mandate system under which the mandated powers were to submit annual reports on their protection of the freedoms of religion and conscience in the mandated territories.⁶ Secondly, through the International Labour Organization (ILO) a number of Conventions were developed, and in particular the 1930 Convention on forced or compulsory labour and its supervisory mechanisms, which laid the groundwork for international monitoring of state obligations and international protection of human rights.⁷ Thirdly, through the petition system which was developed to deal with petitions from minorities on violations of their rights.⁸

Further initiatives on international human rights protection during the inter-war period and after the outbreak of the Second World War culminated in the 1945 San Francisco conference which completed the drafting of the Charter of the United Nations.⁹ The text of the Charter of the United Nations adopted seven human rights provisions of varying content and character: at the Preamble in paragraph 3, Article 1(3), Articles 55 and 56, Article 76(c), Article 13(1)(b), Article 62(2) & (3) and Article 68.¹⁰

3 UN Human rights system

3.1 History and evolution

The evolution of the UN human rights system traces back to the adoption and proclamation of the Universal Declaration of Human Rights (Universal Declaration) on 10 December 1948.¹¹ Following the proclamation of the Universal Declaration, the next step was to develop a human rights covenant whose obligations would be binding on states upon ratification. The Commission on Human Rights in the years following 1948 worked on a draft titled 'Draft Covenant on Civil and Political Rights'.¹² However, in 1952 the General Assembly decided that the Commission should draft two documents – a covenant on civil and political rights and a covenant on economic, social and political rights - which were to be

because it protected states and a state was only to accord the minimum standard to foreigners and could deny the same to its nationals.

⁵ Buergenthal (n 2 above) 20.

⁶ Buergenthal (n 2 above) 8-9. See also Isa & Feyter (n 2 above) 21.

⁷ Buergenthal (n 2 above) 10.

⁸ K Parlett *The individual in the international legal system: continuity and change in international law* (2011) 294; Buergenthal (n 2 above) 13; and RKM Smith *Textbook on international human rights* (2007) 19.

⁹ See Isa & Feyter (n 2 above) 23-24; Buergenthal (n 1 above) 783. On the 1929 Declaration of the International Rights of Man which was adopted by the Institute of International Law. See also Isa & Feyter (n 2 above) 25 and Parlett (n 8 above) 295-296 on the 1941 Atlantic Charter. See also J Humphrey *Human rights and the United Nations: a great adventure* (1984) 12-13 for a detailed discussion on the drafting of the UN Charter at the San Francisco Conference.

¹⁰ United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI.

¹¹ J Humphrey 'The Universal Declaration of Human Rights: its history, impact and juridical character' in BG Ramcharan (ed) *Human rights: thirty years after the Universal Declaration* (1979) 27. At the time the UN had 56 members, 48 voted in favour of the Declaration, none voted against while 8 (Byelorussia, Czechoslovakia, Poland, South Africa, Ukraine, USSR, Yugoslavia and Saudi Arabia) abstained.

¹² Humphrey 'Universal Declaration on Human Rights' (n 11 above) 34.

submitted to the General Assembly for approval and subsequently opened for ratification by states.¹³ The main reason advanced for splitting the covenants was that the measures for implementation for both sets of rights were different.¹⁴ However, some commentators argue that viewed from a political perspective, having two covenants guaranteed that majority could be found to support both covenants.¹⁵

The measures of implementation envisaged for the International Covenant on Civil and Political Rights (ICCPR) was a committee of independent individual experts with power to consider state reports on implementation, receive petitions from states on violations by another state and seek a friendly settlement.¹⁶ Proposals to have the individual right to petition were rejected severally.¹⁷ Finally, the individual right to petition was approved but the entire procedure was relegated to an optional protocol.¹⁸ In stark contrast, the International Covenant on Economic, Social and Cultural Rights (ICESCR), was to be implemented by a system of state reports submitted to the United Nations inter-governmental bodies, including the Economic and Social Council and the specialised agencies which would indicate the steps to be taken by the parties to fulfil their obligations.¹⁹ The Council was also empowered to forward these reports to the Commission on Human Rights for a study and general recommendations.²⁰ The two covenants were adopted in 1966 together with the optional protocol to the civil and political rights covenant and eventually entered into force in 1976. In 1986, arising from ineffective implementation of the ICESCR by the Economic and Social Council, the Committee on Economic, Social and Cultural Rights was established.²¹

Today, almost five decades since the adoption of the measures of implementation for the two covenants, the international community continues to grapple with national level implementation of human rights treaties.

3.2 Treaty based monitoring mechanisms

The first UN treaty, the Convention on the Prevention and Punishment of the Crime of Genocide, was adopted on 9 December 1948.²² In 1965, the UN adopted the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), significant in

¹³ Humprey 'Universal Declaration on Human Rights' (n 11 above) 36 -38.

¹⁴ As above.

¹⁵ M Langford 'Closing the gap? an introduction to the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' (2009) 27 *Nordisk Tidsskrift for Menneskerettigheter* 3.

¹⁶ The Committee is composed of 18 individual experts appointed by their states who must be parties to the Covenant. See International Covenant on Civil and Political Rights 16 December 1966, 999 U.N.T.S., 171 (entered in force 23 March 1976) articles 28 and 29.

¹⁷ S Hoare 'The UN Commission on human rights' in E Luard *The international protection of human rights* (1967) 68-69.

¹⁸ H Steiner 'Individual claims in a world of massive violations: what role for the Human Rights Committee' in P Alston and J Crawford (eds.) *The future of UN human rights treaty monitoring* (2000) 23.

¹⁹ The Economic and Social Council is a 54 member inter-governmental body elected by the UN General Assembly for an overlapping term of three years. See United Nations Economic and Social Council, <http://www.un.org/en/ecosoc/about/members.shtml> (15 July 2015).

²⁰ G Ezeji for *Protection of human rights under the law* (1964) 90-93.

²¹ P Alston *The United Nations and Human Rights: a critical appraisal* (1992) 473-508. The Committee comprises of 18 independent individual experts elected by member states party to the ICESCR. See ECOSOC Resolution 1985/17 of 28 May 1985, <http://www.ohchr.org/en/hrbodies/cescr/pages/cescrindex.aspx> (15 July 2015).

²² Convention on the Prevention and Punishment of the Crime of Genocide, opened for signature Dec. 9, 1948, 78 U.N.T.S. 277.

human rights monitoring as it contained the first individual complaints procedure thus paving way for the individual complaints procedure in the First Optional Protocol to the ICCPR.²³ As discussed earlier, the ICCPR and ICESCR were adopted in 1966.²⁴

The CERD and ICCPR corrected the omission of the Convention on the Prevention and Punishment of the Crime of Genocide by establishing the first two human rights treaty monitoring mechanisms – the treaty monitoring committees.²⁵ Subsequently and over the years, more international human rights treaties were adopted with corresponding treaty monitoring committees.

As of October 2015, there are nine core UN human rights treaties each with an independent treaty monitoring committee.²⁶ In addition to the CERD, ICCPR and ICESCR, these are: the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),²⁷ the Convention Against Torture and Other Cruel, Inhuman and Degrading Punishment (CAT),²⁸ the Convention on the Rights of the Child (CRC),²⁹ International Convention on the Protection of All Migrant Workers and Members of their Families (ICRMW),³⁰ the Convention on the Protection of All Persons from Enforced Disappearance (CPED)³¹ and the Convention on the Rights of Persons with Disabilities (CRPD).³² In addition to the nine core treaty monitoring committees, is the Sub-Committee on the Prevention of Torture (SPT) established in 2007 under the Optional Protocol to the Convention Against Torture.³³ The primary mandate of the SPT is to undertake preventive measures against torture and ill treatment.³⁴

²³ International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195 (CERD).

²⁴ International Covenant for Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 (ICCPR); International Covenant for Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 (ICESCR); Optional Protocol to the International Covenant for Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 302.

²⁵ E Stamatopoulou 'The development of United Nations mechanisms for the protection and promotion of human rights' (1998) 55 *Wash & Lee L. Rev.* 688. See Article 28 of the ICCPR; Article 8 of CERD; Article 16 ICESCR which though not creating a treaty monitoring committee designates the Economic and Social Council to consider reports on implementation. The omission in the Convention on the Prevention and Punishment of the Crime of Genocide is partly addressed by Article IX which gives states the option of seeking remedy at the International Court of Justice.

²⁶ Office for the High Commissioner of Human Rights, core international human rights instruments, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx> (accessed 22 October 2015).

²⁷ Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 (CEDAW).

²⁸ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 UNTS 85 (entered into force 26 June 1987) (CAT).

²⁹ Convention on the Rights of the Child, Nov. 20, 1989, 28 I.L.M. 1448 (CRC).

³⁰ Convention on the Protection of All Migrant Workers and Members of their Families, Dec. 18, 1980, 220 UNTS 39481 (entered into force 1 July 2003).

³¹ Convention on the Protection of All Persons from Enforced Disappearances 2716 U.N.T.S. 3 Doc. A. 61/448 (entered into force on 23 December 2010).

³² Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106, U.N. Doc. A/RES/61/106 (entered into force 3 May 2008).

³³ Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 18 December 2002, A/RES/57/199 (entered in force 22 June 2006).

³⁴ Office of the High Commissioner for Human Rights, human rights bodies, OPCAT, <http://www.ohchr.org/EN/HRBodies/OPCAT/Pages/OPCATIndex.aspx> (16 July 2015).

The treaty monitoring committees are composed of independent experts elected in their individual capacities, though nominated by governments, and serving on a voluntary basis.³⁵ The centre piece of the treaty monitoring committees' work is examination of state reports. This is in accordance with the implementation measures agreed upon in 1966 during the adoption of the ICCPR that global monitoring of national level implementation of treaties would be through establishment of treaty specific committees to monitor compliance of treaty standards primarily through examination of state reports.³⁶

3.2.1 State reporting system

The reporting system constitutes a mandatory obligation that a state assumes upon ratification of a treaty. All the nine core UN human rights treaties provide for the mandatory reporting procedure. Ratifying states undertake to submit an initial report and then periodic reports to the relevant treaty monitoring committee.³⁷

The primary purpose of state reporting is to monitor compliance with treaty provisions. Further purposes of the reporting system are set out in General Comment 1 of the Committee on Economic, Social and Cultural Rights as:³⁸ (i) review of the state party legislation, rules on human rights; (ii) a realistic assessment by the state party of the actual human rights situation; (iii) an opportunity by the state party to highlight progress achieved in the realization of human rights; (iv) facilitation of public scrutiny by the state party; (v) establishment of the basis for the evaluation of the state party progress in the area of human rights; (vi) development of a better understanding of the challenges encountered in the implementation of the covenant; and (vii) facilitation of the exchange of information among states with a view to developing a better understanding of the common problems they face when realising human rights.³⁹

Reviews of the impact of the state reporting system produce mixed results. Some commentators hold the view that the reporting system is the weakest of the monitoring mechanisms.⁴⁰ Tied to this, is the view that it is 'an empty diplomatic ritual' which serves no useful purpose for compliance monitoring.⁴¹ Conversely, favourable views hold that the system is a useful tool in ensuring implementation of treaty standards. The arguments advanced in support are that the mandatory nature of the procedure ensures continuous contact with states that are unwilling to submit themselves to any of optional monitoring

³⁵ Office of the High Commissioner for Human Rights, Human Rights Bodies, treaty based bodies <http://www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx> (accessed 15 July 2013).

³⁶ J Crawford 'The UN human rights treaty system: A system in crisis' in P Alston & J Crawford (eds) *The future of UN human rights treaty monitoring* (2000) 1.

³⁷ Office of the High Commissioner for Human Rights, Human rights bodies, <http://www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx> (accessed 15 July 2013).

³⁸ M O' Flaherty & P Tsai 'Periodic reporting: the backbone of the UN treaty review procedures' in C Bassiouni & W Schabas (eds.) *New challenges for the UN human rights machinery : what future for the UN treaty body system and the human rights council procedures* (2011) 38; See also W Kalin 'Examination of state reports' in H Keller & G Ulfstein (eds) *UN human rights treaty bodies: law and legitimacy* (2012) 38; Kalin & Kunzli (n 4 above) 212.

³⁹ ICESCR Committee, General Comment No. 1: Reporting by State Parties, 24 February 1989, contained in UN Doc. E/1989/22.

⁴⁰ Kalin (n 38 above) 16-17.

⁴¹ J Connors 'An analysis and evaluation of the system of state reporting' in AF Bayefsky (ed.) *The UN human rights treaty system in the 21st Century* (2000) 4.

mechanisms. Moreover, the process of preparing the state report raises awareness on human rights situations at the domestic level as well as enables a state to self-assess its performance.⁴² Regardless of the view one takes, there is consensus across the divide that the reporting procedure can be more effective if its current challenges are addressed. O'Flaherty classifies the challenges of the reporting system into five categories. These are first, input challenges which relate to the treaty monitoring committees' lack of adequate information on the state party necessary for the reporting procedure to be effective. Second are analysis challenges which have a bearing on the capacity of the committees and the resources available to them. Third are output challenges which relate to the outcome of the reporting procedure as most concluding observations are vague and do not render themselves to practical implementation by the states concerned. Fourth are impact challenges dealing with the influence of the reporting procedure on national human rights practices which remains largely unknown. The last category of challenges are environment challenges which relate to the linkages of the reporting procedure to international and regional human rights mechanisms as well as inter-linkages between monitoring committees.⁴³

The impact of the state reporting procedure on national level human rights practices through implementation of concluding observations has not been a subject of much research.⁴⁴ A study by Heyns and Viljoen on the domestic level impact of UN treaties conducted between June 1999 and June 2000 in twenty countries representative of the all the regions in the world found that states routinely failed to implement the concluding observations of treaty monitoring bodies for a number of reasons among them lack of clarity of the concluding observations and impracticality of implementation. In instances in which the concluding observations were implemented the study found that the concluding observations had impacted legal developments.⁴⁵ Overall, the study found that the international monitoring mechanisms have limited demonstrable impact so far.⁴⁶

Equally, a 2014 cross-country study on the domestic impact and effectiveness of the UN state reporting system in the Netherlands, New Zealand and Finland conducted between 2009 and 2013 also found that the system is more akin to 'paper pushing' by states rather than policy promoting.⁴⁷ The reasons for non-implementation included lack of persuasiveness as to the legitimacy of the concluding observations owing to competence of the treaty committees' members, overreliance on non-state actors and the political nature of the reporting process.⁴⁸

In regard to Kenya, as at December 2014, the state had submitted 16 state reports to the UN treaty monitoring bodies and received 15 concluding observations.⁴⁹ The impact of these

⁴² Kalin & Kunzli (n 4 above) 218.

⁴³ O'Flaherty (n 38 above) 45-47; See also for similar views Kalin & Kunzli (n 4 above) 218; D Hill 'Estimating the effects of human rights treaties on state behaviour' (2010) 72 *Journal of Politics* 1162 -1163.

⁴⁴ Kalin (n 38 above) 72; See also O'Flaherty & Tsai (n 38 above) 44.

⁴⁵ CH Heyns & F Viljoen *The impact of the United Nations human rights treaties on the domestic level* (2002) 26.

⁴⁶ Heyns & Viloen (n 45 above) 6.

⁴⁷ J Krommendijk *The domestic impact and effectiveness of the process of state reporting under the UN human rights treaties in the Netherlands, New Zealand and Finland: paper-pushing or policy promoting?* (2014) 367-386.

⁴⁸ Krommendijk (n 47 above) 376-378.

⁴⁹ Office of the High Commissioner for Human Rights, Kenya Homepage, Reporting status, http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/countries.aspx?CountryCode=KEN&Lang=EN

concluding observations to human rights practices in Kenya has however not been researched. This research in the subsequent chapters three, four, five and six conducts a detailed assessment of the Kenya's response to these concluding observations with a view to establishing their impact on national human rights practices.

3.2.2 Complaint procedures

The UN system provides for two types of complaint procedures under the treaty based monitoring mechanisms – inter-state complaints and the individual complaints procedures.

The inter-state complaints procedure traces its origins in the 1954 drafting of the civil and political rights covenant which was then envisaged as the main method of implementing the covenant. However, the procedure was in the later stages of the drafting made optional.⁵⁰ To date it remains an optional provision within the UN system except in the CERD.⁵¹

Inter-state complaints procedure is provided for in the ICCPR under Articles 41-43, the Optional Protocol on the ICESCR at Article 10, CERD under Articles 11-13, CAT at Article 21, in the ICRMW at Article 74, under Article 32 of CPED and in the CRC under Article 12 of Optional Protocol.⁵² The procedure can only be invoked if both states recognize the competence of the relevant committee to adjudicate over complaints.

It is argued that the essence of the procedure is the recognition of the *erga omnes* character of treaty based human rights provisions at the procedural level thus creating a possibility for states not directly affected by a violation to seek to enforce treaty obligations.⁵³ The practice is however different, at the UN level the procedure has not been invoked. Some observers contend that this procedure is impractical as it assumes that states will naively compromise their own inter-state relations to come to the aid of foreigners.⁵⁴ This scepticism is however overstated in view of the fact that at the regional level, in the European and African systems, the procedure has been invoked, though sparingly and in Africa never to the aid of

(accessed 22 October 2015). The state has submitted the following reports: initial state report to the CAT Committee in June 2007 & the 2nd periodic report in September 2012; initial state report to the HRC Committee in August 1979, 2nd periodic report in September 2004 & 3rd periodic report in August 2010; initial state report to the CEDAW Committee in December 1990, the 3rd & 4th periodic reports in January 2000, combined 5th & 6th periodic reports in October 2006 & the 7th periodic report in May 2009; initial to 4th periodic report to the CERD Committee in October 2010; initial state report to the CESCRC Committee in September 2006, combined 2nd to 5th periodic reports to the CESCRC Committee in July 2013; initial state report to the CRC Committee in January 2000, 2nd periodic report to the CRC Committee in September 2005, combined 3rd to 5th periodic reports in March 2013; and the initial report to the CRPD Committee April 2012. The state has received the following concluding observations: 2 concluding observations from the CAT Committee in January 2009 and May 2013; 1 concluding observation from the CERD Committee in September 2011; 4 concluding observations from the CEDAW Committee in February 1994, August 2003, August 2007 & April 2011; 3 concluding observations from the CESCRC Committee in June 1993, December 1995 & December 2008; 3 concluding observations from the Human Rights Committee in September 1981, April 2005 & August 2012; and 2 concluding observations from the CRC Committee in November 2001 & June 2007.

⁵⁰ T Opsahl 'The human rights committee' in Alston (n 21 above) 419.

⁵¹ Office of the High Commissioner for Human Rights, Human Rights Bodies – Complaints Procedures, <http://www.ohchr.org/EN/HRBodies/TBPetitions/Pages/HRTBPetitions.aspx> (accessed 16, July 2013); Article 19 CERD.

⁵² As above.

⁵³ Kalin & Kunzli (n 4 above) 234.

⁵⁴ S Leckie 'Inter-state complaints procedure in international human rights law: hopeful prospects or wishful thinking?' (1988) 10 *Human Rights Quarterly* 249 -303; Opsahl (n 50 above) 420.

foreigners.⁵⁵ In addition, the fact that states have on occasion invoked the jurisdiction of International Court of Justice in human rights cases lends credence to the argument that the procedure retains relevance.⁵⁶ Further arguments point out that the procedure has not been used because it can be terminated by either of the state parties before a conciliation commission has been appointed and also that states that have submitted themselves to the procedure have generally good records of treaty standards compliance.⁵⁷ The better view is that the procedure, though not yet invoked in the UN system, remains relevant in light of the fact that recent complaint procedures under the CRC and the CPED have incorporated it as a monitoring mechanism. The debate then ought to shift to what will be the role of the treaty monitoring committees when the procedure is invoked.

Parallel to the inter-state complaints procedure is the individual complaints procedure, whose primary purpose is to monitor state compliance with treaty provisions. Specifically the procedure's objectives are: to afford a remedy to an individual whose rights have been violated through cessation of the violation or payment of compensation; beside the individual remedy, to induce changes in legislation and human rights practice at national level; and to serve as evidence of cases of massive and gross human rights violations in the state concerned.⁵⁸

CERD was the first UN treaty to establish an individual complaints procedure in 1965 paving way for the first Optional Protocol on the Covenant for Civil and Political Rights.⁵⁹ As of October 2015 the procedure is available under eight treaty monitoring committees: the Human Rights Committee (HRC Committee), the Committee on Economic, Social and Cultural Rights (ICESCR Committee), the Committee on the Elimination of Discrimination Against Women (CEDAW Committee), the Committee Against Torture (CAT Committee), Committee on the Elimination of All Forms of Racial Discrimination (CERD Committee), the Committee on the Rights of Persons with Disabilities (CRPD Committee), and the Committee on Enforced Disappearances (CED Committee).⁶⁰ In April 2014, the individual complaints procedure of the CRC acquired the requisite ratifications thus making it the most recent procedure.⁶¹ For the Committee on Migrant Workers (CWM Committee), the

⁵⁵ Communication 227/99 *Democratic Republic of the Congo v Burundi, Rwanda and Uganda*, Twentieth Annual Activity Report (ACHPR); *Cyprus v Turkey*, App. No. 25781/94 (May 10, 2001); *Denmark v. Turkey*, App. No. 34382/97 (Apr. 5, 2000); and *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser.A) 1978. The European Court also declared admissible four applications against Greece in 1968 although not further action on the same was taken. (*Denmark v. Greece*; *Norway v. Greece*; *Sweden v. Greece*; *Netherlands v. Greece*) available at <http://www.echr.coe.int/Hudoc.htm>>

⁵⁶ See *La Grand (Germany v United States)* (merits) [2001] ICJ Rep 466; *Avena & other Mexican nationals (Mexico v United States)* (merits) (2004) ICJ Rep 12; *Amadou Sadio Diallo (Republic of Guinea v Democratic Republic of Congo)* (merits) [2010] ICJ Rep 639.

⁵⁷ Opsahl (n 50 above) 420.

⁵⁸ R Mullerson 'The efficiency of the individual complaint procedures: The experience of CCPR, CERD, CAT and ECHR' in A Bloed, et al *Monitoring human rights in Europe: comparing international procedures and mechanisms* (1993) 27. See also Concept paper on proposal by the High Commissioner on a unified standing treaty body, UN Doc. HRI/MC/2006/2 (2006) para 15.

⁵⁹ Alston (n 21 above) 143.

⁶⁰ Office of the High Commissioner for Human Rights, Human Rights Bodies – Complaints Procedures, <http://www.ohchr.org/EN/HRBodies/TBPetitions/Pages/HRTBPetitions.aspx> (accessed 22 October 2015).

⁶¹As above.

procedure will be available once the requisite numbers of states recognize the competence of these treaty monitoring committees.⁶²

The individual complaints procedure is not automatic but requires the state, where the procedure is contained within the text of a treaty to specifically make a declaration that it intends to be bound by the procedure upon ratification or afterward, or where the procedure is contained in an optional protocol to ratify the protocol.

Evaluation of the impact of the individual complaints procedure is varied. In principle, there appears to be relative consensus that the procedure constitutes one of the best monitoring mechanisms.⁶³ In practice however, views differ. Those in support of the procedure argue that it is effective in inducing change to national legislation and influencing human rights practices yet, in some instances, without affording meaningful relief to the individual complainant.⁶⁴ Similarly others hold that the procedure has little impact in redressing the individual victim rights as it is not a first instance avenue of redress, it is prolonged, its decisions are not binding and it lacks an effective enforcement mechanism.⁶⁵ Of particular relevance to this study is the impact of the procedure in regard to implementation of the decisions of treaty monitoring committees by concerned states. A number of studies have assessed impact in this regard. The Human Rights Committee of the ICCPR in 2002 indicated that only nearly 30% of the follow-up replies indicate willingness by states to implement its decisions or afford the victim an appropriate remedy.⁶⁶ A study by the Open Society Justice Initiative on the basis of the Human Rights Committee 2009 annual report concludes that compliance with the views of the Human Rights Committee is at about 12% and on the decline, 50% compliance rate with the decisions of the CAT Committee and 30% for the CEDAW Committee.⁶⁷ Pointedly, the high compliance rate under CAT is attributed to the nature of cases addressed, which mainly relate to the non-refoulement principle.⁶⁸

Kenya has not accepted any of the individual complaint procedures. The reasons advanced are that there are sufficient domestic avenues for redress in cases of human rights violations.⁶⁹

3.2.3 Inquiry procedures

Six of the nine human rights treaties mandate the treaty monitoring committees to conduct inquiry procedures. Only the CAT and CPED contain the inquiry procedures in the text of the

⁶² As above.

⁶³ R Alebeek and A Nollkaemper 'The legal status of decisions by human rights treaty bodies in national law' in Keller & Ulfstein (n 38 above) citing D McGoldrick *The human rights committee: its role in the development of the international covenant for civil and political rights* (1994); See also Kalin & Kunzli (n 4 above) 233.

⁶⁴ Mullerson (n 58 above) 27-28.

⁶⁵ G Ulfstein 'Individual complaints' in Keller & Ulfstein (n 38 above).

⁶⁶ UN GA 57th Session, Report of the Human Rights Committee, 11 July 2002 UN Doc. A/57/19 Vol. 1 Supp. No. 40. Para 225; UN GA 64th Session.

⁶⁷ Open Society Justice Initiative Open Society Justice Initiative 'From judgment to justice: implementing international and regional human rights decisions' (2010) 118-121.

⁶⁸ As above.

⁶⁹ Interview with M Njau-Kimani, Legal Secretary, Justice and Constitutional Affairs, Office of the Attorney General and Department of Justice, Kenya, Nairobi, 4 March 2015.

treaty while CEDAW, CRPD, ICESCR and CRC provide for the inquiry procedures in Optional Protocols.⁷⁰

Under the above provisions, the relevant treaty monitoring committees are empowered on their own initiative to investigate a state's compliance with relevant treaty provisions upon receipt of information on gross, serious and systemic violations of human rights in a state.⁷¹ The procedure is however not automatic, it is premised on the state recognition of the competence of the relevant treaty monitoring committee.⁷² States may opt-out of an inquiry procedure at the time of ratifying the treaty or optional protocol by making a declaration that they do not recognize the competence of the treaty monitoring committee.⁷³ The procedure is confidential and involves: the treaty monitoring committee upon receipt of reliable information inviting the state to comment on the information; the treaty committee conducting an inquiry; and transmitting its recommendations to the state.⁷⁴

As of October 2015, the CAT Committee has conducted nine inquiry procedures in Turkey, Egypt, Peru, Sri-Lanka, Mexico, Federal Republic of Yugoslavia, Nepal, Brazil and Lebanon between 1994 and 2014.⁷⁵ Similarly, the CEDAW Committee has between 2003 and 2015 conducted three inquiries in Philippines, Mexico and Canada.⁷⁶

3.3 Charter based monitoring mechanisms

In contradistinction to the treaty monitoring mechanisms, the charter based mechanisms are created outside the framework of any human rights treaty. The legal basis of the charter based mechanisms is generally implied in the human rights provisions of the UN Charter and in particular the resolutions of the Economic and Social Council hence their reference as 'charter based', while the normative basis is derived from the Universal Declaration.⁷⁷

The charter based monitoring mechanisms currently comprise of the Human Rights Council, the special procedures, the Universal Periodic Review and the complaints procedure.⁷⁸

⁷⁰ Office of the High Commissioner for Human Rights, Complaint Procedures, <http://www.ohchr.org/EN/HRBodies/TBPetitions/Pages/HRTBPetitions.aspx#inquiries> (accessed 16 July 2013). See Article 20 of the Convention on Torture; Article 8 of the Optional Protocol on CEDAW; Article 6 of the Optional Protocol on CRPD; Article 33 of CPED; Article 11 of the Optional Protocol on ICESCR; Article 13 of the Optional Protocol on the CRC (communications procedure).

⁷¹ Office of the High Commissioner for Human Rights, Complaint Procedures, <http://www.ohchr.org/EN/HRBodies/TBPetitions/Pages/HRTBPetitions.aspx#inquiries> (accessed July 16, 2013).

⁷² As above.

⁷³ As above.

⁷⁴ As above.

⁷⁵ Office of the High Commissioner for Human Rights, human rights bodies, confidential inquiry under Article 20 of the Convention against Torture, http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Inquiries.aspx (22 October 2015).

⁷⁶ Optional Protocol to CEDAW, all inquiries, <https://opcedaw.wordpress.com/inquiries/all-inquiries/> (22 October 2015).

⁷⁷ J Gutter *Thematic procedures of the United Nations Commission on Human Rights and international law: in search of a sense of community* (2006) 2-3; B Rudolf 'The thematic rapporteurs and working groups of the United Nations Commission on Human Rights' in J Frowein and R Wolfrum (eds.) *Max Planck Yearbook of the United Nations Law* (2000) 292.

⁷⁸ Office of the High Commissioner for Human Rights, Human Rights Bodies, <http://www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx> (accessed 22 October 2015).

3.3.1 Human Rights Council

The Human Rights Council (Council) was established in March 2006 as a subsidiary organ of the General Assembly and to replace the Commission on Human Rights.⁷⁹ In a departure from the traditional 53 member Commission on Human Rights, the Council was slimmed to a body of 47 members elected by a majority of the General Assembly members, by secret ballot and based on equitable geographical distribution.⁸⁰ To safeguard against perpetual membership to the Council, a limit of two terms of three years was set in an effort to resolve charges of selectivity. A further requirement for membership is that a state seeking membership must uphold the highest standards in protection and promotion of human rights including the possibility of suspension of any member who grossly and systematically violates human rights.⁸¹

The Council inherited to a large extent continuity of the mechanisms and procedures of the Commission on Human Rights, specifically the special procedures and the 1503 procedure, now renamed the complaints procedure. The only significant change in the mandate of the Council was the Universal Periodic Review.⁸²

3.3.2 Special procedures

The special procedures are constituted under the Council.⁸³ These special procedures are made up of group and individual mandate holders variously referred to as working groups, special rapporteurs, independent experts or special representatives, perhaps reflective of their sporadic and indeterminate evolution.⁸⁴ The special procedures are either country or thematic mandates. Country mandates report on the human rights situation or allegations of human rights violations in a particular country while thematic mandates report on the worldwide situation of a particular right or freedom both individually and collectively.⁸⁵

The first country mandate, the *ad hoc* Working Group on Southern Africa, was set up in 1967 to examine the human rights situation in South Africa. As at October 2015, there are 14 country mandates.⁸⁶ Of these, six are in Africa: Central Africa Republic, Cote d'Ivoire, Eritria, Mali, Somalia and Sudan.⁸⁷

The first thematic procedure, Working Group on Enforced or Involuntary Disappearances, was established in 1980 as a compromise following criticisms of bias in the application of

⁷⁹ UN GA Res. 60/251.

⁸⁰ UN GA Res. 60/251 para 7.

⁸¹ UN GA Res. 60/251 para 7-8.

⁸² P Alston 'Reconceiving the UN human rights regime: challenges confronting the new UN Human Rights Council' (2007) 7 *Melbourne Journal of International Law* 209. See R Freeman 'New mechanisms of the UN Human Rights Council' (2011) 29 *Netherlands Quarterly of Human Rights* 292-293 for a critical discussion on the periodic reporting and the universal periodic review. The Universal Periodic Review draws historical parallels with the periodic reporting procedure undertaken by the Commission on Human Rights between 1965 and 1981.

⁸³ Office of the High Commissioner for Human Rights, special procedures of the Human Rights Council, <http://www.ohchr.org/EN/HRBodies/SP/Pages/Welcomepage.aspx> (24 July 2015).

⁸⁴ O Hoehne 'Special procedures and the UN Human Rights Council' (2007) 4 *Essex Human Rights Review* 25.

⁸⁵ Office of the High Commissioner for Human Rights, human rights bodies, special procedures of the Human Rights Council, <http://www.ohchr.org/EN/HRBodies/SP/Pages/Welcomepage.aspx> (accessed 22 October 2015).

⁸⁶ As above.

⁸⁷ As above.

country specific procedures.⁸⁸ The thematic procedures mandate holders are appointed for a maximum period of six years.⁸⁹ As of October 2015, there are 41 thematic procedures constituted as six working groups, 30 special rapporteurs and five independent experts.⁹⁰

The special procedures share similar methodologies used to monitor implementation of human rights standards mainly through country visits and bringing to the attention of the states individual communications on alleged human rights violations. Additionally, the special procedures conduct thematic studies and convene expert consultations, engage in advocacy, issue public press statements, provide advice for technical cooperation and contribute in development of human rights standards.⁹¹ The rationale of country visits is to review human rights situations at national level. Once the country visit is completed, the mandate holder issues a report containing the findings and recommendations which are not legally binding.⁹²

Special rapporteurs also send urgent appeals and letters of allegations to states upon receipt of information on specific allegations of human rights seeking information. Mandate holders also send letters to governments to seek information, to submit their observations and to follow-up on recommendations.⁹³ A total of 553 communications were transmitted to 116 countries by the special procedures in 2014.⁹⁴ In addition, the Working Group on Arbitrary Detention considers individual complaints, the only charter based mechanism with a mandate to consider individual complaints.⁹⁵ The Working Group receives communications directly from individuals, their representatives or NGOs on alleged cases of arbitrary detention.⁹⁶

The impact of the special procedures has been discussed in a number research studies from different perspectives. These studies have examined impact in terms of contribution to public international law, early warning, on site visits and in light of communications and urgent appeals transmitted to states for responses.⁹⁷ In public international law, special procedures have made a positive impact in monitoring human rights standards in states that are not parties to treaties and also in monitoring compliance with soft-law instruments.⁹⁸ In relation to early warning, the impact of special procedures has been discussed in terms of collecting and analysing data and information and forewarning on the likelihood of gross human rights

⁸⁸ Rudolf (n 77 above) 293-294; Gutter (n 77 above) 81-90.

⁸⁹ Office of the High Commissioner for Human Rights, Special Procedures of the Human Rights Council, <http://www.ohchr.org/EN/HRBodies/SP/Pages/Introduction.aspx> (accessed 13 June 2015).

⁹⁰ Office of the High Commissioner for Human Rights, Special Procedures of the Human Rights Council, <http://www.ohchr.org/EN/HRBodies/SP/Pages/Themes.aspx> (accessed 22 October 2015).

⁹¹ Office of the High Commissioner for Human Rights, Special Procedures of the Human Rights Council, <http://www.ohchr.org/EN/HRBodies/SP/Pages/Introduction.aspx> (accessed 22 October 2015).

⁹² As above.

⁹³ As above.

⁹⁴ Office of the High Commissioner for Human Rights, Special Procedures of the Human Rights Council, report of the twenty first annual meeting of the special procedures of the Human Rights Council, 29 January 2015, para 7, <http://www.ohchr.org/EN/HRBodies/SP/Pages/Welcomepage.aspx> (accessed 22 October 2015).

⁹⁵ Office of the High Commissioner for Human Rights, Working Group on Arbitrary Detention, <http://www.ohchr.org/EN/Issues/Detention/Pages/Complaints.aspx> (accessed 22 October 2015).

⁹⁶ As above.

⁹⁷ I Nifosi *The UN special procedures in the field of human rights* (2005) 126; Stamatopoulou (n 25 above) 690.

⁹⁸ Nifosi (n 97 above) 131-132.

violations.⁹⁹ Illustrative examples discussed in this regard include the report of the special rapporteur on extrajudicial, summary and arbitrary executions in 1993 which recommended measures in Rwanda to protect civilian population from mass massacres and a national reconciliation campaign.¹⁰⁰ Country visits of special procedures and communications transmitted to governments by special rapporteurs for action are the most relevant to this research in evaluating the impact of the special procedures on national level implementation of human rights standards. A number of studies indicate that country visits are the most effective tool of the special procedures in monitoring human rights implementation at the national level.¹⁰¹

The most incisive study on the impact of special procedures by the Brookings Institute which evaluated the effect of recommendations of the special procedures and communications transmitted to governments on human rights practices at the national level. The study on the one hand analysed government responses to communications sent by a set of 19 thematic procedures between 2004 and 2008. The study also analysed government responses in implementing recommendations of special procedures issued following country visits.¹⁰² The study findings indicated that of the special procedures tools, country visits were the most effective tool while communications and urgent appeals are the least effective tool in influencing human rights practices at national level.¹⁰³

Although Kenya has not issued a standing invitation to the special procedures, as of December 2014, it had received eight country visits from the thematic procedures and 25 communications had been transmitted to the government seeking action and information in respect of alleged human rights violations.¹⁰⁴ An analysis on the impact of the country visits and communications transmitted to the government on human rights practices in Kenya is undertaken in the later chapters of this research.

3.3.3 Universal Periodic Review

The Universal Periodic Review was founded under the General Assembly Resolution that established the Council in 2006.¹⁰⁵ The Universal Periodic Review is a state-driven, intergovernmental and interactive process that reviews performance of all states in fulfilment of their human rights obligations and commitments independent of the treaty obligations.¹⁰⁶ The objective of the review is to improve human rights on the ground in all countries and is

⁹⁹ Nifosi (n 97 above) 135.

¹⁰⁰ As above.

¹⁰¹ T Piconne 'Catalysts for rights: the unique contribution of the UN's independent experts on human rights' (2010) 3; Nifosi (n 97 above) 136.

¹⁰² Piconne (n 101 above) 3-4.

¹⁰³ Piconne (n 101 above) 11.

¹⁰⁴ Office of the High Commissioner for Human Rights, Kenya homepage, Kenya and UN charter based bodies, documents on Kenya, http://ap.ohchr.org/documents/dpage_e.aspx?c=95&su=101 (accessed 22 October 2015).

¹⁰⁵ UN GA Res. 60/251 para 5(e) which provides: ...undertake a universal periodic review, based on the objective and reliable information, of the fulfilment by each State of its human rights obligations and commitments in a manner which ensures universality of coverage and equal treatment with respect to all States; the review shall be a cooperative mechanism, based on interactive dialogue, with full involvement of the country concerned with consideration given to its capacity building needs; such a mechanism shall complement and not duplicate the work of treaty bodies.

¹⁰⁶ Office of the High Commissioner for Human Rights, Kenya homepage, Universal Periodic Review – Kenya, <http://www.ohchr.org/EN/HRBodies/UPR/PAGES/KESession8.aspx> (22 October 2015).

designed to ensure universality in application and equal treatment of all states.¹⁰⁷ The basic instruments for the review are the UN Charter, the Universal Declaration on Human Rights, human rights treaties to which the state is party, voluntary pledges made by states including those made in presenting candidates to the Council and applicable international humanitarian law required to be taken into account.¹⁰⁸ The review is based on a national report prepared by the state under review not exceeding 20 pages, a compilation prepared by the Office of the High Commissioner for Human Rights containing information contained in reports of treaty monitoring committees, special procedures and other relevant UN official documents not exceeding ten pages and a summary prepared by the Office of the Commissioner for Human Rights of other reliable information provided by other relevant stakeholders mainly non-governmental organizations, national human rights institutions and regional inter-governmental organizations not exceeding ten pages.¹⁰⁹

At the end of the review, an outcome report is prepared reflecting the interactive dialogue and summarizing the proceedings of the review process, conclusions, recommendations and the voluntary pledges of the state concerned. The report also clearly details opinions expressed by the state under review on recommendations made and which of the recommendations were accepted or rejected.¹¹⁰ The follow-up mechanisms to monitor implementation of the recommendations are contained in the outcome report and any instances of persistent non-cooperation of a state with the universal periodic review are to be addressed by the Council.¹¹¹ The periodicity of the review is every four years with a total of 48 states being reviewed in the first year during three sessions each lasting two weeks. The first Universal Periodic Review mechanism session was held in April 2008 in which 16 states were peer reviewed.¹¹²

Few studies have assessed the impact of the Universal Periodic Review, perhaps due to its relatively recent status. A 2014 book on the Universal Periodic Review reviews the implementation experiences of the first cycle recommendations in select countries.¹¹³ Other studies highlight the potential of the Universal Periodic Review in monitoring implementation of treaty monitoring committees and special procedures recommendations.¹¹⁴ However, the practice does not appear to support this proposition, particularly evinced by the tendency by states to reject recommendations made by treaty bodies when raised during the Universal Periodic Review.¹¹⁵ Further, some studies suggest that the review process is weak in improving human rights situations at national level as states use the interactive dialogue forum to issue positive statements to the state under review instead of examining

¹⁰⁷ As above.

¹⁰⁸ HRC Res. 5/1, para. 1

¹⁰⁹ HRC Res 5/1 paras 15-16.

¹¹⁰ HRC Res 5/1 paras 25-32.

¹¹¹ HRC Res 5/1 paras 33-38.

¹¹² Office of the Commissioner for Human Rights, Universal Periodic Review, <http://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRSessions.aspx> (accessed 26 July 2013).

¹¹³ H Charlesworth & E Larkin *Human rights and the Universal Periodic Review: rituals and ritualism* (2014).

¹¹⁴ E Dominguez-Redondo 'The universal periodic review of the UN Human Rights Council: an assessment of the first session' (2008) 7 *Chinese Journal of International Law* 731.

¹¹⁵ H Collister 'Rituals and implementation of the Universal Periodic Review and the human rights treaty bodies' in Charlesworth & Larkin (n 113 above) 117-125.

compliance.¹¹⁶ Moreover it has been pointed out that the review process did not inspire national dialogue or raise awareness hence it is at best an international process far removed from the national consciousness.¹¹⁷ Nonetheless, the impact of the review mechanism is best assessed once states provide an account of their implementation of the recommendations during the second cycle review.

Kenya underwent its first review during the eighth session of the Universal Periodic Review in May 2010. During the interactive dialogue 128 recommendations were made. The state responded to most of the recommendations during the plenary session of the Council where the final outcome was adopted. In addition the state rejected seven recommendations and undertook to provide responses on implementation of 15 recommendations by September 2010.¹¹⁸ However, no response was provided.

Drawing from the above assessment of impact of the Universal Periodic Review, Kenya rejected some of the recommendations that had been made by treaty monitoring mechanisms. For instance, in the 2010 review Kenya rejected recommendations on extrajudicial killings and non-discrimination in the context of sexual minorities, which constitute its obligations under international human rights treaties that it has ratified.¹¹⁹

3.3.4 The complaints procedure

The complaints procedure was set up by the Council in June 2007 to 'address consistent patterns of gross and reliably attested violations of all human rights and all fundamental freedoms occurring in any part of the world and under any circumstances.'¹²⁰ The procedure bears great similarities with the 1503 Procedure of the Commission on Human Rights with a number of improvements. These include: prompt examination of complaints, informing the complainant of the outcome of the complaint and the possibility of the working group on situations to submit for public discussion a country situation report.¹²¹ The procedure contains two working groups: on communications and on situations. The working group on communications examines communications to determine admissibility and patterns of gross and reliably attested violations of human rights and fundamental freedoms. It is made up of five members appointed from the Human Rights Council Advisory Committee representing each of the five regional groups.¹²² The working group on situations on the other hand comprises of five members appointed from the state members of the Council representing each of the regional groups. It considers situations of reliably attested human rights

¹¹⁶ Freeman (n 82 above) 309; M Davies 'Rhetorical inaction? Compliance and the Human Rights Council of the United Nations' (2010) 35 *Alternatives* 463; Dominguez - Redondo (n 114 above) 731.

¹¹⁷ J Harrington 'Canada, the United Nations Human Rights Council, and universal periodic review' (2009) 18 *Constitutional Forum constitutionnel* 88; Dominguez - Redondo (n 114 above) 734.

¹¹⁸ A/HRC/15/8 Office of the High Commissioner for Human Rights, Universal Periodic Review <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/144/88/PDF/G1014488.pdf?OpenElement> (accessed 26 July 2013).

¹¹⁹ Office of the High Commissioner for Human Rights, Kenya homepage, Report of the Working Group on the Universal Periodic Review, 17 June 2010, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/144/88/PDF/G1014488.pdf?OpenElement> (24 July 2015).

¹²⁰ Office of the High Commissioner for Human Rights, Human Rights Council complaints procedure, <http://www.ohchr.org/EN/HRBodies/HRC/ComplaintProcedure/Pages/HRCComplaintProcedureIndex.aspx> (accessed 26 July 2013).

¹²¹ As above; See Kalin & Kunzli (n 4 above) 253.

¹²² HRC Res 5/1 paras 91-95.

violations and presents reports and recommendations to the Council on the measures to be taken.¹²³

The procedure remains confidential unless the Council decides to make it public.¹²⁴ The measures the Council can take are limited to keeping the situation under review, discontinuing the review, appointing an independent highly qualified expert to review the situation, discontinue the matter under the confidential procedure and bring it for public discussion or make recommendations to the Office of the High Commissioner for Human Rights for technical assistance and advisory services.¹²⁵

Kenya has not been reviewed under the complaints procedure. The situations that have been monitored are the human rights situations in Eritrea, Iraq, Democratic Republic of the Congo, Turkmenistan, Tajikistan, Guinea and Maldives as well as the situation of trade unions and human rights defenders in Iraq and religious minorities in Iraq.¹²⁶

¹²³ HRC Res 5/1 paras 96-99.

¹²⁴ HRC Res 5/1 para 106 -108.

¹²⁵ HRC Res 5/1 para 109.

¹²⁶ Office of the High Commissioner for Human Rights, Human Rights Council complaint procedure, <http://www.ohchr.org/Documents/HRBodies/HRCouncil/SituationsconsideredHRCJan2013.pdf> (accessed 22 October 2015).

4 African human rights system

4.1 Evolution of the African human rights system

The evolution of human rights in Africa is studied most often in terms of the struggle for decolonisation, self-determination and independence.¹²⁷ Past antecedents trace the history of protection of human rights in Africa to the 1961 International Commission of Jurists, African Conference on the Rule of Law convened in Lagos, Nigeria to discuss protection of human rights in the newly independent states of Africa.¹²⁸ The conference resolved to develop an African convention on human rights which was to be monitored by a court vested with appropriate jurisdiction and accessible to individuals under the jurisdiction of signatory member states.¹²⁹ Stemming from the Lagos conference, the UN Commission on Human Rights organised a series of conferences to push for the establishment of regional human rights mechanisms for Africa. These included: Senegal (1966), Cairo (1969), Addis Ababa (1971), Dar es Salaam (1973), Dakar (1978) and Monrovia in 1979.¹³⁰ The 1979 Monrovia conference developed proposals for setting up an African commission for human rights.¹³¹

At the political level, the Organisation of African Unity (OAU) was created in May 1963 following the adoption of the Charter of the Organization of African Unity (OAU Charter).¹³² The OAU Charter made no express reference to human rights and was principally concerned with political unity, non-interference in the internal affairs of other member states and ending colonialism.¹³³ The OAU nonetheless between 1963 and 1978 addressed human rights issues illustrated by its campaign to end colonialism in Africa and the adoption of the OAU Convention on refugees.¹³⁴ These initiatives were however not informed by national human rights concerns.¹³⁵ Later developments led to the shift of the OAU principle of non-interference, thus leading to the adoption of the African Charter. These include: the rise of repressive African rulers in post-colonial Africa, the emergence of human rights in international politics and UN support for regional human rights regimes.¹³⁶

¹²⁷ CH Heyns 'A 'struggle approach' to human rights' in CH Heyns & K Stefiszyn (eds) *Human rights, peace and justice in Africa: a reader* (2006) 19-20; M Ssenyonjo *The African regional human rights system: 30 years after the African Charter on Human and Peoples' Rights* (2012) 5.

¹²⁸ N Udombana 'Toward the African Court on Human and Peoples' Rights: better late than never' (2000) 3 *Yale Human Rights and Development L.J.* 58; F Viljoen 'A human rights court for Africa and Africans' (2004) 30 *Brook J. Int'l L.* 6.

¹²⁹ Udombana (n 128 above) 58.

¹³⁰ Udombana (n 128 above) 58 -59; G Muigai 'From the African Court on Human and Peoples' Rights to the African Court of Justice and Human rights' in Ssenyonjo (n 127 above) 267.

¹³¹ Muigai (n 130 above) 267.

¹³² Organisation of African Union Charter, 479 U.N.T.S 39 entered into force 13 September 1963, <http://www.au.int/en/treaties> (accessed 23 August 2013) hereinafter (Charter of the OAU).

¹³³ BO Okere 'The protection of human rights in Africa and the African Charter on Human and Peoples' Rights: a comparative analysis with the European and American systems' (1984) 6 *Human Rights Quarterly* 142; Udombana (n 128 above) 55.

¹³⁴ F Viljoen *International human rights law in Africa* (2012) 156-158.

¹³⁵ As above.

¹³⁶ Viljoen (n 134 above) 158-159.

The African Charter was adopted in June 1981 by the OAU in Nairobi, Kenya and entered into force in October 1986 upon ratification by a simple majority.¹³⁷ This was followed by the adoption of the African Charter on the Rights and Welfare of the Child under the auspices of the OAU.¹³⁸ Further developments at the political level led to reconstitution of the OAU to the African Union (AU) in 2001.¹³⁹ The foundational document of the AU, the Constitutive Act, in a significant departure from the OAU Charter contains elaborate and detailed provisions on human rights in the continent.¹⁴⁰ The preamble of the Constitutive Act alludes to the AU's 'determination to promote and protect human and peoples' rights'.¹⁴¹ Further, three of the fourteen objectives of the AU relate to human rights.¹⁴² Six of the sixteen guiding principles of the AU also focus on human rights.¹⁴³ In addition, the Constitutive Act in a pioneering move includes the responsibility to protect principle by providing for the right of the AU to intervene in member states in case of grave violations such as war crime, genocide and crimes against humanity.¹⁴⁴ The Constitutive Act also conditions continued membership to the AU on respect for and adherence to human rights standards.

In addition to the human rights treaties adopted under the OAU, the AU has over the years adopted other human rights instruments to supplement the African Charter. These are: the Protocol to the African Charter on the Rights of Women in Africa and the Protocol to the African Charter on Establishing of the African Court on Human and Peoples' Rights.¹⁴⁵ Other treaties adopted by the AU that relate to human rights include: the AU Convention on Prevention and Combating Corruption and other Related Offences, the African Charter on Democracy, Elections and Governance, the AU Convention for the Protection and Assistance of Internally Displaced Persons in Africa.¹⁴⁶ Against this background, the following section examines the African human rights system with a specific focus on the monitoring mechanisms.

The African Charter is normatively a novel document that straddles both civil and political and economic and social, cultural rights, while emphasizing regional peculiarities such as group rights, self determination and the concept of individual duties.¹⁴⁷ These peculiarities

¹³⁷ African Union, OAU/AU treaties, protocols and charter, <http://www.au.int/en/treaties> (accessed 23 August 2013).

¹³⁸ African Charter on the Rights and Welfare of the Child, adopted 11 July 1990, OAU Doc. CAB/LEG/24.9/ 49 (1990) entered in force 29 November 1999.

¹³⁹ M Evans & R Murray *The African Charter on Human and Peoples' Rights: the system in practice, 1986 - 2006* (2008) 20; See Decisions on the establishment of the African Union and the Pan African Parliament, OAU Doc. AHG/Dec. 143 (XXXVI)

¹⁴⁰ Constitutive Act of the African Union adopted in July 2000, CAB/LEG/ 23.15 (entered into force in May 2001) (Constitutive Act).

¹⁴¹ Constitutive Act, Preamble.

¹⁴² Constitutive Act, Article 3 (e) and 3 (h).

¹⁴³ Constitutive Act, Article 4.

¹⁴⁴ Constitutive Act, Article 4 (h).

¹⁴⁵ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, adopted by the 2nd Ordinary Session of the Assembly of the Union, Maputo, CAB/LEG/ 66.6 (13 Sept. 2000); reprinted in 1 Afr. Hum. Rts. L.J 40 entered to force in Nov. 25, 2005 (Protocol on the Rights of Women); Protocol to the African Charter on Human and Peoples' Rights on Establishing the African Court on Human and Peoples' Rights, June 9, 1998, OAU Doc. OAU/LEG/ EXP AFCHPR PROT (III) (Protocol on the African Court on Human Rights).

¹⁴⁶ Viljoen (n 134 above) 165-166.

¹⁴⁷ The African Charter on Human and Peoples' Rights, adopted in June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) entered into force on Oct. 21, 1986 (African Charter).

find grounding in the drafters' intentions to uphold African traditions, the African philosophy of law and 'meet the needs of Africa'.¹⁴⁸ The African Charter also establishes the African Commission on Human and Peoples' Rights (African Commission) as the sole monitoring body.¹⁴⁹

4.2 African Commission on Human and Peoples' Rights

The African Commission was established in 1987, six years after the adoption of the African Charter and one year after its entry into force. It is composed of eleven persons with expertise in matters of human and peoples' rights, serving in their individual capacity, on part time basis and for a six year renewable term.¹⁵⁰ The members are appointed by secret ballot by the AU Heads of State and Government (AU Assembly) from a list of persons nominated by state parties to the African Charter.¹⁵¹ The African Commission is generally mandated to promote human and peoples' rights and ensure their protection in Africa¹⁵², a protective mandate which since 2008 is also partly exercised by the African Court on Peoples' and Human Rights (African Court).¹⁵³ The African Commission's promotional mandate involves examination of state reports, promotional missions and special mechanisms,¹⁵⁴ while the protective mandate involves consideration of state and individual communications and on-site investigative missions.¹⁵⁵ The territorial jurisdiction of the African Commission extends to all member states of the AU. The African Commission meets twice in the year to execute its mandate, while the secretariat of the African Commission is located in Banjul, The Gambia.¹⁵⁶

4.2.1 Examination of communications

The African Charter envisages two categories of complaints: inter-state communications and 'other communications' interpreted as referring to individual communications.¹⁵⁷

In regard to inter-state complaints, the African Charter allows a state that has reasons to believe that another state is in violation of the provisions of the African Charter to draw the attention of the violating state to the alleged violations in writing and also address the same communication to the secretary of the AU and the chair of the African Commission.¹⁵⁸ The African Charter envisages an amicable bilateral settlement or in the absence of an amicable settlement, submission of the communication to the African Commission.¹⁵⁹ Akin to the UN system, the inter-state communications procedure is not widely used, although it has been invoked once by Democratic Republic of the Congo in a communication filed against

¹⁴⁸ Okere (n 133 above) 145; Udombana (n 128 above) 60.

¹⁴⁹ African Charter, Article 30.

¹⁵⁰ African Charter, Article 31 & 36.

¹⁵¹ African Charter, Article 33.

¹⁵² African Charter, Article 30.

¹⁵³ Protocol on the African Court on Human Rights.

¹⁵⁴ African Charter, Article 45.

¹⁵⁵ African Charter, Chapter III.

¹⁵⁶ African Commission on Human and Peoples' Rights, <http://www.achpr.org/about/> (accessed 18 August 2013).

¹⁵⁷ African Charter, Chapter III.

¹⁵⁸ African Charter, Article 47.

¹⁵⁹ As above.

Uganda, Rwanda and Burundi. The African Commission found Burundi, Uganda and Rwanda in violation of the African Charter and international law.¹⁶⁰

On individual communications, the African Charter contains no express provisions on individual communications rather it contains a provision on 'other communications'.¹⁶¹ Based on this, the African Commission draws the mandate to consider individual communications. The procedure for handling of individual communications is comprehensively provided for in the Rules of Procedure of the African Commission, 2010 (Rules of Procedure 2010).¹⁶² The African Charter and the Rules of Procedure place no standing requirements on individual communications thus allowing individual victims, groups and non-governmental organizations unfettered access, although it is required that the author of the communication should be identified.¹⁶³ On admissibility, individual communications are admissible if: they indicate the authors even if the authors seek anonymity, not written in a language that is insulting to the state or the AU, are compatible with the AU Charter and the African Charter, not based solely on media reports, local remedies have been exhausted unless such remedies would be unduly delayed, submitted within a reasonable time since exhaustion of local remedies or from the date of seizure by the African Commission and do not relate to cases that have been settled by the states involved in accordance with the Charter of the UN, AU Charter or the African Charter.¹⁶⁴ These conditions are conjunctive and must all be met.

The decisions of the African Commission on adjudication of communications are non-binding. It is an open question whether their approval and adoption by the AU Executive Council makes them legally binding.¹⁶⁵ Regardless of the binding or non-binding nature, states have treaty obligations to implement the African Charter, which include obligations to give effect to interpretive decisions of the African Commission in consideration of individual communications.¹⁶⁶ The enforcement or follow-up mechanism for the decisions of the African Commission is provided for in the Rules of Procedure 2010.¹⁶⁷

The African Commission has as of October 2015 published decisions on 250 communications, of which only one decision relates to inter-state communications.¹⁶⁸ Of the decisions on individual communications, 12 communications relate to Kenya and have been processed as follows: seven have been ruled inadmissible,¹⁶⁹ one withdrawn,¹⁷⁰ one decided

¹⁶⁰ Communication 227/99 *Democratic Republic of the Congo v Burundi, Rwanda and Uganda*, Twentieth Annual Activity Report (ACHPR).

¹⁶¹ African Charter, Article 55.

¹⁶² African Commission on Human and Peoples' Rights Rules of Procedure 2010, rule 93-113.

¹⁶³ African Charter, Article 56 (1).

¹⁶⁴ African Charter, Article 56.

¹⁶⁵ Viljoen (n 134 above) 338-339.

¹⁶⁶ As above.

¹⁶⁷ African Commission on Human and Peoples' Rights Rules of Procedure 2010, rule 112.

¹⁶⁸ African Commission on Human and Peoples' Rights, Statistics <http://www.achpr.org/states/stats/> (accessed 22 October 2015).

¹⁶⁹ Communication 19/1988, *International PEN v Malawi, Ethiopia, Cameroon and Kenya*, 3rd Annual Activity Report (ACHPR); Communication 135/1994, *Kenya Human Rights Commission v Kenya*, 9th Activity Annual Report (ACHPR); Communication 142/1994 *Muthuri Njoka v Kenya*, 8th Activity Annual Report; Communication 263/2002, *Kenya Section of the International Commission of Jurists, Law Society of Kenya and Kituo cha Sheria v Kenya*, 18th Activity Annual Report (ACHPR); Communication 375/2009 *Priscilla Njeri Echaria (represented by the Federation of Women Lawyers Kenya and International Centre for the Protection of Human Rights) v Kenya*,

on merit finding no violation found,¹⁷¹ and in two the state was found to be in violation of the African Charter.¹⁷² The last of these 12, is a communication submitted in 2006 in which a decision on merit was taken in May 2015,¹⁷³ hence outside the scope of this thesis. The African Commission has also referred one communication against Kenya to the African Court following Kenya's failure to comply with provisional measures issued by the African Commission.¹⁷⁴ Regarding Kenya's implementation of the decisions in these communications, the record is unpromising. The *Endorois* decision is as of October 2015 partially implemented as discussed in chapters five and eight while in the *Ouko* decision there is no documented evidence that the state facilitated the safe return of the author from the Democratic Republic of the Congo as recommended by the African Commission.

In regard to the impact of the decisions of the African Commission on communications, a number of studies stand out. Viljoen and Louw in their influential study on compliance with the decisions of the African Commission between 1994 and 2004 find that of the 44 communications where decisions on merit had been issued, only in six of those decisions had full implementation occurred, representing a 14% compliance rate.¹⁷⁵ In 13 of the communications, states did not implement the decisions of the African Commission representing 30% non-compliance rate, while there was partial compliance in 14 of the cases equivalent to 32%.¹⁷⁶ The study found on the overall lack of compliance with the decisions of the African Commission.¹⁷⁷ A further study on selected African states reviewed the impact of the Charter and the Protocol on the Rights of Women on state practices in relation to legislation, policy formulation, court judgments, NGO advocacy and the academia and legal training.¹⁷⁸ In the specific context of individual communications, the study as stated above found that Kenya had not implemented the decisions in the *Endorois* case.¹⁷⁹ A study by the Open Society Justice Initiative on implementation of the decisions of the African Commission between 1994 and 2009 found that of the 60 individual communications in which the African Commission had issued decisions on merit, only in seven of the cases had states fully implemented the decisions, signifying a 12% compliance rate.¹⁸⁰ At a glance, the

31st Activity Annual Report (ACHPR); Communication 407/2011 *Artur Margaryan and Artur Sargsyan v Kenya*; Communication 464/2014 *Uhuru Kenyatta and William Ruto (represented by Innocent Project Africa) v Kenya*.

¹⁷⁰ Communication 283/2003, *B v Kenya*, 17th Activity Annual Report (ACHPR).

¹⁷¹ Communication 157/96, *Association pour la sauvegarde de la pix au Burundi v Kenya, Rwanda, Uganda, Tanzania, Zaire (DRC), Zambia*, 16th Activity Annual Report (ACHPR).

¹⁷² Communication 232/1999, *John D. Ouko v Kenya*, 14th Activity Annual Report (ACHPR); Communication 276/2003, *Centre for Minority Rights and Development (CEMIRIDE) on behalf of the Endorois Council Welfare v Kenya*, Twenty Seventh Annual Activity Report (ACHPR).

¹⁷³ Communication 317/2006, *The Nubian Community in Kenya v Kenya*. See African Commission on Human and Peoples' Rights, communications, <http://www.achpr.org/communications/decision/317.2006/> (accessed 22 October 2015).

¹⁷⁴ Communication 381/2009, *Centre for Minority Rights-Kenya & Minority Rights Group International (on behalf of the Ogiek Community of the Mau Forest) v Kenya*.

¹⁷⁵ F Viljoen & L Louw 'State compliance with the recommendations of the African Commission on Human and Peoples' Rights 1994-2004' (2007) 101 *American Journal of International Law* 5.

¹⁷⁶ Viljoen & Louw (n 175 above) 5-6.

¹⁷⁷ Viljoen & Louw (n 175 above) 8.

¹⁷⁸ Centre for Human Rights 'Impact of the African Charter and the Women's Protocol in Selected African States' (2012) 74-75.

¹⁷⁹ As above.

¹⁸⁰ Open Society Justice Initiative (n 67 above) 94.

figures on the rate of full compliance with the decisions of the African Commission signify a declining trend.

4.2.2 On-site investigative missions

The African Commission is mandated to 'use any appropriate method of investigation'.¹⁸¹ This provides the legal basis for the protective missions of the African Commission. Viljoen distinguishes two categories of protective missions envisaged under this mandate.¹⁸² These are: on-site investigative missions and fact-finding missions.¹⁸³ On-site investigative missions are undertaken in response to a large number of communications against a state, while fact finding missions are undertaken independent of communications to assess the truth of allegations of human rights violations generally.¹⁸⁴ The African Commission has conducted on-site investigative missions in Senegal, Mauritania, Sudan and Nigeria,¹⁸⁵ and fact finding missions in Morocco, Togo and Zimbabwe.¹⁸⁶ No investigative mission has been undertaken in Kenya. No studies have so far reviewed the impact of the on-site investigative missions.

4.2.3 State reporting procedure

The African human rights system provides for state reporting under the African Charter and the Protocol on the Rights of Women. Article 62 of the African Charter obligates states to submit every two years periodic reports on the legislative and other measures taken to comply with the African Charter.¹⁸⁷ Similarly, the Protocol on the Rights of Women requires states to submit periodic reports on national level implementation in accordance with the African Charter.¹⁸⁸ The preparation of state reports is guided by the Guidelines for National Periodic Reports under the African Charter.¹⁸⁹ The Rules of Procedure 2010 outline procedures for transmission and considerations of state reports, follow-up and implementation of concluding observations and attendant issues such as non-submission of state reports.¹⁹⁰

On the impact of the state reporting procedure, the assessment is largely uninspiring which is attributed to a number of factors. First, the African Commission only began issuing concluding observations in 2001.¹⁹¹ Second, even after the African Commission began adopting concluding observations, these were never published in the session report or Activity Reports, hence making follow-up on implementation difficult.¹⁹² This gloomy picture is however set to change as the Rules of Procedure 2010, provide a comprehensive system of follow-up on implementation of concluding observations as discussed above and the requirement to post the concluding observations on the African Commission's website.¹⁹³ Yet, the Rules of Procedure 2010 remain limiting in that the publication of the concluding

¹⁸¹ African Charter, Article 46.

¹⁸² Viljoen (n 134 above) 344-345.

¹⁸³ As above.

¹⁸⁴ As above.

¹⁸⁵ Viljoen (n 134 above) 345-347.

¹⁸⁶ Viljoen (n 134 above) 347-348.

¹⁸⁷ African Charter.

¹⁸⁸ Protocol on the Rights of Women, Article 26.

¹⁸⁹ Viljoen (n 134 above) 351-352.

¹⁹⁰ Rules of Procedure 2010, Rules 77 and 78.

¹⁹¹ C Heyns & M Killander 'The African regional human rights system' in Isa & Feyter (n 2 above) 529.

¹⁹² Viljoen (n 134 above) 366.

¹⁹³ Rules of Procedure 2010, Rule 77.

observations is conditioned on the adoption of the Activity Report by the AU Executive Council akin to the publication of decisions on communications.¹⁹⁴ The limitation is however unfounded as the African Charter does not require confidentiality in relation to recommendations arising from the state reporting procedure.¹⁹⁵

Kenya's initial report covering the period 1992 to 2006 was considered by the African Commission in May 2007 resulting in formulation of one concluding observation.¹⁹⁶ The level of implementation of the concluding observation is assessed in the subsequent chapters of this research. On reporting on the Protocol on the Rights of Women, Kenya has not submitted its initial report despite ratifying the Protocol in 2010. On the impact of the state reporting procedure in Kenya, a multi-country study on the impact of the African Charter and the Protocol on the Rights of Women highlighted the lack of a mechanism to ensure implementation of concluding observations.¹⁹⁷

4.2.4 Special mechanisms

Similar to the UN human rights system, the African human rights system also incorporates in its monitoring mechanisms a system of special procedures/mechanisms in the form of special rapporteurs, working groups and committees. The legal basis for the establishment of the special mechanisms in the African Charter is not explicit although commentators have cited Articles 45 (1), 46 and 66.¹⁹⁸ These special mechanisms are constituted as special rapporteurs and working groups or committees. The commissioners serve as individual special rapporteurs dealing with a particular thematic area, while working committees are comprised of commissioners and external experts also focussing on thematic issues of human and peoples' rights.¹⁹⁹ The procedure for the establishment of the special mechanisms is provided for in the Rules of Procedure 2010.²⁰⁰ As of October 2015 there are five special rapporteurships which deal with: prisons and conditions of detention; human rights defenders; rights of women; refugees, asylum seekers, migrants and internally displaced persons; and freedom of expression and access to information.²⁰¹

The first working group was established in 2000 to deal with the rights of indigenous communities in Africa.²⁰² As of October 2015, the African Commission has five thematic working groups dealing with: economic, social and cultural rights; older persons and people with disabilities; extractive industries, environment and human rights violations; and death penalty and extrajudicial, summary and arbitrary executions, in addition to the rights of indigenous populations.²⁰³ There are two thematic committees dealing with prevention of

¹⁹⁴ Viljoen (n 134 above) 367.

¹⁹⁵ As above.

¹⁹⁶ 22nd Activity Report (ACHPR).

¹⁹⁷ Centre for Human Rights (n 178 above) 73-74.

¹⁹⁸ Heyns & Killander (n 191 above) 529; B Nyanduga 'Working groups of the African Commission and their role in the development of the African Charter on Human and Peoples' Rights' in Evans & Murray (n 139 above) 379; Viljoen (n 134 above) 370.

¹⁹⁹ Viljoen (n 134 above) 369.

²⁰⁰ Rules of Procedure 2010, Rule 23.

²⁰¹ African Commission on Human and Peoples' Rights, Special Mechanisms <http://www.achpr.org/mechanisms/> (accessed 22 October 2015).

²⁰² Viljoen (n 134 above) 377.

²⁰³ African Commission on Human and Peoples' Rights, special mechanisms, <http://www.achpr.org/mechanisms/> (accessed 22 October 2015).

torture in Africa and protection of rights of people living with, those affected and vulnerable to and affected by HIV.²⁰⁴ The special mechanisms have in total conducted 40 missions and issued 116 resolutions.²⁰⁵

Kenya has had only one special mechanism mission: a mission by the working group on indigenous populations/ communities in 2010.²⁰⁶ A promotional mission to sensitize the populace on the African Charter was also conducted in 1998.²⁰⁷ The impact of the special mechanisms in Kenya is hard to determine in light of a single thematic mission. However, the multi-country study on the impact of the African Charter and the Protocol on the Rights of Women noted, at the time, that Kenya had been faulted by the African Commission for its indifference to the special mechanisms missions.²⁰⁸

4.3 African Committee of Experts on the Rights and Welfare of the Child

The African Committee of Experts on the Rights and Welfare of the Child (African Committee on the Child) is established under the African Charter on the Rights and Welfare of the Child (Charter on Children).²⁰⁹ The Charter on Children was subsequently adopted in 1990, and entered in force in 1999,²¹⁰ as the regional equivalent of the CRC. While the adoption of the Charter on Children is not a reflection of the cultural-relativist divide, the reasons for its adoption are: the perceived limited participation of African states in the drafting of the CRC and the need to particularise the protection of children to African realities.²¹¹ The Charter on Children outlines universal principles relating to children and protects civil and political as well as economic, social and cultural rights.²¹² State implementation of the above rights contained in the Charter on Children is monitored by the African Committee on the Child.

The African Committee on the Child commenced operations in 2002.²¹³ It consists of 11 members appointed by the AU Assembly by secret ballot and after nomination by states parties to the Charter on Children.²¹⁴ The members serve in their individual capacity, on part-time basis.²¹⁵ Until 2015, members served for a non-renewable term of five years, following an amendment to the Charter on Children in January 2015, the term is renewable once for five years.²¹⁶ The African Committee on the Child sits at the AU headquarters in Ethiopia and holds sessions twice in the year.²¹⁷ The mandate of the African Committee on the Child is protective and promotional, similar to the African Commission. The protective mandate

²⁰⁴ As above.

²⁰⁵ African Commission on Human and Peoples' Rights, Special Mechanisms <http://www.achpr.org/mechanisms/> (accessed 22 October 2015).

²⁰⁶ As above.

²⁰⁷ As above.

²⁰⁸ Centre for Human Rights (n 178 above) 75.

²⁰⁹ Charter on Children article 32.

²¹⁰ African Charter on the Rights and Welfare of the Child (n 138 above).

²¹¹ As above.

²¹² As above.

²¹³ African Committee on the Rights and Welfare of the Child, about the Committee, <http://pages.au.int/acerwc/pages/achievements-acerwc> (27 July 2015).

²¹⁴ African Charter on the Rights and Welfare of the Child, article 34.

²¹⁵ African Charter on the Rights and Welfare of the Child, articles 33(2) & 37 (1).

²¹⁶ African Union, Assembly of the Union, Assembly/AU/Dec.548/XXIV of January 2015.

²¹⁷ African Committee on the Rights and Welfare of the Child, sessions and reports, <http://pages.au.int/acerwc/pages/sessions-and-session-reports> (accessed 27 July 2015).

entails consideration of individual and state communications and investigative fact finding missions, while the promotional mandate involves examination of state reports.

4.3.1 Examination of communications

The Charter on Children provides for submission of communications to the African Committee on the Child from individuals, groups or NGOs recognised by the OAU/AU, member states and the UN.²¹⁸ The procedure for submission and examination of communications is laid out in the African Committee's Guidelines on Communications.²¹⁹ The Guidelines impose no standing requirements, and a communication may be submitted on behalf of the victim with or without his or her consent and may relate to an unidentified group of persons.²²⁰ On admissibility of the communication, the Guidelines require exhaustion of local remedies or instances in which the complaint is dissatisfied 'with the solution provided'.²²¹ Once a communication is deemed admissible, the state is given an opportunity to respond to the issues and a decision is taken on merit.²²²

As of October 2015, the African Committee on the Child has received three communications against Uganda, Kenya and Senegal.²²³ The first communication was submitted in 2005 against the Republic of Uganda, while the second and third communications were submitted in 2009 and 2012 against Kenya and Senegal respectively.²²⁴ The African Committee has issued merit decisions in all three communications, finding the three states in violation of the Charter on Children.²²⁵ The communication against Kenya related to the alleged violations of rights of children of Nubian descent in Kenya and was submitted by two NGOs, Open Society Initiative for East Africa and the Institute for Human Rights and Development in Africa.²²⁶ The African Committee on the Child found that Kenya had violated the rights of nationality, non-discrimination, health and education of children of Nubian descent in Kenya.²²⁷ Notably, Kenya did not respond to the communication during its consideration and has as of October 2015 not implemented the decision. Detailed discussions on the non-implementation are taken up in chapters five (2.6.1) and eight (5.1).

²¹⁸ African Charter on the Rights and Welfare of the Child, article 44 (1).

²¹⁹ Viljoen (n 134 above) 402.

²²⁰ Viljoen (n 134 above) 402- 403.

²²¹ As above.

²²² African Committee on the Rights and Welfare of the Child, communications, <http://pages.au.int/acerwc/pages/communications> (accessed 22 October 2015).

²²³ As above.

²²⁴ Viljoen (n 134 above) 404; *Michelo Hunsungule and others (on behalf of the children of Northern Uganda) v The Government of Uganda*, communication no. 1 of 2005; *Institute for Human Rights and Development in Africa (IHRDA) & Open Society Justice Initiative (on behalf of the children of Nubian descent in Kenya) v The Government of Kenya*; *The Centre for Human Rights (University of Pretoria) & La Rencontre Africaine Pour la Defense Des Droits de L' Homme (Senegal) v The Government of Senegal*.

²²⁵ *Michelo Hunsungule and others (on behalf of the children of Northern Uganda) v The Government of Uganda*, decision communication no. 1 /2005 (19 April 2013); *Institute for Human Rights and Development in Africa (IHRDA) & Open Society Justice Initiative (on behalf of the children of Nubian descent in Kenya) v The Government of Kenya*, decision no.002/com/002/009 (22 March 2011); *The Centre for Human Rights (University of Pretoria) & La Rencontre Africaine Pour la Defense Des Droits de L' Homme (Senegal) v Government of Senegal*, decision no. 003/com/001/ 2012 (15 April 2014)

²²⁶ *Institute for Human Rights and Development in Africa (IHRDA) & Open Society Justice Initiative (on behalf of the children of Nubian descent in Kenya) v The Government of Kenya*.

²²⁷ As above.

4.3.2 Investigative missions

The African Committee on the Child is broadly mandated to conduct investigative missions on matters pertaining to the Charter on Children.²²⁸ The Guidelines on Missions categorise investigative missions as those requested by any person and those undertaken as an initiative of the African Committee on the Child.²²⁹ Investigative missions undertaken pursuant to communications are aimed at fact finding.²³⁰ Upon completion of an investigative mission, the Committee prepares a report with recommendations to the state party which is then submitted to the AU Assembly for adoption.²³¹ The African Committee on the Child in 2005 conducted one investigative fact-finding mission to Uganda.²³² No investigative mission has been conducted in Kenya. No studies have so far assessed the impact of the investigative mission to Uganda.

4.3.3 State reporting

Akin to the African Commission, the African Committee on the Child is also mandated to examine state reports.²³³ The initial report to the African Committee is due two years upon ratification of the Charter on Children and subsequently periodic reports are to be submitted every three years.²³⁴ The procedure of submission and consideration of state reports is outlined in the Committee Guidelines on Reports and greatly mirrors that of the African Commission already discussed above.²³⁵ One distinguishing feature though, is that the African Committee state reporting procedures allude to the parallel reporting under the CRC and require states to submit the reports already submitted to the CRC with additional information on the provisions that are unique to the Charter on Children.²³⁶

The African Committee on the Child has as of December 2014 received state reports from Burkina Faso, Cameroon, Egypt, Kenya, Mali, Niger, Nigeria, Rwanda, Senegal, Tanzania, Togo and Uganda.²³⁷ Of these the eight of the state reports have been examined and concluding recommendations formulated.²³⁸ Kenya submitted its initial state report to the African Committee in 2007, the report was examined in the African Committee's 14th session in November 2009 resulting to the formulation of one concluding observation.²³⁹ The status of implementation of concluding observation is comprehensively discussed in chapter five, section 2.

²²⁸ African Charter on the Rights and Welfare of the Child, article 45 (1).

²²⁹ Viljoen (n 134 above) 404.

²³⁰ As above.

²³¹ African Committee on the Rights and Welfare of the Child, investigative missions, <http://pages.au.int/acerwc/pages/investigation-missions> (27 July 2015).

²³² As above.

²³³ African Charter on the Rights and Welfare of the Child, article 43.

²³⁴ As above.

²³⁵ African Committee on the Rights and Welfare of the Child, state reports and committee recommendations, <http://pages.au.int/acerwc/pages/state-reports-amp-committee-recommendations> (27 July 2015).

²³⁶ Viljoen (n 134 above) 400.

²³⁷ Viljoen (n 134 above) 400; African Committee on the Rights and Welfare of the Child, state reports and committee recommendations, <http://pages.au.int/acerwc/pages/state-reports-amp-committee-recommendations> (27 July 2015).

²³⁸ African Committee on the Rights and Welfare of the Child, state reports and committee recommendations, <http://pages.au.int/acerwc/pages/state-reports-amp-committee-recommendations> (27 July 2015).

²³⁹ As above.

4.4 African Court on Human and Peoples' Rights

The African Court was established by the Protocol on the African Court, which was adopted in 1998 and entered into force in January 2004.²⁴⁰ There is consensus that the impetus to establish the African Court in the 1990's was informed by the inadequacies of the African Commission in its protective role.²⁴¹ The African Court's primary mandate is to complement the protective mandate of the African Commission, specifically the individual communications procedure.²⁴² The Africa Court commenced operations in November 2006.²⁴³ It is composed of 11 judges, nationals of member states of the OAU/AU, who serve in their individual capacity and reflect a balanced representation of gender, regions and the principal legal traditions²⁴⁴. The judges are nominated by state parties to the Protocol on the African Court and elected by the AU Assembly.²⁴⁵ The president and vice president are elected by the judges for a renewable term of two years.²⁴⁶ The judges are elected for a six year period renewable only once with their terms staggered, akin to the practice in the International Court of Justice, to ensure continuity.²⁴⁷ All the judges except the president serve on part-time basis.²⁴⁸ The independence of the judges is formally guaranteed as they enjoy diplomatic immunities under international law and are not liable for decisions and opinions expressed in exercise of their functions.²⁴⁹ The seat of the African Court is in Arusha, Tanzania.²⁵⁰ The territorial jurisdiction extends to states that have ratified the Protocol on the African Court, which as of October 2015 stood at 28 of the 54 state parties of the AU.²⁵¹

The establishment of the African Court creates a two-tiered system of human rights protection in Africa. The relationship between the African Commission and the African Court is that of complementarity as provided for in Articles 5, 6 (1) and (3), 8 and 33 of the Protocol on the African Court.²⁵² Further, the African Commission Rules of Procedure 2010 and the African Court Rules (Court Rules) elaborate on the aspects of the complementarity relationship between the African Commission and the African Court. Aspects of the complementary relationship are alluded to below.

The African Court exercises contentious, advisory and conciliatory jurisdiction. The contentious jurisdiction empowers it to adjudicate disputes brought against state parties to the Protocol on the Court on allegations of violations of the African Charter or any other

²⁴⁰ Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights. (Protocol on the African Court on Human Rights).

²⁴¹ Viljoen (n 128 above) 4-5; Heyns & Killander (n 191 above) 531-532; Muigai (n 130 above) 271-272. *See also* Viljoen (n 134 above) 413- 420 for a detailed discussion.

²⁴² Protocol on the African Court on Human Rights, Article 2.

²⁴³ African Court on Human and Peoples' Rights, court in brief, <http://www.african-court.org/en/index.php/about-the-court/brief-history> (accessed 29 July 2015).

²⁴⁴ Protocol on the African Court on Human Rights, Articles 11, 12 & 14 (2).

²⁴⁵ Protocol on the African Court on Human Rights, Articles 12 & 14.

²⁴⁶ Protocol on the African Court on Human Rights, Article 21.

²⁴⁷ Protocol on the African Court on Human Rights, Article 15.

²⁴⁸ Protocol on the African Court on Human Rights, Article 21.

²⁴⁹ Protocol on the African Court on Human Rights, Article 17.

²⁵⁰ African Court on Human and Peoples' Rights, <http://www.african-court.org/en/> (accessed 18 August 2013).

²⁵¹ African Union treaties, protocols and charters, http://www.au.int/en/sites/default/files/achpr_0.pdf (accessed 22 October 2015).

²⁵² Protocol on the African Court on Human Rights.

human rights instrument that the particular states have ratified.²⁵³ In exercise of the contentious jurisdiction, the Protocol on the African Court allows submission of contentious cases by: the African Commission, state parties that have lodged a complaint at the African Commission; against whom a complaint has been lodged at the African Commission, and whose citizen is a victim of human rights violations; and African intergovernmental organisations.²⁵⁴ In addition, individuals and NGOs (with observer status with the African Commission) may submit cases if the state party has made a declaration under Article 34 (6) of the Protocol on the African Court accepting the African Court's competence to receive cases instituted by individuals and NGOs.²⁵⁵ As of October 2015, only seven states have made the declaration allowing individuals and qualified NGOs to directly institute cases before the African Court. These are Burkina Faso, Côte d'Ivoire, Ghana, Malawi, Mali, Rwanda and Tanzania.²⁵⁶

The African Commission Rules of Procedure 2010 outline instances in which the African Commission may submit cases to the African Court.²⁵⁷ Pointedly, the African Commission has invoked the rules in two instances: one, in the 2011 referral of the Libyan situation;²⁵⁸ and second, in submission a communication against Kenya to the African Court in 2012.²⁵⁹ This resulted in issuance of provisional measures against both Kenya and Libya.²⁶⁰

The decisions of the African Court are final and legally binding on states, as the Protocol on the African Court obliges state parties to comply with judgments in cases concerning them, within the stipulated time and to guarantee their execution.²⁶¹ In contrast with the African Commission, enforcement of the decisions and provisional measures of the African Court is provided for in the Protocol on the African Court.²⁶²

As of October 2015, the African Court has received 54 applications in exercise of its contentious jurisdiction.²⁶³ Of these the African Court has only issued merits judgment in three cases,²⁶⁴ while it has completed merit hearing in the case against Kenya.²⁶⁵ As

²⁵³ Protocol on the African Court on Human Rights, articles 3 & 7.

²⁵⁴ Protocol on the African Court, article 5 (1).

²⁵⁵ Protocol on the African Court, article 5 (3).

²⁵⁶ African Court on Human and Peoples' Rights <http://www.african-court.org/en/> (accessed 22 October 2015).

²⁵⁷ African Commission Rules of Procedure 2010, rule 118 (1) (2) (3).

²⁵⁸ African Commission on Human and Peoples' Rights v Great Socialist Peoples' Libyan Jamahiriya, application 004/2011.

²⁵⁹ African Commission on Human and Peoples' Rights v the Republic of Kenya, application 006/2012.

²⁶⁰ See African Commission on Human and Peoples' Rights v the Republic of Kenya, application 006/2012, provisional measures 15 March 2013; African Commission on Human and Peoples' Rights v Great Socialist Peoples' Libyan Jamahiriya, application 004/2011, provisional measures 20 March 2011.

²⁶¹ Protocol on the African Court on Human Rights, Article 28 (2) & 30.

²⁶² Protocol on the African Court on Human Rights, Article 29 (2) & 31.

²⁶³ African Court on Human and Peoples' Rights, cases, <http://www.african-court.org/en/index.php/2012-03-04-06-06-00/cases-status1> (accessed 22 October 2015).

²⁶⁴ *In the Consolidated matter of Tanganyika Law Society, the Legal and Human Rights Centre v The United Republic of Tanzania & Reverend Christopher R Mtikila v The United Republic of Tanzania*, applications no. 009/2011 & 011/2011, judgment, 14 June 2013; *Lohe Issa Konate v Burkina Faso*, application no. 004/2013, judgment, 5 December 2014; *In the matter of beneficiaries of the late Nibert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo and Blaise Ilboudo & the Burkinabe Human and Peoples' Rights Movement v Burkina Faso*, application no. 13/2011, judgment 28 March 2014.

discussed previously, the African Court has issued provisional measures in four instances, three against Libya and one against Kenya.²⁶⁶ The African Court has also referred four cases to the African Commission.²⁶⁷ Notably, in ten of the cases, the African Court lacked jurisdiction as the respondent states had not made a declaration granting individuals and qualified NGOs direct access to the African Court.²⁶⁸

Returning to the advisory jurisdiction, the African Court is vested with power to issue advisory opinions on the African Charter or any other human rights instruments ratified by states to the OAU/AU member states, the AU/OAU, any of the OAU/AU organs or any African organisations recognised by the OAU/AU.²⁶⁹ The advisory opinions are not binding but derive their legal authority from the judicial character of the African Court.²⁷⁰ As of October 2015, the African Court has received nine requests for advisory opinions. Of these four advisory opinions have been issued while three are pending and one has been withdrawn.²⁷¹ Notably, one of the advisory opinions was sought by the African Committee on the Child, to establish whether the Committee was an intergovernmental organization under Article 5 (1) (e) of the Protocol on the African Court, thus having standing before the African Court.²⁷² The African Court found that the African Committee on the Child was not an inter-governmental organisation,²⁷³ hence it cannot submit the communication against Kenya for non-compliance.

An assessment of the impact of the African Court is less favourable. The relatively small number of cases submitted to the African Court, is unreflective of the human rights situation in Africa. Tied to this is the fact that the African Court has only issued three merit judgments as of October 2015. Further, shifting focus to the implementation of the judgments of the African Court, reviews based on the orders for provisional measures point to a record of non-implementation. Illustratively, Libya did not implement the provisional measures,²⁷⁴ and

²⁶⁵ African Court on Human and Peoples' Rights, press releases, <http://www.african-court.org/en/index.php/news/latest-news/564-african-court-on-human-and-peoples-rights-concludes-hearing-of-application-concerning-kenya-s-ogiek-community-land-rights> (22 October 2015).

²⁶⁶ See African Commission on Human and Peoples' Rights v the Republic of Kenya, application 006/2012, provisional measures 15 March 2013; African Commission on Human and Peoples' Rights v Great Socialist Peoples' Libyan Jamahiriya, application 004/2011, provisional measures 20 March 2011; In the matter of the African Commission on Human and Peoples' Rights v Libya, Application no.002/2013, provisional measures (no. 2) 10 August 2015.

²⁶⁷ African Court on Human and Peoples' Rights, referred cases, <http://www.african-court.org/en/index.php/2012-03-04-06-06-00/referred-cases> (accessed 22 October 2015).

²⁶⁸ African Court on Human and Peoples' Rights, finalised cases and decisions, <http://www.african-court.org/en/index.php/2012-03-04-06-06-00/all-cases-and-decisions> (accessed 22 October 2015).

²⁶⁹ Protocol on the African Court, Article 4 (1).

²⁷⁰ Udombana (n 128 above) 92-93.

²⁷¹ African Court on Human and Peoples' Rights, advisory opinion, <http://www.african-court.org/en/index.php/2012-03-04-06-06-00/advisory-opinion> (22 October 2015).

²⁷² In the matter of request of request for advisory opinion by the African Committee on the Rights and Welfare of the Child on the standing of the African Committee on the Rights and Welfare of the Child before the African Court of Human Rights, Advisory Opinion 002/2013, African Court on Human and Peoples' Rights, 5 December 2014.

²⁷³ As above.

²⁷⁴ In the matter of the African Commission on Human and Peoples' Rights v Libya, Application no.002/2013, provisional measures (no. 2) 10 August 2015 paras 5-8.

similarly, Kenya did not implement the orders.²⁷⁵ A comprehensive discussion on Kenya's non-implementation is taken up in chapter five, section 3.1.6.

The African Court, as discussed above, is set to be transformed to the African Court of Justice and Human and Peoples' Rights which will have three sections: a general affairs section; a human rights section; and an international criminal law section.²⁷⁶ To this end, a Protocol on Amendments to the Protocol on Statute of the African Court of Justice and Human Rights was adopted in June 2014 by the AU Assembly.²⁷⁷

4.5 African Peer Review Mechanism

The 2001 reconstitution of the OAU to the AU omitted from the AU Constitutive Act an economic blueprint, resulting in the development of a framework and blueprint for Africa's political, economic and social recovery – the New Partnership for Africa's Development (NEPAD) which was adopted by the AU in 2002.²⁷⁸ The NEPAD framework document recognised poor governance among other factors as contributing to Africa's diminishing economic growth and sought to address poor governance through adoption of a Declaration on Democracy, Political, Economic and Corporate Governance (Governance Declaration).²⁷⁹ The Governance Declaration established the African Peer Review Mechanism (APRM) to 'promote adherence to and fulfilment of the commitments' in the Governance Declaration.²⁸⁰ In relation to human rights, the Governance Declaration contains an undertaking to generally promote and protect human rights in Africa; particularly the rights of women, children, ethnic minorities and disabled persons in conflict situations, to promote public awareness on the African Charter and to guarantee political rights.²⁸¹

The APRM is a self assessment mechanism voluntarily acceded to by member states of the AU through signing of a Memorandum of Understanding.²⁸² As of October 2015, 34 member states of the AU had signed the Memorandum of Understanding.²⁸³ The APRM process focuses on four thematic areas to assess a states compliance with African and international human rights treaties and standards: democracy and political governance, economic governance and management, corporate governance and socio - economic development.²⁸⁴ The APRM is led by a Committee of the Participating Heads of State and Government (APR Forum). The APR Forum appoints a panel of seven eminent persons (APR Panel) with competencies in one of the thematic areas who are responsible for overseeing and ensuring

²⁷⁵ Interview with M Njau-Kimani, Legal Secretary Justice and Constitutional Affairs, Office of the Attorney General and Department of Justice, Kenya, Nairobi, 4 March 2015. See also Standard Digital News 'IDPs get new lease of life after years in the cold' 8 September 2013, http://www.standardmedia.co.ke/m/?articleID=2000093022&story_title=IDPs-get-new-lease-of-life-after-years-in-the-cold (accessed 27 December 2014).

²⁷⁶ See African Union, Assembly of the Union, Assembly/AU/Dec.83 (V) of 2005; African Union, Assembly of the Union, Assembly/AU/Dec.213 (XII) of February 2009.

²⁷⁷ African Union, Assembly of the Union, Assembly/AU/Dec. 529/XXIII of June 2014.

²⁷⁸ Viljoen (n 134 above) 166.

²⁷⁹ M Killander 'The African peer review mechanism and human rights: the first reviews and the way forward' (2008) 30 *Human Rights Quarterly* 43.

²⁸⁰ Heyns & Killander (n 191 above) 535.

²⁸¹ Heyns & Killander (n 191 above) 535 - 536 quoting Section 10 and 13 of the Governance Declaration.

²⁸² African Peer Review Mechanism, About APRM, <http://aprm-au.org/about-aprm> (accessed 22 October 2015).

²⁸³ As above.

²⁸⁴ African Peer Review Mechanism, Thematic areas, <http://aprm-au.org/thematical-areas> (accessed 22 August 2013).

integrity of the APRM process.²⁸⁵ There is a five stage process comprising of: a background study of the country under review, a country review mission, writing of the country review report, presentation of the report to the APR Forum and tabling of the report to regional and sub-regional structures such as the Pan-African Parliament, AU Peace and Security Council, AU ECOSOC and the African Commission.²⁸⁶ Enforcement of the APRM's recommendations is through application of political pressure by the other states during the presentation of the country review report in the APR Forum. In instances in which a reviewed state is unwilling to address the shortcomings identified, as a last resort member states may notify the state in question of their collective intention to proceed with appropriate measures within a given time.²⁸⁷

As of October 2015, 17 countries have undergone the APRM process.²⁸⁸ On the impact of the APRM process on human rights practices at national level, in theory it can be argued that the process is innovative since it points out states' failure to comply with their international human rights obligations such as failure to submit state reports and ratify human rights instruments and protocols.²⁸⁹ In practice however, the impact of the APRM process can only be assessed by analysing whether states implement the recommendations of the process.

Kenya has acceded to the APRM and was peer reviewed in June 2006 resulting in formulation of ten recommendations relating to implementation of human rights at national level.²⁹⁰ The government submitted a progress report in January 2007 on the extent of the implementation of the recommendations.²⁹¹ The detailed discussions of the impact of the first APRM review are contained in the subsequent chapters of this research.

Kenya's second peer review was initiated in 2011. However, the government rejected the report of the Country Review Team citing factual incorrectness in relation to the pace of the implementation of Constitutional reforms, redressing marginalisation and resettlement of internally displaced persons.²⁹² Resultantly, the report was not tabled at the APR Forum in January and July 2012.²⁹³ Therefore, Kenya's second review had not taken place as of December 2014.

²⁸⁵ African Peer Review Mechanism Base Document <http://aprm-au.org/document/aprm-base-document-0> (accessed 22 August 2013) paras 6-10.

²⁸⁶ African Peer Review Mechanism Base Document (n 284 above) paras 18 -25.

²⁸⁷ African Peer Review Mechanism Base Document (n 284 above) para 24.

²⁸⁸ African Peer Review Mechanism, member countries, <http://aprm-au.org/aprm-map> (accessed 22 October 2015).

²⁸⁹ Killander (n 279 above) 55 -58.

²⁹⁰ African Peer Review Mechanism, Kenya Country Report, <http://www1.uneca.org/Portals/aprm/Documents/CountryReports/Kenya.pdf> (accessed 23 August 2013).

²⁹¹ Kenya progress report on the implementation of the African Peer Review Mechanism National Plan of Action http://www.nepadkenya.org/documents/progress_report_jan06.pdf (accessed 23 August 2013).

²⁹² Interview with L Mbogo-Omollo, Chief Executive Officer, NEPAD Kenya Secretariat, Nairobi, 10 November 2014. The government indicated that the country review was infiltrated by activists who provided non-factual information to the Country Review Team. The government then wanted the Country Review Team to revise the country report before its presentation to the APR Forum, the Country Review Team declined. In October 2013, a team was constituted to restart the process of preparing the background country report. That process has been protracted and is on-going as of October 2015. (This author is part of that team).

²⁹³ As above.

5 East African sub-regional human rights system; East African Court of Justice

The East African Court of Justice (EACJ) is established as the judicial organ of the East African Community (EAC).²⁹⁴ The EAC is a regional intergovernmental organization re-established in 1999 with the primary objective of forming a customs union, a common market, a monetary union and ultimately a political federation.²⁹⁵ The partner states of the EAC are the Republics of Burundi, Kenya, Rwanda, the United Republic of Tanzania and the Republic of Uganda.²⁹⁶

The EACJ was launched and become operational in 2001 with the primary mandate to ensure the adherence to law in the interpretation and application of and in the compliance with the Treaty for the Establishment of the East African Community (EAC Treaty). The seat of the EACJ is in Arusha while the High Courts of partner states serve as sub-registries. The court is composed of two Divisions, the First Instance Division and the Appellate Division that are managed by ten judges two from each of the five partner states. The judges are appointed for a maximum term of seven years by the Summit, the EAC highest organ which consists of heads of state or government of the partner states, which also appoints the president and vice-president of the EACJ from the judges.²⁹⁷

The EACJ has jurisdiction to hear and determine disputes: of interpretation and application of the EAC Treaty, of the EAC and its employees regarding labour issues, of partner states where submitted to it under special agreement, from arbitration clauses arising out of a contract or commercial contract or agreement in which the parties confer jurisdiction on the court and jurisdiction may be extended to human rights at a future date to be determined by the Council of Ministers.²⁹⁸ The EACJ is also vested with advisory jurisdiction.²⁹⁹

The human rights jurisdiction of the EACJ is highly contested, with the partner states on the one hand accusing the EACJ of overstepping its textual boundaries by adjudicating on human rights cases and NGOs, human rights activists, individuals and East African law societies on the other hand embracing it. According to Article 27(2) of the EAC Treaty the original, appellate human rights and other jurisdiction of the EACJ will be determined at a subsequent date through conclusion of a protocol to operationalise the extended jurisdiction of the EACJ.³⁰⁰ A draft protocol to operationalise and extend the jurisdiction of the EACJ to human rights issues has, quite peculiarly, been under consideration by the Council of Ministers since 2005, a matter which has itself been the subject of proceedings before the

²⁹⁴ Treaty for the Establishment of the East African Community (as amended on 14th December 2006 and 20th August 2007), http://www.eac.int/index.php?option=com_content&view=frontpage&Itemid=1 (accessed 23 August 2013) (EAC Treaty).

²⁹⁵ East African Community <http://www.eac.int/> (accessed 23 August 2013). The EAC was originally established in 1967 but collapsed in 1977 following protracted differences between the three partner states Kenya, Uganda and Tanzania.

²⁹⁶ East African Community, About EAC, http://www.eac.int/index.php?option=com_content&view=article&id=1&Itemid=53 (accessed 23 August 2013). The Republics of Burundi and Rwanda became full members of the East African Community on 1st July 2007.

²⁹⁷ East African Court of Justice, <http://www.eacj.org/> (accessed 22 August 2013) (EACJ). Initially the EACJ comprised of only one division but was reconstituted to form two divisions in the December 2006 and August 2007 amendments.

²⁹⁸ As above.

²⁹⁹ EAC Treaty Article 36.

³⁰⁰ EAC Treaty.

EACJ.³⁰¹ Nonetheless, the EACJ has boldly construed its jurisdiction on the interpretation and application of the EAC Treaty in manner that confers on it jurisdiction over human rights issues. Although the EAC is conceived of principally as a economic union, the basis for entertaining human rights jurisdiction stems from the provisions of the EAC Treaty which lists the fundamental principles of the EAC to include ‘good governance including adherence to the principle of democracy, rule of law, accountability, transparency, social justice, equal opportunities, gender equality as well as the recognition, promotion and protection of human rights in accordance with the provisions of the African Charter on Human and Peoples’ Rights.³⁰² In addition, according to the EAC Treaty, membership to the EAC is contingent on adherence to good governance, democracy, rule of law and observance of human rights and social justice.³⁰³

The EAC Treaty imposes no standing conditions for the EACJ, therefore individuals and legal persons in addition to the Secretary General and partner states can institute cases before the EACJ.³⁰⁴ Equally, the EAC Treaty is silent on exhaustion of local remedies, a loophole that the EACJ has remedied, although questionably, by stating that the rule of exhaustion of local remedies is not a condition requisite to invoking its jurisdiction.³⁰⁵

The first case was filed with the EACJ in 2005 and since then, the EACJ has handled more than 20 cases / references many of them invoking the contested human rights jurisdiction of the EACJ.³⁰⁶ In the particular context of Kenya, the EACJ has as of October 2015 adjudicated upon seven cases³⁰⁷ out of which three relate directly to human rights that is: failure of the state to investigate torture by state agencies; unlawful arrest and transfer of alleged terrorism perpetrators to the Republic of Uganda; and unlawful, arrest, detention, search and deportation of a human rights defender by the government of Uganda with the complicity of the Kenya government,³⁰⁸ while the other four obliquely reference human rights principles.

³⁰¹ *Sitenda Sebalu versus the Attorney General of the East African Community and others*, reference No. 1 of 2010 East African Court of Justice, judgment 30 June 2011.

³⁰² EAC Treaty, Article 6.

³⁰³ EAC Treaty, Article 3 (3) (b).

³⁰⁴ EAC Treaty, Articles 28, 29, 30.

³⁰⁵ *Prof Peter Anyang Nyongó and others v Attorney General of Kenya and others*, reference no. 1 of 2006 East African Court of Justice 21. The EACJ in reaching the decision argued that the EACJ is not an international court. However, looking at the EAC Treaty provisions and the definition of an international court, the obvious conclusion is that the EACJ is an international court.

³⁰⁶ EACJ, court decisions, all decisions, http://eacj.org/?page_id=2414 (accessed 22 October 2015).

³⁰⁷ *Prof Peter Anyang Nyongó and others v The Attorney General of the Republic of Kenya and others*, reference no.1 of 2006 East African Court of Justice; *East African Law Society of Kenya and others v The Attorney General of the Republic of Kenya and others*, reference no. 3 of 2007 East African Court of Justice; *Emmanuel Mwakisha Mjawasi and 748 others v The Attorney General of the Republic of Kenya*, reference no. 2 of 2010 East African Court of Justice, *Mary Ariviza and Okotch Mondo v The Attorney General of the Republic of Kenya and the Secretary General of the East African Community*, reference no. 7 of 2010 East African Court of Justice; *Independent Medico Legal Unit v The Attorney General of the Republic of Kenya*, reference no. 3 of 2010 East African Court of Justice; *Omar Awadh Omar and 6 others v The Attorney General of the Republic of Kenya and others*, reference no. 4 of 2011 East African Court of Justice; *Mbugua Mureithi wa Nyambura v The Attorney General of the Republic of Uganda and the Attorney General of the Republic Kenya*, reference no. 11 of 2011.

³⁰⁸ *Independent Medico Legal Unit v The Attorney General of the Republic of Kenya*, reference no. 3 of 2010 East African Court of Justice; *Omar Awadh and 6 others v The Attorney General of the Republic of Kenya and*

The EACJ has therefore not issued any merit judgment against Kenya specifically on human rights, hence it is difficult to assess the impact on human rights practices in Kenya. All the three human rights cases discussed above were disposed of without a merit hearing on the basis of time limitation. Drawing from this, a question may be posed on the issue of limitation of time, and whether it impedes the ability of the EACJ to monitor adherence to human rights by the partner states. Arguably, the issue of limitation of time is not a problem particularly when balanced against the doctrine of legal certainty, the failure of the EACJ to recognise the principle of continuing violations is the main problem.

On the impact of the EACJ, from the perspective of the four other cases decided by the EACJ against Kenya, it is possible to argue that the judgments have not had much political impact on human rights practices in Kenya.³⁰⁹ For instance, following the adverse judgment in *Prof. Peter Anyang Nyong'o and others v the Attorney General of the Republic of Kenya and others*, the Kenya government rallied the other partner states to amend the EAC Treaty. These amendments resulted in introduction of time limitation in submission of cases to the EACJ,³¹⁰ and the establishment of an appellate division and expansion of the grounds for removal of judges which created the possibility of political interference with the independence of the EACJ.³¹¹ Viljoen however argues that the amendments relating to the EACJ – creation of an appellate division and removal of judges - do not materially affect the integrity of the EACJ.³¹²

others, reference no. 4 of 2011 East African Court of Justice; *Mbugua Mureithi wa Nyambura v The Attorney General of the Republic of Uganda and the Attorney General of the Republic Kenya*, reference no. 11 of 2011.

³⁰⁹ J Gathii 'Mission creep or search for relevance: the East African Court of Justice's human rights strategy' (2012) Loyola University Chicago School of Law, public law & theory research paper no. 2012-19, 10.

³¹⁰ See Treaty for the Establishment of the East African Community, 1999 Article 30 which had no provision for time limits and Treaty for the Establishment of the East African Community (as amended on 14 December 2006 and 20 August 2007), Article 30 (2) which introduces limitation of time.

³¹¹ See Treaty for the Establishment of the East African Community (as amended on 14 December 2006 and 20 August 2007) Article 24 which establishes an appellate division.

³¹² Viljoen (n 134 above) 499-500.

6 Locating the findings of international monitoring mechanisms in the national legal order in Kenya

The foregoing has discussed different international monitoring mechanisms that Kenya is subject to and those that it has not subscribed to and outlined the findings and recommendations issued by these monitoring mechanisms. The findings and recommendations outlined comprise those arising from adversarial processes such as orders for provisional measures by the African Court and decisions of the African Commission and African Committee on the Child in relation to individual communications. On the other hand, those resulting from non-adversarial processes include the concluding observations from state reporting both from UN and African regional system; recommendations of special procedures at the UN and African regional level and recommendations of the Universal Peer Review and the African Peer Review Mechanism. The international legal status of the above findings and recommendations of monitoring mechanisms is decidedly mixed. While the judgments of regional courts such as the African Court and the EACJ are binding, the Views of treaty monitoring committees and decisions of the African Commission and the African Committee on the Child are generally considered non-binding.

In regard to Views arising from individual complaints, treaty monitoring committees have argued that the treaty provisions upon which the treaty monitoring committees make their findings are binding on states hence Views on complaints are not merely recommendatory but obligatory on states.³¹³ Although this position appears persuasive, the treaty monitoring committees have never elaborated on the content of the legal obligations and the difference between the Views and the unquestionably binding judgements of human rights courts.³¹⁴ In relation to the decisions of the African Commission on communications, although their legal character has been subject to debate, the decisions are recommendatory thus non-binding.³¹⁵ Notwithstanding, that the recommendations carry legal weight and are obligatory on states is uncontested. Illustratively, the International Court of Justice in the *Diallo* case referred to the recommendations as authoritative interpretations of state obligations under the African Charter.³¹⁶

In the context of concluding observations, although less debated, it is generally accepted that concluding observations are not binding interpretations of the treaty in question, but nonetheless have considerable legal weight as they are based on treaty obligations which are binding on states.³¹⁷ Distilled from this, is then the question of the legal weight of the concluding observations. Legal scholarship has not provided any definitive answer. Scholars have tended to address the question by categorising concluding observations into those that are compelling in that they outline clear violations of treaty obligations and those that are advisory.³¹⁸ According to O'Flaherty, concluding observations have more legal

³¹³ Alebeek & Nollkaemper (n 63 above) 382; Human Rights Committee, General Comment No. 33, 5 November 2008, UN Doc. CCPR/C/GC/33 para 14. The HRC and the CAT Committees have insisted on the binding nature of their Views.

³¹⁴ Alebeek & Nollkaemper (n 63 above) 384; International Law Association 'Report of the Sofia Conference on National compliance with decisions of international tribunals in matters involving human rights' (2012) para 21.

³¹⁵ Viljoen (n 134 above) 338-339.

³¹⁶ *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of Congo)* (merits) [2010] ICJ Rep 639.

³¹⁷ Kalin (n 38 above) 31.

³¹⁸ Krommendijk (n 47 above) 8.

weight if for instance they determine that a state's legislation, practice or policy is at variance with its treaty obligations.³¹⁹ Similarly, concluding observations carry less legal weight if they include general advice or deal with matters that have little or nothing to do with the treaty.³²⁰ Equally, Kalin also argues that concluding observations that relate to broad policy issues on the implementation of treaty obligations carry less weight as states have wide latitude on the range of measures to take.³²¹ Moreover, it has been suggested that when norms based on a certain interpretation of a treaty are repeatedly stated in concluding observations, they may acquire qualities of soft law, demonstrated by the International Court of Justice reference to the concluding observations against Israel as authoritative interpretations of Israel's obligations under the specific treaties.³²²

Even then, what remains less clear are concluding observations that refer to issues not expressly addressed in the treaty, what legal weight should be attached to them? Admittedly, human rights treaties contain vague, ambiguous and often indeterminate provisions. For instance, the meaning of the prohibition of torture and ill-treatment, although absolute, remains contested, and now more overtly in light of the increasing threat of terrorism. Similarly, the scope of the right to a fair trial is contested, while the proper contours of women rights attract much more contestation. The question, at a broader level, is whether states should have any regard to obligations that they never explicitly consented to. From a legal standpoint, the starting point would be general rules of treaty interpretation as laid down in the Vienna Convention on the Law of Treaties.³²³ Then, should human rights treaties be interpreted within the rules of the Vienna Convention on the Law of Treaties?

Legal scholars have addressed this question in light of regional human rights monitoring bodies and drawn varying conclusions. Killander writing on the interpretation approach of the European Court of Human Rights, the Inter-American Court of Human Rights and Commission and the African Commission demonstrates that these tribunals interpret human rights treaties for effective protection while remaining within the confines of the Vienna Convention.³²⁴ On the other hand, Letsas writing on the European Court of Human Rights approach to interpretation argues that the Vienna Convention rules have been peripheral in the European Court's interpretation.³²⁵ A common thread in these commentaries is the doctrine of evolutive interpretation: that human rights treaties should be interpreted as 'living instruments' to give practical effect to human rights protection. Borrowing from this commonality, it can be argued that human rights protection evolves, so that states should be accepting of evolving obligations, although, the interpretive reasoning of the monitoring mechanisms should be explained.

What about findings that derive from reference to soft law documents such declarations adopted by the UN General Assembly, general comments and guidelines? Kalin distinguishes between soft law documents that refer to human rights obligation that are also

³¹⁹ As above.

³²⁰ As above.

³²¹ Kalin (n 38 above) 56-57.

³²² As above.

³²³ Vienna Convention on the Law of Treaties article 31-32 opened for signature on 23 May 1969, 1155 U.N.T.S. 331 (entered into force on 27 January 1980).

³²⁴ M Killander 'Interpreting regional human rights treaties' (2010) 7 *International Journal on Human Rights* 145-169.

³²⁵ G Letsas 'Strasbourg's interpretive ethic: lessons for the international lawyer' (2010) 21 *EJIL* 509-541.

contained in the treaty in question; and those that refer to obligations not addressed in the treaty.³²⁶ He posits that concluding observations carry more weight if they refer to human rights obligations already contained in the treaty in question.³²⁷ In the same vein, the International Court of Justice has observed that the general comments of the UN Human Rights Committee carry great weight.³²⁸ The final issue is that of findings that recommend states to ratify treaties and conventions, sometimes unrelated to the treaty in question. Should states attach any weight to such findings? In the context of treaty monitoring committees, Kalin points to the challenge of linking such recommendations to the fulfilment of treaty in question.³²⁹ He thus suggests that treaty monitoring committees should abstain from requiring states to ratify conventions unrelated to the treaty in question.³³⁰

Returning to the international legal status of the findings of monitoring mechanisms, some commentators argue that the question of the binding or non-binding nature of these findings is overstated. According to these commentators, state implementation of the findings of the monitoring mechanisms is least influenced by the binding or non-binding nature of the finding.³³¹ A study on compliance with the decisions of the African Commission also finds that the legal character of the decisions is not the most influential factor in determining compliance.³³² It is also instructive that under international law the question of whether a state has acted wrongfully and should provide a remedy arises out of the wrongdoing itself and is not conditional on a binding determination of a breach of an international obligation.³³³ Nonetheless, implementation of these findings at the national level is to be resolved by reference to their legal status in the national legal framework.

6.1 Position of international law prior to the Kenya Constitution, 2010

The reception of international law into the national legal system is largely a matter of constitutional law. Under the repealed Constitution, Kenya like most common law countries adhered to the dualist doctrine in regard to application of international treaties. The repealed Constitution contained no textual references to international law or its domestic application,³³⁴ a point which was further buttressed by the Judicature Act which did not list international law among the sources of law in Kenya.³³⁵ The implication was that individuals

³²⁶ Kalin (n 38 above) 57-58.

³²⁷ As above.

³²⁸ *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of Congo)* (merits) [2010] ICJ Rep 639.

³²⁹ As above.

³³⁰ As above.

³³¹ Alebeek & Nollkaemper (n 63 above) 378.

³³² Viljoen & Louw (n 175 above) 32.

³³³ Alebeek & Nollkaemper (n 63 above) 385.

³³⁴ Constitution of Kenya, 1963.

³³⁵ Judicature Act, Cap 8 Laws of Kenya, Section 3 (1) lists the sources of law in Kenya as: 'The jurisdiction of the High Court, the Court of Appeal and all subordinate courts shall be exercised in conformity with – (a) the Constitution, (b) subject thereto to all other written laws including the Acts of Parliament of the United Kingdom cited in Part I of the schedule to this Act modified in accordance with Part II of that schedule, (c) subject thereto and so far as those written laws do not extend or apply, the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the 12th August 1897, and the procedure and practice observed in courts of justice in England at that date; but the common law, doctrines of equity and statutes of general application shall apply so far only as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as the circumstances may render necessary'. Section 3 (2) The High Court and the Court of Appeal shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or allocates by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent

could not rely on international treaties to enforce their rights unless the treaty provisions had been transformed into domestic law through an Act of Parliament.

Judicial practice in regard to application of international law was a mixed bag of jurisprudence. The application of the dualist doctrine was first captured in the 1968 case of *Okunda v Republic*³³⁶ in which the courts held that international law had no legal effect in Kenya. Subsequently in 2001, in *Pattni & Another v Republic*³³⁷ the High Court took the view that international legal norms are non-binding unless incorporated into the constitution or domestic legislation hence could only have persuasive value.³³⁸ On the contrary, some courts were willing to refer to international law as an interpretive tool. In *Mary Rono v Jane Rono*³³⁹ the Court of Appeal took the view that international customary law and treaty law could be applied even in the absence of domestic legislation as long as there was no conflict with domestic law and as an interpretive tool but not a source of remedy.³⁴⁰ Similarly in *RM v AG*,³⁴¹ the High Court held that international norms were applicable as long they were not in conflict with national law.³⁴² However, despite the seemingly progressive gains in the recognition of international law in Kenya, judicial practice remained varied. In March 2007 in *Peter Anyang' Nyong'o & 10 others v Attorney General*³⁴³ the High Court held that treaties are not *stricto sensu* 'law' in Kenya in terms of constitutional and legislative processes as provided in the Constitution. The import was that international law could not be applied in Kenya without domestic incorporation.

6.2 International law in the Constitution, 2010

The Constitution, 2010 contains an unprecedented number of references to international law. More specifically it incorporates international law in the Kenyan legal order. Article 2(5) of the Constitution, 2010 states that: 'the general rules of international law shall form part of the law of Kenya' while 2(6) provides that: 'any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution'.³⁴⁴ In the specific context of international human rights law, the Constitution, 2010 makes no direct reference to international human rights treaties thus it does not accord human rights treaties any special status in the national legal order. Nonetheless the provisions of the Bill of Rights exhibit the resolve to give national legal effect to international human rights law as a number of provisions expressly refer to it.³⁴⁵

with any written law, and shall decide all such cases according to substantial justice without undue regard to technicalities and without undue delay.

³³⁶ East African Law Reports (EA) (1970) 453, 9 I.L.M. 556.

³³⁷ *Pattni and Another v Republic* (2001) KLR 262.

³³⁸ JO Ambani 'Navigating past the 'dualist doctrine': the case of progressive jurisprudence on the application of international human rights norms in Kenya' in M Killander (ed) *International law and domestic human rights litigation in Africa* (2010) 28-29.

³³⁹ *Rono v Rono* (2005) KeCA para 22.

³⁴⁰ Ambani (n 338 above) 29-30.

³⁴¹ *RM v Attorney General* (2006) KeHC para 22.

³⁴² Ambani (n 338 above) 30.

³⁴³ *Peter Anyang' Nyong'o & 10 others v Attorney General* (2007) eKLR.

³⁴⁴ Constitution of Kenya 2010

³⁴⁵ Article 58 (6) (a) (ii): 'Any legislation enacted in consequence of a declaration of a state of emergency may limit a right or fundamental freedom in the Bill of Rights only to the extent that the legislation is consistent with the Republic's obligations under international law applicable to a state of emergency'.

In regard to delegation of power to international regimes and institutions, the Constitution, 2010 contains no express provisions. However, in the context of international human rights regimes and institutions, the Bill of Rights contains provisions that impliedly express Kenya's willingness to abide by supranational human rights regimes and institutions.³⁴⁶ On assuring compliance with international law obligations, the Constitution, 2010 contains specific provisions that require the President to submit a report to Parliament for debate on the state's fulfilment of its international obligations.³⁴⁷

While these provisions undoubtedly provide for the application of international law at the national level, the Constitution, 2010 leaves a number of questions unanswered. At a broader level, the questions are: (i) whether these constitutional provisions changed Kenya from a dualist to a monist state; and (ii) the proper meaning of 'general rules of international law' as provided for in Article 2 (5), specifically whether it refers to international customary law. At a more specific level it is not clear: (i) where in the hierarchy of legal norms that apply in the national legal order, treaties and general principles of international law fall; and (ii) the process by which treaties and general principles of international law enter that hierarchy.

The Constitution, 2010 vests the power and competence to make provision having the force of law in Kenya exclusively on Parliament.³⁴⁸ To that extent, it would appear that treaty-making is a parliamentary function. The Treaty Making and Ratification Act, 2012 provides the procedure for the making and ratification of treaties and disperses this responsibility between the Executive and Parliament.³⁴⁹ Under the Treaty Making and Ratification Act, the treaty-making process serves a dual function: that of binding the state on the international plane and giving domestic legal effect to international law. Drawing from the above, a treaty once ratified has national legal effect so that treaties become part of the national legal order without transforming legislation, thus making Kenya a monist state. Parliament nonetheless retains the power to make transforming legislation particularly in the context of non-self executing norms.

On the 'general rules of international law', it is unclear what the Constitution, 2010 refers to as the term is unknown to the established sources of international law.³⁵⁰ It has been suggested that the term 'general rules of international law' refers to customary international law. The drafting history of the Constitution, 2010 provides an informative account. The initial draft constitutions published in 2002, 2004 and 2005 made express mention of

³⁴⁶ Article 21 (4): 'The State shall enact and implement legislation to fulfil its international obligations in respect of human rights and fundamental freedoms.'

³⁴⁷ Article 132 (1) (c) (iii): 'The President shall once every year submit a report for debate to the National Assembly on the progress made in fulfilling international obligations of the Republic.'

³⁴⁸ Constitution, 2010 article 94 (5).

³⁴⁹ Treaty Making and Ratification Act sections 7-10.

³⁵⁰ Article 38 of the Statute of the International Court of Justice lists the sources of international law as: (a) international conventions, whether general or particular, establishing rules expressly recognised by the contesting states; (b) international custom as evidence of a general practice accepted as law; (c) the general principles of law recognised by civilised nations; (d) subject to provisions of Article 59 judicial decisions and the teachings of the most highly qualified publicists of the various nations as subsidiary means for the determination of rules of law.

customary law as a source of international law in Kenya.³⁵¹ In 2009, during the finalisation of the constitution making process, the provisions relating to international law were completely expunged from the draft constitution published in November 2009.³⁵² A review of public memoranda submitted to the Committee of Experts in July 2009 indicates that the public favoured a cautionary approach towards application of international law in Kenya.³⁵³ A further analysis of the verbatim discussions of the Committee of Experts reveal that a decision was made to subordinate customary international law to the Constitution, 2010 so that it could evolve on its own in the national legal system.³⁵⁴ In addition, examination of verbatim records of the deliberations between the Committee of Experts and the Parliamentary Select Committee on the constitution making process in February 2010 indicates that the Parliamentary Committee stated that it was strongly opposed to too much reference to international law in the draft constitution.³⁵⁵

Taken together, these accounts are indicative of the strong ideological opposition to international law during the finalisation of the review process in 2009/10. The provisions of Article 2(5) and (6) first appeared in the draft constitution published in May 2010 for public approval in the August 2010 national referendum. It is therefore arguable that the ambiguity created in Article 2(5) on 'general rules of international law' was deliberate and never intended to refer to customary international law. Although the history of the constitution making process cannot be an authoritative basis for determining the meaning of 'general rules of international law', this history can nonetheless not be dismissed. This hostility towards international law is to be viewed in the light of the prevailing political circumstances during the 2009/10 finalisation of the constitution making process: the imminent threat of investigations by the International Criminal Court into the 2007/08 post-election violence.

On the issue of hierarchy between international law and national law, the Constitution, 2010 is silent. Review of the constitution making process documents indicates that although various draft constitutions provided for international law in the national legal order, its hierarchy vis-a-vis national legislation was never defined. The Constitution, 2010 contains a supremacy clause,³⁵⁶ which designates the Constitution as the supreme law without setting

³⁵¹ Constitution of Kenya Review Commission, draft Bill, 27 September 2002 clause 5(1) (h): 'The sources of law of Kenya are customary international law and international agreements applicable to Kenya'; Constitution of Kenya Review Commission, draft Constitution of Kenya, March 2004 (Bomas draft) clause 3A (g): 'The laws of Kenya comprise this Constitution and each of the following to the extent that it is consistent with this Constitution—customary international law and international agreements applicable to Kenya'; The proposed new constitution of Kenya, 22 August 2005 clause 3 (g): 'The laws of Kenya comprise this Constitution and each of the following to the extent that it is consistent with this Constitution – customary international law and international agreements applicable to Kenya.'

³⁵² See generally Committee of Experts on Constitutional Review Harmonised draft constitution of Kenya, November 2009, chapter one.

³⁵³ Committee of Experts on Constitutional Review 'Public memoranda on the constitutional review process April – July 2009' HAC/3/1/22 - 31 (accessed from the Kenya National Archives 8 October 2014).

³⁵⁴ Committee of Experts on the Constitutional Review 'Verbatim record of the proceedings of plenary meeting to the Committee of Experts on the Constitutional Review on the chapter on the Bill of Rights held on 2nd January 2010 at Delta House, Nairobi' HAC/1/1/97, 7 (accessed from the Kenya National Archives on 15 October 2014).

³⁵⁵ Committee of Experts on the Constitutional Review 'Verbatim record of the Committee of Experts on the Constitutional Review meeting with the Parliamentary Select Committee held on 16 February 2010 at the Co-operative Bank Management Centre, Karen, Nairobi' 36-37 (accessed from the Kenya National Archives on 16 October 2014).

³⁵⁶ Kenya Constitution 2010, Article 2 (3).

out the hierarchical ordering of the other sources of law mentioned in the Constitution, 2010. Hans Kelsen in his theory of norms posits that the legal system is not a haphazard collection of norms but an organised and interrelated system with a grund norm under which all other norms exist.³⁵⁷ Accordingly, the place of a norm in the hierarchy is determined by how the norm is created so that one norm is created as prescribed by the basic law, another norm as prescribed by another and this forms a legal order with a hierarchical structure.³⁵⁸ Distilled from Kelsen's theory it can be suggested that the place of international law should be at the same level with national legislation since both are created by Parliament. This suggestion that international law should be at the same level with national legislation finds support in the writings of legal scholars.³⁵⁹ However, Kelsen's theory has been criticised as not providing a convincing explanation of the existence of a basic norm or its definition.³⁶⁰ To counter the inadequacies associated with Kelsen's theory, the rule of recognition theory which also provides a form of identifying norms in a legal system is instructive. According to Hart the rule on hierarchy of norms is unstated but observed from the way norms are identified by courts and legal officials.³⁶¹ Based on the rule of recognition theory, one would then turn to judicial practice to determine the place of international law in the Kenyan legal order.

Kenyan courts have since 2010 addressed themselves to the place of international law in the national legal order. All the three cases discussed here relate to the conflict between the provisions on the Civil Procedure Act and the ICCPR thus raising the issue of hierarchy between national legislation and international law. In the first case of *Zipporah Wangui Mathara* the High Court was called upon to stay execution of detention orders in a bankruptcy cause.³⁶² It was argued by counsel for the applicant that the Civil Procedure Act which the respondent sought to rely on to have the applicant committed to civil jail for failure to pay a debt was in conflict with the ICCPR which Kenya ratified in 1972. The High Court in *obiter* took the view that the Constitution, 2010 incorporated international law as a source of law in Kenya hence the Civil Procedure Act was unconstitutional to the extent of the inconsistency with the ICCPR.³⁶³ In regard to the hierarchy of international law in the national legal order, this view by the High Court implied that international law would trump national legislation in case of conflict.

In the second case, *Diamond Trust Bank v Daniel Mwema Mulwa*, the High Court was yet again called upon to stay an arrest warrant issued under the Civil Procedure Act pursuant to a civil debt.³⁶⁴ The High Court in this case enumerated the hierarchy of laws applicable to Kenya as a three-tier hierarchy. This hierarchy consists of the Constitution, 2010 at the apex and to which all other laws are subservient, next in rank as Acts of Parliament and subsidiary legislation at the bottom. The court went on to find that the ICCPR was at the rank of Acts of Parliament. Accordingly, the Covenant was not at par with the Constitution, 2010 and either not above Acts of Parliament. Therefore, treaties were to be treated at par with Acts of Parliament. Impliedly, in case of conflict between a treaty and national legislation, the court

³⁵⁷ H Kelsen *Basic norm theory* (1967).

³⁵⁸ As above

³⁵⁹ Ambani (n 338 above) 32.

³⁶⁰ J Raz 'Kelsen's theory of the basic norm' (1974) 19 *American Journal of Jurisprudence* 94 -111.

³⁶¹ HLA Hart *The concept of law* (1994).

³⁶² Bankruptcy cause no. 19 of 2010 (unreported).

³⁶³ As above.

³⁶⁴ [2010] eKLR.

would not have to consider which law trumps the other. The court held that the arrest warrant was not unconstitutional and a violation of the rights of the judgment debtor.³⁶⁵

The third case of *Beatrice Wanjiku & Another v the Attorney General & Others*, the High Court held that international legal provisions were subordinate to and ought to be in compliance with the Constitution, 2010. Further, the court held that international law did not trump national legislation, hence there was no unconstitutionality in committing a judgment-debtor to civil jail.³⁶⁶

Thus far, although judicial pronouncements on the hierarchy of international law in the national legal order are mixed, the pronouncements appear to place international law at the same level with domestic legislation. On application of international soft law, the courts have used soft law, such as general comments, principles and guidelines, both as interpretive tools and to fill in where gaps exist in national legislation. Three instances are highlighted. First, the Court of Appeal applied the 'commentaries' of the Human Rights Committee and the African Commission Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa to interpret the right to legal aid under the Constitution, 2010.³⁶⁷ Second, the High Court has variously referred to the general comments of the Committee on ESCR to interpret socio-economic rights in the Constitution, 2010. For instance General Comment 13 to interpret the right to education,³⁶⁸ General Comment 7 on forced evictions³⁶⁹ and General Comment 15 on the right to water.³⁷⁰ Third, the High Court has applied the UN Basic Principles and Guidelines on Development based Eviction and Displacement in the absence of national legislation on forced evictions.³⁷¹

Beyond judicial practice, what about the Executive branch practice in regard of international law? Pointedly, findings and recommendations of monitoring mechanisms are directed to the Executive. In the particular context of the Executive, the Constitution, 2010, as discussed previously, requires the President to submit a report for debate to the National Assembly on the progress made in fulfilling international obligations of the Republic and further to ensure that the obligations of the Republic are fulfilled through the actions of the relevant cabinet secretaries.³⁷² Further, with specific reference to human rights, the state is required to enact and implement legislation to fulfil its international obligations in respect to human rights and fundamental freedoms.³⁷³

On actual Executive practice, one illustration stands out. The 2014 and 2015 state of the nation addresses made pursuant to the Constitutional requirement of the President to submit a report for debate to the National Assembly in fulfilment of international obligations

³⁶⁵ As above.

³⁶⁶ As above.

³⁶⁷ M Killander 'How international human rights law influences domestic law in Africa' (2013) 17 *Law, Democracy & Development* 382.

³⁶⁸ *John Kabui Mwai & 3 others v Kenya National Examination Council & 2 others* [2011] eKLR.

³⁶⁹ *Satrose Ayuma & 11 others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 others*, petition 65 of 2010.

³⁷⁰ As above.

³⁷¹ As above.

³⁷² Kenya Constitution 2010, Article 132 (1) (iii) and (5).

³⁷³ Kenya Constitution 2010, Article 21 (4).

contained no reference to specific obligations that Kenya had fulfilled.³⁷⁴ Much less, no mention was made of Kenya's international obligations in relation to human rights.

6.3 Legal status of findings and recommendations of monitoring mechanisms in the national legal order

Aside from the international legal status of the findings of monitoring mechanisms is the question of their national legal status, whether the findings have any legal effect in the national legal system. The starting point is perhaps the question of the juridical hierarchy between the national constitutions and international human rights treaties, particularly, whether human rights treaties have constitutional standing. It turns out the answer is largely negative as only few states grant constitutional status to human rights treaties.³⁷⁵

Regardless, human rights scholarship posits that Views of international monitoring mechanisms on individual complaints acquire legal effect in the national legal system in two ways. First, through special mechanisms or enabling legislation which oblige and authorise state organs to grant legal effect to the findings.³⁷⁶ Second, in the absence of enabling legislation, Views acquire legal effect through enforcement in national courts.³⁷⁷ The proposition on enabling legislation finds support in General Comment 33 of the Human Rights Committee which calls on state parties to the optional protocol to the Covenant on Civil and Political Rights to put in place enabling legislation to receive its Views.³⁷⁸ In practice states have enacted enabling legislation to give effect to the views of monitoring bodies. For instance, the Czech Republic contains legislation that directs the Minister of Justice to coordinate implementation of the Views of the Human Rights Committee.³⁷⁹ Equally, Colombia has enabling legislation that provides for implementation of the Views of the Human Rights Committee and the decisions of the Inter-American Commission on Human Rights.³⁸⁰ The Colombian enabling legislation gives the national courts a role in the implementation of the Views.³⁸¹

In regard to legal effect through national courts, a number of countries allow the Views of monitoring bodies arising from adjudication of individual communications and binding decisions of monitoring mechanisms to take legal effect in national courts. For instance, Costa Rica has legislation that accords decisions of international monitoring bodies the same effect in domestic courts.³⁸² Similarly, in Peru decisions issued by international courts

³⁷⁴ President Uhuru Kenyatta's state of the nation address, 27 March 2014, The Presidency, <http://www.president.go.ke/president-kenyatta-delivers-first-state-of-the-nation-address> / (25 January 2015).

³⁷⁵ For instance the 1994 Argentine Constitution grants international human rights constitutional ranking in the national legal hierarchy. See International Law Association 'National compliance with the decisions of international tribunals in matters involving human rights' 2012, 7-10.

³⁷⁶ Alebeek & Nollkaemper (n 63 above) 362.

³⁷⁷ As above.

³⁷⁸ Human Rights Committee General Comment No. 33 para 20.

³⁷⁹ Alebeek & Nollkaemper (n 63 above) 367.

³⁸⁰ Alebeek & Nollkaemper (n 63 above) 368-369.

³⁸¹ As above.

³⁸² Council of Europe 'Report on the implementation of international human rights treaties in domestic law and the role of courts' 16-17, December 2014, <http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD%282014%29036-e> (accessed 28 January 2015).

with competence over the national state are subject to no further requirements in the national legal order.³⁸³

Unlike the discussion on Views of monitoring mechanisms in relation to individual complaints, there is little literature on how concluding observations and recommendations of the special procedures acquire recognition at the national level.

In the context of Kenya, as already discussed, the Constitution, 2010 does not accord human rights treaties any special status in the national legal order. Similarly no special mechanisms are in place to facilitate implementation of the findings of monitoring mechanisms. Pointedly, the draft constitutions published in 2002, 2004, 2005 and 2009 enshrined a mechanism for the implementation of the recommendations of monitoring mechanisms. Specifically, the drafts provided for the state reporting process to international human rights monitoring bodies and required the state to report on time and enlist public participation in the preparation of the state reports.³⁸⁴ In regard to the recommendations of monitoring mechanisms including the recommendations of the special mechanisms, the draft constitutions required the government to disseminate the recommendations and issue a statement in Parliament on whether and how it intended to implement those recommendations.³⁸⁵ The provision was however expunged in the final stages of the constitutional review process by a special Parliamentary Committee on the constitution review process.³⁸⁶ Although no express reason was given for the removal of this specific provision, it is notable that the Parliamentary Committee stated that its members were ideologically opposed to too much reference to international law in the draft constitution and the need to reduce verbosity in the draft constitution.³⁸⁷

Notably, although the provision was expunged, the chapeau of the provision which served as a mini-preamble on the state obligations in regard to state reporting and recommendations of monitoring mechanisms was reinstated by the Committee of Experts in April 2010.³⁸⁸ This provision appears in Article 21(4) of the Constitution, 2010.³⁸⁹ It may then be argued that the chapeau of the expunged provision, as contained in the Constitution, 2010, embodies an entry point on a mechanism to give legal effect to the findings and recommendations of

³⁸³ As above.

³⁸⁴ See Constitution of Kenya Review Commission draft Bill, 27 September 2002, article 30 (6): 'The Republic shall fulfil all its international obligations in respect to human rights and for that purpose- (a) The Republic shall report on time to international human rights bodies on the implementation of human rights treaties; (b) draft reports intended to submission by the Republic to international bodies shall be published in Kenya for two months and facilities shall be provided for the public to discuss and debate them before the reports are revised and submitted; (c) the Republic shall facilitate the submission of alternative drafts by civil society organisations to international human rights bodies; and (d) the comments and recommendations of international bodies shall be disseminated to the public and the Government shall make a statement in Parliament on how it intends to implement those recommendations.' A similar provision was contained in: Constitution of Kenya Review Commission draft Constitution, 23 March 2004 (Bomas draft) article 30 (6) & (7); Proposed new constitution of Kenya 22 August 2005, article 31 (5) & (6); and Harmonised draft constitution of Kenya 19 November 2009 article 30 (6), (7) & (8).

³⁸⁵ As above.

³⁸⁶ See Revised harmonised draft constitution of Kenya from the Parliamentary Select Committee, 29 January 2010.

³⁸⁷ Committee of Experts on the constitutional review process (n 355 above) 36-37.

³⁸⁸ Proposed constitution of Kenya, 6 May 2010, article 21 (4).

³⁸⁹ Article 21 (4): 'The State shall enact and implement legislation to fulfil its international obligations in respect of human rights and fundamental freedoms.'

monitoring mechanisms as earlier envisaged. In addition to the absence of express constitutional provisions, there is no enabling legislation or mechanisms to give legal effect to the findings of monitoring mechanisms at the national level.

Turning to the national courts, instructively Kenya has not accepted the competence of any of the monitoring mechanism in regard to adjudication of individual communications. Notably though, the decisions of the African Commission and the African Committee on the Child are akin to the Views of the UN treaty monitoring bodies. Nonetheless, there is no law enabling national courts to consider decisions arising from the African Commission or the African Committee on the Child or granting direct legal effect to such decisions before national courts.

What of the binding decisions from the African Court and the East African Court of Justice? In relation to the East African Court of Justice, Article 44 of the Treaty for the Establishment of the East African Community provides for the application of the civil procedure rules of the Member state,³⁹⁰ thus making the judgments automatically enforceable in the national legal order. Additionally, in practice all judgments of the EACJ have the status of national courts judgments in Kenya provided they relate to issues for which the EACJ has jurisdiction.³⁹¹ Of the judgments of the African Court, their position in the national legal order is unclear. It is arguable that the binding judgments of the African court should be directly enforceable in national courts since the African Charter is itself directly enforceable before national courts by virtue of Article 2(6) of the Constitution, 2010.³⁹² However, the challenge lies in the lack of national legislation on the reception and execution of judgments of the African Court. This partly explains Kenya's non-implementation of the African Court order for provisional measures in the Ogiek case, as there appears to be no clarity on the position of judgments of international courts in the national legal order.

In the absence of enabling legislation clarifying the status of findings of monitoring mechanisms in the national legal order, implementation of these findings has been erratic and low as demonstrated in the subsequent chapters. Pointedly, the only implementation arrangements are Executive structures, such as the Inter-Ministerial Committee on International Human Rights Obligations established in 2003 with a mandate to coordinate state reporting to international human rights treaty monitoring bodies.³⁹³ In a similar vein, is the 2014 Presidential Task Force on the implementation of the Endorois decision, also

³⁹⁰ Article 44: 'The execution of a judgment of the Court which imposes a pecuniary obligation on a person shall be governed by the rules of civil procedure in force in the Partner State in which execution is to take place. The order for execution shall be appended to the judgment of the Court which shall require only the verification of the authenticity of the judgment by the Registrar whereupon, the party in whose favour execution is to take place, may proceed to execute the judgment.'

³⁹¹ The position is not founded on the Treaty of the EAC but rooted in practice. Interview with J Okello, Parliamentary Counsel, Senate, Kenya, Parliament Building, Nairobi, 4 August 2015.

³⁹² Article 2 (6): 'Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.'

³⁹³ Interview with M Njau-Kimani, Legal Secretary Justice and Constitutional Affairs, Office of the Attorney General and Department of Justice, Kenya, Nairobi, 4 March 2015.

established by Executive decree.³⁹⁴ A comprehensive examination on the implementation arrangements is taken up in chapter eight.

7 Conclusion

This chapter reviewed international monitoring mechanisms at the UN level, African regional level and at the East African sub regional level. It describes the monitoring mechanisms, identifies those that Kenya is subject to and sets out the findings and recommendations that have been made in relation to Kenya. At the UN level, treaty monitoring committees with the exception of the Committees on CRMW, CPD and CPED have made concluding observations. Further, recommendations have also been made under the special procedures by special rapporteurs and in Kenya's first Universal Periodic Review cycles. At the regional level, the African Commission and the African Committee on the Child have made both concluding observations and issued merit decisions in regard to individual communications. The African Court has also issued one order for provisional measures against Kenya, while a number of recommendations have also been made under the APRM. At the sub-regional level, the East African Court of Justice has not issued any merit judgment in regard to human rights cases against Kenya. One notable feature is that Kenya has not subscribed to any of the optional individual complaint procedures, an issue that is taken up in later chapters of the research. The above listed findings and recommendations lay the basis for the assessment of the implementation which is undertaken in chapters three, four and five.

The chapter in the second part explored the place of the findings and recommendations of monitoring mechanisms in the national legal order in Kenya. The section alludes to the contentions raised in regard to some of the recommendations issued by monitoring mechanisms. This part also conducted a preliminary assessment of the place of international law in the Kenya legal system. The analysis makes clear that while the Constitution, 2010 embraces international law, the interpretation of the courts have tended to lessen the role of international law thus raising the unsettling possibility of lack of impact of international law. Further, the chapter reviewed existing mechanisms to give effect to the findings of monitoring mechanisms. It is notable that Kenya does not have implementing legislation to give effect to the findings of monitoring mechanisms or to provide clarity on execution of binding judgments. In addition, so far implementation mechanisms have consisted of Executive arrangements.

In summary, the chapter sets the foundation for the assessment on the implementation of the findings and recommendations of monitoring mechanisms that is conducted in chapters three, four, five and six and informs the analysis on implementation and impact undertaken in chapter eight.

³⁹⁴ Kenya Gazette Notice 6708 of 26 September 2014 'Task Force on the implementation of the decision of the African Commission on Human and Peoples' Rights contained in Communication 276/2003 (Centre for Minority Rights on behalf of the Endorois Welfare Council v Republic of Kenya)'.

Chapter 3

Assessment of implementation of the findings and recommendations of monitoring mechanisms on personal liberty, physical integrity and political rights

1 Introduction

This chapter assesses the extent of implementation of the findings and recommendations of monitoring mechanisms relating to personal liberty and integrity rights and political rights. The chapter is divided into two: a first part which reviews personal liberty and integrity rights and the second political rights. In the course of the assessment, a distinction is made between findings arising out of the adjudicative processes of the African Commission and recommendations arising out of state reporting and special procedures including the Universal Peer Review. At the end of the chapter a review is made on the implementation of the findings arising out of adversarial monitoring processes.

The recommendations made in relation to personal liberty and integrity rights are clustered as follows: findings on the death penalty, homosexuality, torture, extrajudicial killings, police reforms and accountability, judicial reforms, detention rights and prison reforms, terrorism, administration of justice, accountability for human rights violations and ratification of human rights instruments.

The findings and recommendations are set out at the beginning of each sub-section by providing a summary of the findings and recommendations, followed by the monitoring mechanism (s) that made the findings or recommendations and then the year (s) made.

2 Personal integrity and physical liberty rights

2.1 Death penalty

- (i) Abolish the death penalty (HRC Committee 1981, 2005; CAT Committee 2009, 2013; UPR 2010)

Kenya retains the death penalty for five criminal offences among them murder, robbery with violence and treason with an exception in instances in which the convict is a juvenile, pregnant woman or suffers mental illness.¹ An unofficial moratorium has been in force since 1987 and no person sentenced to death has been hanged. In August 2009 the President commuted all death sentences into life sentences, with a view to alleviating their psychological torture and enabling the prison service to put the death row convicts on the prison labour programmes.² A further problem arises because Kenyan law does not define what constitutes a life sentence. The death penalty remains a lawful sentence and as of

¹ Penal Code of Kenya section 40 (3)204, 296 (2) which provides for the death penalty for treason, murder and robbery with violence respectively; section 12, 25 (2), section 60 which provides for administration of unlawful oaths to commit capital offences. Section 211 and 212 which provide for the exceptions in cases of mental illness, children under 18 years and pregnant women respectively; International Crimes Act, 2008 section 6 (3) which provides for murder if intentional killing formed the basis of genocide, crimes against humanity and war crime.

² 'Kenya's death row inmates get life instead' Time World 5 August 2009
<http://content.time.com/time/world/article/0,8599,1914708,00.html> (14 December 2013).

August 2015, there are 2,316 prisoners on death row of whom 2,250 are men while 66 are women.³

The Constitution, 2010 guarantees the right to life, but contains a death penalty saving clause.⁴ The inclusion of the death penalty saving clause in the Constitution, 2010 was deliberate,⁵ as discussed in detail in chapter six. Instructively, in 2004 the delegates to the constitution making process voted unanimously for the retention of the death penalty in the draft constitution.⁶ Similarly, in 2009 during the finalisation of the constitution making process, the committee mandated with the finalisation elected to retain the death penalty to ensure approval of the draft constitution in the 2010 national referendum.⁷ Nonetheless, the right to life as provided for in the Constitution, 2010 is vague. For instance, the death penalty saving clause is provided for as a separate standalone clause and does not appear to be modifying the seemingly unqualified right to life in clause (1). In addition, exceptions on the right to life include where authorised by the Constitution, while in essence the Constitution, 2010 does not authorise deprivation of the right to life except restrictively in situations of abortion. According to the committee on the finalisation of the constitution-making process the inconsistencies were deliberate so that the constitutionality of the death penalty could be interpreted by the courts either way.⁸ These inconsistencies have been pointed out by the High Court, although the court did not engage in interpretation.⁹

Jurisprudence from the courts on the death penalty is mixed. In July 2010, the Court of Appeal ruled that the mandatory death penalty for murder was unconstitutional as it violated constitutional guarantees on the right not to be subjected to inhuman or degrading punishment or treatment and the right to a fair trial.¹⁰ Ironically, the court's finding in this decision was that the death penalty remains constitutional as long as it is not mandatory. Similarly, the High Court in *Evanson Muiruri Gichane v Republic* extended the ban on mandatory death sentence to attempted robbery with violence.¹¹

Conversely, the High Court, which has original jurisdiction in murder cases, criticised the Court of Appeal decisions that purported to declare the mandatory death penalty

³ Interview with E Ndunda, Legal Officer, Kenya Prisons Service, Nairobi, 7 August 2015.

⁴ Constitution of Kenya, 2010, Article 26 (3) provides that: 'A person shall not be deprived of life intentionally, extent to the authorised by this Constitution or other written law'.

⁵ Constitution of Kenya Review Commission 'The final report of the Constitution of Kenya Review Commission' 2005, 386-387. (Final report of the Constitution of Kenya Review Commission).

⁶ Constitution of Kenya Review Commission 'The votes and proceedings of plenary session of the National Constitutional Conference' 30 November 2005, 159 (accessed from the Kenya National Archives 8 October 2014). Notwithstanding the final draft constitution of March 2004 (Bomas draft) did not include the death penalty. See clause 34 of the Bomas draft constitution of 15 March 2004.

⁷ Committee of Experts on Constitutional Review 'Verbatim record of the proceedings of the Committee of Experts during the Mombasa retreat at the Voyager (operational plan) held on 16 April 2009', 38 (accessed from the Kenya National Archives 16 October 2014). (Committee of Experts verbatim record of the Mombasa retreat of 16 April 2009).

⁸ Interview with O Amollo, Member Committee of Experts on Constitutional Review, Kenya, Nairobi, 1 April, 2015. He explained that the decision not to expressly outlaw the death penalty was informed by the need to secure public support of the draft constitution in the national referendum, a reflection of the challenge of constitution making by way of referendum.

⁹ *Republic v John Kimita Mwaniki* [2011] eKLR.

¹⁰ *Godfrey Ngotho Mutiso v Republic* [2010] eKLR. According to the Court, the unconstitutionality extended to other capital offences other than murder such as robbery with violence and treason.

¹¹ [2010] eKLR.

unconstitutional. In June 2011, the High Court in *Republic v John Kimita Mwaniki* faulted the Court of Appeal ruling pointing out that the Penal Code provisions on the death penalty were couched in mandatory terms.¹² Nonetheless, the Court in this instance found that the death penalty saving clause in the Constitution, 2010 was inconsistent with the right to life and sentenced the accused to thirty years as opposed to the mandatory death sentence.¹³ In December 2011, the High Court arrived at a contrary finding holding that the Constitution, 2010 authorises the death penalty and criticised the Court of Appeal decision declaring the mandatory death penalty unconstitutional.¹⁴ The High Court imposed the death penalty on two murder suspects.¹⁵ The court argued that the Constitution, 2010 had indeed expanded the application of the death penalty and also faulted the 2009 presidential commutation of the death sentences into life sentences suggesting that the President ought to have signed all the death warrants in line with his constitutional responsibility.¹⁶

Following the Court of Appeal decisions in 2010, the position in regard to the mandatory death sentence in the Court of Appeal remained contested with the Court upholding discretionary death sentences in two cases in March 2012.¹⁷ In October 2013, the Court of Appeal in *Joseph Njuguna Mwaura and 2 others v Republic* declared the death penalty as the only sentence in all cases of capital offences to be imposed by all courts.¹⁸ The Court of Appeal in this case opined that the death penalty was not cruel, degrading or inhuman as it was not inflicted for sadistic pleasure but pursuant to a court sentence.¹⁹ The judgement settles the position of the death penalty in the Court of Appeal since it was a decision of a five judge bench, which is final.

Nonetheless, a petition filed in the Supreme Court in November 2013 seeking a determination on the legality of the death sentence provides an opportunity for the Supreme Court to provide direction.²⁰ As of October 2015, the petition has not been determined.

Besides judicial interpretations, debate on abolition of the death penalty in Kenya has been on-going since 2002. The first draft constitution published in September 2002 expressly abolished the death penalty.²¹ However, this view did not find support from the public and the delegates of the 2003/4 constitution making process leading to inclusion of the death penalty in the proposed new constitution of Kenya, 2005.²² In August 2007, a motion tabled

¹² [2011] eKLR.

¹³ As above.

¹⁴ *Republic v Dickson Mwangi Munene and Alexander Chepkonga Francis* [2011] eKLR.

¹⁵ As above.

¹⁶ As above.

¹⁷ *Bernard Mutua Matheka v Republic*, Criminal Appeal no. 155 of 2009 (15 March 2012) (unreported); *James Maina Magare v Republic*, Criminal Appeal no. 224 of 2010 (16 March 2012) (unreported).

¹⁸ *Joseph Njuguna Mwaura & 2 others v Republic*, Criminal Appeal no. 5 of 2008 (18 October 2013).

¹⁹ As above.

²⁰ 'Death row convict goes to Supreme Court to overturn sentence' *The Star* 5 November 2013 <http://allafrica.com/stories/201311051017.html> (14 December 2013).

²¹ Constitution of Kenya Review Commission 'An annotated version of the draft bill, 27 September 2002' clause 32 (2).

²² Republic of Kenya, Proposed New Constitution of Kenya, 2005 clause 35 (1): 'every person has the right to life except as may be prescribed in an Act of Parliament.'

in Parliament seeking abolition of the death penalty was defeated.²³ Similarly, in 2007 the Kenya National Commission on Human Rights prepared a position paper for public engagement on abolition of the death penalty.²⁴ Further, rational debate on the question of the death penalty in the constitution making process in 2009-2010 was obscured by the hotly contested issue of abortion which was provided for in the same provision thus resulting in inclusion of the death penalty saving clause in Article 26(3).

The government position remains that prevailing public opinion is strongly supportive of the death penalty,²⁵ although there has been no empirical investigation on the extent of public support. Regardless, this position can be countered in view of the fact that the Constitution, 2010 does not limit fundamental rights in public interest, so that individual rights are protected notwithstanding the interests of the collective. The National Policy and Action Plan for Human Rights, 2012 commits the government to take steps towards abolition of the death penalty.²⁶ As of October 2015, there is however, no evidence of public awareness campaigns undertaken to sensitize the public on the global trends on the death penalty.

Civil society organisations and other non-state actors in 2011 formed a working group on the death penalty to implement a national advocacy strategy and build momentum for the abolition of the death penalty.²⁷ Similarly, the East African judiciaries in August 2013 held a conference to identify a common East African position on the death penalty.²⁸ However, no consensus was reached, perhaps a display of the extent of support of the death penalty even at the regional level. Further, the working group on the death penalty in June 2015 in conjunction with an informal parliamentary committee introduced a bill in Parliament proposing to amend the penal statutes that provide for the mandatory death sentence.²⁹

The recommendation is as of October 2015 not implemented.

²³ Parliament of Kenya, National Assembly official report, 1 August 2007, <http://www.parliament.go.ke/plone/archive/archive-9th-parliament/hansard/official-report-01.08.07a/view> (13 July 2014).

²⁴ Kenya National Commission on Human Rights, 'Abolition of the death penalty in Kenya: position paper no. 2 of 2007', <http://www.knchr.org/Portals/0/CivilAndPoliticalReports/PP2%20-%20Abolition%20of%20the%20death%20penalty%20-%20final.pdf> (13 July 2014).

²⁵ United Nations General Assembly, Report of the working group on the universal periodic review Kenya, 17 June 2010, para 104.

²⁶ Republic of Kenya National Policy and Action Plan for Human Rights, 2012, 10.

²⁷ Penal Reform International 'Abolition of the death penalty and its alternative sanction in East Africa: Kenya and Uganda' 2012, 20, <http://www.penalreform.org/wp-content/uploads/2013/05/East-Africa-research-report-on-death-penalty-and-life-imprisonment.pdf> (13 July 2014). The working group includes: the International Commission of Jurists Kenya section, Kenya National Commission on Human Rights, Kenya Legal Resources Foundation and CLEAR Kenya.

²⁸ G Kegoro 'We've not hanged any convict since 1987, so why cling to the death penalty?' Daily Nation 28 August 2013, <http://mobile.nation.co.ke/blogs/+Why-cling-to-death+penalty/-/1949942/1965862/-/format/xhtml/-/263r4o/-/index.html> (14 July 2014).

²⁹ See Penal Code (Amendment) Bill, 2015 and Criminal Procedure Code (Amendment) Bill, 2015.

2.2 De-criminalisation of consensual same sex sexual relations

- (i) De-criminalise consensual same sex sexual relations (HRC Committee 2005; Committee CESR 2008; UPR 2010)

The Kenyan penal system criminalises homosexual conduct which it characterises as unnatural offences. Consensual same-sex sexual activities and sexual activity between male persons 'against the order of nature' are criminalised and attract a fourteen years term of imprisonment.³⁰ Further, any attempted same-sex sexual activity attracts a seven year term of imprisonment,³¹ while indecent practices between males whether in public or private are punishable with five years imprisonment.³² Although, evidence of enforcement of these penal provisions is hard to find, the courts have in a few instances convicted persons for homosexual conduct. In *Francis Odingi v Republic*, the accused was in 2006 sentenced to six years imprisonment for engaging in same-sex sexual activity.³³ Similarly, in *Julius Waweru Pleuster v Republic*, the Court of Appeal upheld a trial court's conviction of sodomy.³⁴ In March 2014 statistics from the National Police Service tabled in the National Assembly indicated that 595 cases of homosexuality had been handled by the police since 2010.³⁵ It is unclear if these 595 cases were actual prosecuted cases or included cases of police arrests with no charges being made. The existence of the penal sanctions legitimises violence, discrimination and stigmatisation in enjoyment of rights and access to services. A 2011 report by the Kenya Human Rights Commission documents the incidences of violence, discrimination and stigmatisation faced by homosexual persons.³⁶

Although no international human rights treaties contain express textual references to homosexuality or sexual orientation, treaty monitoring institutions at the judicial, quasi-judicial and political level increasingly find that these treaties protect homosexual status and conduct.³⁷ It is settled that criminalising consensual homosexual conduct and discriminating

³⁰ Penal Code section 162 provides that: 'Any person – (a) who has carnal knowledge of any person against the order of nature; (c) permits a male person to have carnal knowledge of him or her against the order of nature is guilty of a felony and liable to imprisonment for fourteen years.'

³¹ Penal Code section 163: 'Any person who attempts to commit any of the offences specified in Section 162 is guilty of a felony and is liable to imprisonment for seven years.'

³² Penal Code section 165: 'Any male person who, whether in public or private, commits any act of gross indecency with another male person, or procures any male person to commit any acts of gross indecency with him, or attempts to procure the commission of any such act by any male person with himself or with another male person, whether in public or private is guilty of a felony and is liable to imprisonment for five years.'

³³ [2011]eKLR.

³⁴ Criminal Appeal no. 177 of 2006.

³⁵ Parliament of Kenya, National Assembly official records, Hansard, 26 March 2014, <http://www.parliament.go.ke/plone/national-assembly/business/hansard/wednesday-26th-march-2014-1/view> (14 July 2014). The regional breakdown of the cases was Central 85, Coast 63, Rift Valley 204, Nairobi 40, Nyanza 33, North Eastern 9, Garissa 3, Eastern 161, Kitui 16, Meru 103, Western 25 and Murang'a 27.

³⁶ Kenya Human Rights Commission 'The outlawed among us: a study of the LGBTI's community search for equality and non-discrimination in Kenya' 2011.

³⁷ See from the European Court of Human Rights: *Dudgeon v United Kingdom*, application 7525/76, European Court of Human Rights, judgment, 22 October 1981; *Norris v Ireland*, application 10581/83, European Court of Human Rights, judgment, 26 October 1988; *Modinos v Cyprus*, application 15070/89, European Court of Human Rights, judgment, 23 March 1993; from the Inter-American human rights system: *Atala-Riffo & daughters v Chile*, Inter-American Court of Human Rights, merits judgment 24 February 2012, Series C No. 239; Organisation of American States The General Assembly, Resolution AG/RES. 2721 (XLII-O/12) 'Human rights, sexual orientation and gender identity' 4 June 2012; from the Human Rights Committee: *Toonen v Australia* U.N. Doc CCPR/C/50/D/488/1992 (4 April 1994); See also UN Human Rights Council resolutions: A/HRC/Res/27/32

on the basis of sexual orientation is a violation of international human rights law. Yet, although widely recognised, acceptance is by no means universal. At the African regional level, the African Commission has only adopted a resolution condemning violence against persons based on their sexual orientation and gender identity.³⁸ A telling illustration is also that African countries, with the exception of South Africa, have consistently voted against Human Rights Council resolutions on the sexual orientation.³⁹

The Constitution, 2010 prohibits direct and indirect discrimination against any person 'on any ground including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth'.⁴⁰ While sexual orientation is not expressly mentioned, this list of protected statuses is indicative rather than exhaustive hence it can be argued that sexual orientation can be read in the provision. Further, the Constitution binds state organs and public officers to address the needs of vulnerable persons in society who are listed to include women, older persons, persons with disabilities, children, youth and members of marginalised or minority communities.⁴¹ Similarly, the list is indicative rather than exhaustive. As discussed below, the High Court in April 2015 stated that sexual minorities are protected under these provisions.

Notably, the constitution review process in Kenya debated the issue of recognition and protection of the rights of sexual minorities. As discussed in chapter six, in 2003 during the initial stages of the constitution review, the technical committee drafting the chapter on the bill of rights unanimously elected to exclude 'sexual orientation' as a protected ground under the freedom from discrimination provision.⁴² This, it was argued was to ensure that the constitution did not protect the rights of homosexual persons.⁴³ Similarly, the 2009 constitutional review finalisation process spearheaded by the Committee of Experts expressly barred inclusion of homosexuality rights in the Constitution, 2010 on the grounds that inclusion of these rights would weaken public support for the draft constitution resulting in its defeat in the 2010 national referendum.⁴⁴ Illustratively, the 'NO' vote in the 2010 constitutional referendum campaign anchored its arguments on the false propaganda that the Constitution, 2010 guaranteed homosexuality rights.⁴⁵

'Human rights, sexual orientation and gender identity' 27 October 2014; A/HRC/Res/17/19 'Human rights, sexual orientation and gender identity' 14 July 2011.

³⁸ African Commission on Human and Peoples' Rights, Resolution 275/14 'Resolution on protection against violence and other human rights violations against persons on the basis of their real or imputed sexual orientation or gender identity' May 2014.

³⁹ See UN Human Rights Council resolutions A/HRC/Res/27/32 'Human rights, sexual orientation and gender identity' 27 October 2014; A/HRC/Res/17/19 'Human rights, sexual orientation and gender identity' 14 July 2011.

⁴⁰ Constitution, 2010 article 27 (4).

⁴¹ Constitution, 2010 article 21 (3) : 'All State organs and public officers have the duty to address the needs of vulnerable groups in 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.'

⁴² Constitution of Kenya Review Commission 'National Constitutional Conference verbatim report of the technical working committee B (TWC B) chapter 4 and 5 on citizenship and the bill of rights held in tent no. 2 at Bomas of Kenya on 19 September 2003' 37-39 (accessed from the Kenya National Archives on 14 October 2014).

⁴³ As above.

⁴⁴ Committee of Experts verbatim record of the Mombasa retreat of 16 April 2009 (n 7 above) 38.

⁴⁵ Kenya Human Rights Commission 'Wanjiku's journey: tracing Kenya's quest for a new constitution and reporting on the 2010 national referendum' November 2010, 25.

The government position in regard to (de)criminalisation of homosexual conduct is that homosexual conduct is culturally unacceptable in Kenya. However, it is instructive that the Constitution, 2010 subordinates all culture to itself.⁴⁶ Nonetheless, the position is reinforced by statements of influential government officials and its actions. In November 2010, the then Prime Minister ordered the arrest and incarceration of all gay persons.⁴⁷ In March 2014, the Leader of Majority in the National Assembly while responding to questions on failure of the government to enforce criminal sanctions against homosexuality equated homosexuality to terrorism.⁴⁸ In July 2015 the President expressly stated that the issue of human rights for gays and lesbians was culturally unacceptable in Kenya and could not be imposed on Kenyans.⁴⁹

The position of the courts is nonetheless more accommodating. In a petition filed in October 2013 against a government agency for failure to register a non-governmental organisation, the National Gay and Lesbian Human Rights Commission, which seeks to champion the rights of sexual minorities, the High Court in April 2015 ordered the registration and official recognition of the organisation.⁵⁰ The government agency had declined to register the National Gay and Lesbian Human Rights Commission on the basis that the use of the terms 'gay' and 'lesbian' was legally, culturally and morally unacceptable.⁵¹ Although the case was not on de-criminalisation of homo-sexual conduct, but rather on freedom of association, the High Court ruled that sexual orientation is a protected status under the non-discrimination provisions of the Constitution, 2010.⁵²

Instructively, certain government agencies and the national human rights institution have urged the government to reconsider criminalisation of homosexual conduct. The Kenya National Commission on Human Rights in its 2011 report on sexuality and reproductive rights in Kenya, while noting the lack of protection of the rights of sexual minorities recommended decriminalisation of homosexual conduct.⁵³ The Kenya National AIDS strategic plan 2009-2013 noted that criminalisation of homosexual conduct hindered gay men from accessing health rights in relation to HIV services and urged the state to align its policies with the Constitution, 2010.⁵⁴ Equally, in February 2014 the Cabinet Secretary in charge of health at the height of national debate on homosexuality, following Uganda's law

⁴⁶ Constitution, 2010 article 2 (4): 'Any law, including customary law that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.'

⁴⁷ 'Arrest gays, Kenyan Prime Minister orders' *Capital News* 28 November 2010
<http://www.capitalfm.co.ke/news/2010/11/arrest-gays-kenyan-pm-orders/> (14 December 2013).

⁴⁸ Parliament of Kenya, National Assembly, official records, Hansard, 26 March 2014,
<http://www.parliament.go.ke/plone/national-assembly/business/hansard/wednesday-26th-march-2014-1/view> (14 July 2014).

⁴⁹ H Misiko 'Uhuru Kenyatta dismisses gay rights as a non-issue in Kenya' *Daily Nation* 25 July 2015,
<http://mobile.nation.co.ke/news/Uhuru-Kenyatta-gays-rights-barack-obama-kenya/-/1950946/2808676/-/format/xhtml/item/1/-/2in0ht/-/index.html> (accessed 31 July 2015).

⁵⁰ *Eric Gitari v Non-Governmental Organisations Co-ordination Board & 4 others* [2015] eKLR.

⁵¹ As above.

⁵² As above.

⁵³ Kenya National Commission on Human Rights 'Realising sexual and reproductive health rights in Kenya: a myth or reality' April 2012, 104, http://www.knchr.org/Portals/0/Reports/Reproductive_health_report.pdf (14 November 2014).

⁵⁴ Kenya National AIDS Strategic Plan 2009/10 – 2012/13 'Delivering on universal access to services' November 2009, 6, http://www.nacc.or.ke/nacc%20downloads/knasp_iii.pdf (14 November 2014).

on homosexuality, adopted a sympathetic approach in relation to access to HIV services for homosexual persons.⁵⁵

The Kenyan public remains highly intolerant towards homosexuality. A 2013 study by Pew Research indicated that 90% of Kenyans opined that homosexuality is unacceptable in society.⁵⁶ This figure represents a 5% decrease since 2007 when 95% Kenyans held the view that homosexuality is unacceptable.⁵⁷ This intolerance is further illustrated by a number of incidences. At the height of the global debate triggered by Uganda Anti-Homosexuality Act, 2014, there were calls by members of the Kenya National Assembly for stricter enforcement of the existing penal sanctions on homosexuality and deregistration of organisations that champion the rights of gay persons.⁵⁸ Debate in the National Assembly on enforcement of homosexuality laws was skewed in favour of criminalisation.⁵⁹ Further, civil society activists in Nairobi launched an anti-gay day supposedly to be marked on 24 February each year.⁶⁰ In August 2014, a political party, the Republican Party of Kenya, submitted to Parliament a draft Anti-Homosexuality Bill for consideration and enactment.⁶¹ This Bill proposes to criminalise homosexuality and provides upon conviction life imprisonment for Kenyan nationals and stoning to death for foreigners.⁶² As of October 2015, the petition with the draft Bill is pending in Parliament.

What then is the likelihood of decriminalisation of consensual same sex sexual relations? Pointedly, the High Court while deciding the above discussed case on freedom of association for lesbians, gay and transgender persons did not address itself to the question of de-criminalisation of homosexuality. Further, the government has since lodged an appeal against the High Court decision on the basis that homosexual conduct is legally prohibited in Kenya. The decision is nonetheless significant in that it expressly extended recognition of homosexual persons as a minority group and sexual orientation as a protected status under the non-discrimination provisions.

The recommendation has not been implemented as of October 2015.

⁵⁵ Daily Nation 'Gay debate affecting fight against HIV, Macharia says' 28 February 2014, <http://mobile.nation.co.ke/news/Gay-debate-affecting-fight-against-HIV-James-Macharia-says/-/1950946/2225564/-/format/xhtml/-/qe3d0c/-/index.html> (14 November 2014).

⁵⁶ Pew Research Global Attitudes Project, the global divide on homosexuality, <http://www.pewglobal.org/2013/06/04/the-global-divide-on-homosexuality/> (14 July 2014).

⁵⁷ As above.

⁵⁸ 'MPs to fight homosexuality' Daily Nation 18 February 2014, <http://www.nation.co.ke/news/MPs-to-fight-homosexuality/-/1056/2212146/-/4bndb2z/-/index.html> (14 July 2014); Parliament of Kenya, National Assembly official records, Hansard, 11 March 2014, <http://www.parliament.go.ke/plone/national-assembly/business/hansard/tuesday-11th-march-2014/view> (14 July 2014).

⁵⁹ Parliament of Kenya, National Assembly official records, Hansard, 26 March 2014, <http://www.parliament.go.ke/plone/national-assembly/business/hansard/wednesday-26th-march-2014-1/view> (14 July 2014).

⁶⁰ 'Nairobi activists launch Anti-Gay Day in Kenya as Museveni beats about-turn, signs bill' *Standard Digital News*, 25 February 2014, <http://standardgroup.co.ke/lifestyle/article/2000105465/nairobi-activists-launch-anti-gay-day-in-kenya-as-museveni-beats-about-turn-signs-bill?pageNo=1> (14 July 2014).

⁶¹ Parliament of Kenya, National Assembly, petition tracker 2013 – 2014, <http://www.parliament.go.ke/plone/national-assembly/business/petitions-tracker/eleventh-parliament-second-session-petitions-tracker-as-at-friday-21st-february-2014/view> (20 November 2014).

⁶² Draft Anti-Homosexuality Bill, 2014 clause 1.

2.3 Freedom from torture

(i) Introduce national legislation on torture including a definition of torture (CAT Committee 2009, SR TOT 2009, CAT Committee 2013); (ii) Include in the Prevention of Torture Bill the right to be covered by the National Hospital Insurance Fund (CAT Committee 2013); (iii) take measures to eradicate the use of torture by public officials and prosecute and punish those responsible (HRC Committee 2005, SR TOT 2007, CAT Committee 2009, UPR 2010, CAT Committee 2013); (iv) impartially investigate and duly prosecute and punish all acts of torture and ill treatment in accordance with the National Police Service Act (CAT Committee 2013); (v) pay particular attention to the diligent prosecution of cases of torture in line with the UN Guidelines on the Role of Prosecutors (SR TOT 2000, SR TOT 2007); (vi) prevent expulsion of foreigners, return or extradition to countries where they are likely to be subjected to torture (HRC Committee 2005, CAT Committee 2009, 2013); (vii) abolish corporal punishment as a criminal penalty (SR TOT 2000, 2007) (viii) abandon the police issuance of P3 Forms (SR TOT 1999, 2000, 2007); (ix) facilitate access to medical assessment for torture victims as required by the P3 Form (SR TOT 1999, CAT Committee 2009, CAT Committee 2013); (x) undertake credible and effective investigations and punish and prosecute the perpetrators of torture and excessive use of force in Mt Elgon (SR EJK, CAT 2009, UPR 2010); (xi) identify victims of torture and excessive use of force in Mt. Elgon and compensate them adequately (SR EJK 2009, CAT Committee 2009); (xii) ensure that all cases of use of lethal and excessive force in Tana River are effectively and independently investigated and the perpetrators punished upon conviction (CAT Committee 2013) (xiii) impartially investigate allegations of torture by ethnic Somalis (CAT Committee 2013); (xiv) ensure all places of deprivation of liberty including psychiatric hospitals are adequately monitored and put safeguards against torture and ill treatment (CAT Committee 2013).

On national legislation on torture including a definition of torture, although both the repealed Constitution of Kenya, 1963 and the Constitution, 2010 prohibit torture,⁶³ there is no implementing legislation at the national level as of August 2015. The Prevention of Torture Bill, 2011 was finalised in 2011. The Bill adopts a broad definition of torture, defines crimes of torture and ill-treatment, provides for exclusion of evidence obtained through torture, creates a complaints procedure and provides for protection of witnesses, compensation and restitution, extradition and clarifies that in cases of torture limitation of time runs from the point at which a victim is able to lodge a complaint.⁶⁴ While the Bill establishes the National Torture Fund to cater for rehabilitation of victims of torture and ill-treatment including medical expenses,⁶⁵ it does not however include the right to be covered by the National Hospital Insurance Fund.

As of October 2015, the Bill has not been submitted to Parliament for debate despite repeated government assurances that it would be prioritised. For instance, the Attorney General in October 2013 undertook to a visiting delegation from the World Organisation

⁶³ Constitution of Kenya, 1963 (repealed) section 74 and Constitution, 2010 article 25 (a).

⁶⁴ See *generally* Prevention of Torture Bill of 2011.

⁶⁵ Prevention of Torture Bill clauses 16 & 17.

Against Torture that the Bill would be submitted to Parliament before the end of 2013.⁶⁶ Similarly in May 2013 during the consideration of the State report to the Committee Against Torture, the Attorney General assured the Committee that the Bill would be tabled for Parliamentary debate soon.⁶⁷

The National Police Service Act also incorporates provisions relating to torture by police officers. The Act defines torture as any act which intentionally inflicts physical or mental pain or suffering for purposes of obtaining information, to punish a person for an act done or suspected to be done or intimidate a person inflicted by or instigated by public officials.⁶⁸ The Act further criminalizes torture and prescribes a sentence not exceeding 25 years and a sentence not exceeding 15 years for an officer who subjects a person to cruel, inhuman or degrading treatment.⁶⁹ The National Intelligence Service Act also embodies similar provisions prohibiting and criminalizing torture by intelligence officers.⁷⁰

The recommendation is thus partially implemented as of October 2015. Reviewing the implementation pathway, the drafting of the Prevention of Torture Bill was an initiative of civil society organisations. In 2009 civil society organisations formed a tripartite partnership that included civil society organisations, the Kenya National Commission on Human Rights and the Ministry of Justice.⁷¹ The impetus to draft the Bill was influenced by the 2009 concluding observations of Committee Against Torture which recommended that Kenya should legislate a definition of torture, criminalise acts of torture and provide penal sanctions.⁷² The Bill was in 2011 submitted to the Commission on the Implementation of the Constitution for prioritisation as part of legislation developed in line with the Constitution, 2010. Interviews with non-state actors in this tripartite partnership attribute the delay in tabling the Bill in Parliament to the fact that the government is not persuaded on the need for a stand-alone legislation on torture.⁷³ The preferable government position is to amend the Penal statute to provide for the crime of torture.⁷⁴

With regard to the Kenya Police Medical Report Form (P3 Form), the P3 Form is a police document anchored in the Kenya Police Standing Orders for documentation of any form of bodily assault for purposes of proving such claims.⁷⁵ In relation to torture, the P3 Form is the medical document that provides proof of torture. Ideally, the P3 Form should be obtained

⁶⁶ World Organisation Against Torture, 'Kenya: torture reforms must tackle implementation gap and end impunity', 5 October 2013, <http://www.omct.org/monitoring-protection-mechanisms/statements/kenya/2013/10/d22401/> (18 July 2014).

⁶⁷ United Nations Office at Geneva 'Committee against Torture examines report of Kenya' 16 May 2013, http://www.unog.ch/unog/website/news_media.nsf/%28httpNewsByYear_en%29/0F8C319DCCE8F96DC1257B6D005A9DEB?OpenDocument (18 July 2014).

⁶⁸ National Police Service Act 11A of 2011 section 2.

⁶⁹ National Police Service Act section 95.

⁷⁰ National Intelligence Service Act of 2012 section 51.

⁷¹ 'State of torture and related human rights violations' Alternative report to the Human Rights Committee to inform review of the Kenya State report, June 2012, 44, http://www.omct.org/files/2012/07/21869/state_of_torture_and_related_human_rights_violations_in_kenya_unhrc.pdf (18 July 2014) (State of torture and related human rights violations).

⁷² As above.

⁷³ Interview with A Nyanjong, Programme Manager, International Commission of Jurists- Kenya Section, Nairobi, 22 April 2015.

⁷⁴ As above.

⁷⁵ Kenya Police Standing Order no. 72.

free of charge from a police station, filled by a police officer requiring the examination and eventually used by medical officers to record the bodily injuries and their probable causes.⁷⁶ However, in practice police often deny victims the P3 Form or impose charges before issuing the P3 Form making it difficult for medical examination to be conducted and documentation of the observations.⁷⁷ In the absence of medical evidence to prove torture, investigations and prosecution of torture is unlikely. Instructively, following the release of the report of the Special Rapporteur on torture in April 2000, which recommended that the government should ensure accessibility of the P3 Form, the Attorney General indicated that the government accepted part of the report and would implement some of the recommendations.⁷⁸ Accordingly, the July 2000 the internal circular to police officers was as a result of the Attorney General's directive to the Commissioner of Police to ensure access and availability of the P3 Forms in all police stations.⁷⁹

From 2008 the P3 Form was made available on-line on the National Police Service website making it possible for the public to download it for subsequent filling in by the police and medical practitioners. While the availability of the P3 Form online has created access, a majority of the population is still not able to access the Form due to low internet penetration particularly in rural areas.⁸⁰ In practice, even when the P3 Form is obtained from the internet, victims must take the Form to the police station as a police officer must authorise the medical examination as part of criminal investigations into a physical assault.

In terms of facilitating medical assessment for torture victims, challenges exist in relation to documentation of physical and psychological evidence in the P3 Forms by medical doctors. Often doctors are unwilling to fill in P3 form as the government does not provide transport for court attendance to adduce the P3 form in court. The problem is compounded by the fact that one may be required to attend court more than once. This issue of facilitation of medical doctors to fill in P3 Forms was raised in Parliament in November 2009.⁸¹ The Minister in charge of police affairs indicated that although all doctors working in public hospitals were required to fill in P3 forms, there was no budgetary allocation specifically for medical doctors.⁸²

⁷⁶ Kenya Police Service, para-legal documents, <http://www.kenyapolice.go.ke/Paralegals.asp> (18 July 2014).

⁷⁷ Amnesty International 'Kenya: ending the cycle of impunity' June 2001, 4, <http://www.amnesty.org/en/library/info/AFR32/011/2001> (16 November 2014) (Ending the cycle of impunity); Inter Press Service 'Rights-Kenya: torture victims seek justice' 2 July 1999, <http://www.ipsnews.net/1999/07/rights-kenya-torture-victims-seek-justice> (16 November 2014).

⁷⁸ Ending the cycle of impunity (n 77 above) 4.

⁷⁹ As above.

⁸⁰ According to the Communications Authority of Kenya, internet penetration in March 2014 was 53%. Communications Authority of Kenya, research and statistics, 'Quarterly sector statistics report: third quarter of the financial year 2013/14 (Jan-Mar 2014)' 24, <http://www.ca.go.ke/images/downloads/STATISTICS/Sector%20Statistics%20Report%20Q3%202013-2014.pdf> (18 July 2014).

⁸¹ Parliament of Kenya, National Assembly official record, Hansard 19 November 2009, <http://www.parliament.go.ke/plone/archive/archive-10th-Parliament/hansards/official-records-19.11.09/view> (18 July 2014).

⁸² Parliament of Kenya, National Assembly official record, Hansard, 9 December 2009, <http://www.parliament.go.ke/plone/archive/archive-10th-Parliament/hansards/official-records-09.12.09a/view> (18 July 2014).

The findings on the P3 Form are thus partially implemented. The partial implementation is signified by the Police Commissioner circular which was a result of a directive issued by the Attorney General.⁸³ The recommendations of the Special Rapporteur influenced the issuance of the circular. However, there is no documented evidence of any deliberate actions taken to implement subsequent recommendations on the P3 Forms. Recent reports indicate that the P3 Form remains inaccessible and equally documentation of medical assessment in the P3 Form by medical personnel remains a challenge.⁸⁴

In relation to Mt Elgon, the allegations of torture and use of excessive force by security forces arose out of a security operation known as ‘*Operation Okoa Maisha*’ launched in March 2008 to disarm an illegal grouping, the Sabaot Land Defense Force, and restore security in Mt Elgon district.⁸⁵ *Operation Okoa Maisha* was conducted by the police with backing from the military.⁸⁶ The specific allegations of torture during *Operation Okoa Maisha* are documented in a number of reports.⁸⁷ The May 2008 investigation report by the Kenya National Commission on Human Rights documented cases of alleged torture by the military and recommended police investigations into the allegations.⁸⁸ Similarly, Parliament in August 2008 carried out a fact finding mission to investigate the allegations of torture which revealed numerous human rights violations and recommended investigations to determine whether the police or the military were culpable.⁸⁹

The government’s position has been that no human rights violations were perpetrated by security forces. In May 2008, the Commissioner of Police appointed a team comprising of police officers to investigate all human rights violations in Mt Elgon, identify the perpetrators and make appropriate recommendations including guarantees of non-repetition.⁹⁰ The outcome of the investigations was that the allegations documented by the non-state human rights actors were too general and did not name any victims while the victims documented by the Kenya National Commission on Human Rights report could not be traced.⁹¹ Accordingly, the team found that the reports did not conclusively establish that security forces perpetrated human rights violations.⁹² The Kenya Defence Forces also issued a statement in 2008 denying any allegations of torture against its officers. In its statement

⁸³ Ending the cycle of impunity (n 77 above) 3.

⁸⁴ ‘Rape and the elusive P3 Form’ *The Star* 13 December 2013, <http://www.the-star.co.ke/news/article-147725/rape-and-elusive-p3-form> (20 November 2014).

⁸⁵ Kenya Police, news, security brief: operation ‘okoa maisha’ in Mt Elgon, <http://62.24.109.6/News131.asp> (18 July 2014).

⁸⁶ As above.

⁸⁷ Parliament of Kenya ‘Report of the joint visit to Mt. Elgon region by the Committee on Defence and Foreign relations and Local Authorities’ November 2008; Kenya National Commission on Human Rights ‘The mountain of terror: a report on the investigations of torture by the military at Mt. Elgon’ May 2008, http://www.knchr.org/Portals/0/Reports/Mt_Elgon_Report.pdf (20 July 2014); Human Rights Watch ‘Hold your heart: waiting for justice in Kenya’s Mt. Elgon region’ October 2011, http://www.hrw.org/sites/default/files/reports/kenya1011_ToUpload_0.pdf (20 July 2014) .

⁸⁸ Kenya National Commission on Human Rights ‘The mountain of terror: a report on the investigations of torture by the military at Mt. Elgon,’ 2008.

⁸⁹ Parliament of Kenya ‘Report of the joint visit to Mt. Elgon region by the Committees on Defence and Foreign relations and Local Authorities’ November 2008.

⁹⁰ Kenya Police, ‘Kenya Police inquiry into the Mt. Elgon violence’ www.scribd.com/doc/.../Kenya-Police-Inquiry-into-the-Mt-Elgon-violence (12 December 2013).

⁹¹ As above.

⁹² As above.

issued in 2008, the Kenya Defence Forces claimed to have conducted its own investigations found no evidence to support the torture allegations.⁹³

Following failure by the government to investigate and punish the perpetrators of torture, the Independent Medico Legal Unit (IMLU), a nongovernmental organisation, in 2010 petitioned the East African Court of Justice (EACJ) to compel the government to investigate, prosecute and punish the perpetrators of the Mt Elgon torture allegations.⁹⁴ The government however challenged the hearing and determination of the petition on two preliminary grounds. First, the government argued that the East African Court had no jurisdiction to entertain a petition based on human rights violations; and second, that the petition was filed outside the two-month period as prescribed by the Treaty Establishing the East African Community.⁹⁵ While the EACJ ruled that it had jurisdiction to hear and determine the petition, it nonetheless dismissed the petition on the ground that it was filed outside the two-month time period.⁹⁶ Notably, the Attorney General in his pleadings in response to the petition indicated that the security forces did not commit any acts of torture.⁹⁷

Subsequently, IMLU in collaboration with the International Commission of Jurists -Kenya Chapter also filed a communication at the African Commission seeking to compel the state to investigate prosecute and punish the allegations of torture in Mt Elgon.⁹⁸ As of October 2015, the communication had not been declared admissible. According to IMLU, the petition before the EACJ and the subsequent filing of communication with the African Commission was influenced by the recommendations of monitoring mechanisms recommending investigation and prosecution of the perpetrators.⁹⁹

There has been no prosecution of security forces for alleged perpetration of torture in Mt Elgon. In addition, the victims of the Mt Elgon torture allegations have not been identified or compensated. The recommendations relating to the Mt Elgon human rights violations have therefore not been implemented as of October 2015.

The Tana Delta ethnic violence erupted in August 2012 following clashes between the agricultural Pokomo and the pastoralist Orma communities.¹⁰⁰ The Pokomo accused the Orma of grazing their cattle in the Pokomo farms, while the Orma in turn indicted the

⁹³ Ministry of Defence, 'Allegations against the military unfounded' 2008 [http://www.mod.go.ke/?page_link=Mt%20Elgon%20\(SLDF\)](http://www.mod.go.ke/?page_link=Mt%20Elgon%20(SLDF)) (accessed 12 December 2013).

⁹⁴ *Independent Medico Legal Unit v Attorney General of the Republic of Kenya and 4 others*, reference no. 3 of 2010 East African Court of Justice.

⁹⁵ *Independent Medical Legal Unit v Attorney General of the Republic of Kenya & 4 others*, reference no. 3 of 2010, Ruling 29 June 2011.

⁹⁶ *Attorney General of the Republic of Kenya v Independent Medical Legal Unit*, appeal no. 1 of 2011. Judgement 15 March 2012.

⁹⁷ E Kwamboka, 'Attorney General denies torture in Mt. Elgon, says operation was lawful', Standard Digital News 6 October 2010 <http://www.standardmedia.co.ke/business/article/2000019758/ag-denies-torture-in-mt-elgon-says-operation-lawful> (12 December 2013).

⁹⁸ *International Commission of Jurists- Kenya section v Kenya*, African Commission on Human and Peoples' Rights, Communication 385 of 2010.

⁹⁹ Interview with A Kamau, Programme Officer, Independent Medico-Legal Unit, Kenya, Nairobi, 17 January 2015.

¹⁰⁰ Kenya National Commission on Human Rights '29 days of terror in the Delta' October 2012, paras 36 -72, (29 days of terror in the Delta).

Pokomo for killing their cattle.¹⁰¹ A series of revenge attacks between the two communities in August and December 2012 resulted to over 100 deaths.¹⁰² Prior to and in the course of the violence, security forces from the General Service Unit, Administration Police and Regular Police were deployed to the Tana Delta to restore law and order, to protect the population and to mop up the illegal arms.¹⁰³ However, allegations were made on excessive use of force by the security forces against the population resulting to deaths and physical injuries.¹⁰⁴

In September 2012, a judicial commission of inquiry was created by the President to investigate the ethnic violence in the Tana Delta and recommend prosecution for persons who committed offences relating to the ethnic violence.¹⁰⁵ A report of the findings, which identified resources as the major cause of the conflict and recommended prosecution of the perpetrators of the violence, was handed over to the President in May 2013.¹⁰⁶ Despite an undertaking by the President to act on the recommendations, as of August 2015 the report has not been published neither has any person been prosecuted for the violence. It is in doubt whether the judicial commission of inquiry investigated allegations of excessive use of force or use of lethal force by security agencies as the terms of reference only mandated it to examine adequacy and effectiveness of the actions of security officers.

The Kenya National Commission on Human Rights also conducted independent investigations into the Tana Delta ethnic violence in August 2012. The investigations established that security agencies action in prevention and responding to the violence was inadequate and more particularly that there were cases of torture and excessive use of force perpetrated by security agencies though at a low scale.¹⁰⁷ The report recommended that the Independent Policing Authority should investigate the allegations of torture perpetrated by police officers.¹⁰⁸ There is no record of such investigations having been commenced. The recommendation is thus not implemented as of October 2015.

On investigating allegations of torture against ethnic Somalis in Kenya, the terrorism problem in Kenya is often viewed as one nurtured by the Muslim minorities in the Coastal region of Kenya and ethnic Somalis. Consequently, Somalis and the Coastal Muslims are repeatedly the target of security operations aimed at countering terrorist attacks in Kenya. Allegations of torture against ethnic Somalis are well documented. A 2013 report by Human Rights Watch documents human rights violations against ethnic Somalis in Nairobi.¹⁰⁹ An earlier 2012 report also documents human rights abuses against Somalis by the police and military in the

¹⁰¹ As above.

¹⁰² As above.

¹⁰³ As above.

¹⁰⁴ 29 days of terror in the Delta (n 100 above) paras 119 -124.

¹⁰⁵ Kenya Gazette Notice 13554 of September 2012 Appointment of judicial commission of inquiry into the ethnic violence in Tana River, Tana North and Tana Delta Districts.

¹⁰⁶ State House Kenya 'President Kenyatta receives final report on the ethnic violence in Tana Delta districts', May 21, 2013 <http://www.statehousekenya.go.ke/news/may2013/2013220501.htm> (13 December 2013).

¹⁰⁷ 29 days of terror in the Delta (n 100 above) para 142.

¹⁰⁸ 29 days of terror in the Delta (n 100 above) 45-49.

¹⁰⁹ Human Rights Watch 'You are all terrorists: Kenyan police abuse of refugees in Nairobi' May 2013, <http://www.hrw.org/reports/2013/05/29/you-are-all-terrorists> (20 July 2014).

North-Eastern region.¹¹⁰ As of October 2015, there is no documented evidence of investigations of the torture against ethnic Somalis, hence the recommendation has not been implemented.

On ensuring adequate monitoring to prevent torture and ill-treatment in all places of deprivation of liberty including psychiatric hospitals, the Independent Policing Oversight Authority is mandated to conduct inspections in police detention facilities, to monitor and to safeguard against torture and ill treatment.¹¹¹ The Independent Policing Oversight Authority in 2013 visited 17 police stations in line with its mandate to inspect police places of detention. The report alludes to poor detention facilities but makes no mention of torture and ill-treatment in police places of detention.¹¹² Contrastingly, there exist numerous media reports of persons dying in police detention facilities due to torture and ill-treatment.¹¹³ The courts have variously addressed incidences of suspects claiming to have been tortured in police detention facilities. A police officer was in December 2013 ordered by a court to explain allegations of torture by a suspect in police custody.¹¹⁴

On monitoring and safeguarding against torture and ill-treatment in psychiatric hospitals, although no concrete data exists on the extent of torture in psychiatric hospitals, evidence of the practice is not hard to find. A 2013 report by the Independent Medico-Legal Unit finds that torture is prevalent in public mental hospitals.¹¹⁵ In a study that involved 226 respondents from nine public mental hospitals in Kenya, 39% of the respondents reported having been tortured or ill-treated in the hospitals.¹¹⁶ According to the report, torture in mental hospitals is perpetrated in the form of physical assaults by hospital staff, deprivation of food and water, sexual abuse and hard labour.¹¹⁷ The legal framework on mental health in Kenya, the Mental Health Act, contains provisions that do not adequately protect mental patients from torture and ill-treatment. First, the Act makes no mention of torture of mental patients though it addresses ill-treatment of mental patients. On ill-treatment, although the Act prohibits ill-treatment of mental patients, it allows ill-treatment in the interests of the patient to prevent injury to the patient or others.¹¹⁸ Second, on the complaint mechanisms

¹¹⁰ Human Rights Watch Criminal reprisals: Kenya police and military abuses against ethnic Somalis' 2012, <http://www.hrw.org/sites/default/files/reports/kenya0512webwcover.pdf> (20 July 2014).

¹¹¹ Independent Policing Oversight Authority Act section 7 (e): 'The functions of the Authority shall be to conduct inspections of police premises, including police detention facilities under the control of the Service.'

¹¹² Independent Policing Oversight Authority, Performance report January -June 2013, February 2014, 10, http://www.ipoa.go.ke/downloads/images/downloads/performance_report.pdf (20 July 2014).

¹¹³ J Muraya 'Kenya: Agony, queries over death in police cells' 8 February 2014, <http://allafrica.com/stories/201402080106.html> (20 July 2014); 'British tourist dies in Kenyan police custody after being arrested smoking cannabis' *Daily Mail* 23 May 2012, <http://www.dailymail.co.uk/news/article-2148727/British-tourist-dies-Kenyan-police-custody-arrested-smoking-cannabis.html> (20 July 2014).

¹¹⁴ 'Court orders Kasarani OCS to explain torture of a man in the police cell' 28 December 2013, <http://saharatribune.com/2013/12/court-orders-kasarani-ocs-to-explain-torture-of-a-man-in-police-cell/?undefined&undefined> (accessed 20 July 2014).

¹¹⁵ Independent Medico-Legal Unit 'The state of mental health in Kenya: victimization and torture among persons with mental and psychosocial disabilities' 2013, <http://www.imlu.org/2011-06-30-23-44-4/reports/finish/2-reports/24-mental-health-report/0.html> (20 July 2014) (State of mental health in Kenya).

¹¹⁶ State of mental health in Kenya (n 115 above) 38.

¹¹⁷ As above.

¹¹⁸ Mental Health Act section 51: 'Any person in charge of, or any person employed at a mental hospital, who strikes, ill-treats, abuses or wilfully neglects any patient in a mental hospital shall be guilty of an offence; but nothing in this section shall be deemed to make it an offence for the person in charge of, or any person employed

that may be available to patients to report allegations of torture and ill-treatment, the Act vest unqualified discretion on the persons in charge of mental hospitals to decide whether or not to forward letters from patients.¹¹⁹ There are however efforts to align the mental health legal framework with human rights protections for mental patients including the freedom from torture and ill-treatment. The draft Mental Health Policy, 2012 states that the mental health systems will be audited and reviewed to incorporate human rights standards. The Mental Health Care Bill, 2013 recognises the rights of persons with mental illness to be treated humanely with dignity and to be protected from abuse and degrading treatment.¹²⁰ Further, the Bill protects these patients from abuse, cruel and degrading treatment and requires any person witnessing such abuse or ill-treatment to report to the police, the board of the hospital or any other competent authority.¹²¹ On monitoring of mental illness hospitals to safeguard against ill-treatment, the Bill provides that for inspection by the Board of every mental health facility.¹²²

The Mental Health Care Bill, 2013 is as of August 2015 under-going debate in Parliament while the Mental Health Policy, 2012 is yet to be approved by Cabinet.

The recommendations have not been implemented as of October 2015 as the provisions do not mirror the requisite human rights standards.

2.4 Extrajudicial killings and police accountability

(i) Investigate and prosecute police perpetrators of extrajudicial killings (SR EJK 2009, UPR 2010, CAT Committee 2013); (ii) undertake credible and effective investigations into Mungiki killings (SR EJK 2009, UPR 2010); (iii) investigate and punish police death squads and report to Parliament measures taken for their complete abolition (SR EJK 2009); (iv) take all steps to prevent extrajudicial killings and enforced disappearances (CAT Committee 2009); (v) make public the results on investigations on extrajudicial killings, enforced disappearances and excessive use of force by police officers (CAT Committee 2013); (vi) Ensure enactment of the National Coroner's Service Bill and the prompt establishment of the independent examiners service (CAT Committee 2013); (vii) review the law on use of firearms by police officers (UPR 2010); (viii) regulate use of firearms by the police in compliance with

at a mental hospital to take steps he considers necessary in the interests of a patient to prevent the patient from causing physical injury to himself or others. '

¹¹⁹ Mental Health Act section 40 (2): 'Letters addressed by patients to persons other than those mentioned in sub-section 1 [Board or relevant district mental health council or any member of the Board or relevant council] shall be forwarded as the person in charge may, in his discretion decide.' (3): 'Every person in charge of a mental hospital or having charge of any patient in a mental hospital shall be entitled to examine and at his discretion retain any letters addressed to persons other than those mentioned in subsection 1. '

¹²⁰ Mental Health Care Bill, 2013 clause 4 (2): 'A person with mental illness shall be treated humanely and their inherent dignity and privacy upheld;' (3): 'A person with mental illness has the right to protection from physical, economic, social, sexual and other forms of exploitation, abuse and degrading treatment.'

¹²¹ Mental Health Care Bill, 2013 clause 23: 'Every person, body, organization or mental health care facility providing care and treatment to a person with mental illness must take steps to ensure that (a) persons with mental illness are protected from abuse or any cruel or degrading treatment '. 2: 'A person witnessing any form of abuse set out in sub-section 1 above against a person with mental illness must report the incident immediately to the police, the Board or any other competent authority.'

¹²² Mental Health Care Bill, 2013 clause 22: 'Every mental health care facility shall be inspected by the Board at least within every six months to ensure that the conditions, treatment and care of persons with mental illness comply with the provisions of these Act or any other law. '

the UN Basic Principles on the use of force and firearms by law enforcement officers (SR EJK 2009, CAT Committee 2013); (ix) address the problem of arbitrary police actions such as arbitrary and unlawful arrests and widespread corruption (CAT Committee 2009, 2013).

Although official data on extrajudicial killings in Kenya is non-existent, Kenya's history is replete with cases of extrajudicial killings mainly perpetrated by security forces against suspected criminal elements and in the recent past suspected terrorists. Illustratively, sequential annual police crime reports for 2010, 2011 and 2013 do not include records of cases of extrajudicial killings as reported crimes.¹²³ Regardless, a 1997 report of the Special Rapporteur on extrajudicial, summary or arbitrary killings alluded to more than 130 cases of extrajudicial killings perpetrated by security personnel.¹²⁴ A 2008 report by the Kenya National Commission on Human Rights documented an estimated 500 cases of extrajudicial killings and disappearances perpetrated by the police between June and October 2007.¹²⁵ The 2009 Report of the UN Special Rapporteur on extrajudicial, summary or arbitrary executions documented over 60 cases of extrajudicial killings by the police.¹²⁶ In March 2010, police officers murdered seven taxi drivers following an alleged dispute between the taxi drivers and motorbike cyclists.¹²⁷ In January 2011, police officers shot dead three suspects, despite the fact that the three had surrendered along a busy Nairobi highway.¹²⁸ A 2013 report by the Open Society Justice Initiative documents the killing of more than ten persons associated with terrorism in Kenya.¹²⁹ In April 2014, police were alleged to have shot dead five persons whom they had arrested on suspicion of having committed offences.¹³⁰

On investigations and prosecution of police officers implicated in extrajudicial killings, there is little evidence of holding police officers to account. The 2007 Kenya National Commission

¹²³ Kenya Police, annual police crime report for year 2010, 4 August 2010, <http://www.kenyapolice.go.ke/resources/CRIME%20REPORT%202011.pdf> <http://www.kenyapolice.go.ke/resources/Crime%20report%202010.pdf> (30 July 2014); Kenya Police, crime statistics, 31 December 2011, <http://www.kenyapolice.go.ke/resources/CRIME%20REPORT%202011.pdf> (30 July 2014); I Meso 'Police report shows reduction in crime level by 8 per cent' Standard Digital Media, 20 December 2013, <http://www.standardmedia.co.ke/?articleID=2000100499> (30 July 2014).

¹²⁴ BW Ndiaye, 'Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions', 19 December 1997, E/CN.4/1998/68/Add.1, paras 244-251, Office of the High Commissioner for Human Rights, Kenya homepage <http://www.ohchr.org/en/countries/AfricaRegion/Pages/KEIndex.aspx> (30 November 2013)

¹²⁵ Kenya National Commission on Human Rights 'The cry of blood: report on extra-judicial killings and disappearances' September 2008. (The cry of blood: report on extrajudicial killings and disappearances).

¹²⁶ P Alston 'Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions', 26 May 2009, A/HRC/11/2/Add.6, p36– 43 (Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions), Office of High Commissioner for Human Rights, Kenya homepage <http://www.ohchr.org/en/countries/AfricaRegion/Pages/KEIndex.aspx> (30 November 2013)

¹²⁷ *Republic v Ahmed Mohammed Omar & 5 others* [2012] eKLR.

¹²⁸ 'Kenyan police execute three men point blank range' Daily Nation, 19 January 2011, <http://www.nation.co.ke/news/Kenyan-police-execute-three-men-point-blank/-/1056/1092592/-/ovx93e/-/index.html> (20 July 2014).

¹²⁹ Open Society Justice Initiative 'We're tired of taking you to court: human rights abuses in Kenya by the Anti-Terrorism Police Unit' 2013, <http://www.opensocietyfoundations.org/sites/default/files/human-rights-abuses-by-kenya-atpu-20140220.pdf> (20 July 2014) (We are tired of taking you court).

¹³⁰ 'Were five Nyeri youths executed over terror links?' Standard Digital News, 6 May 2014, <http://www.standardmedia.co.ke/the-counties/article/2000111066/were-five-nyeri-youths-executed-over-terror-links> (1 August 2014).

on Human Rights report on the extrajudicial killings of suspected Mungiki members named 20 individual police officers.¹³¹ However, there is no documented evidence of any of these officers having been investigated and prosecuted. On other hand, six of the police officers who killed seven taxi drivers in March 2010 were in December 2012 convicted of murder and sentenced to death.¹³² However, the officers were in July 2014 acquitted of the murder charges on appeal.¹³³ With reference to the April 2014 police killings the Director of Public Prosecutions in July 2014 ordered the arrest and prosecution of police officers implicated in the killings of the five youths.¹³⁴ Notably, the directive by the Director of Public Prosecutions was issued following a complaint by IMLU.¹³⁵ On the shooting of the five suspects in January 2011, the implicated police officers were interdicted in January 2011 but later reinstated.¹³⁶ There is no documented evidence of any prosecution. On extrajudicial killings conducted in the context of terrorism, the government in 2012 constituted a multi-agency task force comprising of the Kenya National Commission on Human Rights, Independent Policing Authority, Law Society of Kenya, the National Police Service and the Director of Public Prosecutions to investigate the killing of one Muslim cleric linked to terrorism.¹³⁷ In August 2013, the task force submitted its report indicating that the killers of the cleric could not be identified due to lack of evidence.¹³⁸ The task force recommended initiating of a public inquest to gather evidence from the public on persons suspected to have been involved in the killing of the cleric.¹³⁹ As of October 2015, the final report of the task force has not been released to the public. The public inquest was completed in October 2015 and absolved the police of any blame in the killing.¹⁴⁰

The recommendations on investigation and prosecution of perpetrators of extra-judicial killing have therefore not been implemented as of October 2015.

On disbandment of police death squads, although the National Police Service has continually denied the existence of any death squads, other sources point to their existence. For instance, in February 2009 the Minister in charge of police affairs admitted to the prior existence of *Kwekwe* squad which he indicated had been disbanded.¹⁴¹ Credible sources

¹³¹ The cry of blood (n 125 above) 75-76.

¹³² *Republic v Ahmed Mohamed Omar & 5 others* [2012] eKLR.

¹³³ *Ahmed Mohammed Omar v Republic* [2014] eKLR.

¹³⁴ 'DPP Keriako Tobiko orders action on police linked to execution of five youth' 18 July 2014, http://www.standardmedia.co.ke/mobile/?articleID=2000128625&story_title=dpp-keriako-tobiko-orders-action-on-police-linked-to-execution-of-five-youth (1 August 2014).

¹³⁵ As above.

¹³⁶ 'Three officers interdicted over Nairobi killings' Daily Nation, 20 January 2011, <http://www.nation.co.ke/News/-/1056/1092820/-/11ffr7wz/-/index.html> (20 July 2014).

¹³⁷ Office of the Director of Public Prosecutions, press releases, <http://www.odpp.go.ke/index.php/2012-06-04-08-14-17/press-release/finish/10-press-release/58-press-release-of-task-force-on-rogo-murder> (1 August 2014).

¹³⁸ 'Muslim cleric Sheikh About Rogo murder inquiry fails to identify drive-by hit men' Standard Digital News 27 August 2013, <http://www.standardmedia.co.ke/print/2000092003/rogo-murder-inquiry-fails-to-identify-drive-by-hit-men> (20 July 2014).

¹³⁹ 'DPP Tobiko orders inquest into cleric Rogo's murder' The Star 27 August 2013 4.

¹⁴⁰ 'Inquest clears police over the killing of Sheikh About Rogo' 22 October 2015, <http://www.nation.co.ke/counties/mombasa/Rogo-killing-inquest/-/1954178/2924780/-/nf5gfe/-/index.html> (accessed 25 October 2015).

¹⁴¹ Parliament of Kenya National Assembly official report, Hansard, 18 February 2009, <http://www.parliament.go.ke/plone/archive/archive-10th-Parliament/hansards/official-records-18.02.09p/view> (1 August 2014).

point to the existence of other police death squads such as *alfa romeo* and the *flying squad*.¹⁴² The existence and disbandment of police death squads remains shrouded in secrecy, and there is no evidence of any report made to Parliament on the disbandment of the death squads as recommended. The *flying squad* was in existence as of July 2014 illustrated by media reports on the squad's extrajudicial killings.¹⁴³ Further, the Anti-terrorism police unit, which was established in 2003 to combat terrorism in Kenya, has also been associated with extrajudicial killings.¹⁴⁴

Parliament in February 2009 debated the issue of extrajudicial killings by the police following a private members motion. Notably, these proceedings were held in camera. Although, the debate occurred during the visit of the Special Rapporteur on extrajudicial, summary and arbitrary executions, no specific reference was made to the Special Rapporteur's visit. Nonetheless, in view of the fact that the Special Rapporteur held meetings with the Parliamentary Committees on foreign affairs, internal security, justice and outlawed organisations,¹⁴⁵ it is reasonable to link the debate to the Rapporteur's visit. In September 2010 Parliament initiated investigations into alleged extrajudicial killings by the police in various parts of the country following parliamentary questions on measures taken by the Executive to address the extrajudicial killings.¹⁴⁶ The parliamentary investigation concluded that the police were culpable and recommended that the police commence investigations and prosecution of officers found to be responsible.¹⁴⁷ However, there is no record of any prosecutions that have been initiated in the particular cases except in one case for which prosecution was on-going at the time of the parliamentary inquiry.¹⁴⁸ The recommendation on disbandment of police killing squads has therefore not been implemented.

On regulating the law on use of firearms by police officers, the Kenya Police Act, repealed in 2011, vested broad and unchecked discretion in police officers in regard to use firearms. The Act allowed police officers to use firearms to prevent the escape of a person in lawful custody or aiding escape of a person in custody or preventing lawful arrest.¹⁴⁹

The National Police Service Act, 2011 sets out a strict regime for the use of firearms by police officers. First, it makes the use of firearms exceptional and only to save life or in self

¹⁴²Open Society Foundations 'Extrajudicial killings in Kenya' 31 January 2011,

<http://www.opensocietyfoundations.org/voices/extrajudicial-killings-kenya> (1 August 2014).

¹⁴³ 'Police kill four suspected gangsters in botched robbery along Thika Road, Nairobi' Standard Digital, 16 July 2014, <http://www.standardmedia.co.ke/thecounties/article/2000128401/police-kill-four-suspected-gangsters-in-botched-robbery> (1 August 2014); 'Mombasa police kill three suspected robbers' Standard Digital News, 31 July 2014, http://www.standardmedia.co.ke/m/?articleID=2000129996&story_title=Mombasa-police-kill-three-suspected-robbers (1 August 2014); 'Flying squad kills three in Ngong raid' The Star, 17 December 2013, <http://www.the-star.co.ke/news/article-147574/flying-squad-kills-three-ngong-raid> (1 August 2014).

¹⁴⁴ We are tired of taking you to court (n 129 above).

¹⁴⁵ Report of the Special Rapporteur on extrajudicial, summary and arbitrary executions, mission to Kenya 16-25 February 2009, 35.

¹⁴⁶Parliament of Kenya National Assembly official report 18 January 2011, 36-51 <http://www.parliament.go.ke/plone/archive/archive-10th-Parliament/hansards/official-report-18.01.11p/view> (30 November 2013); National Assembly official report, 2 February 2011, 33-35 <http://www.parliament.go.ke/plone/archive/archive-10th-Parliament/hansards/official-report-2.02.11p/view> (30 November 2013).

¹⁴⁷ As above.

¹⁴⁸ *Republic v Ahmed Mohammed Omar & 5 others* [2012] eKLR.

¹⁴⁹ Kenya Police Act (Repealed) section 28; Kenya Police Standing Order 51.

defence or defence of another person against imminent threat of life or serious injury.¹⁵⁰ Second, the Act requires police officers to report any use of a firearm even when it does not result in injury.¹⁵¹ Third, where use of a firearm causes death, serious injury or other grave consequences, the Act imposes a duty to report the superior of the responsible officer and to the Independent Policing Authority for investigations.¹⁵² Fourth, the Act holds superiors accountable by requiring them to prevent the unlawful use of firearms and when it occurs, to report to Independent Policing Authority promptly and to the Inspector General of Police.¹⁵³

These provisions were however amended in April 2014, to expand the grounds for lawful use of force to include protection of property, preventing a person charged with committing a felony from escaping, or preventing a person from rescuing or assisting another in lawful custody to escape.¹⁵⁴ Notably, Truth Justice and Reconciliation Report specifically recommended that Standing Order 51 which allows use of firearms to protect property be repealed.¹⁵⁵

In practice, unlawful use of firearms by police officers in Kenya is prevalent and adherence to standards on use of firearms is wanting. The Independent Medico-Legal Unit in June 2014 released a study on gun-related deaths in Kenya between 2009 and 2013 in five urban centres in Kenya. The findings indicate that of the 1,873 documented deaths, 67% of the deaths occurred in the context of law enforcement interventions.¹⁵⁶ The reasons for police shooting were not indicated in 65% of the cases while in 60% of the cases the circumstances of the police use of firearms were not recorded.¹⁵⁷ In addition there is lack of political will in regulating police use of firearms in Kenya which is demonstrated by the April 2014 amendments to the National Police Service Act. These amendments reversed the constitutional and the legislative gains made in 2011. Further to this, public utterances by the senior security officials point to a proclivity to a shoot to kill policy. For instance in September 2013, the Cabinet Secretary in charge of police affairs and the Inspector General of Police directed police officers to shoot and kill armed criminals, and specifically not to be afraid of human rights advocates or extrajudicial killings.¹⁵⁸ Similarly, the Inspector General of Police in August 2013 directed police officers to use firearms if they are threatened by the public.¹⁵⁹ The recommendation has therefore not been implemented as of October 2015.

On enactment of the National Coroner's Service Bill and prompt establishment of the independent examiner's service, the Bill which was finalised in 2010, but has not yet been published for Parliamentary debate as of October 2015. Instructively the Bill was as an

¹⁵⁰ National Police Service Act of 2011, sixth schedule B & C.

¹⁵¹ As above

¹⁵² As above.

¹⁵³ As above.

¹⁵⁴ National Police Service (Amendment) Act, 2014, section 55.

¹⁵⁵ Truth Justice and Reconciliation report, volume IIA.

¹⁵⁶ Independent Medico-Legal Unit 'Guns: our security, our dilemma! enhancing police accountability for police use of firearms' June 2014 (on file with author).

¹⁵⁷ As above.

¹⁵⁸ W Oketch 'Interior Cabinet Secretary Joseph ole Lenku, Inspector General of Police David Kimaiyo declare war on criminals' Standard Digital, 14 September 2013, <http://www.standardmedia.co.ke/?articleID=2000093494> (2 August 2014).

¹⁵⁹ 'Police get shoot to kill orders' Daily Nation 14 September 2013, <http://mobile.nation.co.ke/News/Police+get+shoot+to+kill+orders/-/1950946/1991994/-/format/xhtml/-/61mc2gz/-/index.html> (2 August 2014).

initiative by non-state actors and submitted to the Attorney General in 2010.¹⁶⁰ The Bill provides for independent investigation of deaths resulting from violent crimes, extrajudicial killings and deaths occurring in police or prison custody.¹⁶¹ The recommendation has therefore not been implemented as of October 2015.

In regard to addressing arbitrary and unlawful police arrests, although the Kenyan Criminal Procedure Code empowers the police to arrest persons upon reasonable suspicion of having committed a crime,¹⁶² evidence of practice reveals gross abuse of this power. A 2013 baseline survey on policing standards and gaps in Kenya conducted by Independent Policing Authority indicated that 30% of the respondents had in 2012 experienced police misconduct in the form of arrest or threat of arrest, bribery, falsification of evidence or assault.¹⁶³ The Constitution, 2010 contains comprehensive safeguards against arbitrary and unlawful arrest by the police. First, it guarantees the right to freedom of liberty and security of the persons including the right not to be deprived of freedom arbitrarily.¹⁶⁴ Second, it guarantees the right of an arrested person to be promptly informed of the reason for the arrest, allowed to communicate to an advocate or other persons and to be brought before court as soon as practicable but not later than 24 hours.¹⁶⁵ The National Police Service Act ambiguously provides that police arrests should be conducted in line with the constitutional provisions.¹⁶⁶ The High Court has in one instance ordered a police officer to pay compensation for unlawful arrest, failure to inform the victim of her right to communicate to an advocate and failure to arraign the victim in court within 24 hours.¹⁶⁷

Nonetheless, arbitrary and unlawful arrests remain rampant in Kenya particularly in the context of counter-terrorism measures.¹⁶⁸ This points to the broader debate on curtailing individual liberties in light of human security in the war against terrorism. The Constitution, 2010 guarantees freedom and security of the person,¹⁶⁹ which essentially restricts the power of the state to oppress individuals through arbitrary arrests and detention. The recommendation is therefore partially implemented through the constitution review process which enshrines in the Constitution clear safeguards against unlawful and arbitrary arrests.

2.5 Police reforms

- (i) Establish an independent and credible police oversight authority (SR TOT 1999, HRC Committee 2005, SR TOT 2010, UPR 2010); (ii) ensure sufficient funding and

¹⁶⁰ Interview with A Kamau, Programme Officer, Independent Medico-Legal Unit, Kenya, Nairobi, 17 January 2015.

¹⁶¹ National Coroner's Service Bill, 2013.

¹⁶² Criminal Procedure Code section 29.

¹⁶³ Independent Policing Oversight Authority, 'Baseline survey on policing standards and gaps in Kenya', 2013, 7, http://ipoa.go.ke/images/downloads/IPOA%20Baseline%20Survey%20Report_06.09.2013_revised2.pdf (20 December 2013).

¹⁶⁴ Constitution 2010, article 29 (a).

¹⁶⁵ Constitution, 2010 Article 49 (1).

¹⁶⁶ National Police Service Act section 59 (2) & fifth schedule.

¹⁶⁷ *Purity Kanana Kinoti v Attorney General* [2011] eKLR.

¹⁶⁸ Human Rights Watch 'Kenya: Killings, disappearances by anti-terror police' August 2014, <http://www.hrw.org/news/2014/08/18/kenya-killings-disappearances-anti-terror-police> (18 August 2014) ; Open Society Justice Initiative 'We are tired of taking you to court' November 2013, <http://www.opensocietyfoundations.org/sites/default/files/tired-taking-you-court-11-19-2013.pdf> (18 August 2014).

¹⁶⁹ Constitution, 2010 article 29.

resourcing for the Independent Policing Oversight Authority (CAT Committee 2013); (iii) safeguard the Independent Policing Oversight Authority mandate to report deaths caused by the police (CAT Committee 2013); (iv) create an autonomous internal affairs unit within the police to investigate complaints against the police (SR EJK 2009); (v) conduct vetting of all police officers including establishment of the National Police Service Commission (SR EJK 2009);(vi) ensure sufficient funding for the National Police Service Commission and that it prioritises the use of vetting where alleged offenders are suspended from duty pending investigation and prosecuted (CAT Committee 2013); (vii) ensure adequate training and equipping of police officers for their duties (CAT Committee 2013); (viii) improve the terms and conditions of service of police officers to put them in the same level as other security forces (CAT Committee 2013).

Prior to 2008 there were no specifically designated mechanisms for police oversight. Internally, police oversight was through the complaints procedure provided for in the Force Standing Orders and the Police Manual.¹⁷⁰ Under this complaints system, complaints were considered by fellow police officers and a finding of guilty could result in removal from the police force.¹⁷¹ The shortcomings of this internal oversight are illustrated by the low levels of conviction or action taken against police officers. For instance, only 5% of police officers implicated in murder cases were punished in 2005 while those implicated in other human rights violations were transferred to new duty stations or retired.¹⁷² External oversight could be exercised through the Attorney General who had power to open inquests into unlawful killings by the police.¹⁷³ In September 2008, the Police Oversight Board was established to receive and evaluate complaints from the public against the police.¹⁷⁴ However, the Police Oversight Board suffered a legitimacy crisis primarily because it was established through Executive fiat hence its independence was questionable. In May 2009, the Kenya Task Force on Police Reforms was created with a wide mandate which included recommending comprehensive reforms on police accountability with a special focus on Police Service Commission and Independent Policing Oversight Authority.¹⁷⁵ The history of the establishment of the Police Reforms Task Force traces to the 2008 post-election violence political settlement in which police accountability constituted part of the proposed legal and institutional reforms.¹⁷⁶ The Task Force on Police Reforms drafted three new laws on policing in Kenya which included the Independent Policing Oversight Authority Act.¹⁷⁷

¹⁷⁰ African Police Civilian Oversight Forum *An audit of police oversight in Africa* (2008) 35.

¹⁷¹ As above.

¹⁷² As above.

¹⁷³ As above.

¹⁷⁴ Kenya Gazette 8144, 4 September 2008, Police Oversight Board.

¹⁷⁵ Kenya Gazette Notice no. 4790 of 9 May 2009, Appointment of Task Force on Police Reforms.

¹⁷⁶ Kenya National Dialogue and Reconciliation 'Annotated agenda for the Kenya dialogue and reconciliation' 1 February 2008, <http://www.dialoguekenya.org/Agreements/1%20February%202008%20-Annotated%20Agenda%20for%20the%20Kenya%20Dialogue%20and%20Reconciliation.pdf> (13 December 2013). Specifically, one of the Commissions established as part of the dialogue and reconciliation – the Commission of Inquiry on post-election violence (Waki commission) recommended broad reforms on policing in Kenya.

¹⁷⁷ Commonwealth Human Rights Initiative 'A force for good?: improving the police in Kenya, Tanzania and Uganda' 2014, 3. (Commonwealth Human Rights Initiative).

The Independent Policing Oversight Authority (Independent Policing Authority) was established in November 2011 and operationalised in June 2012.¹⁷⁸ It is mandated to investigate complaints of police misconduct and recommend appropriate action, monitor police places of detention and ensure independent oversight in the handling of public complaints by the National Police Service.¹⁷⁹ Additionally, the Independent Policing Authority is required to investigate all deaths and serious injury in police custody or which occur as a result of police action.¹⁸⁰ To provide independent oversight, the Independent Policing Authority is vested with powers to request documents from the police, enter premises with a warrant, interview and take statements and seize or remove objects.¹⁸¹ Upon completion of an investigation, the Independent Policing Authority may recommend prosecution, disciplinary action or improvement of processes to prevent police misconduct.¹⁸² Further, the Independent Policing Authority has power to apply to court for enforcement of its recommendations.¹⁸³ The work of the Independent Policing Authority is overseen by an independent board appointed through a transparent and competitive process.¹⁸⁴

In practice, the Independent Policing Authority has been less efficient than expected in providing civilian oversight on the police. As of October 2015, the Independent Policing Authority has released two performance reports. According to the reports covering January - December 2013, the Independent Policing Authority has received 1,090 complaints out of which only 27 are under investigation.¹⁸⁵ Of the 114 notifications of extrajudicial killings and deaths in police custody received in 2013, no police officers have been prosecuted, although it is acknowledged that the prosecutorial function vests in the Director of Public Prosecutions.¹⁸⁶ Human rights advocates in February 2014 criticised the Independent Policing Authority for its wanting performance and attributed its poor performance to failure to fully apply its powers.¹⁸⁷ Nonetheless, the poor performance of the Independent Policing Authority points to lack of political will by the government and a negative police culture for the following reasons. First, the Independent Policing Authority is not anchored in the Constitution, 2010 and is instead established through an Act of Parliament making its functions liable to Parliamentary amendments. Instructively, the Police Reforms Task Force had proposed that the Independent Policing Authority be anchored in the national constitution.¹⁸⁸

¹⁷⁸ Independent Policing Oversight Authority, www.ipoa.go.ke (13 December 2013).

¹⁷⁹ Independent Policing Oversight Authority Act section 6.

¹⁸⁰ As above.

¹⁸¹ Independent Policing Oversight Authority Act section 7.

¹⁸² Independent Policing Oversight Authority section

¹⁸³ Independent Policing Oversight Authority section

¹⁸⁴ Independent Policing Oversight Authority section 8-11.

¹⁸⁵ Independent Policing Oversight Authority 'Performance report January – June 2013' 2013, http://www.ipoa.go.ke/images/downloads/performance_report.pdf (undated) (2 August 2014); Independence Policing Oversight Authority 'Performance report for six months ended December 2013' 2 April 2014, 10, http://www.ipoa.go.ke/images/downloads/IPOA_Performance_Report_Jul-Dec_2013.pdf (2 August 2014).

¹⁸⁶ Independent Policing Oversight Authority 'Performance report for six months ended December 2013' April 2014, 10, http://www.ipoa.go.ke/downloads/images/downloads/IPOA_Performance_Report_Jul-Dec_2013.pdf (2 August 2014).

¹⁸⁷ 'Is the Independent Policing Oversight Authority the new toothless bulldog in town?' Standard Digital Media, 22 February 2014, http://37.188.98.230/?articleID=2000105207&story_title=is-the-independent-policing-oversight-authority-ipoa-the-new-toothless-bulldog-in-town&pageNo=1 (2 August 2014).

¹⁸⁸ Commonwealth Human Rights Initiative (n 177 above) 3.

Second, resource allocation to the Independent Policing Authority has been insufficient. For instance, in the 2013/14 financial year Parliament allocated the Independent Policing Authority Kshs 154 million against a budgetary request of Kshs 609 million.¹⁸⁹ Similarly, in the 2014/15 financial year, the Independent Policing Authority was allocated Kshs 215 million.¹⁹⁰ Third, in terms of safeguarding the Independent Policing Authority mandate, Parliament in April 2014 passed amendments that expanded the scope of lawful use of firearms by police officers to include protection of property and preventing escape from lawful custody thus significantly reducing the Independent Policing Authority oversight role in police accountability.

On the negative police culture, the Independent Policing Authority has raised complaints on alleged interference with and obstruction of its investigations by the police. For instance, the Independent Policing Authority is prosecuting a police officer for failing to obey lawful summons issued to him by the Authority and failure to surrender evidentiary material in a case of extrajudicial killing.¹⁹¹ Instructively, the Inspector General of Police tried to interfere with the case by requiring that the officer be tried *in camera*.¹⁹² Similarly, in August 2014 the Police Service failed to execute a warrant of arrest against a police officer, suspected of extra-judicial killings, as directed by the Director of Public Prosecutions.¹⁹³ The Director of Public Prosecutions in September 2014 reprimanded the Police Service for extrajudicial killings and frustrating investigations in cases involving police officers.¹⁹⁴

On creation of an autonomous internal affairs unit within the police to investigate complaints against the police, the National Police Service Act establishes the Internal Affairs Unit as a separate and autonomous unit to receive and investigate complaints of police misconduct.¹⁹⁵ The Unit is also empowered to investigate complaints if directed by a senior officer, the Inspector General or the Independent Policing Authority.¹⁹⁶ The Internal Affairs Unit reports to the Deputy Inspector General who in turn reports to the Inspector General of Police.¹⁹⁷ To ensure effective investigations, the Independent Policing Authority is mandated to monitor the performance and investigations on the Unit.¹⁹⁸ The Unit was set up in August 2013 and

¹⁸⁹ Independent Policing Oversight Authority 'Performance report for six months ended December 2013 'April 2014, 19, http://www.ipoa.go.ke/downloads/images/downloads/IPOA_Performance_Report_Jul-Dec_2013.pdf (2 August 2014).

¹⁹⁰ 'State bodies want more cash in upcoming year' Standard Digital News, 26 May 2014, http://www.standardmedia.co.ke/article/2000122407/state-bodies-want-more-cash-allocation-in-upcoming-year?articleID=2000122407&story_title=state-bodies-want-more-cash-allocation-in-upcoming-year&pageNo=1 (2 August 2014).

¹⁹¹ Independent Policing Authority, media 'Charges against the OCS Pangani Police Station over slum shooting' (undated) <http://www.ipoa.go.ke/ipoa-media/press-releases/207-oversight-authority-releases-report-on-policing-standards-and-gaps-10> (2 August 2014).

¹⁹² As above.

¹⁹³ 'Keriako Tobiko accuses policeman of killing witness' Daily Nation, 3 September 2014, <http://mobile.nation.co.ke/news/DPP-accuses-policeman-of-killing-witness/-/1950946/2440400/-/format/xhtml/-/y30tr2/-/index.html> (accessed 3 September 2014).

¹⁹⁴ As above.

¹⁹⁵ National Police Service Act section 87.

¹⁹⁶ National Police Service Act section 87 (4).

¹⁹⁷ National Police Service Act section 87 (9).

¹⁹⁸ National Police Service Act section 87 (5).

is housed within the National Police Service offices, in contradiction with the National Police Service Act,¹⁹⁹ which requires it to be located separately to secure its autonomy.

The police vetting is provided for in the National Police Service Act as part of the police reforms.²⁰⁰ Practically, each serving police officer was to undergo vetting upon the enactment of the National Police Service Act. The power to conduct the police vetting is vested in the National Police Service Commission.²⁰¹ The process of vetting is provided for by the National Police Service (Vetting) Regulations, 2013.²⁰² The vetting commenced on 17 December 2013 and as of June 2015, the National Police Service Commission has vetted 189 officers of which 165 have been found suitable to continue serving, nine are undergoing further investigations while 15 have been found unsuitable.²⁰³ Notwithstanding, the vetting process has a number shortcomings. First, the process was delayed for over two years despite the National Police Service Act having come into force, perhaps a reflection of lack of commitment by the police to the police reform process. Second, the vetting exercise has been criticised for lack of transparency in the decision making process regarding individual police officers. Illustratively, in February 2014 three independent members of the vetting panel resigned on the grounds that their views were not taken into account in the decisions made.²⁰⁴ Third, the vetting process has been criticised for inclining too heavily on financial integrity at the expense of other vetting criterion and in particular, on human rights violations.²⁰⁵ The police vetting panel has attributed its failure to probe individual police officers human rights records to lack of evidence from the public due to fear of retribution.²⁰⁶ Nonetheless, following the criticism, in May 2014, 12 senior police officers were sacked for violation of human rights, rape, defilement, lack of discipline, bribery and want of financial probity.²⁰⁷ Fourth, police officers who have appealed the unfavourable vetting decisions continue to serve contrary to the Vetting Regulations which provide that such officers should be sent on leave.²⁰⁸ In addition, the vetting process has also been challenged in court by the police officers for not adhering to the constitutional guarantees of fairness and due process. In *Immanuel Okutoyi Masinde and others v the National Police Service Commission & another*, the High Court quashed the decisions of the vetting panel in relation to three senior officers.²⁰⁹

Summarising the analysis on police reforms and accountability, the recommendations relating to the institutional framework such as setting up a credible police oversight,

¹⁹⁹ Personal visit (by the author of this thesis) to the Internal Affairs Unit, Jogoo House, Nairobi, Kenya on 30 July 2014.

²⁰⁰ National Police Service Act section 7 (2).

²⁰¹ As above.

²⁰² Kenya Legal Notice 218 of 16 December 2013.

²⁰³ National Police Service Commission, vetting results, <http://www.npsc.go.ke/index.php/vetting-results> (2 August 2014).

²⁰⁴ 'Kaguthi, Werunga and Sang ditch Johnston Kavuludi's police vetting panel' Standard Digital News, 26 February 2014, <http://www.standardmedia.co.ke/?articleID=2000105546> (2 August 2014).

²⁰⁵ Commonwealth Human Rights Initiative (n 177 above) 17.

²⁰⁶ As above.

²⁰⁷ Standard Digital News 'Kenya: 12 top police officers as NPSC releases vetting results' 29 May 2014, <http://www.standardmedia.co.ke/article/2000122774/shocking-allegations-behind-sacking-of-top-cops/> (20 November 2014).

²⁰⁸ Commonwealth Human Rights Initiative (n 177 above) 17.

²⁰⁹ 2014 [eKLR]

establishing an autonomous internal affairs unit and police vetting are partially implemented through the police reform process which was a central component of the 2008 political settlement of the 2007/08 post-election violence. The police reform process was further spurred by the constitution review process which anchored the institutional framework of the national policing services and the objects and functions of Police Service in Constitution. However, there have been attempts to rollback on the Constitutional gains as evinced by weakening of the Independent Policing Authority through poor funding and narrowing its mandate by broadening the grounds for lawful use of force. Similarly, recommendations on police vetting are partially implemented. Media reports indicate that the delayed police vetting was commenced following personal intervention by the President.²¹⁰ Therefore, the implementation cannot be attributed to the influence of the recommendations on government action.

2.6 Institutional judicial reforms

(i) Take legislative measures to ensure independence of the Judiciary (SR TOT 2000, SR TOT 2007, CAT Committee 2009, UPR 2010, CAT Committee 2013); (ii) take reform measures to address corruption in the Judiciary (HRC Committee 2005, CAT Committee 2009, UPR 2010); (iii) make judicial appointments transparent and merit based (SR EJK 2009); (iv) reform the Judicial Service Commission to make its membership more representative and strengthen its role in appointment, discipline and dismissal of judicial officers (SR EJK 2009); (v) undertake vetting of existing judges to replace them with competent and corruption free appointees (SR EJK 2009); (vi) create a complaints procedure within the Judicial Service Commission to check the conduct of judicial officers (SR EJK 2009).

The independence Constitution of Kenya, 1963 provided a measure of judicial independence by securing the tenure of judges, thus shielding them from executive power and control. In addition, judicial appointments were to be made by the Judicial Service Commission which comprised of the Chief Justice, Attorney General, two judges appointed by the President and the chairperson of the Public Service Commission.²¹¹ The process of removal of a judge required a presidentially appointed tribunal which would recommend removal.²¹² In practice however, a number of judges of the High Court had their terms in office cut short without any regard to the constitutional guarantees on security of tenure.²¹³ In 1988 the Constitutional provisions relating to security of tenure were removed through a Parliamentary amendment but were later reinstated in 1990 following pressure from international aid organisations.²¹⁴ Regardless, these provisions had a number of shortcomings when viewed against the concept of independence of the Judiciary in a broader sense. First, the President alone determined the appointment of members of the removal tribunal. Second, the Constitution

²¹⁰ Standard Digital News 'President Uhuru Kenyatta 'played role in ending impasse on police vetting' 11 November 2013', http://www.standarddigitalworld.co.ke/?articleID=2000097399&story_title=uhuru-played-role-in-ending-impasse-on-officer-vetting (20 November 2014); Standard Digital News 'Vetting gives police reforms major boost' 23 December 2013, <http://www.standardmedia.co.ke/?articleID=2000100676> (20 November 2014).

²¹¹ Constitution, 1963 (Repealed) section 68 (1).

²¹² Constitution, 1963 (Repealed) section 62 (4).

²¹³ JT Gathii 'The dream of judicial security of tenure and the reality of Executive involvement in Kenya's judicial process' 1994, Thoughts on Democracy Series, Issue II; M Mutua 'Justice under siege: the rule of law and judicial subservience in Kenya' (2001) 23 *Human Rights Quarterly*, 96-118.

²¹⁴ Gathii (n 213 above) 12-17; Mutua (n 213 above) 102.

was silent on whether the recommendations of the tribunal were binding on the President and whether such findings were subject to independent review. Third, the provisions only related to judges leaving out magistrates who constitute the bulk of judicial officers in Kenya. Fourth, the Constitution did not guarantee the financial independence of the Judiciary. Fifth, on the Judicial Service Commission, all the members of the Commission were presidential appointees either directly or indirectly since the Chief Justice, the Attorney General and the chair of the Public Service Commission were directly appointed by the President. This further extended the presidential domination over judicial appointments and ultimately the independence of the Judiciary.

The Constitution, 2010 incorporates provisions that insulate the Judiciary from external interference. It contains an explicit declaration on the independence of the Judiciary as the central judicial organ.²¹⁵ The content of this independence is both substantive and functional. Substantive independence in the judicial decision making process only subject to the Constitution and the law, salary and tenure protections and absolute immunity in execution of judicial functions is guaranteed.²¹⁶ Functional independence is guaranteed by vesting judicial authority solely in the courts and tribunals established by or under the Constitution.²¹⁷ The process of appointment of judicial officers is by a non-political process through the Judicial Service Commission which comprises the Chief Justice, three judges, the Attorney General, two lawyers, two representatives of the public appointed by the President and a member of the Public Service Commission.²¹⁸ The Constitution, 2010 also makes provision for removal of judges from office, a procedure which involves the Executive and National Assembly in the case of the Chief Justice and only the Executive for the other judges.²¹⁹ Financial independence of the Judiciary is also safeguarded through the establishment of the Judiciary Fund, administered by the Chief Registrar for the 'administrative expenses of the Judiciary and such other purposes as may be necessary for the discharge of the functions of the Judiciary.'²²⁰

Commentators writing on independence of the judiciary distinguish between *de jure* and *de facto* independence.²²¹ *De jure* independence is defined as judicial independence that

²¹⁵ Article 160 provides: (1) In the exercise of judicial authority, the Judiciary, as constituted in Article 16, shall be subject only to this Constitution and the law and shall not be subject to the control or direction of any person or authority. (2) The office of a judge of a superior court shall not be abolished while there is a substantive holder of office. (3) The remuneration and benefits payable to or in respect of judges shall be a charge on the Consolidated Fund. (4) Subject to Article 168 (6). The remuneration and benefits payable to, or in respect of, a judge shall not be varied to the disadvantage of that judge, and the retirement benefits of a retired judge shall not be varied to the disadvantage of the retired judge during the lifetime of that retired judge. (5) A member of the Judiciary is not liable in an action or suit in respect of anything done or omitted to be done in good faith in the lawful performance of a judicial function.

²¹⁶ As above.

²¹⁷ Article 159 (1) provides: Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution.

²¹⁸ Constitution of Kenya 2010, Articles 171 & 172.

²¹⁹ Constitution of Kenya 2010, Article 168.

²²⁰ Constitution of Kenya 2010, Article 173.

²²¹ J Melton 'Does de jure juridical independence really matter? a re-evaluation of explanations for judicial independence' (2013) http://www.ucl.ac.uk/~uctqjm0/Files/gjinston_judicialindependence.pdf (15 November 2013); LP Feld & S Voight 'Economic growth and judicial independence: cross country evidence using a new set of indicators' (2003) CESifo Working Paper No. 906 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=395403 (15 November 2013).

derives from the laws such as the Constitution while *de facto* independence refers to actual independence enjoyed by judges and the influence of their decisions on government behaviour.²²² With reference to *de facto* independence, the assessment is mixed. The positive pointers of *de facto* independence include progressive increase of budgetary allocation for the Judiciary and delinked the budget from the Executive.²²³ Additionally, a comprehensive review of pay and benefits for judicial staff was undertaken to improve their terms of service.²²⁴ However, it is an open question whether decisions of judges influence the other two arms of government. For instance, in November 2013, the National Assembly disregarded a court order barring Parliamentary debate on removal of members of the Judicial Service Commission and recommended to the President establishment of a tribunal initiating removal of six members of the Judicial Service Commission.²²⁵ Equally, the Executive disregarded the court order and acted on the recommendations of the National Assembly by suspending the six Judicial Service Commission members and setting up a tribunal to initiate their removal.²²⁶ Additionally, execution of court orders by the Executive remains a challenge. For instance, in 2014 the Judiciary issued a series of warrants of arrest for the Principal Secretary in the Office of the President for failure obey court orders relating to payment of compensation in civil claims on human rights violations.²²⁷

On addressing corruption in the Judiciary, a number of both institutional and administrative measures have been put in place to address corruption in the Judiciary. Institutionally, the Constitution provides for vetting of serving judges with a view to ridding the Judiciary of corrupt and inept judicial officers.²²⁸ The vetting of judges is anchored in legislation, which provides for the establishment, powers and functions of the vetting framework, the Judges and Magistrates Vetting Board.²²⁹ The vetting process began in September 2011 and as of August 2015 the Judges and Magistrates Vetting Board had completed vetting of 53 judges out of whom 13 were found unsuitable to continue serving and vetting of 220 magistrates of

²²² Feld & Voight (n 221 above) 1.

²²³ Inaugural Report of the State of the Judiciary and Administration of Justice, 2011, 63-64. The Judiciary budget in 2010/11 was Kenya shillings 3.9 billion, 9.8 billion in 2011/12 and 16.8 billion in 2012/13.

²²⁴ Inaugural Report of the State of the Judiciary and Administration of Justice (n 223 above) 55.

²²⁵ *Judicial Service Commission v Speaker of the National Assembly & Attorney General* petition 518 of 2013; Parliament of Kenya National Assembly official report 7 November 2013 <http://www.parliament.go.ke/plone/national-assembly/business/hansard/thursday-7th-november-2013/view> (18 November 2013).

²²⁶ Kenya Gazette Notice No. 15094 29 November 2013 Tribunal to investigate the conduct of Mr. Ahmednasir Abdullahi, Rev. Dr. Samuel Kobia, Prof. Christine Mango, Justice Mohamed Warsame, Ms. Emily Ominde, Ms Florence Mwangangi members of the Judicial Service Commissioner.

²²⁷ 'Court orders arrest of interior PS Mutea Iringo' Standard Digital News, 5 February 2014, <http://www.standardmedia.co.ke/?articleID=2000103966> (2 August 2014); 'Judge issues fresh arrest warrant against Interior PS Mutea Iringo' Standard Digital News 4 July 2014, <http://mobile.nation.co.ke/news/Judge-issues-fresh-arrest-warrant-against-Mutea-Iringo/-/1950946/2371614/-/format/xhtml/-/uii3hq/-/index.html> (2 August 2014).

²²⁸ Sixth Schedule section 23 (1) provides that: Within one year after the effective date, Parliament shall enact legislation, which shall operate despite Article 160, 167 and 168, establishing mechanisms and procedures for vetting suitability of all judges and magistrates who were in office on the effective date to continue to serve in accordance with the values and principles set out in Articles 10 and 59.

²²⁹ The Vetting of Judges and Magistrates Act 2 of 2011.

whom 28 were found unsuitable.²³⁰ In the constitution-making process, the provisions on vetting of all serving judges and magistrates were contentious. Initial draft constitutions of September 2002 and March 2004 provided for vetting of all serving judges.²³¹ The draft constitution published in 2005 and disapproved in the 2005 referendum did not provide for vetting of judges.²³² During the 2009/10 finalisation of the constitution making process, the Committee of Experts following submissions from the public and the Judiciary on judicial reforms reinstated the provisions requiring all judges and magistrates to be vetted.²³³

Administratively, judicial power that was previously centralized in the office of the Chief Justice and the Registrar has been decentralized with the Supreme Court and the Courts of Appeal having their own presidents while the High Court has a principal judge at the top.²³⁴ An ombudsperson's office has also been established within the Judiciary with a primary mandate to deal with public complaints against staff of the Judiciary.²³⁵ Little is however known of the action taken on the complaints received by the judicial ombudsperson. The Judicial Service Commission has in place a Code of Conduct and Ethics for judicial officers which sets up a standing committee to handle enforcement and disciplinary issues.²³⁶ Further, the Judiciary has harnessed on technology by digitizing case files and court records to minimize incidences of file disappearances and to facilitate monitoring and tracking of cases with a view to reducing corrupt practices.²³⁷

The above measures notwithstanding, recent surveys on corruption rank the Judiciary among the most corrupt public institutions in Kenya. The 2013 East African Bribery Index ranked the Judiciary third among government departments most affected by corruption after police and land services.²³⁸ Sequential East African Bribery Index reports for 2012 and 2011 rank the Judiciary as the third and eighth most corrupt institution in Kenya.²³⁹ Similarly, the

²³⁰ Judges and Magistrates Vetting Board 'Fourteenth announcement determination on suitability' 1 http://www.jmvb.or.ke/downloads/JMVB%20Downloads/JMVB%20Reports/9th_announcement_of_the_board.pdf (16 June 2015).

²³¹ See Draft constitution of Kenya, Bomas draft, 15 March 2004, clause 309 schedule 7 sub clause 13; Constitution of Kenya Review Commission draft constitution, 27 September 2002, schedule 7 sub clause 10.

²³² See The proposed new constitution of Kenya, 2005, 22 August 2005, article 288 schedule which omits provisions on vetting of judges and magistrates.

²³³ Committee of Experts on the Constitutional Review 'verbatim record of the proceedings of the Committee of Experts consultative meeting with the Judiciary, ICJ, LSK, FIDA, KMJA and KWJA on the Judiciary chapter held on 15 December 2009 at the Hilton Hotel, Nairobi' HAC/1/1/92 (accessed from the Kenya National Archives on 16 October 2014).

²³⁴ Constitution of Kenya, 2010, Articles 163 (1) (a), 164 (2) & 165 (2).

²³⁵ Republic of Kenya, The Judiciary, Office of the Ombudsperson, <http://www.judiciary.go.ke/portal/the-ombudsperson.html> (accessed 18 November 2013).

²³⁶ The Kenyan Judicial Service code of conduct and ethics, <http://kenyalaw.org/kl/index.php?id=1928> (18 November 2013).

²³⁷ W Mutunga 'Progress report on the transformation of the Judiciary the first hundred and twenty days' 19 October 2013, Kenya Law Reports <http://www.kenyalaw.org/Forum/?p=227> (15 November 2013).

²³⁸ The East African Bribery Index 2013, 16 <http://tikenya.org/index.php/more-links/publications/corruption-surveys/east-africa-bribery-index> (accessed 18 November 2013).

²³⁹ The East African Bribery Index 2012, 15-16 <http://tikenya.org/index.php/more-links/publications/corruption-surveys/east-africa-bribery-index> (accessed 18 November 2013); The East African Bribery Index 2011, 10-11 <http://tikenya.org/phocadownload/bribery%20index%20report%202011%20-%20compressed.pdf> (accessed 18 November 2013).

2012 Kenya National Survey on Corruption and Ethics ranks the Judiciary as the ninth most corrupt government institution.²⁴⁰

From the foregoing, the findings relating to judicial reforms are fully implemented mainly through the constitution reform process. The Constitution of Kenya Review Commission Act specifically directed the review process to address issues of accountability, competency, discipline and independence of the Judiciary.²⁴¹ Similarly, during the constitution making process the public expressed the view that the independence of the Judiciary should be entrenched in the national constitution.²⁴² Although, the findings were made as early as 2000 it is unlikely that they would have been implemented without an overhaul of the relevant constitutional provisions, for instance on the composition of the Judicial Service Commission.

2.7 Administration of justice

(i) Establish an independent witness protection unit (SR EJK 2009, UPR 2010; (ii) establish a National Legal Aid scheme accompanied by setting up the office of the public defender (SR TOT 1999, HRC Committee 2005, CAT Committee 2009, CAT Committee 2013) (iii) enact the Victim of Offences Bill (CAT 2013); (iv) reduce delays in civil compensation cases (CAT Committee 2013); (v) repeal the one year limitation on claims of tort against Government officials (CAT Committee 2013); (vi) delink the power to control public prosecutions from the Executive (SR EJK 2009).

The necessity for witness protection in Kenya can be traced to the difficulties experienced in investigating and prosecuting cases of corruption, organized criminal gangs and militia and ethnic clashes.²⁴³ Prior to the enactment of the Witness Protection Unit in Kenya, protection of witnesses was through *ad hoc* measures instituted before and during the trial.²⁴⁴ In practice, the prosecution would make an application for court ordered police protection which was often not enforced due to lack of an adequate legal framework.²⁴⁵

The Kenya Witness Protection Unit was set up in March 2009 pursuant to the Witness Protection Act, 2006 which became operational in September 2008.²⁴⁶ The Witness Protection Unit was under the Office of the Attorney General and staffed by personnel seconded from the Office of the Attorney General, police, intelligence services, immigration services and the provincial administration.²⁴⁷ The Unit lacked independence for a number of reasons. First, the Witness Protection Act vested the discretion to determine admission to the witness protection programme solely in the Attorney General.²⁴⁸ This undermined the

²⁴⁰ National Survey on Corruption and Ethics 2012 ,27 Ethics and Anti-Corruption Commission, Publications, Surveys, <http://www.eacc.go.ke/default.asp?pageid=21> (accessed 18 November 2013).

²⁴¹ Constitution of Kenya Review Act section 17 (d) (v) '...examine and make recommendations on the judiciary generally and in particular, the establishment and jurisdiction of the courts, aiming at measures necessary to ensure competence, accountability, efficiency, discipline and independence of the Judiciary.'

²⁴² The final report of the Constitution of Kenya Review Commission (n 4 above) 205-210.

²⁴³ C Mahony 'The justice sector afterthought: witness protection in Africa' 2010, Institute for Security Studies, 116.

²⁴⁴ Mahony (n 243 above) 122.

²⁴⁵ As above.

²⁴⁶ Mahony (n 243 above) 116.

²⁴⁷ As above

²⁴⁸ Witness Protection Act, 2006 (Repealed) section 5.

independence of the Unit particularly because the Attorney General was also in charge of prosecutions in Kenya. Second, the terms of reference and functions of the Unit were provided for in regulations and not enshrined in the Witness Protection Act, 2006. The import is that the functions were subject to manipulation by the Executive. Third, the Unit was staffed by personnel from the Attorney General and security forces resulting to politicization of its mandate and inability to protect witnesses when investigations were against the police. Fourth, the Witness Protection Act, 2006 did not provide for security of tenure for the Unit's director which could result in control of the director by Executive.

In 2010, the Witness Protection Act, 2006 was amended leading to the establishment of an independent and autonomous Witness Protection Agency, vide the Witness Protection (Amendment) Act, 2010, which was launched in August 2011.²⁴⁹ The Witness Protection Agency is mandated to establish and maintain a programme for protection of witnesses and also to determine the type of protection measures to be applied and the criteria for admission to and removal from the programme.²⁵⁰ The independence of the Witness Protection Agency is guaranteed through the following. First, the Witness Protection Agency is established as an independent and autonomous agency.²⁵¹ Second, the power to determine admission to the witness protection programme vests in the Director of the Agency,²⁵² and provision is made for a non-admission review mechanism.²⁵³ Third, the amended Act creates an advisory board mandated to approve the Agency's budget and provide direction on the exercise of its powers.²⁵⁴ Fourth, the amended Act provides for security of tenure of the Agency's director.²⁵⁵

However, while the Witness Protection Agency has functional independence, political will to fully support the Agency remains lacking demonstrated by poor allocation of resources. In the 2010/11 financial year, the Witness Protection Agency was allocated Kshs 35 million against a budget request of 1.2 billion Kshs, while in 2011/12 the Agency was allocated 235 million and 196 million in 2013/14.²⁵⁶ Relatedly, the Budget and Appropriations Committee of the National Assembly in its 2013 budget report indicated that prevailing public opinion preferred funds for the Witness Protection Agency to be reallocated to health and security as the Witness Protection Agency was of 'little value'.²⁵⁷ Similarly in the 2014/15 financial year, the Agency was allocated 169 million,²⁵⁸ which is much lower than the amount allocated in the previous financial year.

²⁴⁹ Witness Protection Agency, about us <http://www.wpa.go.ke/about-us/background/who-we-are> (12 December 2013).

²⁵⁰ Witness Protection (Amendment) Act, 2010 section 3C
http://www.kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/WitnessProtectionAct_No16of2006.pdf (12 December 2013).

²⁵¹ Witness Protection (Amendment) Act, 2010 section 3G (1).

²⁵² Witness Protection (Amendment) Act, 2010 section 3C.

²⁵³ Witness Protection (Amendment) Act 2010 section 3P.

²⁵⁴ Witness Protection (Amendment) Act, 2010 section 3U.

²⁵⁵ Witness Protection (Amendment) Act, 2010 section 3E.

²⁵⁶ 'Kenya: Mutula needs 1.5 billion for witness protection' *The Star* 11 June 2011.

²⁵⁷ The National Assembly ' Budget and Appropriations Committee report on estimates of revenue and expenditure for the 2013/14 financial year', 2013, 31
www.parliament.go.ke/plone/senate/news/...of...budget.../file (12 December 2013).

²⁵⁸ The National Treasury, Budget, programme based budget guide, www.treasury.go.ke/.../725-2014-2015-programme (accessed 2 September 2014).

In terms of actual performance, the functions of the Witness Protection Agency remain largely invisible and unknown. While the Agency is required to submit periodic reports to Parliament, there is no requirement for public reports.

The assessment finds that the finding is fully implemented. On the implementation pathway, the Witness Protection was amended with support from experts of the International Criminal Court, the United States and the UN to meet international standards.²⁵⁹ Further, the memorandum, objects and reasons for the amendment Bill indicated the amendments would enable Kenya meet its international obligations under the International Crimes Act, 2009 in relation to protection of witnesses and victims.²⁶⁰ Accordingly, it is reasonable to argue that the establishment of an independent witness protection programme in Kenya was driven by the post-election violence cases and the intervention of the International Criminal Court.

On the establishment of a National Legal Aid scheme including the office of the public defender, legal aid in Kenya has historically been construed as legal representation for accused persons. Illustratively, the repealed Constitution, 1963 only provided for the right to legal representation in the context of the right to a fair trial.²⁶¹ Although the provision implied a right to legal representation, in practice legal representation was provided only in murder cases. Consequently, persons not charged with murder, though charged with capital offences and those making civil claims, had no entitlement to State funded legal representation in Kenya. A government funded National Legal Aid Scheme, the National Legal Aid and Awareness Programme, was established in September 2008 to increase access to justice for the poor, marginalised and vulnerable persons through provision of legal advice and representation, creating legal awareness and paralegal support and training.²⁶² The National Legal Aid and Awareness Programme was operationalized on a pilot basis and in partnership Law Society of Kenya in five court stations.²⁶³ The Programme provides legal representation on both criminal and civil matters including family matters, children issues, murder and robbery with violence charges.²⁶⁴

The Constitution, 2010 guarantees legal aid broadly as an equal rights issue and as access to justice. As an equal rights issue, the Constitution, 2010 sets out the right to fair hearing which provides for an unequivocal right for accused persons to be represented by an advocate, regardless of the gravity of the offence, if substantial injustice would result from lack of legal representation.²⁶⁵ However, the scope of this right is limited to criminal trials, hence it does not extend to civil cases notwithstanding that legal representation is ordinarily required in cases of child maintenance, family disputes, land and employment disputes. Nonetheless, other Constitutional provisions appear to mitigate this situation. First, the Constitution provides for the right to access to justice which binds the state to ensure that all

²⁵⁹ Parliament of Kenya, National Assembly official report, Hansard, 6 April 2010, <http://www.parliament.go.ke/plone/archive/archive-10th-Parliament/hansards/official-records-6.04.10p/view> (21 November 2014).

²⁶⁰ Witness Protection (Amendment) Bill, 2010 memorandum of objects and reasons, 32.

²⁶¹ Constitution, 1963 (repealed) section 77.

²⁶² Government of Kenya, Department of Justice, National Legal Aid and Awareness Programme, <http://justice.go.ke/index.php/programs-commissions/national-legal-awareness-program-naleap> (20 August 2014).

²⁶³ As above.

²⁶⁴ As above.

²⁶⁵ Constitution, 2010 article 50 (2) (h).

persons can access justice and that any fees charged do not impede access.²⁶⁶ Second, the Constitution requires that no fees shall be charged for commencement of constitutional applications to enforce the Bill of Rights.²⁶⁷

To concretise the Constitutional provisions, the Legal Aid Bill, 2015 provides for a qualified right to grant of legal aid for those who cannot afford in matters of criminal, civil and constitutional nature.²⁶⁸ The Bill establishes a National Legal Aid Service to administer the provision of a credible, affordable and accountable legal aid scheme.²⁶⁹ Further, the Bill sets up the Legal Aid Fund which will be applied to provide representation for persons granted legal aid, meeting the costs of legal aid providers and the operational costs of the National Legal Aid Service.²⁷⁰ Eligibility to legal aid is tied to a two part test: (i) of means; and (ii) of merit. An application for review of the legal aid decision should be made to the National Legal Aid Service while a further appeal lies with the High Court.²⁷¹ The Legal Aid Bill, 2015 is as of August 2015 undergoing debate in Parliament.²⁷² The finding relating to the establishment of the national legal aid scheme is partially implemented through the constitution review process, while the aspect of establishing the office of the public defender is not implemented. Although a legal aid scheme, the National Legal Aid and Awareness Programme, was established in 2008, it must be noted that this scheme was not founded on any legal framework and was provided not as a right. The Constitution of Kenya Review Commission, 2002 identified the provisions of the repealed Constitution relating to legal aid as limited since it only provided for legal representation in criminal trials.²⁷³ However, the Constitution, 2010 also contains limited provisions in that legal aid is not expressly provided for. Initial draft constitutions of 2002, 2004, 2005 and 2009 made specific provision for establishment of the office of the public defender alongside the offices of the Attorney General and the Director of Public Prosecutions.²⁷⁴ The office of the public defender was to provide legal representation and legal advice to persons unable to afford legal services.²⁷⁵ This provision was however removed by a Parliamentary committee charged with review of the draft constitution in January 2010. The recommendation is therefore not implemented as of October 2015.

On enactment of the Victims Offences Bill, the Constitution, 2010 directed Parliament to enact legislation for the protection of the rights and welfare of victims of crime.²⁷⁶ This signifies a departure from the traditional criminal law practice which fails to address the rights of victims in criminal prosecution, by providing for enactment of legislation to protect

²⁶⁶ Constitution, 2010 article 48.

²⁶⁷ Constitution 2010 article 22 (3) (c).

²⁶⁸ Legal Aid Bill, 2015 clause 27.

²⁶⁹ Legal Aid Bill, 2015 clause 6.

²⁷⁰ Legal Aid Bill, 2015 clause 21 & 22.

²⁷¹ Legal Aid Bill, 2015 clause 49 & 51.

²⁷² Parliament of Kenya, National Assembly, bill tracker as at 31 July 2015, <http://www.parliament.go.ke/the-national-assembly/house-business/bills-tracker> (accessed 2 August 2015).

²⁷³ Commission for Review of the Constitution of Kenya 'Final report of the Constitution of Kenya Review Commission', 2005, 110.

²⁷⁴ See Constitution of Kenya Review Commission draft Bill, 27 September 2002 clause 210; Draft constitution of Kenya, 15 March 2004 (Bomas draft) clause 204; Proposed new constitution of Kenya, 2005 clause 176; Harmonized draft constitution of Kenya, 2009 clause 195.

²⁷⁵ As above.

²⁷⁶ Constitution, 2010 article 50 (9).

the rights and promote the welfare of victims of crimes. The Victim of Offences Bill, 2013, was passed by Parliament on 27 August 2014. The Bill was tabled in Parliament as a private member Bill in November 2013. The recommendation is therefore fully implemented.

With regard to reducing delays in civil compensation cases, the courts have in the past awarded court ordered compensation for violations of human rights by State agents. For instance, in regard to unlawful police shooting during the 2007/08 post election violence, the High Court awarded one of the victims Kshs five million.²⁷⁷ In *Liza Catherine Wanjiru Mwangi v Attorney General* the victim was in 2010 awarded Kshs seven million for torture by the police flying squad.²⁷⁸ In *Otieno Mak'Onyango v the Attorney General and another*, the applicant was in 2012 awarded Kshs 20 million for arbitrary arrest, unlawful search and detention following the 1982 aborted coup in Kenya.²⁷⁹ However, these cases and many others, the victims have been characterised by delay in effecting payment. For example, a Tanzanian national who was in 2008 awarded Kshs 21 million for inhuman and degrading treatment, false imprisonment and malicious prosecution perpetrated by the police in 1993 is yet to be paid as of October 2015.²⁸⁰ Notably, in July 2014, the petitioner moved to the East African Court of Justice seeking to enforce the court ordered compensation.²⁸¹

In practice, once a court awards compensation against the government, the complaint's advocate draws up a certificate of order to the Attorney General notifying of the court order. The Attorney General is then required to advise the responsible government office, often the Office of the President in cases of human rights violations by law enforcement officers, of its obligation to pay compensation. However, payment is often not made making enforcement of human rights a nullity.

The issue of non-payment or delay in payment of court ordered compensation in civil cases has featured in national debates. In a number of individual cases the accounting officer in the Office of the President has been sued for failure to pay or delay in paying compensation. In 2014, the High Court issued seven warrants of arrest against the accounting officer in the Office of the President for contempt of court specifically failing to appear in court to explain the delay. In June 2014 the Commission on Administrative Justice (Office of the Ombudsman) sued the accounting officer in the Office of the President and the Attorney General for failure to pay compensation in the *Liza Catherine Wanjiru* case.²⁸² The Office of the President in March 2015 paid full compensation to the victim.²⁸³ In July 2014, the Office of the President announced that it would pay all civil compensation cases in tranches in the 2014/15 financial year.²⁸⁴ The recommendation is categorised as partially implemented as of October 2015 since the government has expressly indicated willingness to pay. The

²⁷⁷ High Court of Kenya in Nairobi civil case 196 of 2008, judgement 10 June 2010.

²⁷⁸ [2010] eKLR/ High Court civil case 31/04 of 2007.

²⁷⁹ [2012] eKLR.

²⁸⁰ *James Alfred Koroso v Attorney General* [2008] eKLR. See also *Republic v Attorney General & another ex parte James Alfred Koroso* [2013] eKLR filed in February 2012 seeking to enforce the payment of compensation.

²⁸¹ *James Alfred Koroso v the Hon. Attorney General of the Government of Kenya & the Permanent Secretary Ministry of State for Provincial Administration and Internal Security*, reference no. 12 of 2014.

²⁸² Commission on Administrative Justice 'Ombudsman sues on behalf of torture victim', http://www.ombudsman.go.ke/index.php?option=com_content&view=article&id=189&catid=78&Itemid=496 (20 August 2014).

²⁸³ Interview with O Amollo, Ombudsman, Office of the Ombudsman, Kenya, Nairobi, 1 April 2015.

²⁸⁴ 'Government to pay compensation for torture claims' *Sunday Nation* 27 July 2014 4-5.

assessment suggests that the commitment is as a result of pressure from individuals through litigation and perhaps most pointedly the Office of the Ombudsman.

In relation to repeal of the one year limitation on claims of tort against government officials, the Public Authorities Limitation Act restricts the period within which claims of tort can be filed against the government to one year.²⁸⁵ The import of this provision is that it creates statutory impediments in the prosecution of public officials for human rights violations. The Prevention of Torture Bill, 2011 addresses this by restricting application of limitation of time provisions in other statutes in cases of torture committed by government officials.²⁸⁶ However, other forms of human rights violations besides torture remain subject to the limitation of time provisions.

In the case of *Wachira Weheire v Attorney General*, the High Court took the view that this provision is inconsistent with the Constitution, 2010 as it impedes the rights of victims to seek redress for violation of fundamental rights.²⁸⁷ Although the High Court found the provision inconsistent with the Constitution, 2010, it did not repeal it, deferring rather to Parliament.²⁸⁸ As of October 2015, the provision has not been repealed, thus the finding has not been implemented.

On delinking the power to control public prosecutions from the Attorney General, historically government power to investigate and prosecute crimes was viewed typically as an executive function. Illustratively, the repealed Constitution, 1963 provided for the Attorney General's power to prosecute under executive powers of the government.²⁸⁹ In practice the power to prosecute was exercised by the Director of Public Prosecutions which was a unit in the office of the Attorney General. In this scenario, allegations of human rights violations by the Executive, including the police, presented an inherent conflict of interest since prosecutorial control vested in the Attorney General who was a presidential appointee.

The Constitution, 2010 removed the Executive control over public prosecutions by establishing an independent office of the Director of Public Prosecutions.²⁹⁰ Further, the Constitution, 2010 confers on the Director of Public Prosecutions power exercisable at his/her discretion to institute, take over and continue or discontinue any public prosecution.²⁹¹ In exercise of these powers the Director of Public Prosecutions is not subject to the control or direction of any person or authority.²⁹² Further, to safeguard the prosecutorial powers from abuse, the Director of Public Prosecutions cannot discontinue a prosecution without the permission of the Court.²⁹³ In addition the appointment of the

²⁸⁵ Public Authorities Limitation Act section 3 (1).

²⁸⁶ Prevention of Torture Bill of 2011 clause 25.

²⁸⁷ [2010] eKLR.

²⁸⁸ As above.

²⁸⁹ Constitution 1963 (repealed) section 26.

²⁹⁰ Constitution, 2010 article 157(1).

²⁹¹ Constitution, 2010 article 157 (6).

²⁹² Constitution, 2010 article 157 (10).

²⁹³ Constitution, 2010 article 157 (8): 'The Director of Public Prosecutions may not discontinue a prosecution without the permission of the court.'

Director of Public Prosecution is through an open and competitive process and enjoys security of tenure.²⁹⁴

The recommendation is therefore fully implemented through the constitution making process. Notably, delegates at the constitution review process recommended separation of the prosecutorial functions from the office of the Attorney General through creation of an independent and constitutional office of the Director of Public Prosecutions.²⁹⁵

2.8 Rights of detained persons and prison reform

(i) Ensure that the Persons Deprived of Liberty Bill 2012 contains all the legal safeguards before tabling in Parliament (CAT Committee 2013); (ii) take measures to bring the conditions of detention in line with the UN Standard Rules for the Treatment of Prisoners (HRC Committee 1981; CAT Committee 2009); (iii) ensure that all persons detained are afforded in practice fundamental legal safeguards during detention such as right to a lawyer, independent medical examination and to notify a relative (HRC Committee 2005, CAT Committee 2009, CAT Committee 2013); (iv) guarantee the right of detainees to be treated humanely and with dignity that is right to live in hygienic conditions, health care and adequate food (HRC Committee 2005, CAT Committee 2009); (v) ensure victims alleging abuse in places of detention can complain to an independent and impartial institution (CAT Committee 2013); (vi) allow inspection of detention facilities by the Kenya National Commission on Human Rights (SR TOT 1999, HRC Committee 2005, CAT Committee 2009); (vii) strengthen judicial supervision of places of detention (SR TOT 1997, SR TOT 2007, CAT Committee 2009); (viii) publish Kenya National Commission on Human Rights reports on visits to places of detention (SR TOT 2000, SR TOT 2007, CAT 2013); (ix) reform the current bail system to make reasonable and affordable to reduce pre-trial detention (CAT Committee 2009); (x) increase judicial capacity and review the criminal justice system to reduce pre-trial detention (CAT Committee 2013); (xi) enforce relevant provisions on alternative non-custodial measures to address over-crowding in prisons (CAT Committee 2009, CAT Committee 2013); (xii) ensure availability of adequate health facilities in all prisons by increasing the number of medical personnel (CAT Committee 2009); (xiii) Adopt the draft correctional policy (CAT Committee 2013).

Kenya's prison population as of August 2015 stood at 57,805 prisoners, out of whom 23,580 convicted prisoners while 34,225 were pre-trial detainees,²⁹⁶ against a maximum proposed prison capacity is 25,000.²⁹⁷ In addition, the state of Kenyan prisons is chronically inconsistent with human rights standards. The Kenya National Commission on Human Rights Annual Report for 2010/11 indicated that a key finding of its monitoring of detention facilities was rampant congestion which negatively impacted on provision of adequate health care, food and hygienic conditions leading to inhuman and degrading punishment.²⁹⁸ These

²⁹⁴ Constitution, 2010 article 157 (2) & (5); article 158.

²⁹⁵ Constitution of Kenya Review Commission Final report (n 5 above) 198.

²⁹⁶ Interview with E Ndunda, Legal Officer, Kenya Prisons Service, Nairobi, 7 August 2015.

²⁹⁷ As above.

²⁹⁸ Kenya National Commission on Human Rights, Annual Report for the 2010/11, 2011, 56 -57.

conclusions were expounded on in a study on the state of human rights in prisons and places of detention launched in March 2011.²⁹⁹

Prior, to the promulgation of the Constitution, 2010 the rights of detained persons were not protected in the Constitution. Similarly, the Prisons Act does not provide for the rights of detained or imprisoned persons. Illustratively, the Act contains no prohibition against cruel, inhuman and degrading punishment or treatment and instead allows prison officers to use force against a prisoner to make him/her obey lawful orders or to uphold prison discipline.³⁰⁰

The Constitution, 2010 protects the rights of detained persons, to the extent that the rights are consistent with the deprivation of liberty, including the right to petition for an order of *habeas corpus*.³⁰¹ The Constitution, 2010 further directs Parliament to enact legislation that provides for humane treatment of detained and imprisoned persons taking into account international human rights standards.³⁰²

The Persons Deprived of Liberty Act, 2014 was drafted to provide for humane treatment of persons detained, in police custody or imprisoned.³⁰³ The Act provides for the right not to be confined in crowded facilities and requires the Cabinet Secretary in-charge of administration of justice to make regulations as to the number of persons that can be held in a prison facility.³⁰⁴ It provides for the right of detained or imprisoned persons to communicate to a person of their choice including an independent lawyer,³⁰⁵ and to medical examination, treatment and healthcare.³⁰⁶ Further, the Act provides for the right to adequate food approved by a medical practitioner or a nutritionist,³⁰⁷ and to hygienic conditions.³⁰⁸ On independent complaint mechanisms for detained and imprisoned persons, the Act outlines a two tier complaints procedure. It provides that any person who has been deprived of their liberty and have their rights violated may lodge a complaint with the administrative officer in charge of the facility in which the person is detained.³⁰⁹ The administrative officer is required to investigate the complaint, address the complaint, inform the complainant of the outcome and keep a register of all complaints received and their resolutions.³¹⁰ If detained person is dissatisfied with the finding of the administrative officer, an appeal may be lodged with the Cabinet Secretary.³¹¹ Further, the Act provides for the right to lodge complaints with Kenya National Commission on Human Rights and the Office of the Ombudsman.³¹² The Act

²⁹⁹ Kenya National Commission on Human Rights, 'A true measure of society: an account of the status of human rights in Kenyan prisons', 2011.

³⁰⁰ Prisons Act section 18 (1).

³⁰¹ Article 51(1) & (2).

³⁰² Article 51 (3): 'Parliament shall enact legislation that – (a) provides for the humane treatment of persons detained, held in custody or imprisoned; and (b) takes into account the relevant international human rights instruments'.

³⁰³ Persons Deprived of Liberty Act, 2014.

³⁰⁴ Persons Deprived of Liberty Act, 2014 section 12.

³⁰⁵ Persons Deprived of Liberty Act, 2014 section 8.

³⁰⁶ Persons Deprived of Liberty Act, 2014 section 16.

³⁰⁷ Persons Deprived of Liberty Act, 2014 section 14.

³⁰⁸ Persons Deprived of Liberty Act, 2014 section 15.

³⁰⁹ Persons Deprived of Liberty Act, 2014 section 29 (1).

³¹⁰ Persons Deprived of Liberty Act, 2014 section 29 (3, 4, & 5).

³¹¹ Persons Deprived of Liberty Act, 2014 section 29 (7).

³¹² Persons Deprived of Liberty Act, 2014 section 29 (8)

criminalises obstructing, concealing or failure by law enforcement officials to act on a complaint.³¹³

The constitution making process recommended that the constitution should enshrine the UN Minimum Standards for the Treatment of Prisoners to safeguard the rights of prisoners.³¹⁴ Initial draft constitutions of 2002 and 2004 enumerated a long list of rights to which prisoners were entitled to.³¹⁵ As discussed in chapter six, these rights were removed in subsequent drafts, though the provisions were not contentious, and instead relegated to national legislation.³¹⁶ During the finalisation of the constitution-making process in 2009/10, it was argued that exclusion of these rights from the text of the draft constitution was necessary to secure its approval in the 2010 national referendum.³¹⁷

The Persons Deprived of Liberty Act, 2014 enshrines all the safeguards necessary to guarantee the rights of detained persons. The recommendation is therefore fully implemented as of October 2015.

On allowing the Kenya National Commission on Human Rights to inspect places of detention, the Kenya National Commission on Human Rights Act mandates the Commission to monitor investigate and report on the observance of human rights.³¹⁸ Notwithstanding the statutory mandate, the Commission has in the past been denied access to prison facilities. In April 2014, the Kenya National Commission on Human Rights was denied access to the Kasarani administrative detention facility during *Operation Usalama Watch*.³¹⁹ Similarly, there is no documented evidence of tabling and discussion of the Commission's reports in Parliament. The recommendation is not implemented.

On reforming the bail system to make it reasonable, the Constitution, 2010 incorporates a qualified right to be released on bond or bail, on reasonable conditions, pending a charge or trial as one of the elements of the rights of arrested persons.³²⁰ There is therefore a constitutional right to bail, although not absolute, as the Constitution, 2010 prohibits excessive bail terms and provides that bail may be denied in light of compelling reasons. The Constitution, 2010 also prohibits pre-trial detention for persons charged with offences punishable by a fine only or a term of imprisonment of less than six months.³²¹

In practice, controversy exists on the nature and scope of the constitutional right to bail which is further compounded by lack of legislative guidelines on bail leaving the courts with unchecked discretion. Questions abound on whether the right is absolute or qualified, whether all classes of offences are bailable, whether accused persons should be released

³¹³ Persons Deprived of Liberty Act, 2014 section 29 (9).

³¹⁴ Constitution of Kenya Review Commission final report (n 9 above) 121.

³¹⁵ See Draft constitution of Kenya, Bomas draft, 15 March 2004 clause 75; Constitution of Kenya Review Commission, draft Bill, 27 September 2002 clause 70.

³¹⁶ See The proposed new constitution of Kenya 2005, 22 August 2005, clause 74; Harmonised draft constitution of Kenya, 17 November 2009, clause 74.

³¹⁷ Committee of Experts verbatim record of the Mombasa retreat of 16 April 2009 (n 7 above) 38.

³¹⁸ Kenya National Commission on Human Rights, 2011 section 8.

³¹⁹ Kenya National Commission on Human Rights, News, press statements, 'Press statement on the on-going police operation on insecurity and terrorism' 10 April 2014, <http://mobile.nation.co.ke/news/DPP-accuses-policeman-of-killing-witness-/1950946/2440400/-/format/xhtml/-/y30tr2/-/index.html> (22 August 2014).

³²⁰ Article 49(1)(h)

³²¹ Article 49 (2).

on free bond and what constitutes reasonable bail conditions. Recent decisions by the courts highlight these controversies. In some instances courts have wrongfully declined to grant bail for capital offences on the basis that the Criminal Procedure Code which outlaws bail for capital offences had not been declared unconstitutional, hence that provided compelling reasons to decline bail.³²² In other instances, courts have granted excessive bail terms thus defeating the right all together.³²³ In a number of cases, courts have also granted bail for capital offences and cases linked to terrorism.³²⁴ Judicial officers have also pointed to the rising cases of accused persons failing to attend court once granted bail, a problem which seemingly stems from the lack of a supervision mechanism for bailed persons.³²⁵ In March 2015, the Judiciary launched the Bail and Bond Policy Guidelines which provide policy direction on bail and bond particularly in relation to the factors to consider the degree of proof required to deny bail or bond.³²⁶

On enforcing relevant provisions on non-custodial measures to reduce overcrowding in prisons, the Kenya Penal Code provides a range of punishments that a court may prescribe upon conviction.³²⁷ Similarly, the Probation of Offenders Act provides that an offender convicted of an offence tried by a subordinate court may be placed on probation instead of a custodial sentence.³²⁸ The Community Service Orders Act, 1998 requires courts to commit offenders convicted of offences punishable by a term not exceeding three years to community service.³²⁹ However, much of the prisons overcrowding problem is a result of pre-trial detainees. For instance, in August 2015, 61% of persons in prison facilities were pre-trial detainees.³³⁰ The Constitution, 2010 in addition to the conditional right to bail, contains express provisions prohibiting pre-trial detention of persons charged with offences punishable by a fine or a term of imprisonment not exceeding six months.³³¹ However, in practice the provisions particularly those relating to grant of pre-trial detention bail for offences attracting more than six months imprisonment remain subject to judicial discretion, often resulting into high numbers of remand cases. Beyond, the Constitutional provision, Kenya lacks a sentencing policy which would define the objective of criminal sanctions and address the question of custodial and non-custodial sentences.

³²² *Republic v Gerald Irungu* [2010] eKLR. In this case the court argued that the provisions of the Criminal Procedure Code outlawing bail for capital offences had not been declared unconstitutional hence were still applicable. Similarly in *Republic v Moses Kenu ole Pemba* [2010] eKLR the court took the view that bail should not be provided for persons charged with murder and terrorist activities resulting into mass deaths.

³²³ *Republic v Peter Muasya and 2 others* [2013] eKLR.

³²⁴ *Republic v Danson Mgunya and another* [2010] eKLR; *Republic v Oby Tylene Oyugi & 11 others* (Nyeri) H.C. CR case No. 38 of 2010; *Aboud Rogo Mohamed & another v Republic* [2011] eKLR.

³²⁵ Concerns as suspects continue to skip bail' Standard Digital 15 November 2013 https://www.standardmedia.co.ke/mobile/?articleID=2000097790&story_title=concern-as-suspects-continue-to-skip-bail&pageNo=1 (21 December 2013).

³²⁶ National Council on the Administration of Justice 'Bail and Bond Policy Guidelines 2015'.

³²⁷ Penal Code section 24.

³²⁸ Probation of Offenders Act section 4.

³²⁹ Community Service Orders Act, 1998 section 3.

³³⁰ Personal interview with the Prisons Service 7 August 2015.

³³¹ Constitution, 2010 article 49 (2): 'A person shall not be remanded in custody for an offence if the offence is punishable by a fine only or by imprisonment for not more than six months.'

On judicial supervision of pre-trial detainees, the Prisons Act confers on judicial officers powers to visit prisons and exercise all the powers of a court.³³² In practice however, there is no documented structure of judicial supervision of pre-trial detainees, though magistrates' court habitually visit prison facilities. The bail and bond policy guidelines 2015 provide for supervision of pre-trial detainees by judicial officers without providing details on the frequency of the supervision.³³³

The recommendations relating to the bail system and non-custodial sentences are partially implemented through the constitution review process. The constitution review process recommended that bail for all offences unless there are compelling reasons to deny bail.³³⁴

2.9 Accountability for large-scale human rights violations

(i) Ensure publication, submission to Parliament and implementation of the Truth Justice and Reconciliation report (CAT Committee 2013); (ii) fully cooperate with the International Criminal Court (UPR 2010, CERD Committee 2011, CAT Committee 2013); (iii) establish an independent investigative authority in the post-election violence (CAT Committee 2009, CESCRC Committee 2008, SR EKJ 2009, CERD Committee 2011, CEDAW Committee 2011, CAT Committee 2013); (iv) publicly report in intervals of six months the progress of the investigation and prosecution of post-election related violence (SR EJK 2009); (v) ensure victims of post-election violence obtain redress and compensation (CAT Committee 2009, CERD Committee 2011, CEDAW Committee 2011, CAT Committee 2013); (vi) make the report of the multi-agency task force on post-election violence public (CAT Committee 2013).

The Kenya Truth Justice and Reconciliation Commission (Truth Commission) was created as one of the four commissions agreed upon in the political settlement of the 2007/08 post election violence.³³⁵ As a result, the Truth Justice and Reconciliation Commission Act (Truth Commission Act) was enacted in October 2008 and commenced operation in March 2009.³³⁶ The Truth Commission was mandated to inquire into human rights violations committed by the State, individuals and groups relating to economic crimes, land, economic marginalization and politically motivated violence.³³⁷ The scope of the inquiry was December 1963 to February 2008.³³⁸ The expected outcomes of the inquiry included: documentation of human rights abuses including economic crimes perpetrated since independence, identification and recommendation for prosecution the perpetrators of the human rights violations and identification of victims and recommendation of a framework for reparations.

³³² Prisons Act section 73 (1): 'A Minister or a judge may at any time visit any prison and exercise all or any powers of a visiting justice, and may enter any observations he thinks fit to make in reference to the condition of the prison and the prisoners in a visitors book to be kept for that purpose by the officer in charge; the officer in charge shall inform the Commissioner of Prisons the observations so entered in a visitor's book.'

³³³ National Council on the Administration of Justice 'Bail and bond policy guidelines, 2015' (March 2015).

³³⁴ Constitution of Kenya Review Commission Final report (n 5 above) 122.

³³⁵ Kenya National Dialogue and Reconciliation, Truth Justice and Reconciliation Commission, <http://www.dialoguekenya.org/Agreements/4%20March%202008Truth,%20Justice%20and%20Reconciliation%20Commission.pdf> (23 August 2014). The other three commissions were: the Commission on Inquiry on Post Election Violence, the Independent Review Commission on Elections and the National Ethnic and Race Relations Commission.

³³⁶ Truth Justice and Reconciliation Commission Act Kenya.

³³⁷ Truth Justice and Reconciliation Commission Act section 6.

³³⁸ As above.

Further, the Truth Commission Act set out detailed provisions on the report resulting from the inquiry and its implementation. First, the report was to be submitted to the President.³³⁹ Second, the Truth Justice and Reconciliation Commission was required to publish the report for public dissemination upon its submission to the President.³⁴⁰ Third, the Minister of Justice was to table the report in Parliament within 21 days following its publication.³⁴¹ Fourth, the Minister of Justice was to operationalise the implementation mechanisms provided in the report within six months of its publication.³⁴² Fifth, to monitor the implementation of the report, the Minister of Justice was required to inform Parliament within three months of receiving the report and subsequently twice a year on the status of the implementation.³⁴³ Notably, these provisions aimed to shield the Truth Commission report from political interference.

The report was submitted to the President in May 2013. It was subsequently published in the Kenya Gazette on 7 June 2013 thus paving way for its tabling in Parliament, adoption and subsequent implementation.³⁴⁴ However, the report was not tabled in Parliament within 21 days as required by law.³⁴⁵ In July 2013, the Attorney General published amendments to the Truth Commission Act seeking to vest in the Attorney General, the power to set in motion mechanisms to monitor implementation of the Report.³⁴⁶ The rationale of proposed amendments was to facilitate the Attorney General to table the report and initiate its implementation together with other structural amendments to reflect the current political dispensation.³⁴⁷ However, there were founded concerns that opening the Truth Commission Act to amendments would also create an avenue for the National Assembly to introduce amendments geared to altering, editing or rejecting the report. In the end, the amendment Bill incorporated proposed amendments that would open the report for consideration by the National Assembly.³⁴⁸ The amendment Bill was passed by the National Assembly in December 2013.³⁴⁹ The import of Truth Justice and Reconciliation (Amendment) Act is largely negative. On a positive note, the amended Act facilitates the Attorney General to table the report in Parliament in line with the current political dispensation. Further, it

³³⁹ Truth Justice and Reconciliation Commission Act section 48 (1).

³⁴⁰ Truth Justice and Reconciliation Commission Act section 48 (3).

³⁴¹ Truth Justice and Reconciliation Commission Act section 48 (4).

³⁴² Truth Justice and Reconciliation Commission Act section 49 (1).

³⁴³ Truth Justice and Reconciliation Commission Act section 50 (1).

³⁴⁴ Kenya Gazette Notice No. 8656 The Truth Justice and Reconciliation Act Notification, <http://kenyalaw.org/kl/index.php?id=4042> (12 December 2013).

³⁴⁵ Truth Justice and Reconciliation Act section 48 (4) provides that the minister responsible for justice shall table Report of the Truth Justice and Reconciliation Commission in Parliament 21 days after its publication in the Gazette.

³⁴⁶ Truth Justice and Reconciliation (Amendment) Bill of 2013, <http://www.kenyalaw.org/kl/fileadmin/pdfdownloads/bills/2013/THETRUTHJUSTICEANDRECONCILIATIONAMENDMENTBILL2013.pdf> (12 December 2013).

³⁴⁷ The Truth Justice and Reconciliation Commission Act provided for tabling of the report in Parliament by the Minister of Justice. In the current political dispensation, there is no Minister of Justice and the roles previously exercised by the Minister of Justice are exercised by the Attorney General. Equally, in the new political dispensation there are two Houses of Parliament – the National Assembly and the Senate, hence there was need for clarity on which House the report would be tabled.

³⁴⁸ Truth Justice and Reconciliation Commission (Amendment) Bill, 2013 clause 4.

³⁴⁹ Parliament of Kenya National Assembly Hansard 5 December 2013 <http://www.parliament.go.ke/plone/national-assembly/business/hansard/thursday-5th-december-2013-at-2.30pm/view> (12 December 2014).

entrenches implementation of the report within the state machinery which is necessary for allocation of resources. Notwithstanding, the negative consequences of the amended Act are far-reaching. First, the amended Act gives the National Assembly power to debate the report and monitor its implementation.³⁵⁰ This could lead to editing, alteration or rejection of the contents of the report which would ultimately water down Kenya's transitional justice agenda. Second, the amended Act provides that implementation of the report shall commence after consideration of the report by the National Assembly,³⁵¹ putting the implementation of the report under the control of the National Assembly. As of October 2015, the report has not been tabled in Parliament.

The President, during the March 2015 the state of the nation address dealt with the Truth Justice and Reconciliation report and some of the issues raised in the report. First, he issued a public apology to all victims of past human rights atrocities as required by the report.³⁵² Second, he directed the establishment of a KES 10 billion fund to compensate victims of past human rights atrocities.³⁵³ Third, he directed the National Assembly to fast track the tabling of the Truth Justice and Reconciliation report in Parliament.³⁵⁴ Pointedly, a number of petitions have been filed in the High Court seeking to expunge sections of the report, particularly by individuals adversely mentioned, to stop the Attorney General from tabling the report and barring the implementation of the report.³⁵⁵ In a positive move, the High Court in June 2015 declined to issue orders to expunge sections and bar implementation of the report in one of the petitions.³⁵⁶

The Truth Commission report has infrequently featured in the national discourse. There have been numerous calls by civil society organisations to the government to implement the report.³⁵⁷ Even then, the report has not generated rigorous public debate as would be expected. A number of reasons could be attributed to this failure. First, the troubled life of the Truth Commission due to the past history of its chairperson led to loss of credibility of the Commission and by implication its report. Second, the allegations of the alterations of the

³⁵⁰ Truth Justice and Reconciliation Commission (Amendment) Act, 2013 section 3.

³⁵¹ Truth Justice and Reconciliation Commission (Amendment) Act, 2013 section 4(3).

³⁵² State of the nation address by President Uhuru Kenyatta, 26 March 2015, <http://m.news24.com/kenya/MyNews24/Full-State-of-the-Nation-address-by-president-Uhuru-Kenyatta-20150326> (accessed 16 June 2015).

³⁵³ As above

³⁵⁴ As above.

³⁵⁵ *Beth Wambui Mugo v TJRC & another* Judicial Review No. 284 of 2013, Nairobi; *Ngengi Muigai v TJRC & another*, Miscellaneous civil application number 277 of 2013; *Hon. Basil Criticos versus Attorney General & others*, civil suit no. 576 of 2012; *George Ngero Gichuru & 23 others v TJRC*, Constitutional petition 29 of 2013, Nakuru High Court; *Kiri wa Ngugi & others v TJRC & others*, Miscellaneous civil case no. 213 of 2013 Judicial Review Division Nairobi; *Kiri wa Ngugi & others v TJRC and others*, Miscellaneous civil application 192 of 2013; *Njenga Mwangi & another v TJRC & others*, Constitutional petition number 286 of 2013.

³⁵⁶ *Ngengi Muigai v TJRC & another*, Miscellaneous civil application number 277 of 2013 (unreported).

³⁵⁷ F Olick 'Civil society faults State over TJRC report' Standard Digital, 23 May 2014, <http://www.standardmedia.co.ke/article/2000122104/civil-society-faults-state-over-tjrc-report> (23 August 2014); International Commission of Jurists, media, news, 'Government told to table the TJRC report on historical injustices' 21 June 2013, <http://www.icj-kenya.org/index.php/media-centre/news/538-government-told-to-table-the-tjrc-report-on-historical-injustices> (23 August 2013).

land chapter further diminished credibility of the report among the public.³⁵⁸ The recommendation is partially implemented as of October 2015.

Kenya's 2007/08 post-election violence erupted following the contested 2007 presidential elections and subsequent swearing in of the Party of National Unity candidate as president. The violence which lasted between 30 December 2007 and 28 February 2008 resulted in 1,133 deaths, displacement of approximately 350,000 persons and loss of property.³⁵⁹ As part of the political settlement, the Commission of Inquiry into the Post-Election Violence was established in May 2008 to investigate into the facts surrounding the violence and to recommend measures to bring to justice persons responsible for the violence.³⁶⁰ The Commission recommended establishment of a special tribunal to bring to account persons bearing the greatest responsibility for the post election violence, particularly for the crimes against humanity.³⁶¹ Further, the Commission's recommendations entrenched a safety clause that in the event of failure to establish a special tribunal or if the special tribunal fails to carry out its mandate or if its purposes are averted, the names and information relating to persons alleged to bear the greatest responsibility would be submitted to the International Criminal Court (ICC).³⁶²

From 2008 the government made multiple attempts to establish mechanisms for independent investigations into the post-election violence. In June 2008, the Director of Public Prosecutions appointed a team of state counsels to work alongside the police in collecting nationwide statistics on cases resulting from the post-election violence.³⁶³ The team prepared a report cataloguing cases that had resulted in convictions, acquittals, cases withdrawn, cases pending before courts and those that were pending in the investigative stages.³⁶⁴ There was no follow-up on the cases and the report findings only became public following its submission to the ICC prosecutor in November 2009. In January 2009 and in line with the recommendations of Commission the government sought to establish a special tribunal to investigate prosecute and determine cases against persons responsible for crimes against humanity, genocide and gross human rights violations.³⁶⁵ The motion to

³⁵⁸ 'New split in the TJRC over land chapter' *The Star* 15 May 2013 7; 'How TJRC land chapter was censored' *The Star* 3 June 2013 3.

³⁵⁹ Report of the Commission of Inquiry on the Post-Election Violence in Kenya, October 2008, 305.

³⁶⁰ Kenya Dialogue and Reconciliation, commission of inquiry on post-election violence, 4 March 2008, <http://www.dialoguekenya.org/Agreements/4%20March%202008-Commission%20of%20Post-election%20Violence.pdf> (23 August 2014); Kenya Gazette Notice no. 4473 vol. cx.no.4 of 23 May 2008.

³⁶¹ Report of the Commission of inquiry on the Post-Election Violence in Kenya, October 2008, 472.

³⁶² Report of the Commission of Inquiry on the Post-Election Violence in Kenya (n 360 above) 483.

³⁶³ Department of Public Prosecutions, ' Report to the Hon. Attorney General by the team on the review of post election related cases in Western, Nyanza, Central, Rift Valley, Eastern, Coast and Nairobi Provinces', Nairobi, 2009 (Report to the Attorney General, February 2009) <http://www.icc-cpi.int/iccdocs/doc/doc786008.pdf> (accessed 30 November 2013).

³⁶⁴ As above.

³⁶⁵ Parliament of Kenya National Assembly official report 29 January 2009, 27-28 <http://www.parliament.go.ke/plone/archive/archive-10th-Parliament/hansards/official-records-29.01.09/view> (30 November 2013); See The Special Tribunal for Kenya Bill, 2009 http://www.kenyalaw.org/Downloads/Bills/2009/The_Special_Tribunal_for_Kenya_Statute_2009.pdf (30 November 2013).

establish the special tribunal was however defeated in Parliament in February 2009.³⁶⁶ Subsequent attempts to establish the special tribunal were defeated in Cabinet in July 2009 and in Parliament in November 2009.³⁶⁷ Following failure by the government to set up the special tribunal, the names and relevant information on those who allegedly bore the greatest responsibility for the 2007/08 post-election violence were handed over the prosecutor of the ICC in July 2009.³⁶⁸ In November 2009 the prosecutor of the ICC initiated investigations into the persons bearing the greatest responsibility.³⁶⁹ In December 2010, the prosecutor of the (ICC) publicly named six persons whom he contended bore the greatest responsibility for the violence. In January 2012, the ICC formally confirmed charges for four persons alleged to bear individual criminal responsibility for crimes against humanity.³⁷⁰

On cooperation with the ICC, the Statute of the ICC (ICC Statute) imposes direct and mandatory obligations on state parties for cooperation and judicial assistance.³⁷¹ The obligation to cooperate is twofold: a general obligation to cooperate,³⁷² and an obligation to adopt or amend national legislation to allow for cooperation with the ICC.³⁷³ The many forms of the general obligation to cooperate include: identifying and tracking persons and things, taking of evidence including testimony under oath and the production of evidence, questioning individuals, executing searches and seizures, examination of places and sites including exhumation of grave sites, provision of documents and records, protection of victims and witnesses and preservation of evidence and tracing and freezing the assets of the instrumentalists of crime for eventual forfeiture.³⁷⁴

Kenya is a state party to the ICC Statute. In regard to cooperation with the ICC, the state enacted the International Crimes Act, 2008 which domesticates the ICC Statute and sets out the framework for cooperation with the ICC.³⁷⁵ In September 2010, Kenya entered a cooperation agreement with the ICC extending to it privileges and immunities that are necessary for it to effectively function in the territory of Kenya.³⁷⁶ Further, the state established a Witness Protection Agency for witness protection, as previously discussed.³⁷⁷

³⁶⁶ Parliament of Kenya National Assembly Hansard 12 February 2009, 29-33
<http://www.parliament.go.ke/plone/archive/archive-10th-Parliament/hansards/official-records-12.02.09/view> (30 November 2013).

³⁶⁷ Parliament of Kenya National Assembly Hansard 16 December 2010, 23-27
<http://www.parliament.go.ke/plone/archive/archive-10th-Parliament/hansards/official-records-16.12.10p/view> (30 November 2013).

³⁶⁸ International Criminal Court, pre-trial chamber II, situation in the republic of Kenya, request for authorisation of an investigation pursuant to article 15, <http://www.icc-cpi.int/iccdocs/doc/doc785972.pdf> (21 November 2014).

³⁶⁹ As above.

³⁷⁰ International Criminal Court, situation in the Republic of Kenya, In the case of the *Prosecutor v. William Samoei Ruto, Henry Kosgey and Joshua Arap Sang*, Decision on the confirmation of charges 23 January 2012, <http://www.icc-cpi.int/iccdocs/doc/doc1314535.pdf> (23 August 2014);

³⁷¹ Rome Statute of the International Criminal Court, 2187 U.N.T.S. 90 (entered into force 1 July 2002) (ICC Statute).

³⁷² Article 86 provides that 'State Parties shall, in accordance to the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court'.

³⁷³ Article 88 provides that 'State Parties shall ensure that there are procedures available under their national law for all the forms of cooperation that are specified under this part'.

³⁷⁴ ICC Statute article 93 (1).

³⁷⁵ International Crimes Act 16 of 2008.

³⁷⁶ Legal Notice No. 170, The Privileges and Immunities International Criminal Court Order, 2010, Kenya Law, Legal Notices 2010, <http://kenyalaw.org/kl/index.php?id=728> (18 November 2013).

³⁷⁷ Witness Protection Agency <http://www.wpa.go.ke/> (accessed 18 November 2013).

With reference to production of evidence and provision of documents and records, the government's position is that it has provided the Office of the Prosecutor with reports of the Commission of Inquiry into Post Election Violence and that of the Kenya National Commission on Human Rights on the 2007/08 post election violence.³⁷⁸ The government also asserts that it has availed to the prosecution minutes of the National Security Advisory Committee for the relevant period in addition to availing senior government officials to testify during the pre-trial hearings.³⁷⁹ Notably, the reports of the Commission of Inquiry into the Post Election Violence and the Kenya National Human Rights Commission are public documents hence submission of these documents is inconsequential and would not ordinarily count for cooperation.

However, against this, the Office of the Prosecutor has severally stated that Kenya's compliance record is unsatisfactory, citing failure by the government to provide evidence and to facilitate access to witnesses.³⁸⁰ On this the government has argued that there is a court order in force which prohibits the taking or recording evidence from any Kenyan or issuing summons to any Kenyan for purposes of taking any evidence by the ICC process.³⁸¹ It would be expected that the government as the defendant would seek to have the order lifted to enable it fulfil its international obligations as required by the Constitution, 2010. There is no evidence of such action by the government in the last two years. In March 2013, the government filed submissions on the status of its cooperation with the ICC outlining what it had done to fulfil its obligations as well as identifying at least two areas in which it was unable to process the prosecutor's requests.³⁸² Nonetheless, the government's subsequent activities within and outside the ICC to discontinue, defer and/or suspend the cases against the President and Deputy President belied its rhetoric on cooperation.³⁸³ In March 2014, the

³⁷⁸ International Criminal Court 'Government of the Republic of Kenya submissions on the status of cooperation with the International Criminal Court , or in the alternative, application for leave to file observations pursuant to Rule 103 (1) of the Rules of Evidence and Procedure', paras 30 -34. http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200109/related%20cases/icc01090211/court%20records/filing%20of%20the%20participants/states%20representatives/Pages/713.aspx (18 November 2013).

³⁷⁹ As above.

³⁸⁰ Statement by ICC Prosecutor on notice to withdraw charges against Mr. Muthaura, ICC Press and Media, press releases http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/OTP-statement-11-03-2013.aspx (18 November 2013).

³⁸¹ Government of Kenya submissions on the status of cooperation with the International Criminal Court (n 380 above) para 42. See *Jackson Mwangi and James Kuria v Attorney General and Kalpana Rawal* HCCC petition no. 2 of 2011 (unreported). The ICC prosecutor had on 15 July 2010 sought to interview ten senior police officers in the course of its investigations. The request was granted and in line with national law a High Court judge, Justice Kalpana Rawal, was appointed to conduct the interviews. The above mentioned petition was filed seeking to bar the Judge from taking or recording evidence from any Kenyan or issuing any summons to any Kenyan for purposes of the ICC prosecutor's request. The Attorney General never opposed the petition nor lodged an appeal.

³⁸² International Criminal Court, Trial chamber v, The Prosecutor v Uhuru Muigai Kenyatta, 18 March 2013, <http://www.icc-cpi.int/iccdocs/doc/doc1577522.pdf> (22 November 2014).

³⁸³ In October 2013, Kenya called for an extra-ordinary summit of the Assembly of the African Union to seek political support for the suspension of the ICC cases against the Kenyan President and Deputy President. The decisions and declarations of the Summit sought to *inter alia* advise the President and Deputy President not to attend the ICC proceedings. See African Union, Summits, para 10 at page 4, <http://summits.au.int/en/sites/default/files/Ext%20Assembly%20AU%20Dec%20&%20Decl%20 E 0.pdf> (accessed 30, November 2014); The Government has also unsuccessfully filed applications challenging the

trial chamber in case two deferred making a finding of Kenya's non-cooperation to give the state an opportunity to comply with its obligations.³⁸⁴ In September 2014 the trial chamber vacated the commencement of trial in case two pending an outstanding cooperation request.³⁸⁵ Further, two status conferences were convened in October 2014 to discuss the status of cooperation between the prosecution and the government.³⁸⁶ In December 2014, the prosecutor of the ICC withdrew charges in the first case against Uhuru Kenyatta.³⁸⁷ The withdrawal of the charges was linked to lack of cooperation by the government.³⁸⁸ Taken together these accounts do not point to full cooperation with the ICC. The recommendation is thus not implemented as of October 2015.

On establishment of a local tribunal to try low level perpetrators after the ICC's intervention, in February 2012 the state set up a multi-agency task force comprising of officers from the police, public prosecutions, the State Law Office, Ministry of Justice, National Cohesion and Constitutional Affairs and Witness Protection Agency with a six months mandate to review all cases arising out of the 2007 post election violence and make recommendations on investigation of the cases.³⁸⁹ The multi-agency task force examined 6,081 files from the police and recommended in its interim report that some of the files be referred back to the police for further investigations and immediate prosecution of cases where suspects had been identified.³⁹⁰

In February 2014, the Director of Public Prosecutions, while addressing a forum on prosecution of middle and low level perpetrators of the 2007/08 post-election violence, indicated that none of the 6,081 police files reviewed by the multi-agency task force could be prosecuted due to insufficient evidence.³⁹¹ This position was further sealed by the President in the state of the nation address in March 2015 in which he indicated that the Director of Public Prosecutions had recommended that the violations be remedied through restorative justice.³⁹² The reasons for inability to prosecute were indicated as: inadequate evidence, inability to identify perpetrators, witness fear of reprisals and general lack of technical and

admissibility of the Kenya cases at the ICC. See <http://icc-cpi.int/iccdocs/doc/doc1078823.pdf> (18 November 2013).

³⁸⁴ International Criminal Court, questions and answers, situation in the Republic of Kenya, the Prosecutor v Uhuru Muigai Kenyatta, 19 September 2014, <http://www.icc-cpi.int/iccdocs/PIDS/publications/kenyatta-qa-19-09-2014-eng.pdf> (22 November 2014).

³⁸⁵ As above.

³⁸⁶ International Criminal Court, press and media, situation in the Republic of Kenya, status conferences in Kenyatta case on 7 and 8 October 2014, http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/ma166.aspx (22 November 2014).

³⁸⁷ International Criminal Court, 'Notice of withdrawal of the charges against Uhuru Muigai Kenyatta' 5 December 2014, ICC-01/09-02/11, <http://www.icc-cpi.int/iccdocs/doc/doc1879204.pdf> (accessed 13 June 2015).

³⁸⁸ As above.

³⁸⁹ Kenya Gazette Notice Number 5417 of 18 April 2012 Multi-agency Task Force on the 2007/2008 Post Election Cases

³⁹⁰ Human Rights Committee, Replies from the Government of Kenya to the list of issues (CCPR/C/KEN/Q/3) to be taken up in connection with the consideration of its 3rd periodic report (CCPR/C/KEN/3) 30 May 2012, paras 66-68 Office of the High Commissioner for Human Rights, Kenya homepage, Kenya and UN treaty bodies <http://www.ohchr.org/en/countries/AfricaRegion/Pages/KEIndex.aspx> (November 30, 2013).

³⁹¹ 'JSC, Tobiko in row over special court' Daily Nation 6 February 2014, <http://mobile.nation.co.ke/news/JSC-Tobiko-in-row-over-special-court/-/1950946/2196020/-/format/xhtml/-/kk3oddz/-/index.html> (accessed 2 September 2014).

³⁹² State of the nation address March 2015 (n 352 above).

forensic capacity at the time of commission of the crimes.³⁹³ Impliedly, the government does not envisage any local prosecutions for the perpetrators of the 2007/08 post election violence.

On non-state actors initiatives to ensure local prosecutions, in February 2013, a number of victims and non-governmental organisations filed a constitutional petition seeking an order compelling the government and in particular the Director of Public Prosecutions to release of the findings of the multi-agency task force and government accountability for the 2007/08 post election violence.³⁹⁴ The petition sought a declaration that failure of the government to conduct effective and independent investigations into the 2007 post election violence cases constitutes violations of its international obligations under the Statute of the International Criminal Court.³⁹⁵ This petition was dismissed by the High Court in August 2015 for lack of sufficient evidence.³⁹⁶ A second petition was also filed in February 2013 to compel the government to investigate, prosecute and offer compensation to victims of sexual and gender based violence.³⁹⁷ As of October 2015, the second petition has not been determined.

Interviews with non-state actors indicate that the petitions were influenced by the recommendations of monitoring mechanisms made in 2008, 2009, 2010 and 2011 and the continued state failure to investigate, prosecute and compensate the victims.³⁹⁸

As discussed earlier, the government has initiated the setting up of a fund to compensate victims of past human rights violations including the 2007/08 post election violence. Therefore the recommendations on compensation of victims of post-election violence are partially implemented as of October 2015. However, as relates to investigations, the government appears to have barred any likelihood for investigations and prosecution.

2.10 Counter-terrorism and human rights

(i) Revise the Anti-terrorism Bill 2006 in accordance with international human rights law (SR Suppression of Terrorism 2006), HRC Committee 2012; (ii) ensure measures taken to combat terrorism are in accordance with international human rights law (CAT Committee 2009; CAT Committee 2013); (iii) prevent expulsion of foreigners, return or extradition to countries where they are likely to be subjected to torture (HRC Committee 2005, CAT Committee 2009, CAT Committee 2013).

Kenya has since independence been a target of five major terrorist attacks and a series of minor attacks all together resulting in more than 500 deaths, thousands of injured persons

³⁹³ As above.

³⁹⁴ *Citizens Against Violence and others v Attorney General of Kenya and others* petition 102 of 2013 (unreported).

³⁹⁵ As above.

³⁹⁶ As above. See also 'Kenya tribal clashes victims lose 31.5billion compensation in a case against the State' 22 August 2015, <http://www.standardmedia.co.ke/article/2000173800/kenya-s-tribal-clashes-victims-lose-sh31-5-billion-case-against-state> (accessed 25 October 2015).

³⁹⁷ *COVAW and others v the Attorney General, the Director of Public Prosecutions, the Inspector General of the National Police Service, the Chairperson of the Independent Policing Oversight Authority and the Minister of Health* petition 122 of 2013 (unreported).

³⁹⁸ Interview with A Kamau, Programme Office, Independent Medico Legal Unit, Kenya, Nairobi, 17 January 2015; Interview with A Nyanjong, Programme Manager, International Commission of Jurists-Kenya Section, Nairobi, 22 April 2015.

and economic loss.³⁹⁹ Until 2012, Kenya lacked a standalone legislation to deal with terrorism. The Penal Code does not criminalise terrorism acts and in fact makes no mention of the word 'terrorism'. It is however acknowledged that the Penal Code criminalises crimes associated with terrorism such as murder, injury to persons and destruction of property. Kenya's first attempt to criminalise acts of terrorism was through the Suppression of Terrorism Bill, 2003.⁴⁰⁰ The Bill sought to define terrorism,⁴⁰¹ criminalise incitement to commit terrorism outside the country,⁴⁰² provide for declaration of organisations as terrorist organisations,⁴⁰³ grant law enforcement officers powers of search, seizure and detention⁴⁰⁴ and to provide for extradition of terrorism suspects.⁴⁰⁵

However, the Suppression of Terrorism Bill, 2003 was widely criticised by human rights organisations, the East African Law Society, the clergy and the Muslim community on the grounds of unconstitutionality, violation international human rights and discrimination against Muslims. First, it was argued that the definition of terrorism was vague and thus could be construed as encompassing a wide range of legitimate acts.⁴⁰⁶ Second, the Bill violated a number of civil rights by: allowing incommunicado detention which could lead to torture, arbitrary police searches, detention of suspects for 36 hours against the constitutional threshold of 24 hours and it curtailed the freedom of association through the wide Executive powers to declare an organisation as a terrorist organisation.⁴⁰⁷ Third, the Bill was criticised for explicitly discriminating against the Muslim community by for instance providing that wearing of religious clothing similar to that worn by terrorists rendered one a suspect.⁴⁰⁸ The Suppression of Terrorism Bill, 2003 was never tabled in Parliament.

In 2006, a supplemental Anti-Terrorism Bill, 2006, which was a less stringent version of the Suppression of Terrorism Bill, 2003, was tabled in Parliament.⁴⁰⁹ This Bill was rejected by the Parliamentary committee on Administration of Justice.⁴¹⁰ The reasons advanced for rejection of the Bill were that it was developed at the behest of the US government thereby

³⁹⁹ These include: the 1998 US Embassy bombing in which 214 people died, the 2002 Kikambala Paradise Hotel bombing in which 14 people died, the September 2013 Westgate Mall attacks in which 67 people died, the June 2014 attacks in Lamu in which 70 people died and the April 2015 attacks at a University in which 148 people died. .

⁴⁰⁰ Kenya Gazette Supplement No. 38 of 30 April 2003.

⁴⁰¹ Suppression of Terrorism Bill, 2003 clause 3.

⁴⁰² Suppression of Terrorism Bill, 2003 clause 8

⁴⁰³ Suppression of Terrorism Bill, 2003 clauses 9 & 10.

⁴⁰⁴ Suppression of Terrorism Bill, 2003 clauses 21, 26, 30 & 40.

⁴⁰⁵ Suppression of Terrorism Bill, 2003 clause 37.

⁴⁰⁶ See Amnesty International 'memorandum to the Government of Kenya on the Suppression of Terrorism Bill, 2003, September 2004, <http://www.amnesty.org/en/library/info/AFR32/003/2004> (25 August 2014) ; J Prestholdt 'Kenya, United States, and counterterrorism' (2011) 57 *Africa Today*, 10, http://www.academia.edu/755791/Kenya_the_United_States_and_Counterterrorism (25 August 2014); KM Otiso 'Kenya in the crosshairs of global terrorism: fighting terrorism at the periphery' (2009) 1 *Kenya Studies Review*, 122-123; Unpublished: CL Mwazighe 'Legal responses to terrorism: the case study of the Republic of Kenya' unpublished Masters thesis, Naval Post Graduate School, 2012 59-71.

⁴⁰⁷ As above.

⁴⁰⁸ Prestholdt (n 406 above) 10.

⁴⁰⁹ R Muhula 'Kenya and the global war on terrorism: searching for a new role in a new war' in J Davis *Africa and the war on terrorism* (2007) 53-54; See also 'Kenyan MPs reject anti-terrorism law' Panapress, 6 June 2006, <http://www.panapress.com/Kenyan-MPs-reject-proposed-anti-terrorism-law--13-582250-18-lang1-index.html> (accessed 2 September 2014).

⁴¹⁰ As above.

undermining the potential for the evolution of localised responses to terrorism.⁴¹¹ This fact was borne credence by an appeal made by the then US Ambassador to Parliament to pass the Bill.⁴¹² Second, it was argued that the Bill was discriminatory in that it targeted the Muslim community.⁴¹³

An anti-terrorism legislation, the Prevention of Terrorism Act, 2012 was eventually passed by Parliament in September 2012,⁴¹⁴ and became operational in October 2012.⁴¹⁵ Similar to 2003 and 2006 the enactment of the Prevention of Terrorism Act faced opposition from the Muslim community on the basis that it was discriminatory and targeted Muslims.⁴¹⁶ Notwithstanding the Muslim concerns, the Prevention of Terrorism Act was passed primarily due to pressure from the Financial Action Task Force, a global standard setting body for anti-terrorism and combating the financing of terrorism.⁴¹⁷ The Financial Action Task Force had threatened to blacklist Kenya if anti-terrorism legislation was not passed by October 2012, a move that would have affected Kenya's imports and exports transactions and also labelled Kenya as a risky country for investment.⁴¹⁸ The Prevention of Terrorism Act, 2012, while an improvement of the 2003 and 2006 anti-terrorism bills, has a number of weaknesses. First, the Act adopts a broad and vague definition of the nature of acts that constitute terrorism.⁴¹⁹ The problem posed by the vague definition is that it is liable to abuse by law enforcement agencies, particularly against mere dissenters from the social and political order. Second, on due process rights the Act allows the police to hold terrorists suspects for up to 90 days in investigative detention,⁴²⁰ which could result to prolonged denial of liberty and ill-treatment. Third, on freedom of association, the Act criminalises and imposes a thirty year sentence of imprisonment for membership to terrorist organisations without the requirement that an individual should have engaged in a terrorist activity.⁴²¹

Kenya's adherence to human rights standards in its counter-terrorism measures is largely wanting. The fight against terrorism in Kenya is both through criminal proceedings and military force. A number of reports document numerous human rights violations in Kenya's counterterrorism measures. In May 2012, Human Rights Watch produced a report on human rights abuses of ethnic Somalis by the Kenya Military and the police allegedly perpetrated in

⁴¹¹ As above.

⁴¹² As above.

⁴¹³ As above.

⁴¹⁴ Parliament of Kenya, National Assembly, official record, Hansard, 27 September 2012, <http://www.parliament.go.ke/plone/archive/archive-10th-Parliament/hansards/official-report-27-september-2012/view> (2 September 2014) (Hansard 27 September 2012).

⁴¹⁵ Prevention of Terrorism Act, 2012.

⁴¹⁶ 'Kenya: Muslim chiefs want terror Bill shelved' *The Star* 24 September 2012 7.

⁴¹⁷ F Oluoch 'Kenya under pressure to pass anti-terrorism law' *The East African* 29 September 2012, <http://www.theeastafrican.co.ke/news/Kenya-under-pressure-to-pass-anti-terrorism-law/-/2558/1521092/-/5t6ugiz/-/index.html> (2 September 2014); Hansard 27 September 2012 (n 416 above) 68-70.

⁴¹⁸ F Oluoch 'Kenya under pressure to pass anti-terrorism law' *The East African* 29 September 2012, <http://www.theeastafrican.co.ke/news/Kenya-under-pressure-to-pass-anti-terrorism-law/-/2558/1521092/-/5t6ugiz/-/index.html> (accessed 2 September 2012).

⁴¹⁹ Prevention of Terrorism Act, 2012 section 2 (b).

⁴²⁰ Prevention of Terrorism Act, 2012 section 32 (10).

⁴²¹ Prevention of Terrorism Act, 2012 section 24.

2011.⁴²² The report documented incidences of arbitrary arrests and detention and beatings of men, women and children and rape of women by the military and the police for the allegedly harbouring terrorists in their neighbourhoods.⁴²³ Similarly, Open Society Initiative in November 2013 produced a report on extrajudicial killings and enforced disappearances perpetrated by the Anti-Terrorism Police Unit.⁴²⁴ The Anti-Terrorism Police Unit is a specialised unit of the Kenya Police established in 2003 to address terrorism in Kenya. The Open Society Initiative report documented abuses allegedly perpetrated by the Anti-Terrorism Police Unit from 2007 to 2013 which included extrajudicial killings, enforced disappearances, ill-treatment and torture and refoulement.⁴²⁵ In particular, the report contains a non-exhaustive list of 20 persons that have been killed or involuntarily disappeared in circumstances linked to the Anti-Terrorism Police Unit.⁴²⁶ In April 2014, the Kenya National Commission on Human Rights together with other non-state human rights organisations publicly condemned the security forces for human rights violations committed during the insecurity and terrorism operation, *Operation Usalama Watch*.⁴²⁷

In December 2014, the government enacted new legislation, the Security Laws (Amendment) Act, 2014 which amended 22 existing pieces of legislation on national security, particularly aimed at addressing terrorism.⁴²⁸ In the context of anti-terrorism, the Act sought to limit the rights to a fair trial and to be released on bail for alleged terrorism suspects.⁴²⁹ These provisions were however declared unconstitutional by the High Court in February 2015.⁴³⁰

Although rigorous debate on counterterrorism and human rights is generally lacking in Kenya, the Constitution, 2010 guarantees the right to freedom and security of the person.⁴³¹ The elements of the right are: freedom from arbitrary arrest, right not to be detained without trial and right not to be subjected to torture and inhuman and degrading treatment or punishment.⁴³² The right thus imposes restrictions on the power of the state to coerce individuals through arbitrary arrests and detention. On the other hand, the Constitution, 2010 does not provide for the right to human security or an individual right to security. Therefore, it can be argued that balancing liberty and security of the person against human security has no constitutional basis. In addition, in Kenya, as elsewhere globally, the trade off between

⁴²² See generally Human Rights Watch 'Criminal reprisals: Kenyan police and military abuses against ethnic Somalis' May 2012, <http://www.hrw.org/sites/default/files/reports/kenya0512webwcover.pdf> (accessed 2 September 2014).

⁴²³ As above.

⁴²⁴ See generally Open Society Initiative (n 129 above).

⁴²⁵ As above.

⁴²⁶ As above.

⁴²⁷ Kenya National Commission on Human Rights, news room, press statements 'Press statement on the on-going police operation on insecurity and terrorism' 10 April 2014, <http://www.knchr.org/Portals/0/PressStatements/Press%20Release%20on%20Operation%20Rudisha%20Usalama.pdf> (accessed 2 September 2014).

⁴²⁸ See Security Law (Amendment) Act, 2014.

⁴²⁹ Security Law Amendment Act, 2014 sections 16 and 20.

⁴³⁰ *Coalition for Reform and Democracy & another v Republic of Kenya & another* [eKLR] 2015.

⁴³¹ Article 29: 'Every person has the right to freedom and security of the person which includes...'

⁴³² Article 29 (a): 'deprived of freedom arbitrarily without just cause; (b) detained without trial except during a state of emergency, in which case the detention is subject to article 58; (d) subjected to torture in any manner, whether physical or psychological; (f) treated or punished in a cruel, inhuman or degrading manner.'

individual liberties and human security often results in greater curtailment of individual liberties among certain groups in the society resulting in discrimination.

The High Court has in a number of instances addressed itself to human rights violations in the government's counter-terrorism measures. In 2013 the High Court in *Salim Awadh Salim & 10 others v the Commissioner of Police & 3 others* found the state liable for violation of the right to be free from arbitrary arrests, deprivation of liberty and right to due process of law in its counter-terrorism activities.⁴³³ Similarly, in *Zuhura Suleiman v the Commissioner of Police & 2 others*, the High Court declined to uphold the state's claims of national security in a case involving extra-judicial removal from Kenya of a terror suspect.⁴³⁴ In addition as discussed above the High Court has nullified legislation on anti-terrorism.⁴³⁵

The recommendations are thus not implemented. As discussed above, although the Anti-Terrorism Bill, 2006 was revised the Prevention of Terrorism Act, 2012 contains provisions that negate international human rights standards. Further, the impetus for passing the Act came from external forces with no link to the recommendations of monitoring mechanisms.

2.11 Ratification of human rights treaties

(i) Optional protocol against torture (SR TOT 2007, 2009, CAT Committee 2009, UPR 2010, CAT Committee 2013); (ii) optional protocols of the International Covenant on Civil and Political Rights (HRC Committee 2005, APRM 2006, UPR 2010); (iii) International Convention for Protection of Persons from Enforced Disappearances (UPR 2010, CAT Committee 2013); Convention on the Prevention and Punishment of the Crime of Genocide (UPR 2010); (iv) Declaration under Article 34 (6) of the Protocol for the establishment of the African Court (African Commission 2007).

Prior to the promulgation of the Constitution, 2010 ratification of treaties was exclusively a function of the Executive.⁴³⁶ In practice, negotiation, signing and final consent to be bound by a treaty was carried out by the Ministry of Foreign Affairs and the Ministry to which the subject matter of the treaty related.⁴³⁷ Parliamentary involvement was only after the treaty had been ratified during the process of domestication of the treaty into national legislation.⁴³⁸ This process of ratification was undesirable in that there was no public participation in treaty ratification and that the Executive had the sole prerogative of making decisions on ratification.

The Constitution, 2010 makes any treaty ratified by Kenya part of Kenyan law.⁴³⁹ The Treaty Making and Ratification Act, 2012 provides for the process of ratification of treaties and places Parliament at the heart of the process.⁴⁴⁰ In 2010, following the promulgation of the Constitution, 2010 the government indicated that ratification of treaties had been suspended awaiting the enactment of the Treaty Making and Ratification Act. However, despite the

⁴³³ [2013] eKLR.

⁴³⁴ [2010] eKLR.

⁴³⁵ *Coalition for Reform and Democracy - CORD and 2 others v Attorney General & another* [2015] eKLR.

⁴³⁶ Constitution of Kenya Review Commission, Final report (n 5 above) 149 -150.

⁴³⁷ As above.

⁴³⁸ As above.

⁴³⁹ Constitution, 2010 article 2 (6).

⁴⁴⁰ Treaty Making and Ratification Act, 2012.

enactment of the Act in September 2012, the Act is yet to be operationalised as at October 2015. Consequently, none of the human rights instruments listed above have been ratified. There is however evidence that Parliament has been considering and approving ratification of treaties that are not human rights related, notwithstanding that the Treaty Making and Ratification Act has not been operationalised.⁴⁴¹

Tied to the delay in operationalising the Treaty Making and Ratification of Treaties Act, 2012 is the issue of political will. In January 2015 during Kenya's second Universal Peer Review, the government rejected all recommendations relating to ratification of treaties.⁴⁴² A detailed discussion on non-implementation of findings relating to ratification of treaties is undertaken in chapter eight, section 4.2.

The recommendations have therefore not been implemented as of October 2015.

3 Political rights

The recommendations made in relation to political rights are clustered in the following broad areas: freedom of information, freedom of assembly, freedom of the media and protection of human rights defenders and hate speech.

One finding is made by the African Commission in the John Ouko case relating to freedom to make political choices and hold political opinions.

The section first assesses the implementation of the recommendations, and then turns to the finding.

3.1 Freedom of information

(i) Urgently enact the Freedom of Information Bill (UPR 2010) (ii) review national legislation on freedom of information to fully comply with the ICCPR (UPR 2010).

Prior to the Constitution, 2010, freedom of information was not expressly provided for in the Constitution, although it could be read from freedom of expression which was constitutionally guaranteed.⁴⁴³ However, in practice, a number of laws such as the Preservation of Public Security Act, the Official Secrets Act and the Public Archives and Documentation Services limited the enjoyment of freedom of expression, particularly the implied freedom to receive information and ideas without interference.⁴⁴⁴

The Constitution, 2010 elevates freedom of access to information to an individual right guaranteed in a broad sense. First, it guarantees access to information held by the State.⁴⁴⁵ Second, the obligation to provide access to information extends to all State organs including

⁴⁴¹ See Parliament of Kenya, National Assembly, order of business 6 August 2015 motions to approve ratification of: Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation; East African Community Peace and Security Protocol and Mutual Peace and Security Pact, <http://www.parliament.go.ke/the-national-assembly/house-business/order-papers> (accessed 5 August 2015).

⁴⁴² Office of the High Commissioner for Human Rights, Human Rights Council 'Report of the working group on Universal Peer Review - Kenya' 26 March 2015, para 143.

⁴⁴³ Constitution, 1963 (repealed) section 79.

⁴⁴⁴ International Commission of Jurists Kenya section, freedom of information, status of freedom of information in Kenya, <http://www.icj-kenya.org/index.php/freedom-of-information/299-status-of-freedom-of-information-in-kenya> (accessed 12 September 2014).

⁴⁴⁵ Constitution, 2010, article 35 (1) (a): 'Every citizen has the right to information held by the State'.

public entities, the Judiciary and Parliament.⁴⁴⁶ Third, private persons are also obliged to avail information, though the obligation is qualified to the extent that the information is necessary for the protection or enjoyment of another person's rights and freedoms.⁴⁴⁷ Fourth, it guarantees every person the right to information that affects the person and the added right to have that information corrected or deleted.⁴⁴⁸ Fifth, the Constitution, 2010 imposes on the state minimal standards of voluntary disclosure of information to the public, in what is referred to as important information affecting the nation.⁴⁴⁹

Nonetheless, the right of access to information is restricted solely to citizens. Contrastingly, Article 19 (2) of the Covenant on Civil and Political Rights guarantees the right to access information to 'everyone'.⁴⁵⁰ While it may be argued that freedom of information is essentially to be enjoyed by the owners of the information, in that case the citizenry, freedom of information is often a fundamental condition for the exercise of other rights ordinarily guaranteed for non-citizens. Indeed, access to information is a prerequisite for the exercise of the procedural freedom of expression which the Constitution guarantees to 'every person'. Drawing from this, it is reasonable to argue for guarantee of the freedom of information to non-citizens with any necessary limitations in scope.

Emerging jurisprudence from the High Court adopts a restrictive interpretation of 'who is a citizen' and therefore entitled to seek information under the right of access to information. In the case of *Famy Care Limited v Public Procurement Administrative Review Board & another*, a company incorporated in India sought to enforce its rights of access to information held by State agencies in Kenya.⁴⁵¹ The High Court took the view that 'citizen' referred to natural persons hence a foreign company was not entitled to the right to access to information.⁴⁵² Similarly, in *Nairobi Law Monthly Company Limited v Kenya Electricity Generating Company*, although the company in issue was incorporated in Kenya, the High Court maintained that only natural persons are entitled to seek enforcement of the right to access to information held by State agencies.⁴⁵³ Perhaps the question that the High Court ought to have considered in both instances is what injustice would be suffered by the public if the information was disclosed. The Constitution, 2010 provides that the bill of rights is to be interpreted to promote the objects and spirit of the bill of rights and the values of humanity, equality, equity and freedom.⁴⁵⁴ In addition, the fact that freedom of expression - freedom to

⁴⁴⁶ As above. Article 260 of the Constitution defines the State as: '...the collectivity of organs, offices and other entities comprising the Government of the Republic of Kenya'.

⁴⁴⁷ Constitution, 2010, article 35 (1) (b): '...information held by another person and required for exercise or protection of any right or fundamental freedom'.

⁴⁴⁸ Constitution, 2010 article 35 (2): 'Every person has the right to the correction or deletion of any misleading information that affects the person'.

⁴⁴⁹ Constitution, 2010 article 35 (3): 'The State shall publish and publicise any information affecting the nation'.

⁴⁵⁰ International Covenant on Civil and Political Rights, 999 UNTS 171 (entered into force 23 March 1976) (Kenya ratified on 1 May 1972) article 19 (2): 'Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of the frontiers either orally, in writing or in print, in the form of art or through any other media of his choice.'

⁴⁵¹ [2012] eKLR.

⁴⁵² As above.

⁴⁵³ Petition 278 of 2011.

⁴⁵⁴ Constitution, 2010 article 20(4): 'In interpreting the Bill of Rights, a court, tribunal or other authority shall promote (a) the values that underlie an open and democratic society based on human dignity, equality, equity and freedom; and (b) the spirit, purport and objects the Bill of Rights.'

receive and impart information - is guaranteed to 'every person',⁴⁵⁵ makes it permissible for the courts to adopt a less restrictive approach in the right to access information. Nonetheless, modern constitutional law analyses wording so carefully that arguments in favour of extending the right to non-citizens are perhaps constrained by the precise text of the Constitution, 2010.

The positive character of freedom of information requires that beyond constitutional recognition, the State must put in place clear procedures of accessing information by way of national legislation. As of October 2015 a draft freedom of information law, the Access to Information Bill, 2013 is awaiting publication for parliamentary debate. Similar to the Constitution, the Access to Information Bill, 2013 restricts the right of access to information to citizens.⁴⁵⁶ The Bill seeks to operationalise the constitutional provisions on access to information and provides for: a duty to disclose information by private entities deriving from their public functions as opposed to public ownership,⁴⁵⁷ a clear and simplified procedure of accessing information,⁴⁵⁸ a proactive public information disclosure system,⁴⁵⁹ and protection of whistle blowers.⁴⁶⁰

The process of developing a freedom of information legislation in Kenya traces back to 1999.⁴⁶¹ In October 2000 a motion was moved in Parliament to introduce the Freedom of Information Bill as a private member Bill.⁴⁶² There is however no evidence of subsequent tabling of the Bill in Parliament. In May 2007, the Freedom of Information Bill, 2007 was tabled in Parliament as a private member's Bill.⁴⁶³ However, the Bill lapsed without debate following dissolution of Parliament in October 2007.⁴⁶⁴ In 2011, the government published the Freedom of Information Bill which following stakeholder review was renamed the Access to Information Bill, 2013. The finding is thus partially implemented as of October 2015 through the constitution review process.

The High Court in 2011 while adjudicating a case under the right of access to information criticised the government for the continued failure to enact the freedom of information legislation.⁴⁶⁵ Further, as discussed above the Access to Information Bill, 2013 fails to comply with the standards of the ICCPR as it narrowly restricts the right to Kenyan citizens.

⁴⁵⁵Constitution, 2010 article 33 (1) (a): 'Every person has the right to freedom of expression, which includes freedom to seek, receive or impart information or ideas'.

⁴⁵⁶ Access to Information Bill, 2013 clause 4.

⁴⁵⁷ Access to Information Bill, 2013 clause 2.

⁴⁵⁸ Access to Information Bill, 2013 clauses 8 & 9.

⁴⁵⁹ Access to Information Bill, 2013 clause 5.

⁴⁶⁰ Access to Information Bill, 2013 clause 18.

⁴⁶¹ International Commission of Jurists – Kenya section, status of the freedom of information in Kenya, <http://www.icj-kenya.org/index.php/freedom-of-information/299-status-of-freedom-of-information-in-kenya> (accessed 12 September 2014).

⁴⁶² Parliament of Kenya, National Assembly Hansard, 4 October 2000, 1958-1974.

⁴⁶³ Parliament of Kenya, National Assembly Hansard, 17 May 2007, <http://www.parliament.go.ke/plone/archive/archive-9th-parliament/hansard/official-report-17.05.07/view> (accessed 12 September 2014).

⁴⁶⁴ As above.

⁴⁶⁵ *Nairobi Law Monthly Company Limited versus Kenya Electricity Generating Company (Kengen) & 6 others* petition no. 278 of 2011.

3.2 Freedom of assembly

- (i) Guarantee the right to peaceful assembly and impose only restrictions that are necessary in a democratic society (HRC Committee 2005).

The repealed Constitution, 1963 provided for the right to peaceful assembly paired with the freedom of expression,⁴⁶⁶ thus essentially interpreting assembly as a moment of expression. The right was further qualified in the interests of defence, public safety, public order, public morality and to safeguard the rights of others.⁴⁶⁷ In practice, the right to peaceful assembly was regulated by the Public Order Act which outlined administrative requirements for the exercise of the right. Specifically, the Public Order Act provided for issuance of prior permission for public meetings and processions following fulfilment of a stringent set of requirements.⁴⁶⁸ Although the Public Order Act was amended in 1997 to expand the exercise of political rights, the amendments only related to political party uniforms and did not amend the provisions requiring licensing of all political rallies.⁴⁶⁹ In 2003, the High Court sitting as a constitutional court was called upon to consider the constitutionality of the provisions of the Public Order Act requiring licensing of all public gatherings and processions. The High Court opined that these provisions were constitutional and necessary for the welfare of Kenyans.

The Constitution, 2010 guarantees the right to peaceful and unarmed assembly as a stand-alone right which also pairs the right to petition public authorities.⁴⁷⁰ Although the text of the Constitution, 2010 appears to encompass a single right to assembly for the purpose of petitioning public authorities, it is arguable that it envisages an unfettered right to assembly and a separate and distinct right to petition public authorities. The right to assembly protects both the actual assembly and preparatory measures to undertake the assembly. In practice, exercise of the right to assemble requires one to notify the police prior to the assembly and obtain a permit.⁴⁷¹ It is reasonable to argue that the requirement of prior permission is a constitutionally permissible administrative regulation meant to set out the character of the assembly in terms of time, place, noise levels and expected turn-out to create conditions necessary for the exercise of the right. However, the uniformity of these administrative regulations, the precision of the requirements and the discretion that vests in police officers in issuing permits is open to debate. Notably, the requirement of permission as a precondition for the exercise of the right to assembly featured in the constitution-making process. In initial drafts of the constitution the right to assembly was unqualified in relation to prior permission with the express wording 'without the requirement of prior permission'.⁴⁷²

⁴⁶⁶ Constitution, 1963 (repealed) section 80.

⁴⁶⁷ As above.

⁴⁶⁸ Public Order Act, section 5.

⁴⁶⁹ Statute Law (Miscellaneous) Amendment Act, 2007.

⁴⁷⁰ Constitution, 2010 section 37: 'Every person has the right, peaceably and unarmed, to assemble, to demonstrate, to picket and to present petitions to public authorities'.

⁴⁷¹ Interview with police officers at Kenya Police Headquarters, Vigilance House, Nairobi, Kenya 27 October 2014.

⁴⁷² Bomas draft constitution clause 53: 'Every person has the right peaceably, unarmed and without the requirement of prior permission to assemble, to demonstrate, to picket and to present petitions to public authorities'; Proposed New Constitution of Kenya, 2005 clause 53: 'Every person has the right peaceably, unarmed and without the requirement of prior permission to assemble, to demonstrate, to picket and to present petitions to public authorities' Harmonised draft constitution, November 2009 clause 42: 'Every person has the

However, the wording was expunged in subsequent drafting by a committee of Parliament charged with constitutional review in January 2010.⁴⁷³

The High Court has adjudicated on the content and exercise of the right to peaceful assembly. In *Mike Sonko Gidion Kioko v the Attorney General & 8 others* the High Court in July 2014 was petitioned to issue an injunction to stop opposition parties from calling for mass action on *saba saba* day (7 July 2014).⁴⁷⁴ The High Court while declining to grant the injunction stated that the right to peaceful assembly enshrines rights that amount to mass action.⁴⁷⁵ The Court was however resounding in its finding that the exercise of the right was limited to the extent that the assembly was peaceful, unarmed and was conducted without incitement to violence, hate speech and destruction of property.⁴⁷⁶

This recommendation is thus fully implemented through the constitution making process which as discussed above sets out the right and provides clear limitations in line with ICCPR.

3.3 Freedom of the media and protection of human rights defenders

(i) Investigate the harassment of journalists and protect human rights defenders (SR FO & E 2011, UPR 2010); (ii) extend an invitation to the Special Rapporteur on human rights defenders (UPR 2010).

On harassment of journalists and protection of human rights defenders, the Constitution, 2010 guarantees the protection of journalists against State interference and penalisation.⁴⁷⁷ However, in practice reports often cite harassment and attacks on journalists, although official data on the extent of the harassment is unavailable. A 2013 baseline survey report by the Kenya Media Programme indicates that 91% of 282 journalists interviewed in the study had faced a security threat in the course of their work,⁴⁷⁸ with 48% having received threatening messages more than three times.⁴⁷⁹ The main sources of the threats were politicians and organised groups.⁴⁸⁰ Further, the report indicates that the threats are mainly in relation to reports on corruption, land and local leadership.⁴⁸¹ In relation to actual protection, 22% of the journalists indicated that they had received protection from the police while 17% were protected by human rights defenders.⁴⁸² In addition, on investigation and

right peaceably, unarmed and without the requirement of prior permission to assemble, to demonstrate, to picket and to present petitions to public authorities’.

⁴⁷³ Revised harmonised draft of the constitution from the Parliamentary Select Committee 29 January 2010 clause 35: (1) ‘Every person has the right peaceably and unarmed, to assemble, to demonstrate, to picket and to present petitions to public authorities’

⁴⁷⁴ [2014] eKLR.

⁴⁷⁵ As above.

⁴⁷⁶ As above.

⁴⁷⁷ Constitution, 2010 article 34 (2): ‘The State shall not exercise control over or interfere with any person engaged in broadcasting, the production or circulation of any publication or the dissemination of information by any medium; or penalise any person for any opinion or view or the content of any broadcast, publication or dissemination.’

⁴⁷⁸ Hivos ‘Safety and protection of Kenyan journalists: is it common sense or common cents’ April 2013, 14, https://hivos.org/sites/default/files/baseline_survey_report_final.pdf (accessed 28 October 2014).

⁴⁷⁹ Hivos (n 478 above) 15.

⁴⁸⁰ Hivos (n 478 above) 14.

⁴⁸¹ As above.

⁴⁸² Hivos (n 478 above) 20-21.

prosecution of harassment cases by the State, the report indicates that action is rarely taken.⁴⁸³

While the Constitution, 2010 enshrines independence of journalists and provides that the state shall not penalise any person for any opinion or view or content of publication or broadcast,⁴⁸⁴ national legislation does not contain explicit protections for journalists against criminal sanctions. For instance, the Penal Code imposes criminal sanctions on unlawful publication of defamatory material with intent to defame another person.⁴⁸⁵ It may however be argued that these provisions are inconsequential in light of provisions of the Constitution, 2010 which require all laws in force prior to its promulgation to be construed with alterations and exceptions necessary to conform to the Constitution.⁴⁸⁶ In addition, no journalist has been prosecuted under these provisions since 1963.⁴⁸⁷ In 2005, in a case of criminal libel brought against a journalist under these provisions, the Attorney General while discontinuing the prosecution stated that it was not government policy to prosecute anyone for criminal libel.⁴⁸⁸ However, review of recent government actions in relation to freedom of the media and particularly protection of journalists reveals a different picture. In December 2013, the government enacted the Kenya Information and Communication (Amendment) Act, 2013. The amendment Act was enacted to operationalise the Constitutional provisions on independence of the media, specifically establishment of an independent body to set media standards, regulate and monitor compliance with the standards.⁴⁸⁹ However, the amendment Act violated the Constitutional requirements on independence of the media in at least two fronts. First, the amendment Act establishes a Communication Authority of Kenya whose membership is controlled by the Executive and National Assembly.⁴⁹⁰ Second, the Act sets up a Communication and Media Appeals Tribunal under the Communication Authority whose membership is government dominated and which is empowered to impose punitive fines on journalists and media houses including recommending deregistration of journalists.⁴⁹¹

The existence of government control in independent bodies meant to regulate, monitor compliance with media standards and also adjudicate over cases of breach of the standards negates clear constitutional provisions outlawing state control over media and journalists. Instructively, the Kenya Information and Communication (Amendment) Bill 2013 was initially

⁴⁸³ Hivos (n 478 above) 31-32.

⁴⁸⁴ Article 34 (2) (b).

⁴⁸⁵ Kenya Penal Code sections 194-196.

⁴⁸⁶ Constitution, 2010 article 262 section 7 (1): 'All law in force immediately before the effective date continues in force and shall be construed with alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.'

⁴⁸⁷ Panapress 'Kenyan journalist freed as government discontinues libel case' 20 January 2005, <http://www.panapress.com/Kenyan-journalist-freed-as-govt-discontinues-libel-case--12-562069-42-lang1-index.html> (accessed 24 November 2014).

⁴⁸⁸ As above.

⁴⁸⁹ Constitution, 2010 section 34 (5): 'Parliament shall enact legislation that provides for the establishment of a body, which shall – (a) be independent of control by government, political interests or commercial interests; (b) reflect the interests of all sections of the society; and (c) set media standards and regulate and monitor compliance with those standards.'

⁴⁹⁰ Kenya Information and Communication (Amendment) Act, 2013 section 7.

⁴⁹¹ Kenya Information and Communication (Amendment) Act, 2013 section 37.

passed by Parliament in October 2013.⁴⁹² However, the President declined to assent to the Bill and returned it to the National Assembly citing a number of provisions which contradicted the Constitution, 2010 and suggested recommendations to amend them.⁴⁹³ These recommendations sought to entrench further government control over the media.⁴⁹⁴ The National Assembly adopted the recommendations as set out in the President's memorandum.⁴⁹⁵

The issue of the independence and protection of journalists featured in the national debate in relation to the Kenya Information and Communication (amendment) Bill, 2013. The Commission on the Implementation of the Constitution, pointed out that the amendment Bill was unconstitutional and if enacted would erode the constitutional guarantees on media freedom.⁴⁹⁶ Further, the media fraternity and civil society organisations in December 2013 held peaceful demonstrations and petitioned the National Assembly not to pass the Bill as it negated constitutional safeguards on the freedom of the media.⁴⁹⁷ Similarly, human rights organisations petitioned the President not to assent to the Kenya Information and Communication (amendment) Bill, 2013 as revised in December 2013 arguing that it contained punitive provisions against individual journalists.⁴⁹⁸ Regardless, the President assented to the amendment Bill in December 2013.⁴⁹⁹ The High Court in February 2014 issued a restraining order suspending implementation of the amendment Act pending a determination of the constitutionality of the amendment Act.⁵⁰⁰ As of October 2015, the restraining order is still in force pending the hearing of petitions filed by media owners, journalists and the Media Council. Therefore, from the above, the finding on investigation and protection of journalists and human rights defenders has not been implemented as of October 2015.

⁴⁹²Parliament of Kenya, National Assembly, official report, Hansard, 31 October 2013, <http://www.parliament.go.ke/plone/national-assembly/business/hansard/thursday-31st-october-2013-at-2.30pm/view> (accessed 24 November 2014).

⁴⁹³ Parliament of Kenya, National Assembly, official report, Hansard, 27 November 2013, <http://www.parliament.go.ke/plone/national-assembly/business/hansard/wednesday-27th-november-2013-at-2.30pm/view> (accessed 24 November 2014).

⁴⁹⁴ As above.

⁴⁹⁵ Parliament of Kenya, National Assembly, official report, Hansard, 5 December 2013, <http://www.parliament.go.ke/plone/national-assembly/business/hansard/thursday-5th-december-2013-at-2.30pm/view> (accessed 24 November 2014).

⁴⁹⁶ Commission on the Implementation of the Constitution 'Press statement on the Kenya Information and Communication (amendment) Bill, 2013' 7 November 2013, <http://www.cickenya.org/index.php/newsroom/press-releases/item/351-cic-press-statement-on-the-kenya-information-and-communications-ammendment-bill#.VHMTQ9KUc54> (accessed 24 November 2014).

⁴⁹⁷ 'Kenya: KCA leads journalists in demo over oppressive media bill' 3 December 2013, <http://allafrica.com/stories/201312041188.html> (accessed 24 November 2014).

⁴⁹⁸ Article 19 'Kenya: new laws mark major setback for media freedom' 16 December 2013, <http://www.article19.org/resources.php/resource/37407/en/kenya:-new-laws-mark-major-setback-for-media-freedom> (accessed 24 November 2014).

⁴⁹⁹ Daily Nation 'Controversial media bill signed into law' 16 December 2013, <http://www.nation.co.ke/news/politics/Media-Bill-Uhuru-Kenyatta-Justin-Muturi/-/1064/2114230/-/kxau85z/-/index.html> (accessed 24 November 2014).

⁵⁰⁰ *Nation Media Group Limited & 2 others v Attorney General & 4 others*, Petition 30 of 2014 (consolidated with *Kenya Editor's Guild & 2 others v Republic*, Petition 31 of 2014 as consolidated with *Media Council of Kenya v Cabinet Secretary Ministry of Information and Technology*, Judicial Review Misc. Appl. No. 30 of 2014).

On invitation of the Special Rapporteur on human rights defenders, Kenya has no open invitations to any UN special procedure as of October 2015.⁵⁰¹ Accordingly, Kenya has not extended an invitation to the Special Rapporteur on human rights defenders.

3.4 Freedom of expression – hate speech

- (i) Undertake legislative amendments to widen the scope of existing national law to give effect to CERD (CERD Committee 2011);
- (ii) enforce legislation on hate speech and incitement to hatred particularly for political purposes (CERD Committee 2011);
- (iii) speed up determination of racial discrimination cases in courts (CERD Committee 2011).

In regard to legislative amendments to widen the scope of national law to give effect to hate speech in line with Article 4, international law restricts freedom of speech as relates to propaganda and incitement to genocide. While the aspects of what constitutes hate speech are largely developed, the definition of hate speech is unsettled. Article 4 of the International Convention on Elimination of Racial Discrimination enumerates a number of obligations of states in relation to hate speech. Article 4 requires state parties to condemn dissemination of ideas based on racial superiority, dissemination of ideas based on racial hatred, incitement to racial discrimination and incitement to acts of racially motivated violence.⁵⁰² Additionally, it obligates states to declare an offence punishable by law dissemination of ideas based on racial superiority, incitement to racial discrimination or acts of violence or incitement to violence against a race or group of persons and to criminalise and declare illegal organisations which promote and incite racial discrimination.⁵⁰³ It also requires states to prohibit public institutions and authorities from promoting or inciting racial discrimination.⁵⁰⁴

The Constitution, 2010 embraces the notion of protection of freedom of speech by capturing both protected and prohibited speech.⁵⁰⁵ However, the challenge is that while Constitution, 2010 precludes hate speech from the protected ambit of freedom of speech it does not define what constitutes hate speech.

⁵⁰¹ Office of the High Commissioner for Human Rights, Kenya homepage, open invitation to special procedures, standing invitations, <http://www.ohchr.org/EN/HRBodies/SP/Pages/Invitations.aspx> (accessed 30 October 2014).

⁵⁰² International Convention on Elimination of Racial Discrimination (CERD) article 4: 'State Parties condemn all propaganda and all organisations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination, and to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention'.

⁵⁰³ CERD article 4 (a): '...Shall declare an offence punishable by all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof'; (b): 'Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law'.

⁵⁰⁴ CERD article 4(c): 'Shall not permit public authorities or public institutions national or local to, promote or incite racial discrimination.'

⁵⁰⁵ Article 33 (1): 'Every person has the right to the freedom of expression, which includes (a) freedom to seek, receive or impart information or ideas; (b) freedom of artistic creativity; and (c) academic freedom and freedom of scientific research.' (2): 'The right to freedom of expression does not extend to (a) propaganda for war; (b) incitement to violence; (c) hate speech; or advocacy for hatred that (i) constitutes ethnic incitement, vilification of others or incitement to cause harm; or (ii) is based on any ground of discrimination specified or contemplated in Article 27 (4).'

The National Cohesion and Integration Act, 2008 contains the most comprehensive provisions on hate speech under Kenyan law. The Act defines hate speech as ‘speech which is threatening, abusive or insulting or involves the use of threatening, abusive or insulting words which is intended to stir ethnic hatred or is likely to stir ethnic hatred or having regard to the circumstances, ethnic hatred is stirred up.’⁵⁰⁶ The speech covered includes the use of threatening, abusive or insulting words or behaviour or display of written material, publication or distribution of written material, direction of performance or public performance of a play, the distribution, showing or playing of a recording of visual images or the provision, production or direction of a programme.⁵⁰⁷ The Act imposes a penalty of a fine not exceeding one million Kenya shillings and/or a term of imprisonment not exceeding three years or both.⁵⁰⁸ The Act further defines ethnic hatred as ‘hatred against a group of persons defined by reference to colour, race, nationality (including citizenship) or ethnic or national origins’.⁵⁰⁹ The Act also criminalises ethnic or racial contempt and introduces other hate speech actors to include newspapers, radio or media stations.⁵¹⁰

This definition of hate speech in the National Cohesion and Integration Act falls short of the state obligations encompassed in Article 4 in a number of ways. First, the offence of hate speech is restricted to individuals while Article 4 is wider and covers commission of hate speech by organisations. Second, criminalisation of hate speech does not extend to activities that assist persons or organisations engaging in hate speech as provided for in Article 4. In practice, the open nature of the definition of hate speech has resulted into wide interpretations hence making it difficult to prosecute hate speech. As of June 2015, there is only one known conviction for hate speech despite more than ten cases having been filed with the courts.⁵¹¹ Further, the essence of hate speech as defined by the Act is threat, abuse or insult. Often the language used is coded and the words used could have alternative meaning or are figurative or innuendos. In such instances the threatening, abusive or insulting element of the speech is difficult to prove as characterizing what constitutes hate speech is factually driven. On the converse, it can be argued that the provisions on hate speech in the National Cohesion and Integration Act are inadequate as they fail to provide for grounds of defence particularly when viewed from the perspective of protection of freedom of speech.

⁵⁰⁶ National Cohesion and Integration Act section 13(1): ‘A person who – (a)uses threatening, abusive or insulting words or behaviour or displays any written material; (b) publishes or distributes written material; (c) presents or directs the public performance of a play; (d) distributes, shows or plays a recording of visual images; or provides, produces, or directs a programme which is threatening, abusive or insulting or involves the use of threatening abusive or insulting words or behaviour commits an offence if such person intends thereby to stir up ethnic hatred or having regard to all the circumstances ethnic hatred is likely to be stirred up’.

⁵⁰⁷ As above.

⁵⁰⁸ National Cohesion and Integration Act section 13 (2): ‘Any person who commits an offence under this section shall be liable to a fine not exceeding one million shillings or a term of imprisonment not exceeding three years’.

⁵⁰⁹ National Cohesion and Integration Act section 13 (3).

⁵¹⁰ National Cohesion and Integration Act section 62 (1): ‘Any persons who utters words intended to incite nay feelings of contempt, hatred, hostility, violence or discrimination against any person, group or community on the basis of ethnicity or race, commits an offence and shall be liable on conviction to a fine not exceeding one million, or to imprisonment for a term not exceeding five years, or both.’ (2): ‘A newspaper, radio or media enterprise that publishes the utterances referred to in subsection (1) commits an offence and shall be liable on conviction to a fine not exceeding one million shillings.’

⁵¹¹ *Allan Wadi Okeno v National Cohesion and Integration Commission* 2015 (unreported).

As of October 2015, the National Cohesion and Integration Act, 2008 has not been amended to widen the scope of hate speech. Nonetheless, government in its Second Medium Term Plan 2013-2017 commits to review the Act to align it with the Constitution.⁵¹² The finding has therefore not been implemented.

On enforcement of legislation on hate speech and incitement to hatred particularly for political purposes, a number of persons have been charged with hate speech and incitement to hatred. In 2010 three Members of Parliament were charged with incitement to violence. In *Republic v Joshua Serem Kutuny*, the Member of Parliament was charged with incitement to violence by distributing leaflets directing certain ethnic communities to leave his constituency.⁵¹³ The charges were later dropped for lack of evidence.⁵¹⁴ In *Republic v Wilfred Machage and 2 others*, two members of Parliament and a political activist were charged with uttering words likely to stir ethnic hatred during the campaign for the 2010 constitutional referendum.⁵¹⁵ The members of Parliament were acquitted in 2011 due to failure by the prosecution to adhere to the rules relating to electronic evidence.⁵¹⁶ In *Republic v Ali Chirau Makwere*, the Member of Parliament was charged with uttering words likely to stir ethnic hatred.⁵¹⁷ This case was withdrawn in 2012 after the Member of Parliament apologised for the hate speech utterances. Although the National Cohesion and Integration Act provides for conciliation, the Act does not expressly state if such conciliation precludes a criminal trial.⁵¹⁸ Nonetheless, viewed from a criminal law perspective, it is unlikely that conciliation would preclude trial. In 2012, three musicians were charged with propagating hate speech through musical performances.⁵¹⁹ While two of these cases are pending in court, the third was acquitted in June 2014 for lack of evidence.⁵²⁰ The court in this case pointed out that the alleged 'hateful speech' did not mention any ethnic community.⁵²¹ This finding alludes to the use of coded language and innuendos which on the face of it do not constitute abusive, insulting or threatening language hence difficult to characterise as hate speech.

As of October 2015, there has not been any conviction on politically driven hate speech cases. The reasons for failure to enforce the National Cohesion and Integration Act can be inferred from the cases that the courts have handled. In the first hate speech case that the courts were called upon to adjudicate, *Republic v Wilfred Machage and 2 others*, the court in acquitting the accused persons stated that the prosecution failed to follow the rules of evidence as relates to electronic records.⁵²² The specific issue was that the main piece of evidence on which the charges were premised was a video clip recording of the accused

⁵¹² Kenya Vision 2030, Second Medium Term Plan 2013-2017, 104.

⁵¹³ Criminal case No. 1141/10 Chief Magistrates Court in Nairobi (unreported).

⁵¹⁴ As above.

⁵¹⁵ Criminal Case No. 1140/10 (unreported).

⁵¹⁶ As above.

⁵¹⁷ Criminal case 1215/15 (Unreported).

⁵¹⁸ National Cohesion and Integration Act section 51.

⁵¹⁹ 'Musicians charged with hate speech' *Daily Nation*, 5 July 2012, 9.

⁵²⁰ 'Court acquits musician De Mathew over anti-Raila song' *Daily Nation*, 20 June 2014,

<http://mobile.nation.co.ke/news/Court-acquits-musician-DeMathew-Raila-Odinga-song/-/1950946/2355326/-/format/xhtml/-/v13ebkz/-/index.html> (accessed 8 July 2014).

⁵²¹ As above.

⁵²² Criminal case no. 1140/10 (unreported).

persons uttering the objectionable words.⁵²³ The video clip was produced in court but the prosecution did not call any witness to certify the authenticity and integrity of the electronic record as required by the Evidence Act.⁵²⁴ The video clip recording could thus not be admitted as evidence leading to acquittal of the accused persons.⁵²⁵ In the case of *Republic v Joshua Serem Kutuny*, the charges were dropped due to lack of evidence to mount a prosecution.⁵²⁶ The case of *Republic v Ali Chirau Makwere* was withdrawn following a conciliation mediated by the National Cohesion and Integration Commission.⁵²⁷ The June 2014 acquittal of the musician charged with propagating hate speech in his song was as a result of the prosecution failing to adduce evidence to link the singer to hate speech. Drawing from this discussion, failure to enforce the Act can be attributed to: lack of capacity to prosecute hate speech, lack of political will to enforce the law and weakness in the Act. This recommendation has thus not been implemented.

3.5 Freedom to make political choices and hold political opinions

(i) Facilitate the safe return of John Ouko back to Kenya (ACHPR 1999)

John Ouko, a students' union leader at the University of Nairobi, was arrested and unlawfully detained at the Secret Service Department in Nairobi for ten months in 1997 due to his political opinions.⁵²⁸ In the course of detention, Ouko was tortured and subjected to torture, inhuman and degrading treatment in Nairobi. He fled from Kenya and from March 1998 was leaving at a refugee camp in the Democratic Republic of Congo.⁵²⁹ Subsequently, he filed a communication at the African Commission alleging violation of his right to liberty and security of the person, freedom from torture and inhuman and degrading treatment and freedom of association.⁵³⁰ The African Commission found violation of: the freedom from torture, inhuman and degrading treatment; the right to personal liberty and freedom from arbitrary arrest; and the freedom of expressions, association and movement. The African Commission in its decision in 2000 urged Kenya to facilitate the safe return of John Ouko back to Kenya.⁵³¹

There is no documentary evidence pointing to any measures taken by the government to facilitate his return to Kenya. In addition, interviews with government officials indicate that no action was taken.⁵³² The finding was therefore not implemented.

4 Review of the implementation of findings arising from adjudicative monitoring processes

This chapter has assessed implementation of one finding arising from an adjudicative monitoring process. This finding, discussed above, relates to a decision by the African Commission in a communication by John Ouko. While the finding was an individualised

⁵²³ As above.

⁵²⁴ As above.

⁵²⁵ As above.

⁵²⁶ Criminal case 1141/10 (unreported).

⁵²⁷ Criminal case 1215/12 (unreported).

⁵²⁸ *Ouko v Kenya* (2000) AHRLR 135 (ACHPR 2000).

⁵²⁹ As above.

⁵³⁰ As above.

⁵³¹ As above.

⁵³² Interview with M Njau-Kimani, Legal Secretary Justice and Constitutional Affairs, Office of the Attorney General and Department of Justice, Kenya, Nairobi, 4 March 2015.

remedy requiring specific action, there is no evidence of any action taken by the government to implement the decision. Notably, the state did not participate in the adjudication of the communication as it failed to respond to the African Commission's request for information. Further, this was the first merit decision against Kenya at a time when, even if the state had ratified the African Charter, it had not engaged with the African Commission, for instance by submitting the initial state report.⁵³³ More comprehensive discussions are undertaken in chapter eight on the overall analysis of implementation.

5 Conclusion

The analysis in this chapter finds that a minimal number of recommendations on personal liberty and physical integrity rights and political rights have been implemented. Most of the recommendations that are fully implemented or partially implemented were implemented through the constitution review process. Distilled further, these recommendations mainly relate to legal and institutional reforms such as police institutional reforms, judicial reforms and institutional reforms on the prison system and generally on the administration of justice. However, recommendations that had no bearing on the constitution making process, for instance those relating to investigation and prosecutions of individuals for human rights violations have not been implemented. The analysis also finds instances of state obstructionism marked by attempts to reverse implementation that has occurred through the constitution making process. This is illustrated by weakening of laws through amendments such as those relating to police accountability and poor resourcing of institutions and delay in enactment of laws.

On the implementation pathways, most of the recommendations have been implemented through the constitution making process and not as a result of government action. Non-state actors have also been critical in implementation of the recommendations of monitoring mechanisms for example in initiating the Prevention of Torture Bill. The assessment also finds the potential of other independent actors such as the Office of the Ombudsman in implementation of the recommendations.

As to whether the implementation of the recommendations particularly, enactment of laws and establishment of institutions, has resulted in greater enjoyment of human rights by the public, the assessment is largely negative. There is generally lack of political will to implement the laws, enforce human rights standards and institutional cultures that do not respect human rights despite enactment of progressive laws. Illustratively, despite the establishment of police accountability mechanisms, police excess such as extrajudicial killings and torture remain prevalent. A detailed analysis of this assessment is undertaken in chapter eight.

⁵³³ African Charter on Human and Peoples' Rights, CAB/LEG/67/3 rev.5, 21 I.L.M. 58 (1982) (entry into force 21 October 1986). Kenya ratified 23 January 1992, <http://www.au.int/en/sites/default/files/African%20Charter%20on%20Human%20and%20Peoples'%20Rights.pdf> (10 November 2015). For submission of initial state report, see African Commission on Human and Peoples' Rights, states, state reporting, Kenya, <http://www.achpr.org/states/kenya/> (accessed 10 November 2015).

Chapter 4

Assessment of the implementation of recommendations on economic, social and cultural rights

1 Economic, social and cultural rights

The recommendations analysed relate to: constitutional protection of economic, social and cultural rights in general and particularly social security rights, food, water, health, land, housing rights, corruption and poverty alleviation. At the outset the chapter will analyse the over-arching recommendation on incorporation of economic, social and cultural rights (socio-economic) into the domestic law.

1.1 Incorporation of economic, social and cultural rights into the domestic law

- (i) Incorporate socio-economic rights into the domestic law (CESCR Committee 1993, APRM 2006, CESCR Committee 2008).

The repealed Constitution, 1963 placed socio-economic rights outside the constitutional arena and beyond the enforcement power of courts. Therefore although Kenya had ratified the International Covenant on Economic Social and Cultural Rights,¹ these rights were not subject to judicial adjudication. Review of the Judiciary's record in adjudication of socio-economic rights is mixed. In limited instances the Judiciary interpreted civil and political rights as protecting aspects of socio-economic rights. For instance, in *Musa Mohammed Dagane and 25 others v the Attorney General*, the court interpreted the civil right to property to include the right to adequate housing, finding that forced evictions constituted a violation of the right to adequate housing.² Similarly, in 2006 the High Court on its own motion addressed itself to the right to a clean environment which it argued was protected by the right to life.³ The Court in this instance declared that every person in Kenya was entitled to the right to a clean and healthy environment and had a duty to safeguard the environment.⁴ Contrastingly, the High Court in March 2010 declined to interpret the right to life as encompassing the right to livelihood instead finding that the right to life protected mere physical existence.⁵ In other instances, the courts adjudicated on socio-economic rights in the context of rights provided in national laws. The High Court in 2004 adjudicated on the right to basic education, in particular whether the right to basic education constitutes higher education in a case brought under the Children Act to enforce parental responsibility.⁶ The Court found that the right to basic education included higher education hence parental responsibility could extend to the provision of higher education.⁷

The Constitution, 2010 was drafted in the context of growing socio-economic and regional disparities and perceived failure of successive governments to address inequality.

¹International Covenant on Economic, Social and Cultural Rights, 993 U.N.T.S., 3, entered into force on 3rd January 1976. Kenya ratified in January 1976.

² [2011] eKLR. The petition was filed in 2006 and was decided within the framework of Article 75 on the right to property in the former Constitution.

³ *Peter Waweru v Republic* [2006] eKLR.

⁴ As above.

⁵ *Paul Mungai & 20 others v Attorney General & 2 others* [2010] eKLR.

⁶ *Diana Ndele Wambua v Paul Makau Wambua* [2004] eKLR.

⁷ As above.

Accordingly, the bill of rights is recognised as the framework for social, economic and cultural policies and an avenue for promoting social justice.⁸ The Constitution, 2010 incorporates a set of justiciable socio-economic rights in the bill of rights. Article 43 enumerates the rights to: health, accessible and adequate housing, and to reasonable standards of sanitation, food, clean and safe water, social security and education.⁹ Beyond their mere presence in the bill of rights, the economic, social and cultural rights are accorded equal status with civil and political rights. A structural distinction exists by having the economic, social and cultural rights consigned to Article 43 only. It is instructive that prior drafts of the constitution published in 2002, 2004, 2005 and 2009 incorporated socio-economic rights as individual and stand-alone rights.¹⁰ As discussed later in chapter six, the socio-economic rights were relegated to one article in the later stages of the constitution-making process by the Parliamentary committee on the constitution review allegedly with a view to reducing verbosity.¹¹

On justiciability, Article 23 (1) empowers the High Court to hear and determine applications on the enforcement of all rights, without any distinction.¹² To enhance access to the courts for enforcement of the Bill of Rights, Parliament is directed to enact legislation granting original jurisdiction to subordinate courts to enforce the Bill of Rights.¹³ The remedies provided for violation of the rights include declaration of rights, injunction, conservatory order, compensation and order for judicial review.¹⁴ The Constitution, 2010 also outlines principles to guide the courts in adjudicating socio-economic rights.¹⁵ This provision

⁸ Constitution, 2010 article 19: (1) 'The Bill of Rights is an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies.' (2) 'The purpose of recognising and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings.'

⁹ Article 43 (1) Every person has the right – (a) to the highest attainable standard of health, 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.

¹⁰ See Constitution of Kenya Review Commission zero draft constitution, 27 September 2002 clauses 56-62; Bomas draft constitution, 15 March 2004 clauses 60-66; Proposed New Constitution of Kenya, 22 August 2005 clauses 60-66; Harmonized draft constitution of Kenya, 17 November 2009 clauses 61-66.

¹¹ Committee of Experts 'Verbatim record of the Committee of Experts on the Constitutional Review meeting with the Parliamentary Select Committee held on 16 February 2010 at Cooperative Bank Management Centre, Karen, Nairobi', 32 (accessed from the Kenya National Archives 18 October 2014).

¹² Article 23 (1): 'The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or a fundamental freedom in the Bill of Rights.'

¹³ Article 23 (2): 'Parliament shall enact legislation to give original jurisdiction in appropriate cases to subordinate courts to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.'

¹⁴ Article 23 (3): 'In any proceedings brought under Article 22, a court may grant appropriate relief, including – (a) a declaration of rights; (b) an injunction; (c) a conservatory order; (d) a declaration of the invalidity of any law that denies, violates, infringes, or threatens a right or a fundamental freedom in the Bill of Rights that is not justified under Article 24; (e) an order for compensation; and (f) an order for judicial review.'

¹⁵ Article 20 (5): 'In applying any right under Article 43, if the State claims that it does not have the resources to implement the right, a court, tribunal or other authority shall be guided by the following principles – (a) it is the responsibility of the state to show that the resources are not available; (b) in allocating resources, the State shall give priority to ensuring the widest possible enjoyment of the right or fundamental freedom having regard to prevailing circumstances, including the vulnerability of particular groups or individuals; and (c) the court, tribunal or other authority may not interfere with a decision by a State organ concerning the allocation of available resources, solely on the basis that it would have reached a different conclusion.'

establishes a rebuttable presumption that the state will always have the resources to implement socio-economic rights and burdens the state with the responsibility to show absence of resources. The rights outlined in Article 43 are subject to the textual limitation of progressive realisation.¹⁶

Although the Kenyan Courts have not addressed the meaning of phrase 'progressive realisation', the court has in one instance pointed out that the aspect of progressive realisation required the state to demonstrate plans and policies that are in place or to be put in place for the achievement of these rights.¹⁷ The Committee CESCR in its General Comment 3 observes that the concept of progressive realisation implies that the rights will not be achieved within a short time, but that the concept should not be construed to divest the obligations of all meaningful content.¹⁸ Equally, the Limburg Principles highlight that states should move expeditiously towards realisation of the rights,¹⁹ and that states are required to initiate steps immediately for the realisation of the rights.²⁰

The courts have since 2010 adjudicated on a number of individual socio-economic rights. On the right to education, the High Court in 2011 was called upon to assess a policy restricting the number of candidates from private schools joining national secondary schools against the constitutional guarantees of the right to education and non-discrimination.²¹ The Court in this instance referred to General Comment 13 of the Committee on CESCR to delineate the content of the state obligation but nonetheless found that this policy did not violate the right to education.²² On the right to health, the High Court declined to grant an order for the petitioner to be provided with free medicine by the state for his condition, on the basis that the petitioner pleaded violation of a number of rights without adequately substantiating the alleged violations.²³ In essence the court argued that the petitioner did not demonstrate that the state had breached its obligation to protect the right to health.²⁴ Similarly, a number of cases have been decided in regard to the right to accessible and adequate housing with the courts determining that evictions constitute a violation of this right.²⁵ In regard to the right to be free from hunger, the court declined to find that the state had violated the right on the basis that the petitioners failed to provide state policies against which the court to assess the alleged violation.²⁶

¹⁶ Constitution 2010, Article 21 (2): 'The state shall take legislative, policy and other measures, including the setting of standards, to achieve the progressive realisation of the rights guaranteed under Article 43. '

¹⁷ *Mitu-Belle Welfare Society v Attorney General and 2 others*, Nairobi Petition 164 of 2011 (unreported).

¹⁸ UN Committee on Social, Economic and Cultural Rights 'General Comment No.3: The nature of State parties' obligations' UN Doc. E/1991/23, 14 December 1990, para 9.

¹⁹ The Limburg Principles on the implementation of the International Covenant on Economic, Social and Cultural Rights, UN Doc. E/CN.4/1987/17.

²⁰ As above.

²¹ *John Kabui Mwai and 3 others v the Kenya National Examination Council and 2 others* [2011] eKLR.

²² As above.

²³ *Mathew Okwanda v Minister of Health and Medical Services & 3 others* [2013] eKLR.

²⁴ As above.

²⁵ *Susan Waihera Kariuki and 4 others v the Town Clerk Nairobi City Council and 3 others* [2013] eKLR; *Ibrahim Sangor Osman v the Minister of State for Provincial Administration and Internal Security* [2011] eKLR; *Satrose Ayuma & 11 others v the Registered Trustees of the Kenya Railway Staff Retirement Benefits Scheme & 3 others* Petition 65 of 2010; *Mitu-Belle Welfare Society v Attorney General and 2 others*.

²⁶ *Consumer Federation of Kenya (COFEK) v Attorney General & 4 others* [2012] eKLR.

The effectiveness of the remedies for socio-economic rights is open to debate. The gist of the debate is what happens when the state is unresponsive, unwilling or lacks the resources to implement a remedy. For instance, in the case of *Ibrahim Sangor Osman* the government was in November 2011 ordered to reconstruct residences for the 1,123 petitioners and pay compensation in excess of KES 200 million.²⁷ Instructively, the government did not defend the petition. As of October 2015, the government has not reconstructed the residences or provided alternative housing or paid compensation. Additionally, in cases in which the courts have ordered the state to file documents detailing policies or planned policies in regard to realisation of socio-economic rights, there is no evidence that the state has endeavoured to report back.²⁸ Besides the question of a politically unresponsive state or one that lacks resources, remedies that require social changes, which by nature is long term, pose a different set of challenges. The issue is whether a remedy that cannot be implemented immediately can be termed as an enforceable remedy. It is however acknowledged that there are instances where the remedies can be implemented immediately such as injunctions to maintain the status quo, which the courts in Kenya have issued severally in cases of forced evictions. Even then, the courts have also required the state to undertake measures aimed at systemic reform such as development of guidelines for evictions,²⁹ or development of a housing policy,³⁰ remedies which cannot be said to be of immediate implementation.

The failure of the government to enforce judicial remedies relating to socio-economic rights should perhaps not be surprising. A review of the constitution-making process indicates that the state on at least two occasions sought to obscure the government obligations in regard to socio-economic rights. First, in the draft constitution published in 2005 the Attorney General altered the provisions of the draft constitution published in 2004 to afford the state latitude in implementation of socio-economic rights based on availability of resources.³¹ Secondly, in 2010 the Parliamentary committee charged with review of the draft constitution relegated socio-economic rights to one article comprising of single words in relation to each right.³² Further, the Parliamentary committee also removed provisions requiring the state to bear the burden of proof in establishing that resources for the implementation of socio-

²⁷ *Ibrahim Sangor Osman v the Minister of State for Provincial Administration and Internal Security* [2011] eKLR.

²⁸ *Satrose Ayuma & 11 others v the Registered Trustees of the Kenya Railway Staff Retirement Benefits Scheme & 3 others* Petition 65 of 2010; *Mitu-Belle Welfare Society v the Attorney General & 2 others, petition 164 of 2011*. See GO Odongo & GM Musila 'Judicial enforcement of economic and social rights under Kenya's Constitution' in D Chirwa & L Chenwi (eds) *Protection of economic, social and cultural rights in Africa: international, regional, sub-regional and national perspectives* (forthcoming, Oxford University Press, 2014) 32 for an in-depth discussion.

²⁹ *Satrose Ayuma & 11 others v the Registered Trustees of the Kenya Railway Staff Retirement Benefits Scheme & 3 others* Petition 65 of 2010.

³⁰ *Engineer Charo wa Yaa v Jama Abdi Noor, Trade Plus International Ltd. Municipal Council of Mombasa, County Council of Mombasa and Attorney General* HC Misc. App. No. 8 of 2011 – Mombasa.

³¹ See Proposed New Constitution of Kenya, 2005 clause 31 (3): 'The Articles specified in clause (2) shall not be construed as imposing on the State obligations beyond the resources available to the State.' Clause 2 referred to socio-economic rights.

³² See Revised harmonized draft constitution of Kenya, 29 January 2010, with recommendations from the Parliamentary Select Committee on the Review of the Constitution clause 40: 'The State shall take legislative, policy and other measures including setting standards to achieve the progressive realisation of the rights of every person to: (a) social security; (b) health; (c) education; (d) housing; food; and (e) water.'

economic rights are not available.³³ Although the provisions were largely reinstated, this meddling with state obligations in relation to the rights and their textual formulation is indicative of the government's attitude towards socio-economic rights.

The recommendation on incorporation of socio-economic rights into the domestic law has been fully implemented through the constitution-making process. Tracing the implementation pathway, framework of the constitution review process, the Constitution of Kenya Review Act, 1997, listed the objectives of the constitution-making process to include securing provisions in the constitution to ensure protection of the basic needs of all Kenyans through equitable sharing of resources.³⁴ The legislative history of the Act does not make reference to the recommendations of monitoring mechanisms made in 1993. Similarly, as discussed later in chapter six no reference was made to the findings of monitoring mechanisms throughout the constitution-making process.

1.2 Social security rights

(i) Regularise the situation of informal sector workers by including them in social security (CESCR Committee 2008); (ii) progressively extend the scope of NHIF to cover all workers and to reimburse all medical expenses (CESCR Committee 2008); (iii) remove NHIF penalties for persons unable to pay (CESCR Committee 2008); (iv) extend the scope of NSSF (CESCR Committee 2008).

Social security is a concept that lends itself to many definitions. Broadly defined social security refers to both social insurance and social assistance. Social assistance envisions programmes funded by the state that support persons who are unable to provide for themselves such as cash transfers and safety net benefits.³⁵ Conversely, social insurance refers to programmes in which savings are made and later paid to the contributors to maintain their income status.³⁶ Narrowly defined social security are measures put in place to cushion individuals and their dependants from loss of income as a result of retirement, sickness, unemployment, invalidity or work injury.³⁷ The Committee on CESCR in its General Comment 19 highlights nine principal elements of social security as: healthcare, sickness, old age, unemployment, employment injury, family and child support, maternity, disability and survivors and orphans.³⁸ The analysis in respect of the findings is confined to the principal branches identified in the General Comment 19.

³³ See Revised harmonized draft constitution of Kenya, 29 January 2010, with recommendations from the Parliamentary Select Committee on the Review of the Constitution clause 19 on application of the Bill of Rights which excludes provisions on socio-economic rights. See also corresponding clause 25 of the Harmonized draft constitution of Kenya, 19 November 2009 which contains express provisions relating to the application of socio-economic rights.

³⁴ Constitution of Kenya Review Commission Act, 1997 section 3 (f): 'The object and purpose of the review of the Constitution is to secure provision therein ensuring the provision of basic needs of all Kenyans through the establishment of an equitable framework for economic growth and equitable access to national resources'.

³⁵ CM Fombad 'An overview of the constitutional framework of the right to social security with special reference to South Africa' (2013) 21 *African Journal of International and Comparative Law* 2-3.

³⁶ Fombad (n 35 above) 2.

³⁷ As above.

³⁸ UN Economic and Social Council 'General Comment No.19: The right to social security', E/C.12/GC/19 4 February 2008, para 2.

Prior to August 2010, the repealed Constitution did not recognise the right to social security and in the absence of national legislation domesticating the Covenant on Economic, Social and Cultural Rights, the state had no legally enforceable duty to provide social security. Kenya has also not domesticated the ILO conventions on social security.³⁹ In addition there was no official policy on social security, social insurance or any other form of social protection. Nonetheless, social security in Kenya was vaguely provided within two main schemes, the National Social Security Fund and the National Health and Insurance Fund. The National Social Security Fund runs a contributory scheme in which employees and employers make contributions to cushion the employee against poverty and vulnerability in old age.⁴⁰ This scheme is principally aimed for workers in the formal sector,⁴¹ although in 2009 its coverage was extended to the informal sector.⁴² The National Hospital Insurance Fund, on the other hand operates a healthcare scheme covering hospital costs for both formal and informal sector workers and their dependants.⁴³ While the scheme is compulsory for formal sector workers, it is voluntary for informal sector workers.⁴⁴ There also exists the Civil Service Pension scheme, the largest non-contributory social protection covering all permanent and pensionable civil servants.⁴⁵ This pension is paid to beneficiaries upon retirement at the age of 60 or if they opt for early retirement at 50 years.⁴⁶

These schemes are inadequate for the following reasons. The National Social Security Fund until 2009 only covered formal sector workers, who as at 2012 comprised 8% of the labour force, hence leaving out majority of the workers.⁴⁷ Further, the Fund operated as a provident fund which paid a lump sum benefit as opposed to monthly pension. The National Hospital Insurance Fund is compulsory only for salaried workers thus leaving out informal sector workers and its coverage is limited to curative services only. Further, both schemes, do not meet all the nine elements laid out in General Comment 19 contingencies such as unemployment.⁴⁸

To address the gap in relation to informal workers, the government in October 2009 extended National Social Security Fund coverage to employers having one to four employees thus requiring such employers to register and remit contributions of their workers.⁴⁹ This brought under the ambit of social security coverage small enterprises and other informal sector workers such as domestic workers. Additionally, the Mbao pension plan was introduced in 2009 as a private initiative aimed at providing social security for the

³⁹ International Labour Organization, instruments, ratification by country, http://www.ilo.org/dyn/normlex/en/f?p=1000:11210:0::NO:11210:P11210_COUNTRY_ID:103315 (accessed 18 March 2014).

⁴⁰ National Social Security Fund, <http://www.nssf.or.ke/about/> (accessed 18 March 2014).

⁴¹ As above.

⁴² Kenya Gazette Notice 159 of 30 October 2009 National Social Security Fund (commencement of contributions).

⁴³ National Hospital Insurance Fund, <http://www.nhif.or.ke/healthinsurance/> (accessed 18 March 2014).

⁴⁴ As above.

⁴⁵ The National Treasury, departments, pensions, <http://www.treasury.go.ke/index.php/departments/pensions> (accessed 18 March 2014).

⁴⁶ As above.

⁴⁷ Ministry of State for Planning, National Development and Vision 2030, Kenya social protection sector review June 2012, 12 (Kenya social protection sector review).

⁴⁸ Kenya social protection sector review (n 47 above) 13.

⁴⁹ Kenya Gazette Notice 159 of 30 October 2009 National Social Security Fund (commencement of contributions).

informal sector.⁵⁰ It is a voluntary pension plan for medium and small micro-enterprises which enables its members to save Kenya shillings 20 per day for retirement.⁵¹

The Constitution, 2010 recognises the right to social security. It states that 'every person has the right to social security',⁵² and obligates the state to 'provide appropriate social security for persons unable to support themselves and their dependants'.⁵³ The state is further obliged to 'take legislative, policy and other measures including the setting of standards for the progressive realisation'⁵⁴ of this right.

In regard to the policy framework, the Kenya National Social Protection Policy was launched in June 2011.⁵⁵ The policy commits the government to extend legal social security coverage to all workers, convert the National Social Security Fund to a pension scheme and to re-establish the National Hospital Health Insurance Fund as a scheme that covers all Kenyans.⁵⁶

The National Social Security Fund Act was amended in December 2013 establishing a mandatory scheme for all employed persons above the age of 18 but below the pensionable age.⁵⁷ The new law also establishes a provident fund for self-employed persons.⁵⁸ The Fund cushions workers against old age and invalidity and provides support to survivors.⁵⁹ The Act also increases contributions to the Social Security Fund from the previous flat rate of Kenya shillings 200 to 6% of the employee's monthly salary with the employer making a similar contribution.⁶⁰

The National Health Insurance Fund coverage is compulsory for all salaried workers while membership is open and voluntary to informal sector workers.⁶¹ On reimbursement of all medical expenses that is both inpatient and outpatient, the government in January 2012 extended coverage of outpatient costs to civil servants. However, as of August 2015 coverage of outpatient costs is yet to be extended to members from the informal and the private sectors.⁶²

⁵⁰ Mbao pension plan, mbao pension flier, <http://www.rba.go.ke/images/stories/downloads/Mbao-Flier.pdf> (accessed 18 March 2014).

⁵¹ As above.

⁵² Article 43 (1) (e).

⁵³ Article 43 (3).

⁵⁴ Article 21 (2).

⁵⁵ Ministry of Gender, Children and Social Services, National Social Protection Policy June 2011 (National Social Protection Policy)

⁵⁶ National Social Protection Policy (n 55 above) 19-21.

⁵⁷ National Social Security Fund Act, 2013 section 18 (4): 'All persons who are subject to the provisions of the Employment Act and are eighteen years old or above and have not attained the pensionable age shall be members of the Pension Fund.'

⁵⁸ National Social Security Fund Act, 2013 section 18 (5): 'The following members of the Fund shall be subject to the Provident Fund in terms of payment of contributions into and payment out of the Provident Fund – (a) self employed persons who voluntarily register to be members of the Fund'.

⁵⁹ National Social Security Fund Act, 2013 section 34: 'Pension benefits shall be of the following description: (a) retirement pension; (b) invalidity pension; (c) survivor's pension; (d) funeral grant ; and (e) emigration benefit.'

⁶⁰ National Social Security Fund Act, 2013 section 20.

⁶¹ National Health Insurance Fund, nhif registration, <http://www.nhif.or.ke/healthinsurance/> (accessed 18 March 2014).

⁶² National Health Insurance Fund, civil servants.

In relation to removal of penalties imposed for late payments to the National Health Insurance Fund, the National Hospital Insurance Fund Act imposes a penalty equal to five times the amount payable for late payment of the standard contributions.⁶³ As of August 2015, the provisions of the Act relating to the penalty have not been reviewed. The 2011 National Social Protection policy commits the government to re-establish National Hospital Insurance Fund as a fully-fledged health insurance scheme with universal coverage.⁶⁴ A cover targeting informal sector workers was launched in March 2014.⁶⁵ As of August 2015, the National Hospital Insurance Fund has not been re-structured.

In summary, the assessment finds that recommendations on the right to social security particularly those relating to the National Social Security Fund are partially implemented. Tracing the implementation pathway, policy documents, the National Social Protection Policy 2011 and the Kenya Social Security Review 2012 reference the African Union Social Protection Framework endorsed by the heads of African States in 2009 and the Constitution, 2010 as the impetus for the inclusion of informal sector workers and expansion of the scope of social security coverage in Kenya. The African Union Social Protection Framework commits governments to progressively realise a minimum social protection package which includes: health care, child support, informal workers, the unemployed, the elderly and persons with disabilities.⁶⁶ Similarly, the National Social Protection Policy expressly states that the process of reviewing Kenya's social protection framework was initiated following the African Union inter-governmental conference on social protection in 2006.⁶⁷

1.3 Right to adequate food

(i) Take measures to reduce chronic malnutrition (CESCR Committee 1993); (ii) ensure freedom from hunger (CESCR Committee 2008, UPR 2010).

The Committee on CESCR in General Comment 12 provides that the core content of the right to adequate food envisages availability and accessibility.⁶⁸ The notion of availability envisages food in a quantity and quality that satisfies the dietary needs of individuals, is free from adverse substances and is culturally acceptable.⁶⁹ On dietary needs, the diet should meet the nutritive needs of the individual for physical and mental growth, development and maintenance and physical activity taking into account the stage of life, gender and occupation.⁷⁰ On free from adverse substances, the food must also be safe from

⁶³ National Health Insurance Fund section 18: '...if any contribution which any person is liable to pay under this Act in respect of any month, is not paid on or before the day in which payment is due, a penalty equal to five times the amount of that contribution shall be payable by that person for each month or part thereof during which the payment remains unpaid, and any such penalty shall be recoverable as a sum due to the Fund, and when recovered shall be paid into the Fund.'

⁶⁴ National Social Protection Policy (n 55 above) 21.

⁶⁵ 'NHIF launches cover for informal sector' *Standard Digital News* 18 March 2014, <http://www.standardmedia.co.ke/health/article/2000107199/nhif-launches-health-cover-for-informal-sector> (accessed 19 March 2014).

⁶⁶ Kenya social protection review (n 47 above) 1.

⁶⁷ National Social Protection Policy (n 55 above) 1.

⁶⁸ UN Committee on Economic, Social and Cultural Rights, General Comment 12: The right to adequate food (Art. 11 of the Covenant) E/C.12/1999/5 12 May 1999, para 8.

⁶⁹ As above.

⁷⁰ UN Committee on Economic, Social and Cultural Rights, General Comment 12 (n 68 above) para 9.

environmental contamination, natural toxins and inappropriate handling.⁷¹ Cultural acceptability implies that regard must be had to values attached to food and food consumption.⁷² The notion of accessibility on the other hand, envisages that access to food should be sustainable.⁷³ It includes both physical and economic access. Physical accessibility implies that adequate food should be accessible to persons with particular vulnerabilities such as physically disabled, infants, elderly persons, young children, persons with mental disabled, the terminally ill, displaced persons and indigenous persons whose access to ancestral land is threatened.⁷⁴ Economic accessibility connotes ability to afford food for an adequate diet at a personal or household level.⁷⁵

The number of Kenyans defined to be food insecure in 2011 stood at 10 million, a quarter of the total population, with two million lacking access to food at any given time.⁷⁶ The state of food insecurity in the world report, 2013 puts the number of under-nourished Kenyans at 11 million.⁷⁷

Prior to the Constitution, 2010 while Kenya had acknowledged international commitments on the right to be free from hunger, the right was legally unenforceable as there was no implementing legislation at the national level with the exception of the right as it relates to children.⁷⁸ The Children Act, 2001 requires those who assume parental responsibility over a child to provide an adequate diet.⁷⁹ Statistical data indicates that 26% of children under five years in Kenya are stunted, while 11% are underweight and 4% wasted as a result of malnutrition.⁸⁰

The Kenya Vision 2030 first Medium Term Plan 2008-12 affirmed the challenge of food security and undertook to address the challenge through a number of measures. To address food availability, the Medium Term Plan proposed increased food production through use of technology and scientific innovations, investing in agricultural research, increasing access to key farm inputs such as fertiliser and undertaking land reforms for efficient utilisation of land.⁸¹ On access to food, at the national level the Plan proposed to double the Strategic

⁷¹ UN Committee on Economic, Social and Cultural Rights, General Comment 12 (n 68 above) para 10.

⁷² UN Committee on Economic, Social and Cultural Rights, General Comment 12 (n 68 above) para 11.

⁷³ UN Committee on Economic, Social and Cultural Rights, General Comment 12 (n 68 above) para 9.

⁷⁴ UN Committee on Economic, Social and Cultural Rights, General Comment 12 (n 68 above) para 13.

⁷⁵ As above.

⁷⁶ Republic of Kenya, National food security and nutrition policy 2011, 1.

⁷⁷ FAO, IFAD & WFP 'The state of food insecurity in the world: the multiple dimensions of food security', 2013, 43.

⁷⁸ International Covenant on Economic, Social and Cultural Rights, (Kenya ratified in January 1976); Convention on the Rights of the Child articles 24 (c) and 27 (3) (Kenya ratified on 30 July 1990); African Charter on the Rights and Welfare of the Child articles 14 (2)(c) (Kenya ratified on 25 July 2000); African Charter on Human and Peoples' Rights (Kenya ratified on 10 February 1992). Although the African Charter does not explicitly provide for the right to adequate food, the African Commission on Human Rights has interpreted the right as implicit in other provisions such as the right to a clean and healthy environment. See *Social and Economic Rights Action Centre and another versus Nigeria* (2001) AHRLR 60 (ACHPR 2001).

⁷⁹ Children's Act section 23: (1) 'In this Act, parental responsibility means all the duties, rights, powers, responsibility and authority which by law a parent of a child has in relation to the child and the child's property in a manner consistent with the evolving capabilities of the child.' (2) 'The duties referred in subsection (1) include in particular to provide him with – adequate diet.'

⁸⁰ Kenya National Bureau of Statistics, 'Kenya Demographic and Health Survey 2014 (2015) 35 -38 (Kenya Demographic and Health Survey 2014).

⁸¹ Republic of Kenya, First Medium Term Plan 2008-2012, 65-67.

Grain Reserves from four million bags of cereal to eight million bags and to include other foods such as rice, powdered milk, pulses and a reserve cash fund.⁸² At the household level, the Plan proposed to increase access through supporting agricultural income generating opportunities and production and consumption of traditional foods.⁸³ The Strategic Grain Reserve stores and maintains maize on behalf of the government to ensure that there is sufficient food during times of emergency such as drought or poor harvest.⁸⁴

The Constitution, 2010 makes explicit provision for the right to adequate food thus reframing the debate from a government moral imperative to an enforceable right. It provides that 'every person has the right to be free from hunger and to have adequate food of acceptable quality'.⁸⁵ Further, in relation to children, the Constitution, 2010 guarantees that 'every child has the right to basic nutrition'.⁸⁶ In the context of children, the right to basic nutrition confers immediate state obligations while the state is obligated to take legislative, policy and other measures including the setting of standards, to achieve the progressive realisation of the right to adequate food.⁸⁷ In addition, the state is also required to enact and implement legislation to fulfil international obligations relating to human rights.⁸⁸ In 2011, the government launched the National Food and Nutrition Security policy whose primary objectives are to: achieve good nutrition for the optimum health of all Kenyans; increase the quantity and quality of food available, accessible and affordable to all Kenyans at all times; and to protect vulnerable populations using innovative and cost effective safety nets linked to long-term development.⁸⁹ The policy addresses food access and availability including storage, production and processing and special issues such as access to food for the urban poor, strategic grain reserves and cultural, social and political factors.⁹⁰ To address hunger in times of drought, the President in 2011 established the National Drought Management Authority to coordinate structures in drought management and support policies on drought management.⁹¹

The Special Rapporteur on the right to food links food security with access to land and security of tenure.⁹² 70% of the food consumed in rural areas in Kenya is own production, thus underscoring the value of land tenure and access.⁹³ A number of legal and policy documents recognise the centrality of land reforms in realising the right to food in Kenya, although actualization of the reforms has been slow. The Agricultural Sector Development Strategy 2010-2020 recognises secure land tenure, sustainable land use planning and

⁸² First Medium Term Plan (n 81 above) 65-66.

⁸³ As above.

⁸⁴ National Cereals and Produce Board, roles of NCPB, http://www.ncpb.co.ke/index.php?option=com_content&task=view&id=34&Itemid=50 (24 February 2014).

⁸⁵ Article 43 (1) (c).

⁸⁶ Article 53 (1) (c).

⁸⁷ Article 21 (2).

⁸⁸ Article 21(4): 'The state shall enact and implement legislation to fulfil its international obligations in respect of human rights and fundamental freedoms.'

⁸⁹ National food and nutrition security policy (n 76 above) 9.

⁹⁰ National food and nutrition security policy (n 76 above) 11-22.

⁹¹ Kenya Legal Notice number 171 of 24 November 2011.

⁹² UN General Assembly 'Report of the special rapporteur on the right to food', 2010, para4.

⁹³ Ministry of Agriculture 'Food Security in Kenya' August 2009, 3 http://www.kilimo.go.ke/kilimo_docs/pdf/food_security_main_paper_ps.pdf (accessed 24 February 2014).

equitable distribution of land as key contributors of food security.⁹⁴ The Strategy aims to reduce the number of food insecure persons in Kenya by 30% in 2020. The National Land Policy outlines principles and guidelines to ensure that good agricultural land is put into productive use thus guaranteeing food security.⁹⁵

On the legislative front, the Food Security Bill, 2014 drafted to operationalise the right to food is yet to be debated in Parliament as of October 2015. The Bill commits the government to realisation of the essential elements of accessibility and availability in regard to the right to food.⁹⁶ Further, it makes provision for vulnerable groups such as pregnant and lactating mothers.⁹⁷ The Bill also puts in place institutional mechanisms for the implementation of the right to food.⁹⁸

Notwithstanding the above policies and programmes and legislative initiatives, certain measures adopted by the government threaten the right to food, thus breaching its obligation to fulfil the right to food. First, the food pricing dilemma with particular reference to the most important food stuff in Kenya, maize and maize related foodstuffs. Food pricing poses two competing interests which the government must balance: (i) ensuring that farmers receive adequate prices for their maize to guarantee continued production and marketing; and (ii) keeping food (maize) prices low to safeguard access to food.⁹⁹ The government seeks to achieve this balance through the National Cereals and Produce Board, a state owned commercial entity involved in grain trading and market intervention and stabilisation.¹⁰⁰ The Board buys maize from farmers at an administratively determined price, irrespective of the market forces, which often disrupts the market prices since the Board's price is perceived as the minimum market price.¹⁰¹ This drives the cost of maize and related products up. Critics argue that the Board should adopt more transparent ways of fixing prices or leave it to market forces to ensure food security.¹⁰² Further, the Board is also the custodian of the government's Strategic Grain Reserve, an emergency food reserve meant to cushion Kenyans against drought or famine.¹⁰³ However, the Board's role as the custodian of the Strategic Grain Reserve appears to be in conflict with its commercial activities as it often sells most of the grains thus failing to maintain appropriate levels of the Strategic Grain Reserves leading to shortages in time of need.

Assessing Kenya's Strategic Grain Reserve in light of the right to adequate food as provided in General Comment 12, discussed above, a number of shortcomings are identified. First, the Board's focus is on grains, mainly maize and other grains, hence the emergency food

⁹⁴ Republic of Kenya, Agricultural Sector Development Strategy 2010-2020, 2010, 59.

⁹⁵ Republic of Kenya Sessional paper no. 3 of 2009 on the National Land Policy, 2009, para 120.

⁹⁶ Food Security Bill, 2014 clause 5 (2) (b).

⁹⁷ Food Security Bill, 2014 clause 9.

⁹⁸ Food Security Bill, 2014 clause 12.

⁹⁹ TS Jaynea *et al* 'The effects of NCPB marketing policies on maize prices in Kenya' (2008) 38 *Agricultural Economics*, 313.

¹⁰⁰ National Cereals and Produce Board, roles of NCPB, <http://www.ncpb.co.ke/> (accessed 24 February 2014).

¹⁰¹ Jaynea (n 99 above) 313.

¹⁰² 'Food prices key priority for Kenya – World Bank' *The East African* 23 February 2013,

<http://www.theeastafrican.co.ke/news/Food-prices-key-priority-for-Kenya/-/2558/1702712/-/vx61m7z/-/index.html> (accessed 24 February 2014); 'Reform cereals board to ensure food supply, state told' Daily Nation 2 November 2013, <http://mobile.nation.co.ke/business/Reform-National-cereals-board-to-ensure-secure-food-supply/-/1950106/2057870/-/format/xhtml/-/dqfjmsz/-/index.html> (accessed 24 February 2014).

¹⁰³ National Cereals and Produce Board, roles of NCPB.

available in cases of starvation is primarily cereals. It is undoubted that cereals alone cannot meet the dietary needs of individuals. Second, on the issue of cultural acceptability, often famine in Kenya is localised to the arid and semi-arid lands whose inhabitants are mainly pastoralist communities, and their staple diet comprises meat and milk as opposed to maize. Third, availability in the specific context of adverse effects, the Board has on a number of occasions distributed contaminated relief maize.¹⁰⁴

In June 2014, the government indicated that the Strategic Grain Reserve was to be reformed to the National Food Security Agency whose focus will be primarily food security.¹⁰⁵ These reforms are yet to be actualised at the time of writing, October 2015.

Second is the enactment of the Value Added Tax Act, 2013 which led to an increase in food prices thus breaching the government obligation to fulfil the right to adequate food. The Value Added Tax Act, 2013 reviewed and updated the Value Added Tax Act, 1989,¹⁰⁶ with view to improving revenue collection. The 2013 Act drastically reducing the number of zero rated items comprising of basic commodities such as flour, milk, maize, infant feeding formula, bread, rice and kerosene.¹⁰⁷ The import was that the previously zero rated basic commodities were subject to the standard rate 16% value added tax thus driving the prices of basic foodstuffs up. The Value Added Tax Act, 2013 was amended in April 2014, following a public outcry, thus bringing basic food items under the tax exemption bracket.¹⁰⁸ The enactment of the Value Added Tax Act, 2013 resulting in increased in food prices demonstrates the government's disregard for its obligations under the right to adequate food.

The High Court has in one instance been called upon to adjudicate on the right to food. In *Consumer Federation of Kenya (COFEK) v the Attorney General and 4 others* the court was called upon to make a declaration that failure of the government to reduce and stabilise high oil prices violated the right to be free from hunger and to adequate food of acceptable quality.¹⁰⁹ Although the court dismissed the petition for want of proper prosecution, it examined the policies that the state had undertaken to stabilise high fuel prices, and found them reasonable in the circumstances.¹¹⁰

The right to adequate food has featured in national debates particularly the issue of food prices. In July 2013 while Parliament was debating the Value Added Tax Bill, Consumer

¹⁰⁴ Business Daily 'Court orders relief maize destroyed amid fears of aflatoxin poisoning' 22 August 2011, <http://www.businessdailyafrica.com/Corporate-News/Court-orders-relief-maize-destroyed/-/539550/1223658/-/phl8f8/-/index.html> (accessed 2 November 2014); Business Daily 'Cereals board sues shipper over bad maize' <http://www.businessdailyafrica.com/-/539444/617372/-/view/printVersion/-/rqywhez/-/index.html> (accessed 8 November 2014); Standard Digital News 'Kenya: State accused of giving IDPs contaminated maize' 19 February 2014, <http://www.businessdailyafrica.com/-/539444/617372/-/view/printVersion/-/rqywhez/-/index.html> (accessed 8 November 2014).

¹⁰⁵ Standard Digital News 'New regulator to monitor country's grain reserves' 10 June 2014, <http://www.standardmedia.co.ke/kenyaat50/article/2000124196/new-regulator-to-monitor-country-s-grain-reserves> (accessed 2 November 2014).

¹⁰⁶ Value Added Tax Act 35 of 2013.

¹⁰⁷ Value Added Tax Act, 2013

¹⁰⁸ Parliament of Kenya, National Assembly official report, Hansard 23 April 2014, <http://www.parliament.go.ke/plone/national-assembly/business/hansard/wednesday-23nd-april-2014-9.00-a.m/view> (accessed 2 November 2014).

¹⁰⁹ eKLR [2012].

¹¹⁰ As above.

Federation of Kenya (COFEK) organised a public demonstration protesting the proposed imposition of 16% tax on basic commodities.¹¹¹

In conclusion, recommendations relating to the right to food are partially implemented. The policy framework has been developed and there exists programmatic measures under Kenya Vision 2030 that the government intends to undertake to implement the findings. Further, there is draft legislation to concretise the government obligations in relation to the right to food, including reforming of the Strategic Grain Reserves. The partial implementation is attributable to the right being supported by the economic development strategy, the Kenya Vision 2030 and inclusion of the right to be free from hunger in the Constitution, 2010. The National Food Security and Nutrition Policy makes reference of the right to food as provided in the Constitution.

1.4 Right to water and sanitation

(i) Ensure affordable access to adequate water and sanitation for informal settlements and semi-arid and arid areas (CESCR Committee 2008); (ii) reduce waiting times for water collection (CESCR Committee 2008); (iii) control prices charged by private water services and water kiosks (CESCR Committee 2008); and (iv) connect Kibera to the Nairobi water sewerage services (CESCR Committee 2008).

The provision of water and sanitation services in Kenya is governed by the Water Act, 2002.¹¹² The Act does not expressly recognise the right to water and sanitation, although policy documents such as the National Water Services Strategy provide for the right. Water supply is governed by the Water Act which establishes three tier institutions: Water Services Regulatory Board, Water Service Boards and Water Service Providers.¹¹³ The Water Services Regulatory Board provides general oversight on provision of water and sanitation services while the Water Service Boards are responsible for management of water and sewerage services and the appointment of the Water Service Providers, who are the agents that directly supply water to consumers. The Water Services Regulatory Board therefore monitors and regulates the Water Service Boards and Water Service Providers. This institutional framework also includes the Water Services Trust Fund which finances provision of water in semi-arid and arid areas and in poor urban settlements.¹¹⁴ In terms of policy measures there is the National Water Services Strategy 2007-2015 which aims at provision of water at a minimum target of 20 litres per person per day and extension of sewerage services to all parts of Kenya.¹¹⁵ Similarly, the Kenya Vision 2030 aims to ensure access to water and sanitation for all by 2030 which is to be achieved in five year developmental blocks.¹¹⁶ Accordingly, the Kenya Vision 2030 planned to attain 90% access to adequate

¹¹¹ Consumer Federation of Kenya, <http://www.cofek.co.ke/> (accessed 24 February 2014).

¹¹² Water Act, 2002.

¹¹³ Water Act, part IV, sections 46-78.

¹¹⁴ Water Act, 2002 section 83: (1) 'There is hereby established a Fund to be known as the Water Services Trust Fund.' (2) 'The object of the Fund is to assist in financing of water services to areas of Kenya which are without adequate water services.'

¹¹⁵ National Water Services Strategy 2007-2015.

¹¹⁶ Republic of Kenya, Kenya Vision 2030, 2007, 119.

drinking water in urban areas and 70% in rural areas and 70% and 65% access to safe sanitation in urban and rural areas respectively.¹¹⁷

The Constitution, 2010 guarantees the right to water for every person¹¹⁸ and the right to reasonable standards of sanitation,¹¹⁹ both conditioned upon progressive realisation similar to other Article 43 rights. In the specific context of semi-arid and arid lands, the Constitution, 2010 specifically binds government to ensure provision of reasonable access to water for minorities and marginalised groups.¹²⁰ In line with this, the Constitution, 2010 establishes the Equalisation fund, a public fund financed by one half per cent of the total national revenue, set aside to accelerate provision of services, such as water, in historically marginalised areas.¹²¹ Further, the Constitution, 2010 devolves the provision of water and sanitation to county government.¹²² On the implementing legislation for the right to water, the High Court in August 2013 in the *Satrose Ayuma* case called for amendment of the Water Act, 2002 to bring it into compliance with the right to water as guaranteed in the Constitution, 2010.¹²³ The Water Bill, 2014 is as of October 2015 undergoing Parliamentary debate.¹²⁴ In terms of guaranteeing the right to water, the Bill has at least two shortcomings. First, the provision on the right to water is simply restated as provided in the Constitution, 2010.¹²⁵ It would be expected that the right would be concretized in legislation to include aspects of availability, quality, physical accessibility and affordability. Second, the Bill is silent on discontinuation of water services for instance for non-payment. The High Court in the *Satrose Ayuma* case considered the right to water in the context of constructive eviction.¹²⁶ The court in this instance recommended inclusion of provisions in the water legislation on procedures for discontinuation of water services akin to the South Africa right to water regime.¹²⁷

On affordable access to adequate water and sanitation in informal settlements, the Nairobi Water and Sewerage Company, in 2008 established an Informal Settlements Unit.¹²⁸ The rationale behind the Unit was to ensure access and provision of water to informal settlements separately guided by social considerations, and not revenue collection.¹²⁹ This approach according to a 2010 survey improved both physical and economic access to

¹¹⁷ As above.

¹¹⁸ Article 43 (1) (d): 'Every person has the right to clean and safe water in adequate quantities'.

¹¹⁹ Article 43 (1)(b) provides: 'every person has the right ...and the reasonable standards of sanitation'.

¹²⁰ Article 56 (e): 'The Government shall put in place affirmative action programmes designed to ensure that minorities and marginalised groups have reasonable access to water, health services and infrastructure.'

¹²¹ Constitution article 204 (2): 'The national government shall use the Equalisation Fund only 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.'

¹²² Fourth Schedule, Articles 185 (2), 186 (1) and 187 (2) Distribution of functions between the national and county governments, part 2 county governments 11.

¹²³ Petition 65 of 2010.

¹²⁴ Parliament of Kenya, National Assembly, bill tracker as of 23 October 2015, <http://www.parliament.go.ke/the-national-assembly/house-business/bills-tracker/item/1979-bills-tracker-as-at-october-23rd-2015> (accessed 25 October 2015).

¹²⁵ Water Bill, 2014 clause 62: 'Every person in Kenya has the right to clean and safe water in adequate quantities and to reasonable standards of sanitation as stipulated by Article 43 of the Constitution of Kenya.'

¹²⁶ Petition 65 of 2010.

¹²⁷ As above.

¹²⁸B Crow & E Odaba 'Access to water in a Nairobi slum: women's work and institutional learning' (2010) 35 *Water International* 737.

¹²⁹ As above.

water,¹³⁰ although adequacy remains a challenge. General Comment 15 of the Committee on CESCR defines the human right to water as sufficient, safe, acceptable and physically and economically accessible water for personal and domestic uses.¹³¹ Personal accounts of residents of informal settlements reveal that often they have to forego washing clothes, personal hygiene or even in extreme times cooking due to scarcity of water.¹³² Available data on access to water in most Nairobi informal settlements reveals that water supply is rationed to three days in a week.¹³³

In the context of semi-arid and arid areas, the National Policy for the Sustainable Development of Northern Kenya and Other Arid Lands, 2012 indicates that more than 43% of people in arid and semi arid lands take more than one hour to access water in the dry season while 24% take more than two hours.¹³⁴ The Policy however is silent on strategies to address provision of adequate and affordable water. Equally, the draft National Water Policy, 2012 contains no explicit policy direction on ensuring access to adequate and affordable water for semi-arid and arid lands.¹³⁵ Further, the Water Bill, 2014 does not expressly address provision of water in arid and semi-arid lands, although it requires county governments to put in place measures for provision of water in rural areas that are not commercially viable.¹³⁶

On reduction of waiting times for water collection, findings of a study conducted in 2011 in selected Kenyan informal settlements reveal that the time taken to collect water is approximately ten minutes per single trip, with multiple trips required to collect adequate water.¹³⁷ Based on its findings, the study posits that further reduction of the time taken in water collection, would not require additional community water points but instead household water connections.¹³⁸ Review of official data indicates that most households in Kenyan informal settlements do not have household water connections, rather water is collected from communal water points located in yards, from water kiosks and in other social amenities such as schools and mosques.¹³⁹

On water prices, studies often find that the price of water in Kibera is much higher than prices in middle and high income areas in Nairobi. Some studies find that the price of water in Kibera is eight times higher than the price in Nairobi middle income areas with household

¹³⁰ Crow and Odaba (n 128 above) 738.

¹³¹ UN Committee on Economic, Social and Cultural Rights, General Comment 15: The right to water (Arts.11 and 12 of the Covenant) E/C.12/2002/11, 20 January 2003, paras 11 & 12.

¹³² Crow and Odaba (n 128 above) 740.

¹³³ Water Services Trust Fund, MajiData, Slum level, Nairobi, Kibera <http://www.majidata.go.ke/slum.php?MID=MTE=&SMID=MTk=> (4 March 2014).

¹³⁴ Republic of Kenya, Sessional paper 8 of 2012, National Policy for the sustainable development of Northern Kenya and other arid lands, 2012, 8.

¹³⁵ Republic of Kenya, National Water Policy 2012, 13-14.

¹³⁶ Water Bill, 2014 clause 87 (1): 'County governments shall put in place measures for provision of water to rural areas which are considered by the Commission not to be commercially viable for provision of the water services.'

¹³⁷ B Crow *et al* 'Using GPS and recall to understand water collection in Kenyan informal settlements' (2013) 38 *Water International* 57.

¹³⁸ Crow *et al* (n 137 above) 57-58.

¹³⁹ Water Services Trust Fund, other projects, MajiData, slum level <http://www.majidata.go.ke/slum.php?MID=MTE=&SMID=MTk=> (accessed 16 June 2015).

connections.¹⁴⁰ Similar studies find that minimum water prices in Kibera are higher than average prices in Kenya and maximum Kibera prices are almost twice the price in European cities.¹⁴¹ As at June 2015, the price of water remains high with average prices at Kenya shillings 25 for a 20 litre jerry can.¹⁴² Water in Kibera is supplied through an estimated 650 private water vendors legally and illegally connected to the few Nairobi City Council water mains running through Kibera or nearby areas.¹⁴³ The water vendors sell water to the residents from standing pipes outside their houses or water kiosks.¹⁴⁴ By its own admission the Nairobi Water and Sewerage Company has not been able to control the prices charged by private water vendors since a prior initiative, the 2003 *Maji Bora Kibera*, failed as a result of poor communication and mistrust between the Company and water vendors.¹⁴⁵ Nonetheless, the draft National Water Policy 2012, commits the government to control prices charged by private water vendors by replacing informal water vendors with formalised and controlled providers.¹⁴⁶

With reference to connection of Kibera to the Nairobi sewerage system, available data indicates that Kibera has not been connected to the Nairobi sewer lines as of October 2015.¹⁴⁷ However, there are eco-sanitation facilities put up through partnerships between the Nairobi Water and Sewerage Company, non-governmental organisations and youth groups.¹⁴⁸ The eco-sanitation facilities comprise of communal toilets and bathrooms which residents pay to use with water and soap provided at the facility. Even then, in majority of the Kibera villages, residents use flying toilets and pit latrines which drain into the Ngong River which runs through Kibera.¹⁴⁹

The recommendations relating to water and sanitation are partially implemented through the constitution review process. On the implementation pathways, interviews with a key government official indicate that policy measures in the National Water Policy to reduce water prices by private vendors and the 2008 initiatives to improve physical access to water in Kibera were undertaken in response to the 2008 recommendations of the Committee on Economic, Social and Cultural Rights.¹⁵⁰ According to the official, the recommendations were

¹⁴⁰ F Dafe 'No business like slum business? the political economy of the continued existence of slums: a case of Nairobi' (2009) working paper series 09-98 London School of Economics, 24.

¹⁴¹ Crow and Odaba (n 128 above) 736-737.

¹⁴² Personal visit (by the author of this thesis) to Kibera, Nairobi, 21 June 2015.

¹⁴³ Crow & Odaba (n128 above) 736.

¹⁴⁴ As above.

¹⁴⁵ Crow & Odaba (n128 above) 742. The *Maji Bora Kibera* was an initiative that attempted to bring together an association of private water vendors and the Nairobi Water and Sewerage Company to promote self regulation among the vendors, improve their credibility and promote relations with the Company. The initiative had been established to address water shortages, high water prices and erratic water supply. It collapsed in 2007 as a result of miscommunication and mistrust between the Company and water vendors.

¹⁴⁶ Republic of Kenya, draft National Water Policy, 2012, 12.

¹⁴⁷ Water Services Trust Fund, other projects, MajiData, slum level, Kibera, sanitation situation, <http://www.majidata.go.ke/slum.php?MID=MTE=&SMID=MTk=> (accessed 25 October 2015).

¹⁴⁸ Personal visit (by the author of this thesis) to Lindi, Kibera, Nairobi, 5 March 2014.

¹⁴⁹ As above.

¹⁵⁰ Interview with M Njau-Kimani, Legal Secretary Justice and Constitutional Affairs, Office of the Attorney General and Department of Justice, Kenya, Nairobi, 4 March 2015.

submitted to Cabinet which approved and delegated their implementation to the then Ministry of Water and Irrigation.¹⁵¹

1.5 Right to health

(i) Set a day for the entry into force of the HIV/AIDS Prevention and Control Act (APRM 2006, CESC Committee 2008); (ii) ensure affordable access for everyone, including adolescents to comprehensive family planning services (CESC Committee 2008); (iii) adequately fund the free distribution of contraceptives (CESC Committee 2008).

The HIV/AIDS Prevention and Control Act was enacted in December 2006 to provide measures for the prevention, management and control of HIV/AIDS and for treatment, support and counselling of infected persons and those at the risk of infection.¹⁵² However, the Act did not expressly provide a commencement date. Rather, it vested discretion to appoint the commencement date on the relevant Minister, in addition to allowing for staggered commencement of different sections.¹⁵³ The Act commenced operation in March 2009, with the exception of sections 14, 18, 22, 24 and 39.¹⁵⁴ Notably, this was after a case was filed in July 2008 seeking to compel the government to commence operation of the Act.¹⁵⁵ There was no reason given for the delayed commencement of the Act or the further delay in commencing some provisions. Sections 14, 18 and 22 whose commencement was further delayed relate to consent in HIV testing and disclosure of results, while section 24 criminalizes non-disclosure leading to intentional transmission of HIV/AIDS and section 39 deals with research requirements in HIV/AIDS.¹⁵⁶ The delay in commencing the operation of sections 14, 18 and 22 was unjustified in view of the fact that it stripped privacy rights in HIV testing and disclosure further fuelling the stigma associated with HIV/AIDS. In December 2010, sections 14, 18, 22 and 24 of the Act commenced operation.¹⁵⁷ The entry into force of section 24 criminalised transmission of HIV/AIDS.¹⁵⁸ The High Court in March 2015 declared Section 24 of the HIV/AIDS Act unconstitutional.¹⁵⁹

The Constitution, 2010 addresses itself to delayed commencement of laws. It provides that once an Act of Parliament has been published in the Gazette, it enters into force after 14 days unless the Act stipulates a different date or time for its entry into force.¹⁶⁰ This resolves the habitual abuse of discretion by the Executive by delaying commencement of laws indefinitely. This recommendation is therefore fully implemented. While review of available

¹⁵¹ As above.

¹⁵² HIV and AIDS Prevention and Control Act 14 of 2006.

¹⁵³ HIV and AIDS Prevention and Control Act, 2006, section 1: '...and shall come into operation on such date as the Minister may, by notice in the Gazette appoint and different dates may be appointed for different sections.'

¹⁵⁴ Kenya Legal Notice 34 of 27 February 2009 Commencement of the HIV/AIDS Prevention and Control Act, 2006.

¹⁵⁵ 'Man in court over delayed HIV Act' *Capital News* 24 July 2008, <http://www.capitalfm.co.ke/news/2008/07/man-in-court-over-delayed-hiv-act/> (accessed 5 March 2014).

¹⁵⁶ HIV and AIDS Prevention and Control Act, 2006.

¹⁵⁷ Kenya Legal Notice 180 of 4 November 2010 Commencement of sections 14, 18, 22 and 24 of the HIV/AIDS Prevention and Control Act, 2006 .

¹⁵⁸ HIV and AIDS Prevention and Control Act section 24 (3).

¹⁵⁹ *Aids Law Project v Attorney General and 3 others* [2015] eKLR.

¹⁶⁰ Article 116 (2): '...an Act of Parliament comes into force on the fourteenth day after its publication in the *Gazette*, unless the Act stipulates a different date on or time at which it will come into force.'

literature and relevant interviews do not indicate whether government action was taken in response to the petition, it is reasonable to attribute government gazettelement of the commencement of the Act to the filing of the petition.

In relation to ensuring affordable access to comprehensive family planning services, studies indicate there is near universal knowledge by both men and women on family planning in Kenya.¹⁶¹ The percentage of women of reproductive age using any method of contraception stands at 46% while the unmet demand for family planning services is at 26%.¹⁶² There are however disparities between rural and urban women with prevalence rates at 37% for rural areas, differences that are partly attributable to access and affordability.¹⁶³ Among adolescents the contraceptive prevalence rate stands at 14.1%.¹⁶⁴ In addition, available data indicates that 45% of those who use contraceptives obtained it free.¹⁶⁵

The Constitution, 2010 guarantees the right to reproductive health care, paired with the general right to health.¹⁶⁶ The Constitution, 2010 does not define what constitutes the right to reproductive health. Equally, a review of the legislative history of the bill of rights does not reveal the scope of what the right encompasses, although it does reveal that the right was contested throughout the constitution-making process, which explains the ambiguity.¹⁶⁷ Nonetheless, in view of the fact that the right to reproductive health is provided for under the right to health which essentially imposes positive obligations on the state, it is plausible to argue that the right guarantees provision of services related to reproductive health care such as education, counselling and family planning. The legislative framework to operationalise the right to reproductive health care, the Reproductive Health Bill, 2014 was published in April 2014 as a private member Bill. The Bill defines reproductive rights 'to include the right to all individuals to attain the highest standard of sexual and reproductive health and to make informed decisions on their reproductive lives free from discrimination, coercion or violence.'¹⁶⁸ In addition the Bill provides for free ante-natal and delivery services in public health facilities and for termination of pregnancy if the pregnancy endangers the health and life of the mother.¹⁶⁹ In regard to adolescents, the Bill commits the state to facilitate provision

¹⁶¹ Kenya Demographic and Health Survey (n 80 above) 57.

¹⁶² Kenya Demographic and Health Survey (n 80 above) 61.

¹⁶³ Kenya Demographic and Health Survey (n 80 above) 64.

¹⁶⁴ Kenya Demographic and Health Survey (n 80 above) 63.

¹⁶⁵ Kenya Demographic and Health Survey (n 80 above) 69.

¹⁶⁶ Article 43 (1)(a): 'Every person has the right to the highest attainable standard of health care, which includes the right to health care services, including reproductive health care'.

¹⁶⁷ See Constitution of Kenya Review Commission 'Compendium of public comments on the draft bill to alter the constitution' 17 April 2003, 109 (accessed from the Kenya National Archives 1 October 2014). The church recommended removal of the phrase 'including reproductive health care' arguing that it was already encompassed in the general right to health; Constitution of Kenya Review Commission 'Verbatim report of the technical working committee B on citizenship and the bill of rights held in tent no. 2 at the Bomas of Kenya on 19 January 2004' HAC/6/B/31, 126-133 (accessed from the Kenya National Archives 8 October 2014). In the discussions of the technical working committee, proposals were made to delete the right to reproductive health care from the draft Constitution. However, it was agreed that the right should be retained on the basis that Kenya was a signatory to the Cairo Declaration on Population and Development. Committee of Experts 'Verbatim record of proceedings of the plenary meeting of the Committee of Experts on Constitutional Review held on 3 January 2010 at Delta House, Nairobi' HAC/1/1/98, 66-67 (accessed from the Kenya National Archives 17 October 2014).

¹⁶⁸ Reproductive Health Care Bill, 2014 clause 2.

¹⁶⁹ Reproductive Health Care Bill, 2014 clauses 17 & 19.

of adolescent friendly and affordable reproductive health services.¹⁷⁰ The Bill was however withdrawn from Parliament following strong opposition from teachers, the church and parents on the grounds that the Bill purports to allow for distribution of contraceptives to school children.¹⁷¹ Further, the government indicated that it did not support the Bill to extent that it provided for reproductive health services to school children.¹⁷² As of June 2015, the Bill is yet to be re-introduced in Parliament. The policy framework includes the National Reproductive Health Policy 2007, which commits the government to address the unmet demand for family planning services through creating sustained demand for family planning services, guaranteeing availability of contraceptives, promoting involvement of men and marketing of contraceptives through non-formal channels.¹⁷³ The Kenya Vision 2030, is silent on reproductive health care as is the Vision 2030 Second Medium Term Plan 2013-2017.

The government in 2010 launched the National Family Planning Costed Implementation Plan 2012- 2016 which is aimed at reposition family planning in the national agenda. The Costed Implementation Plan endeavours to raise the contraceptive prevalence rate from 45.4% in 2010 to 54% in 2015 with youth aged 15-24 years as the key target.¹⁷⁴ Accordingly the resources required for its implementation is KES 26.6billion.¹⁷⁵ However, government funding for family planning services is inadequate. In 2010/11 the government allocated KES 575 million, in 2011/12 522 million, in 2012/13 KES 522 million and 765 million in 2013/14.¹⁷⁶ Nonetheless, at the November 2013 International Conference on Family Planning, 2013 Kenya was among the African countries lauded for increasing its budgetary allocation of family planning services and supplies.¹⁷⁷

The recommendations on affordable family planning services are partially implemented primarily through increased budgetary provision. Government documents on provision of family planning services do not make any reference to the Constitution, 2010 despite the Constitutional guarantee of the right to reproductive health. In addition, the policy framework does not appear to have been formulated in response to the recommendations of monitoring mechanisms.

¹⁷⁰ Reproductive Health Care Bill, 2014 clause 34.

¹⁷¹ O Wanzala 'Kenyan teachers oppose bid to introduce contraceptives in schools' 15 June 2014, <http://www.africareview.com/News/-/979180/2349352/-/9ejrf/-/index.html> (accessed 7 November 2014); Standard Digital News 'Where is the time for condom use?' 25 June 2014, http://standardgroup.co.ke/m/story.php?articleID=2000125924&story_title=Where-is-the-time-for-condom-use (accessed 7 November 2014); Standard Digital News 'Why Reproductive Health Bill must be aborted' 29 June 2014, <http://www.standardmedia.co.ke/article/2000126362/why-the-reproductive-health-bill-must-be-aborted> (accessed 7 November 2014).

¹⁷² Standard Digital News 'Fury over Bill on reproductive health' 20 June 2014, <http://www.standardmedia.co.ke/print/2000125456/fury-over-bill-on-reproductive-health> (accessed 12 November 2014).

¹⁷³ Ministry of Health, National Reproductive Health Policy, 2007, 14.

¹⁷⁴ Ministry of Health National Family Planning Costed Implementation Plan 2012- 2016.

¹⁷⁵ As above.

¹⁷⁶ Ministry of Health, Division of Reproductive Health, family planning services.

¹⁷⁷ 'Africa governments on course in provision of family planning services' *The East African Standard* 14 November 2013, <http://www.theeastafrican.co.ke/news/Africa-govts-on-course-in-provision-of-family-planning-services/-/2558/2073156/-/9cirdyz/-/index.html> (accessed 6 March 2014).

1.6 Land rights

(i) Adopt the National Land Policy (CESCR Committee 2008); (ii) address land ownership taking into account historical contexts of land ownership and acquisition (APRM 2006, CERD Committee 2011); (iii) implement the Ndung'u report on grabbing of public land (CESCR Committee 2008).

The National Land Policy was approved by Cabinet on 25 June 2009 and later adopted by Parliament as Sessional Paper number 3 of 2009 on the National Land Policy on 3 December 2009.¹⁷⁸ The Policy had been forwarded to Cabinet in April 2007 and was only approved following pressure from land sector civil society organisations, which organised to publicly launch of the Policy on 26 June 2009 without Cabinet adoption of the Policy.¹⁷⁹ The move by the land sector non-state actors was controversial for two reasons: first the policy is a government document hence it ought to be launched by the government; and second the proposed launch was to proceed without the policy having been approved by Cabinet. Regardless, this served to put the necessary pressure on the government leading to approval of the policy on 25 June 2009. The delay in adoption of the Policy was attributed to competing interests from large-scale foreign land owners and politicians.¹⁸⁰

The Constitution, 2010 anchors the National Land Policy thus providing a Constitutional framework for its implementation.¹⁸¹ Despite the adoption of the National Land Policy there are attempts to roll back on its implementation. Parliament in Session Paper number 3 of 2009 on the National Land Policy indicated that KES 9.6 billion would be required for progressive implementation over six years.¹⁸² It would then be expected that the government would from 2010 allocate at least KES 1.6 billion per year for the implementation of the National Land Policy. However, the total budgetary allocation to the Ministry of Lands is about KES two billion,¹⁸³ without any specific amount designated for implementation of the National Land Policy bringing to question the government's commitment to implement the Policy.

In relation to addressing land ownership taking into account historical contexts, the National Land Policy sets the cut off date for historical land grievances at 1895, at the establishment of the colonial regime in Kenya.¹⁸⁴ The Policy embodies the national framework for resolving historical land injustices in Kenya. It specifically addresses itself to historical land grievances and outlines the measures the government ought to take. These measures include: establishing mechanisms to resolve historical land claims from 1895 and thereafter; establishing legal and administrative frameworks to investigate, document and determine historical land injustices; review all laws and policies that perpetuate land injustice; and

¹⁷⁸ National Land Policy (n 95 above).

¹⁷⁹ Centre for Land Economy and Rights of Women, Launching the Kenyan National Land Policy, 26 June 2009, http://www.clearwomen.org/articles/launch_of_the_land_policy_26.6.09.pdf (accessed 7 March 2014).

¹⁸⁰ Kenya National Dialogue and Reconciliation monitoring project report, January 2009 [http://www.dialoguekenya.org/Monitoring/\(January%202009\)%201ST%20Review%20Report%20%20Project%20Context%20and%20Summary%20of%20Findings.pdf](http://www.dialoguekenya.org/Monitoring/(January%202009)%201ST%20Review%20Report%20%20Project%20Context%20and%20Summary%20of%20Findings.pdf) (accessed 7 March 2014).

¹⁸¹ Constitution of Kenya, articles 60- 68.

¹⁸² National Land Policy (n 95 above) para 271.

¹⁸³ I Mwachane 'The contribution of land to the recent violence in Kenya: implications for the on-going policy dialogue' (2010) *The World Bank Annual Conference on Policy and Administration* 11.

¹⁸⁴ National Land Policy (n 95 above) para 179.

establishing restitutive mechanism for historical land injustices.¹⁸⁵ The Constitution, 2010 contains provisions on resolution of historical land injustices. First, the Constitution, 2010 establishes the National Land Commission which is constitutionally mandated to undertake investigations into historical and current land injustices with a view to recommending appropriate redress.¹⁸⁶ Second, the Constitution, 2010 directs Parliament to enact legislation regulating minimum and maximum private land holding acreages and facilitating review of all grants or dispositions of public land, and particularly to question their legality.¹⁸⁷ Third, the Constitution, 2010 restricts land ownership by non-citizens by confining such ownership to leasehold tenure only and capping the leasehold titles to a maximum of 99 years.¹⁸⁸

On review of land laws that perpetuate land injustice, Parliament in 2012 rationalised the existing land statutes by enacting the Land Act 2012, the Land Registration Act 2012 and the National Land Commission Act 2012 thus repealing seven of the existing land statutes laws.¹⁸⁹ These new land laws address historical land injustices in the following ways. First, the Land Registration Act, 2012 repeals the doctrine of absolute sanctity of first registration by doing away with the statutory exemption previously attached to first registration.¹⁹⁰ The legality of any registration is now questionable if title has been acquired illegally, unprocedurally or through a corrupt scheme.¹⁹¹ This opens an avenue for the state, individuals and communities to question legality of titles of both public and private land if obtained illegally, unprocedurally or through corruption. Second, the Land Act, 2012 provides an elaborate system for allocation of public land by the National Land Commission, thus making it independent of abuse by the Executive and enshrining the concept of public

¹⁸⁵ National Land Policy (n 95 above) para 179: 'The Government shall: (a) Establish mechanisms to resolve historical land claims in 1895 or thereafter. The rationale for this decision is that 1895 is the year Kenya became a protectorate under the British Protectorate East Africa with the power to enact laws and policies for the Crown. It is these colonial practices and laws which formed the genesis of mass disinheritance of various communities of their land; (b) Establish a legal and administrative framework to investigate, document and determine historical land injustices and recommend mechanisms for their resolution; (c) Review all laws and policies adopted by post independence Governments that exacerbate historical land injustices; (d) Establish suitable mechanisms for restitution of historical land injustices and claims; and (e) Specify a time period within which land claims should be made.'

¹⁸⁶ Article 67 (1): 'There is established the National Land Commission. (2) The functions of the National Land Commission are – (e) to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress'.

¹⁸⁷ Article 68: 'Parliament shall – (c) enact legislation – (i) to prescribe minimum and maximum land holding acreage in respect of private land; (v) to enable the review of all grants or dispositions of public land to establish their propriety or legality'.

¹⁸⁸ Article 65: '(1) A person who is not a citizen may hold land on the basis of leasehold tenure only, and any such lease, however granted, shall not exceed 99 ninety nine years.'

¹⁸⁹ The repealed land statutes are: the Indian Transfer of Property Act, the Government Land Act, the Registration of Land Act, the Land Titles Act, the Registration of Land Act, the Way leaves Act and the Land Acquisition Act.

¹⁹⁰ Land Registration Act, 2012 section 25: (1) 'The certificate of title issued by the Registrar upon registration or to a purchaser of land upon transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as the proprietor of the land is the absolute indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except - (a) on the ground of fraud or misrepresentation to which the person is proved to be party; or (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.'

¹⁹¹ As above.

participation.¹⁹² Third, the Land Act, 2012 also provides for minimum and maximum holding acreages for private land as directed by the Constitution, 2010.¹⁹³ A bill to concretise these provisions, the Minimum and Maximum Land Holding Acreages Bill, 2015 is yet to be tabled in Parliament as of October 2015.¹⁹⁴ Fourth, the National Land Commission Act, 2012 vests management of public and unregistered community land in the National Land Commission thus shielding it from illegal acquisition and allocation.¹⁹⁵ It also mandates the National Land Commission to review all grants or dispositions of public land to determine their legality within a given timeline of five years.¹⁹⁶ In addition, the Act mandates the Commission to recommend to Parliament legislation on adjudication of claims arising historical land grievances within two years.¹⁹⁷ To this end, the National Land Commission in May 2014 established a task force to formulate a bill for investigations and adjudication of claims arising out of historical land injustices.¹⁹⁸ As of October 2015, although a draft bill has been drafted, it has not been table in Parliament.

On restriction of land ownership by non-citizens, the Constitution, 2010 outlaws absolute proprietorship of land by foreigners, and truncated such absolute ownership to 99 year leases effective 27 August 2010.¹⁹⁹ Additionally, it converted all 999 year leases to 99 years effective 27 August 2010.²⁰⁰ It shields the cancellation of the absolute ownerships and truncation of the 999 year leases from violations of the right to property by legitimizing these actions under Article 40 which protects the right to property.²⁰¹

Notwithstanding the above discussed constitutional and legal framework political will to address historical land grievances in Kenya cannot be assumed. The National Land Commission is faced with a number of challenges. First, operationalisation of the Commission was delayed due to failure by the President to appoint members of the National Land Commission despite Parliamentary approval. The appointment was only done following a court order and instructively the President also failed to adhere to the timeline set by the

¹⁹² Land Act, 2012 section 12.

¹⁹³ Land Act, 2012 section 159: (1) 'Within one year of the coming to force of this Act, the Cabinet Secretary shall commission a scientific study to determine the economic viability of maximum and minimum acreages in respect of private land for various land zones in the country. (2) The findings of the study shall be available for the public to make observations and shall be modified based on the valid representations in accordance with the principles of participation of the people, good governance, transparency and accountability.'

¹⁹⁴ Minimum and Maximum Land Holding Acreages, Bill 2015.

¹⁹⁵ National Land Commission Act, 2012 section 5 (1): 'Pursuant to Article 67 (1) of the Constitution, the functions of the Commission shall be – (a) to manage public land on behalf of the national and county governments.' 2 'In addition to the functions set out in subsection (1), the Commission shall in accordance to Article 67 (3) of the Constitution- (e) manage and administer all unregistered trust land and unregistered community land on behalf of the county government'.

¹⁹⁶ National Land Commission Act, 2012 section 14.

¹⁹⁷ National Land Commission Act section 15.

¹⁹⁸ Kenya Gazette No 3139 of 20 February 2014.

¹⁹⁹ Constitution of Kenya, 2010 Sixth Schedule Article 8 (1): 'On the effective date, any freehold interest in land in Kenya held by a person who is not a citizen shall revert to the Republic of Kenya to be held on behalf of the people of Kenya, and the State shall grant to the person a 99 year old lease at a peppercorn rent.'

²⁰⁰ Constitution 2010, Sixth Schedule Article 8 (2): 'On the effective date, any other interest in land in Kenya greater than a ninety nine year old lease held by a person who is not a citizen shall be converted to a ninety nine year lease.'

²⁰¹ Article 40: 'The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless such deprivation – (a) results from acquisition of land or an interest in land or a conversion of an interest in land, or a title to land, in accordance with Chapter Five'.

court order.²⁰² Second, allocation of resources to the National Land Commission has also been inadequate. In the 2013/14 fiscal year, Parliament only allocated slightly over KES 200 million, against the four billion that the Commission had requested.²⁰³ Third, the functional independence of the Commission is also weakened by statutory provisions. The National Land Policy had envisaged an independent Commission with power to establish and manage all land registers in Kenya,²⁰⁴ in order to facilitate audit of all land. However, the new land statutes vest the powers of maintaining land registers in the Ministry of Lands which to some extent restricts the Commission's role in auditing public land.²⁰⁵

On implementation of the recommendations of the Ndung'u report, the Commission of Inquiry into Illegal and Irregular Allocations of Public Land in Kenya was established in June 2003 to investigate illegal allocation of public in Kenya.²⁰⁶ This Commission submitted its report (commonly referred to as the Ndung'u report) in December 2004 which was subsequently released to the public in June 2005. The Ndung'u report made specific recommendations on revocation of illegal and irregular titles to individuals and private entities and general recommendations to correct past land injustices.²⁰⁷ The general recommendations included: establishment of a National Land Commission, computerisation of land records, development of a national land policy, upgrading of informal settlements, harmonisation of land laws and establishment of a Land Titles Tribunal to rectify and revoke illegal and irregular titles.²⁰⁸ Many of these general recommendations have been implemented through the National Land Policy and through the constitution making process, much of which is discussed above. The assessment in this part will therefore focus on the implementation of specific recommendations on revocation of title.

In 2006, private citizens filed a case seeking orders to compel the government to implement recommendations of the Ndung'u report as it related to unlawful acquisition of their land by the Catholic Church.²⁰⁹ The High Court held that the recommendations of the report did not confer any statutory duty on the government hence the court could not issue orders on its implementation.²¹⁰ According to the High Court, once the report was presented to the President, there was no statutory obligation to act in a particular way.²¹¹ Of note, the High Court declared the recommendation to establish a Land Disputes Tribunal unconstitutional on the basis that such a tribunal would oust the jurisdiction of the High Court contrary to the Constitution.²¹² Nonetheless, annual reports of Kenya Anti-Corruption Commission between 2005 and 2011 document a limited number of cases in which titles have been revoked and

²⁰² *Amoni Thomas Amfry & another v the Minister of Lands & another others* [2013] eKLR. The court order issued on 4 February 2013 directed the President to appoint the commissioners within 7 days, but the appointments were done on 13 February 2013.

²⁰³ 'National Land Commission in the crosshairs' *Standard Digital News* 6 June 2013, http://37.188.98.230/?articleID=2000085334&story_title=national-land-commission-in-the-crosshairs&pageNo=1 (accessed 10 March 2014).

²⁰⁴ National Land Policy (n 95 above) para 233.

²⁰⁵ Land Registration Act section 7.

²⁰⁶ Kenya Gazette Notice 4559 of 4 July 2003.

²⁰⁷ Report of the Commission of Inquiry into Illegal / Irregular Allocation of Public Land in Kenya (2004).

²⁰⁸ As above.

²⁰⁹ *Mureithi & 2 others v the Attorney General & 4 others* KLR (E & L) 1.

²¹⁰ As above.

²¹¹ As above.

²¹² As above.

public land restored to the government.²¹³ The bulk of the cases however, have stalled in court due to legal technicalities.²¹⁴ In July 2009, the Minister of Lands indicated that the government would implement the recommendations of the Ndung'u report.²¹⁵ However, there is no documented evidence of any government action. In October 2013, the National Land Commission indicated that it would revoke illegal title deeds in line with the recommendations of the Ndung'u report.²¹⁶

Notably, the National Land Commission Act provides a timeline of five years within which the Commission should review grants and dispositions of public land,²¹⁷ which impliedly encompasses the illegally acquired land in the Ndung'u report. However, whether the National Land Commission can revoke illegal titles to public land is a matter of debate. It is argued that the Commission lacks exclusive power to deal with land as the Constitution, 2010 does not expressly give the Commission power to revoke titles, a provision that is also lacking in national legislation.²¹⁸ Opponents of this view point out that the National Land Commission Act, 2012 vests the power to review all grants or dispositions to public land on the National Land Commission and direct revocation of title if illegally acquired.²¹⁹ Further, the Commission has power under the Constitution, 2010 to initiate investigations on present and historical land injustices and recommend appropriate action.²²⁰ Taken together these provisions leave no doubt of the Commission's power to revoke title. The Commission in July 2013 put notices revoking 29 titles to public land that had been illegally allocated.²²¹ One of the owners of the 29 properties moved to court seeking to prohibit the Commission from taking possession of the land without compensation, however the court declined to grant the order.²²²

Summarizing the above, the recommendations relating to land rights are partially implemented largely through the constitution making process leading to enactment of laws and creation of an institutional framework to address historical land grievances and to implement the Ndung'u report. The Constitution, 2010 provided strict timelines for the government to enact laws and to address land ownership and historical land grievances. It is also reasonable to argue that some of the recommendations could not be implemented outside the framework of the constitution review process. For instance, addressing recommendations on land ownership would not have occurred without the review of the land regime. Nonetheless, beyond the constitutional requirements there are attempts to rollback

²¹³ Ethics and Anti-Corruption Commission, publications, annual reports, <http://www.eacc.go.ke/default.asp?pageid=20> (accessed 10 March 2014).

²¹⁴ As above.

²¹⁵ M Machuka 'Ray of hope for Ndung'u land report proposals' *Standard Media* 15 July 2008, <http://www.standardmedia.co.ke/business/article/1144019353/ray-of-hope-for-ndung-u-land-report-proposals> (accessed 9 March 2014).

²¹⁶ 'Land Commission to revoke illegal title deeds' *The Star* 21 October 2013.

²¹⁷ National Land Commission Act section 14.

²¹⁸ 'Commission lacks power to resolve land issues, says Ndung'u' *Business Daily* 24 March 2013, <http://www.businessdailyafrica.com/Commission-lacks-powers-to-resolve-land-issues/-/539546/1729304/-/12bseixz/-/index.html> (accessed 10 March 2014).

²¹⁹ National Land Commission Act section 14 (5): 'Where the Commission finds that title has been acquired in an unlawful manner, the Commission shall, direct the Registrar to revoke title.'

²²⁰ Article 67 (2) (e): 'The functions of the National Land Commission are – to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress.'

²²¹ 'National Land Commission revokes titles for illegally acquired public land' *Daily Nation* 10 July 2013, 29.

²²² *Elizabeth Nditi Njoroge v the National Land Commission* [2013] eKLR.

on the implementation as evinced by inadequate funding and delays in setting up the National Land Commission. Therefore, the implementation can wholly be attributed to the constitution-making process. This view is supported by the government delay in implementing the recommendation the National Land Policy which was not premised on the constitution review process. In addition, subsequent amendments to the land laws that negate the Constitutional provisions lend credence to this view.

1.7 Housing rights

(i) Prioritise construction of social housing that is affordable in the slum upgrading programme (KENSUP) (CESCR Committee 2008); (ii) legalise informal settlements (SR ESCR 2004; (iii) establish a quasi judicial body on informal settlement (SR ECSR 2004, SR Housing 2010); (iv) include a provision in the 2010 Constitution on evictions only as a last resort (CESCR Committee 2008); (iv) adopt legislation or guidelines on evictions and address evictions in the housing bill (SR ECSR 2004, HRC Committee 2005, SR Housing 2010).

The Kenya Slum Upgrading Programme (KENSUP) was initiated in 2004 as a partnership between the government of Kenya and UN-HABITAT within the broader framework of the Millennium Development Goals on improving the lives of at least 100 million slum dwellers by 2020.²²³ KENSUP aims at providing security of tenure, physical and social infrastructure and improved housing in selected slum areas in Nairobi, Mavoko, Mombasa and Kisumu towns.²²⁴ The Kenya Vision 2030 identifies KENSUP as one of its key initiatives in housing to be implemented within the first Medium Term Plan 2008-2012.²²⁵ In line with this, the Vision 2030 progress report 2013 indicates that between 2008 and 2012, 900 low cost housing units were completed under the KENSUP programme.²²⁶ However, concerns exist on the affordability of the houses to slum dwellers. Policy documents such as the 2004 National Housing Policy, commit the government to ensure affordability in the upgrading of slums and informal settlements.²²⁷

A 2009 report by Amnesty International indicates that many residents of Kibera expressed concern that they may not afford the houses constructed under KENSUP putting into question the level of policy implementation.²²⁸ In 2012, the government initiated the process of formulating the National Slum Upgrading Policy.²²⁹ The National Slum Upgrading Policy recommends among others: development of a slum upgrading legislation to address affordability, security of tenure and accessibility, a clear framework for participation of all stakeholders including vulnerable groups and resource allocation to social housing.²³⁰ The Policy is yet to be adopted as of October 2015.

²²³ Ministry of Housing, <http://www.housing.go.ke/survey/> (accessed 10 March 2014).

²²⁴ As above.

²²⁵ Kenya Vision 2030 (n 116 above) 152.

²²⁶ Kenya Vision 2030 progress report, February 2013, 13.

²²⁷ Republic of Kenya, Sessional Paper 3 of 2004 on the National Housing Policy for Kenya, 2004, 10.

²²⁸ Amnesty International 'The unseen majority: Nairobi's two-million slum dwellers' 2009, 25-27.

²²⁹ As above.

²³⁰ Ministry of Housing, Background document: National Slum Upgrading and Prevention Policy, May 2013 http://healthycities.berkeley.edu/uploads/1/2/6/1/12619988/kenya_slum_upgradeprevent_policy_may_2013.pdf (accessed 11 March 2014).

The Constitution, 2010 guarantees the right to accessible and adequate housing.²³¹ The state is obligated to develop legislation, policy and other measures including setting standards for the progressive realisation of the right.²³² This right is refined by the Housing Bill, 2012 which as of October 2015 has not been enacted into law. The Housing Bill adopts a broad definition of adequate housing which encompasses: security of tenure including for informal settlements, affordability, accessibility and availability of services.²³³ To achieve the right to housing, the Housing Bill commits 5% of all national revenue to fund housing development, including low cost social housing.²³⁴ This Bill is yet to be submitted to Parliament as of October 2015. The recommendation is therefore partially implemented since the Housing Bill envisages a legal framework that ensures affordability of housing.

With reference to legalisation of informal settlements, the nature of informal settlements is that they are found on public land, community land or private land and are characterised by competing rights of the tenants, the landlords both resident and non-residents who own the structures and the title holder.²³⁵ The National Land Policy addresses the issue of informal settlements but does not recommend their legalisation.²³⁶ Similarly, the KENSUP implementation strategy lists tenure regularisation as one of the processes in the slum upgrading but is silent on legalisation.²³⁷ The proposed policy framework on slum upgrading and prevention recommends legislation that will address the issue of land tenure for slums and informal settlements.²³⁸ The High Court in the *Satrose Ayuma* case, while adjudicating on forced evictions called for legalisation of informal settlements.²³⁹ As of October 2015, the government has not put in place any mechanisms for legalisation of informal settlements. The recommendation is therefore not implemented.

On evictions, Kenya has a number of laws that contain piecemeal provisions on evictions.²⁴⁰ These laws have been inadequate because many of them protect legal occupiers of land or property, do not provide clear procedures for eviction and are poorly enforced. The National Land Policy recommended for development of an appropriate legal framework in line with international guidelines.²⁴¹ The Constitution, 2010 makes no mention of evictions under the right to housing. Instructively, the first draft constitution of September 2002 contained

²³¹ Article 43 (1) (b): 'Every person has the right to accessible and adequate housing'.

²³² Article 21 (2).

²³³ Housing Bill, 2012 clause 2.

²³⁴ Housing Bill, 2012 clause 10 (2) (a).

²³⁵ PM Syagga 'Land tenure in slum upgrading' 2011, 6, http://hal.archives-ouvertes.fr/docs/00/75/18/66/PDF/Paul_Syagga_-_LAND_TENURE_IN_SLUM_UPGRADING.pdf (accessed 11 March 2014).

²³⁶ National Land Policy (n 95 above) para 209-211.

²³⁷ UN-Habitat and the Kenya Slum Upgrading Programme strategy document, 2008, 14.

²³⁸ National Slum Upgrading and Preventing Policy.

²³⁹ *Satrose Ayuma and 11 others versus Registered Trustees of the Kenya Railway Staff Retirements Benefits Scheme & 3 others*, petition 65 of 2010

²⁴⁰ The Physical Planning Act, Section 25 allows local authorities to demolish structures put up without the approval of the authorities. The Act does not provide the procedure for such eviction. The Kenya Ports Authority Act, the Kenya Airways Authority Act and the Kenya Railways Corporation Act all grant these corporations power to demolish any buildings or structures that pose a danger or obstruct their services. A court order is required before any such demolition can be carried out. Previous legislation such as the Government Land Act required a court order before an eviction could be carried out on public land.

²⁴¹ National Land Policy (n 95 above) para 211.

provisions outlawing forced evictions under the right to housing.²⁴² Although these provisions were never contentious, and were unanimously endorsed during the constitution-making process in January 2004,²⁴³ they were however removed from the subsequent draft constitutions. Nonetheless, jurisprudence evolving from the courts recognises that the right to accessible and adequate housing encompasses a prohibition of forced evictions, hence forced evictions are unconstitutional. In *Ibrahim Sangor Osman & 1122 others versus the Minister of State for Provincial Administration and Internal Security*, the High Court expressly stated that forced eviction was a violation of right to accessible and adequate housing as guaranteed under Article 43 (1) (b).²⁴⁴ Subsequently in *Mitu-belle Welfare Association versus the Attorney General & 2 others*,²⁴⁵ *Susan Waithera Kariuki & 4 others versus the Town Clerk Nairobi City Council & 3 others*²⁴⁶ and *Satrose Ayuma & 11 others versus Registered Trustees of the Kenya Railways Staff Benefits Retirement Scheme & 3 others*,²⁴⁷ the courts have held that forced evictions violated the right to adequate housing. However, in one case, the court declined to grant orders to allow persons evicted from private land to temporarily remain on the land pending the merit hearing and determination of the case.²⁴⁸ The court took the view that the right to housing as provided for in the Constitution was progressive and aspirational, to be rendered with time.

The legal framework on evictions is contained in the Evictions and Resettlement Procedures Bill, 2013. The object of the Evictions and Resettlement Procedures Bill (Evictions Bill) is to provide procedures for all forms of evictions, protection, prevention and redress against evictions for all occupiers of land including unlawful occupiers.²⁴⁹ The Bill defines unlawful eviction as permanent or temporary removal of persons against their will from land or homes which they occupy without access to legal or other protection.²⁵⁰ The Bill prohibits unlawful eviction and imposes a maximum fine of KES two million or a term of imprisonment not exceeding five years.²⁵¹ It outlines procedures to be followed prior to evictions on both public and private land. In regard to public land, the National Land Commission is mandated to undertake adequate consultations with the persons to be evicted.²⁵² In cases of private land, the owner of the land is required to serve a written notice at least 90 days before the intended eviction.²⁵³ The Bill also contains the procedure to be followed during evictions which reflects the provisions of General Comment 7 of the Committee on Economic, Social

²⁴² Constitution of Kenya Review Commission 'Annotated version of the draft Bill 27 September 2002' clause 59 (2): 'No person may be evicted from their home, or have their home demolished without an order of court made after considering all the relevant circumstances.' (3) 'Parliament may not enact any law that permits or authorises arbitrary evictions.'

²⁴³ Constitution of Kenya Review Commission 'National Constitutional Conference verbatim report of the technical working committee B (TWC B) on chapter 4 & 5 citizenship and bill of rights held in tent no. 2 at Bomas of Kenya on 19 January 2004' HAC/6/B/31, 55-60 (accessed from the Kenya National Archives 8 October 2014).

²⁴⁴ [2011] eKLR.

²⁴⁵ [2012] eKLR.

²⁴⁶ [2013] eKLR.

²⁴⁷ Petition 65 of 2010.

²⁴⁸ *Engineer Charo wa Yaa versus Jama Abdi Noor, Trade Plus International Ltd. Municipal Council of Mombasa, County Council of Mombasa and Attorney General* HC Misc. App. No. 8 of 2011 – Mombasa.

²⁴⁹ Evictions and Resettlement Procedures Bill, 2013 (Evictions Bill).

²⁵⁰ Evictions Bill, clause 2.

²⁵¹ Evictions Bill clause 7.

²⁵² Evictions Bill clause 13.

²⁵³ Evictions Bill clause 14.

and Cultural Rights.²⁵⁴ The Bill prohibits any eviction from public land that would render the person(s) evicted homeless.²⁵⁵ In cases of lawful evictions and where persons so evicted are rendered homeless, the National Land Commission is mandated to resettle them.²⁵⁶ The remedies provided for unlawful evictions include declaration of rights, injunction and compensation.²⁵⁷

However, the Bill limits its application from 'professional unlawful occupiers' and to situations of landlord-tenant distress for rent.²⁵⁸ It is noted that General Comment 7 does not address the issue of eviction for non-payment of rent. On 'professional unlawful occupiers', the Bill does not define who is to be classified as such, perhaps leaving its interpretation to the courts.

Reviewing the evolution of the Evictions Bill, its history dates back to 2006 when a joint workshop of the Centre for Housing Rights and Evictions (COHRE), Economic and Social Rights Centre (Hakijamii) and the Ministry of Lands was organised to discuss forced evictions and human rights in Kenya.²⁵⁹ Instructively, the workshop was a follow-up to concluding observations made by the Human Rights Committee on development of eviction guidelines in Kenya.²⁶⁰ At the end of the workshop, a taskforce was established to work on draft guidelines on evictions. However, the process only began in 2009 resulting in production of the first draft evictions guidelines in 2010.²⁶¹ Later there was consensus, and following failure by the Constitution, 2010 to expressly outlaw evictions, on the need to develop an enforceable legal instrument leading to the conversion of the guidelines to a draft Evictions Bill.²⁶² This Bill was subsequently forwarded to Cabinet for approval in 2011.

The High Court has in a number of cases following the promulgation of the Constitution, 2010 decried the lack of a comprehensive legal framework on evictions in Kenya. In *Susan Waithera Kariuki*, the court while granting conservatory orders pointed out that the state ought to develop legal guidelines on forced evictions and displacement of people from informal settlements.²⁶³ Similarly, in the *Mitu-Belle Welfare Association* case, the court regretted the lack of legislation to govern forced evictions in Kenya, while noting that courts could however rely on the guidelines provided under international law.²⁶⁴ The court in this case directed the state to furnish it with legislation and policies on forced evictions within 90 days. In the *Satrose Ayuma* case, the court also directed the state to file within 21 days its policies on evictions in Kenya and also outlined in its judgement the guidelines in the UN

²⁵⁴ Evictions Bill clause 16.

²⁵⁵ Evictions Bill clause 17.

²⁵⁶ Evictions Bill clause 18.

²⁵⁷ Evictions Bill clause 22.

²⁵⁸ Evictions Bill clause 3 (2).

²⁵⁹ Economic and Social Rights Centre (Hakijamii), Draft eviction and resettlement guidelines, 2012, 4, <http://www.escr-net.org/sites/default/files/Final%20evictions%20booklet.pdf> (accessed 13 March 2014).

²⁶⁰ As above.

²⁶¹ As above.

²⁶² As above.

²⁶³ [2011]eKLR.

²⁶⁴ Petition 164 of 2011.

Basic Principles and Guidelines on Development based Eviction and Displacement which it directed the state was to adhere to when evicting the petitioners.²⁶⁵

From the foregoing, the recommendations to adopt legislation to address evictions are partially implemented. The role of transnational actors in the implementation is particularly notable. For instance, the implementation of the recommendation on development of the evictions guidelines was initiated by a local civil society organisation and an international organisation. Similarly, these transnational actors have used the recommendations of monitoring mechanisms in pleadings before the courts leading to court directives requiring the state to implement the findings. In the *Satrose Ayuma* case the court recommended that the state should enact legislation on evictions which should include legalisation of informal settlements and security of tenure.²⁶⁶ Notably, the former Special Rapporteur on the Right to Adequate Housing, Miloon Kothari, filed submissions in this case as *amicus curiae* and raised the findings that he had made in his 2004 mission to Kenya before the court.²⁶⁷ Additionally, in the *Ibrahim Sangor Osman* case, the Human Rights Committee concluding observation to develop guidelines for evictions in Kenya was raised in the pleadings by non-state actors including an international expert and other international actors who appeared as interested parties.²⁶⁸

The recommendation on including a provision in the Constitution that evictions should be carried out only as a last resort is not implemented since as discussed above, the provisions relating to evictions in the Constitution were expunged in the later stages of the drafting process.

1.8 Corruption

Prosecute cases of corruption and review the sentencing policy in light of corruption cases (APRM 2006, African Commission 2007, CESCRC Committee 2008)

The global Corruption Perception Index consistently ranks Kenya in the bottom quarter of the most corrupt countries in the world. For instance, in 2005 Kenya was ranked at 144 out of 158 countries while nine years later in 2014 it was ranked at 145 out of 174 countries.²⁶⁹ Similar, a 2012 national survey on corruption and ethics by the Ethics and Anti-Corruption Commission indicated that 67.7% of those interviewed rated corruption in Kenya as very high.²⁷⁰

The legal framework for anti-corruption in Kenya is the Anti-Corruption and Economic Crimes Act, 2003, which until 2011 established the Kenya Anti-Corruption Commission, vested with broad powers to investigate cases of corruption in Kenya.²⁷¹ However, the power to prosecute until 2010 vested in the Attorney General, and following the promulgation of the Constitution, 2010 in the Director of Public Prosecutions. The decision to deprive the Kenya

²⁶⁵ Petition 65 of 2010.

²⁶⁶ As above.

²⁶⁷ As above.

²⁶⁸ [2011] eKLR.

²⁶⁹ Transparency International, Corruption Perception Index, <https://www.transparency.org/cpi2014/results> (19 June 2015).

²⁷⁰ Ethics and Anti-Corruption Commission 'National survey on corruption and ethics 2012' June 2013, 9, <http://www.eacc.go.ke/docs/National-Survey-Corruption-Ethics-2012.pdf> (accessed 7 November 2014).

²⁷¹ Anti-Corruption and Economic Crimes Act, 2003 section 7.

Anti-Corruption Commission powers is historical based on a High Court ruling of 2000 which held that anti-corruption bodies set up under an Act of Parliament could not have explicit powers to prosecute corruption offences under the Constitution.²⁷² Nonetheless, to mitigate the negative impact of the court's ruling, Parliament put safeguards in the Kenya Anti-Corruption Commission Act, 2003 to ensure effectiveness in prosecution of corruption cases. First, the Attorney General was made accountable in the exercise of prosecutorial powers by requiring submission of annual reports to Parliament outlining the steps taken on the recommendations to prosecute forwarded by the Kenya Anti-Corruption Commission.²⁷³ In the report the Attorney General was also required to indicate the status of each prosecution undertaken and where a recommendation to prosecute was rejected, precise reasons for failing to prosecute.²⁷⁴ Equally, the Kenya Anti-Corruption Commission was required to prepare reports to Parliament and to the public on the cases investigated and setting out any recommendations to prosecute not accepted by the Attorney General.²⁷⁵ It was envisaged that this system of parallel reporting would ensure accountability and more particularly establish which agency among the Kenya Anti-Corruption Commission, the Attorney General and the Judiciary was impeding prosecution of corruption.²⁷⁶ The Anti-Corruption and Economic Crimes Act also provides for special magistrates to hear anti-corruption cases.²⁷⁷ Reports of the Kenya Anti-Corruption Commission from 2007-2011 indicate that during this time period between 64% and 94% of cases recommended for prosecution to the Attorney General were accepted.²⁷⁸ While this paints a near efficient picture as envisaged by the law, it remains unknown if the Attorney General actually initiated prosecutions in the cases. There are no reports by the Attorney General to Parliament outlining the cases which prosecution had been commenced. Nonetheless, reports of the Kenya Anti-Corruption Commission indicate that prosecutions were initiated,²⁷⁹ although it is difficult to ascertain whether each

²⁷² *Stephen Mwai Gachiengo and Albert Muthee Kahuria v Republic*, High Court Miscellaneous Application 302 of 2000. In this case, the High Court argued that the Constitution vested the power to prosecute exclusively in Attorney General hence an anti-corruption body that is a corporate entity separate from the Attorney General could not have power to prosecute.

²⁷³ Anti-Corruption and Economic Crimes Act section 37: 'The Attorney General shall prepare an annual report on prosecutions with respect to corruption or economic crime.'

²⁷⁴ Anti-Corruption and Economic Crimes Act section 37 (3): 'The annual report for the year shall include a summary of the steps taken during the year in each prosecution and the status at the end of the year of each prosecution.' (4): 'The report shall also indicate if the recommendation of the Commission to prosecute a person for corruption or economic crime was not accepted and shall set out succinctly the reasons for not accepting the recommendation.'

²⁷⁵ Anti-Corruption and Economic Crimes Act section 36 (1) : 'The Commission shall prepare quarterly reports setting out the number of reports made to the Attorney General under Section 35 and such other statistical reports relating to those reports that the Commission considers appropriate. ' (2): 'A quarterly report shall if a recommendation of the Commission to prosecute to prosecute a person for corruption or economic crime was not accepted. '

²⁷⁶ J Gathii 'Kenya's long anti-corruption agenda 1952-2010: prospects and challenges of the Ethics and Anti-Corruption Commission under the 2010 Constitution', (2011) 4 *L. & Dev. Rev.* 40-41.

²⁷⁷ Anti-Corruption and Economic Crimes Act section 3.

²⁷⁸ Adopted from Kenya Anti-Corruption Commission annual reports 2007/08 – 2010/11. According to the reports 81% of the cases recommended for prosecution in 2007/08 were accepted; 64% were accepted in 2008/09; 94% were accepted in 2009/10 and 84% in 2010/11.

²⁷⁹ See Kenya Anti-Corruption Commission Annual Report 2007-2008, 39, http://www.eacc.go.ke/Docs/Annual_Report_0708.pdf ; Kenya Anti-Corruption Commission Annual Report 2008-2009, 18, <http://www.eacc.go.ke/Docs/KACC-Report-08-09.pdf>; Kenya Anti-Corruption Commission Annual Report 2009-2010, 27-28, <http://www.eacc.go.ke/Docs/Annual-Report09-10.pdf> ; Ethics and Anti-Corruption

recommendation to prosecute was acted upon since the reports on prosecuted cases are cumulative, not tied to a specific reporting period.

The above legal framework was weak since it did not anchor the Commission in the Constitution thus making its investigative powers subject to challenges of constitutional legitimacy. The promulgation of the Constitution, 2010 presented an opportunity to redress these systemic weaknesses in the prosecution of corruption. A review of policy actions taken by different government agencies from 2006 on prosecution of corruption is indicative of state's implementation of the finding.

In 2007, through the Statute Law Miscellaneous Amendments Act, Parliament amended the Anti-Corruption and Economics Crimes Act by introducing provisions that further weakened prosecution of corruption. First, the amendments introduced a provision which mandated the head of the Kenya Anti-Corruption Commission to discontinue investigations into any corruption case after consultations with the Attorney General and the Minister for Justice.²⁸⁰ Second, a provision was introduced allowing the government not to prosecute cases of corruption when the suspected person had given full disclosure of the facts involving corruption by oneself or others and when a corrupt suspect had refunded all the money or property acquired through corruption.²⁸¹ This amnesty provision shielded past cases of corruption from investigations thus impeding prosecution of corruption. For instance, in line with this amnesty provision the Grand Regency Hotel, which had been build with proceeds from a corruption syndicate, the Goldenberg Scandal, was surrendered to the government in 2008 thus ending investigation into and possible prosecution of some Goldenberg Scandal cases.²⁸²

In 2008, the Minister of Finance was involved in a corrupt sale of the Grand Regency Hotel, a sale which was flouted procurements laws and had the Hotel sold for about one third of its market value. Following pressure from the Parliament and the public the Minister resigned.²⁸³ It would have been expected that the Minister would be prosecuted for corruption or economic crimes. However, the President established a commission of inquiry to investigate the Minister.²⁸⁴ The findings of the commission of inquiry were never made public, but the Minister was subsequently reappointed to Cabinet.

In 2010, during the finalisation of the constitution-making process a committee of Parliament charged with review of the Constitution removed the provision anchoring the anti-corruption commission in the draft constitution. Notably, prior drafts of the constitution had provided for

Annual Report 2010 -2011, 19-20, <http://www.eacc.go.ke/Docs/KACC-ANNUAL-REPORT%202010-2011.pdf> (13 November 2014).

²⁸⁰ Statute Law Miscellaneous Amendments Act, 2007, 232 (accessed 14 March 2014 from the Government Printer). The provision was introduced as section 25 A.

²⁸¹ Statute Law Miscellaneous Amendments Act, 2007, 240-241 (accessed 14 March 2014). This provision was introduced as section 56B.

²⁸²Gathii (n 276 above) 61-62.

²⁸³ Parliament of Kenya National Assembly Hansard 2 July 2008, <http://www.parliament.go.ke/plone/archive/archive-10th-Parliament/hansards/official-report-2july2008-afternoon/view> (accessed 14 March 2014).

²⁸⁴ Kenya Gazette 6217 of 11 August 2008.

an anti-corruption body anchored in the Constitution.²⁸⁵ The justification given by the Parliamentary committee for removal of the provisions on the anti-corruption body was that there was no need for such a body.²⁸⁶ In the end the Constitution, 2010 directed Parliament to enact legislation for establishment an independent ethics and anti-corruption commission.²⁸⁷ Additionally, it was thought that in view of the past history of the challenges posed by lack of prosecutorial powers for anti-corruption bodies, that Parliament would expressly grant the anti-corruption body prosecutorial powers. However, Parliament failed to, it only made it permissible by providing for granting of prosecutorial powers to other authorities other than the Director of Public Prosecutions through legislation.²⁸⁸ Even then, in 2011 when enacting legislation to set up the independent ethics and anti-corruption commission, the Ethics and Anti-Corruption Commission, Parliament failed to confer prosecutorial powers to the Commission yet it was constitutionally possible. Further, in August 2011 Parliament, prior to the establishment of the Ethics and Anti-Corruption Commission, disbanded the then Kenya Anti-Corruption Commission on the pretext that it was paving way for establishment of the new Commission.²⁸⁹ The disbandment was largely seen as a strategy to halt on-going corruption investigations against a number of members of Parliament.²⁹⁰ By disbanding the Kenya Anti-Corruption Commission, Parliament pre-empted these would be prosecutions.

The record of the Judiciary in prosecution of cases of corruption is also wanting in many respects. The Judiciary remains fixated with the notion of protection of procedural rights, often defeating investigation and prosecution of corruption in Kenya. First, the belief that conferring prosecutorial powers to an anti-corruption body established under statute was unconstitutional was based on questionable interpretation of the Constitution by the Judiciary in 2000.²⁹¹ Second, in many instances the Judiciary has been quick to halt prosecution of corruption suspects on the ground that procedural rights of suspects are likely to be violated.²⁹² While it is acknowledged that the constitutional guarantees on the right to a fair

²⁸⁵ See Constitution of Kenya Review Commission, draft constitution of Kenya 15 March 2004 (Bomas draft) clause 99; Proposed new constitution of Kenya, 22 August 2005, clause 99; Kenya Harmonized Draft Constitution (17 November 2009) clause 99. These provisions establish the Ethics and Anti-Corruption Commission outline its functions and provides expressly for possible grant of prosecutorial powers by stating that 'Parliament may confer on the Commission any other function.'

²⁸⁶ Committee of Experts 'Verbatim record of Committee of Experts on Constitution Review meeting with the Parliamentary Select Committee held on 16 February 2010 at Cooperative Bank Centre, Karen' HAC/1/1/120, 40 (accessed from Kenya National Archives 17 October 2014).

²⁸⁷ Constitution, 2010 article 79: 'Parliament shall enact legislation to establish an independent ethics and anti-corruption commission, which shall be and have the status and powers of a commission under Chapter Fifteen, for purposes of ensuring compliance with, and enforcement of, the provisions of this Chapter.'

²⁸⁸ Constitution, 2010 article 157 (12): 'Parliament may enact legislation conferring powers of prosecution on authorities other than the Director of Public Prosecutions.'

²⁸⁹ Parliament of Kenya National Assembly Hansard, 24 August 2011, <http://www.parliament.go.ke/plone/archive/archive-10th-Parliament/hansards/official-report-24.08.11a/view> (accessed 14 March 2014).

²⁹⁰ 'Why MPs united against Lumumba' *Standard Digital Media* 29 August 2011, <http://www.standardmedia.co.ke/business/article/2000041754/why-mps-united-against-lumumba?pageNo=1> (accessed 14 March 2014).

²⁹¹ *Stephen Mwai Gachiengo & Albert Muthee Kahuria v Republic* High Court Miscellaneous Application No 302 of 2000.

²⁹² In 2001 in *A v Attorney General & Chief Magistrates Court ex parte Kipng'eno Arap Ng'eny* Miscellaneous Civil Application 406 of 2001, the court stopped prosecution of the suspected person on the ground that the case

trial are absolute, the point is that courts too often adopt a narrow interpretation of the Constitution, 2010 which impedes prosecution of corruption cases.

Taken together, the above discussed actions of different government agencies are not indicative of implementation of the recommendations to prosecute corruption in Kenya. As of October 2015, the legal framework of anti-corruption has been strengthened by anchoring the anti-corruption body in the Constitution thus shielding it from judicial challenges of its constitutionality. However, the Ethics and Anti-Corruption Commission has no prosecutorial powers, instead the powers are vested in the Director of Public Prosecutions, a pointer to the lack of political will on the Executive and Parliament to prosecute corruption. Additionally, the record of the courts under the Constitution, 2010 is mixed. In recent cases some decisions have adopted a liberal interpretation of the Constitution thus facilitating prosecution of corruption.²⁹³ Other decisions have unnecessarily curtailed the powers of the Director of Public Prosecutions to prosecute high level state corruption.²⁹⁴ The problem is that the power to prosecute can only be exercised in the arena of the court, hence when the court bars prosecution nothing more can be done.

The recommendations on prosecution of corruption are therefore not implemented. This conclusion is based on at least three reasons. First, that although the constitution-making process provided an avenue to strengthen the legal framework for prosecution of corruption in Kenya, as discussed above, Parliament failed to accord the anti-corruption body prosecutorial powers. Second, the 2011 disbandment of the anti-corruption body by Parliament with a view to pre-empting intended investigation and prosecution of corruption. Third, the existing disparity between reported cases of corruption in Kenya, and the number of cases prosecuted. In addition, the sentencing policy has not been reviewed.

1.9 Poverty alleviation

(i) Allocate sufficient funds for the implementation of the National Poverty Eradication Plan (CESCR Committee 2008, UPR 2010); (ii) implement Vision 2030 (UPR 2010); (iii) implement the kazi kwa vijana programme (UPR 2010); (iv) implement the Constituency Development Fund (UPR 2010).

The number of poor people in Kenya is estimated to be half of the total population. The number of those living below the poverty line in 2013 was 45.9%,²⁹⁵ with the actual number of poor people estimated to be 20.1 million.²⁹⁶

was brought nine years after he had left office as a Minister hence he did not have access to sufficient material to mount his defence. Similarly in *Republic v Judicial Commission of Inquiry into the Goldenberg Affair, ex parte Saitoti*, Miscellaneous Application 102 of 2006 [2006] eKLR, the court halted prosecution on the basis that the Commission of Inquiry during its hearing and subsequent recommendation of the prosecution of Saitoti had failed to take into consideration information that showed he was innocent hence violating his rights on the presumption of innocence.

²⁹³ *Thuita Mwangi & 2 others v the Ethics and Anti-Corruption Commission & 3 others* [2013] eKLR.

²⁹⁴ The High Court in February 2014 issued orders barring the Director of Public Prosecutions from arresting the Central Bank of Kenya Governor for alleged charges of abuse of office until the Governor has had a chance to question the basis of the charges brought against him. That a court can allow a person to question the basis of the right to prosecute them is unusual and perhaps unknown to criminal law.

²⁹⁵ World Bank, Data, world development indicators, <http://data.worldbank.org/country/kenya> (accessed 7 November 2014).

The National Poverty Eradication Plan was developed in 1999 as Kenya's blue-print in eradication of poverty with the aim of reducing the number of poor people by 50% by 2015.²⁹⁷ Subsequently, the Poverty Eradication Commission was established to coordinate the efforts of all stakeholders working on alleviation of poverty and to implement the National Poverty Eradication Plan.²⁹⁸ The Poverty Eradication Commission operates a revolving fund that finances community groups with a view to improving the incomes of such groups.²⁹⁹ In 2012/13 fiscal year the budgetary allocation was KES 100 million which the Commission indicated was insufficient for the implementation of the Plan.³⁰⁰ In June 2013, the report of the Parliamentary Budget and Appropriations Committee reduced the budget of the Poverty Eradication Commission by 170 million and recommended for its winding up in 2014 to control public spending.³⁰¹ The recommendation is therefore not implemented since there was no increased funding and government action points towards disbanding the Commission.

The *kazi kwa vijana* (jobs for youth) programme was a government initiative launched in March 2009 to create employment for 200,000-300,000 youths in rural and urban areas in labour intensive programmes of different Government ministries.³⁰² The programme aimed at facilitating income earning opportunities for the youth in activities such as repairing access roads, building small dams, running water kiosks, planting trees, eliminating mosquitoes and implementing waste management systems.³⁰³ In July 2010, the programme was upgraded to the Kenya Youth Empowerment Programme, a four year World Bank funded programme, to provide internships and training to the youth under the Ministry of Youth Affairs. The primary objective of the Kenya Youth Employment Programme was to increase youth employability by facilitating acquisition of employable skills among the youth through four to six months internships.³⁰⁴ However, the *kazi kwa vijana* programme collapsed in October 2011. A financial management review conducted by the World Bank in June 2011 indicated that the Government had misappropriated millions of shillings through ineligible expenditures.³⁰⁵ The World Bank thus withdrew its funding to the *kazi kwa vijana* programme.³⁰⁶ At the time of its collapse the programme had provided temporary jobs to more than 200,000 youths in

²⁹⁶ Kenya Institute of Public Policy Research and Analysis 'Kenya Economic Report 2013' 2013
<http://www.kippra.org/downloads/Kenya%20Economic%20Report%202013.pdf> (accessed 15 March 2014).

²⁹⁷ National Poverty Eradication Plan 1999-2015.

²⁹⁸ Kenya Gazette Notice April 1999.

²⁹⁹ Centre for Governance and Development 'National devolved funds report: institutional structures and procedures' (2007) 17-30.

³⁰⁰ 'Poverty eradication funds not enough' *news24 Kenya* 6 July 2012,
<http://m.news24.com/kenya/MyNews24/Poverty-eradication-funds-not-adequate-20120706> (accessed 15 March 2014).

³⁰¹ Parliament of Kenya, Report of the Budget and Appropriations Committee, 13 June 2013,
http://www.parliament.go.ke/plone/senate/news/report-of-the-budget-and-appropriations-committee-on-the-estimates-of-revenue-and-expenditure-for-financial-year-2013-2014/at_download/file (accessed 15 March 2014).

³⁰² State House Kenya 'Kenya shillings 15 billion 'kazi kwa vijana programme' officially launched', 12 March 2009, <http://www.statehousekenya.go.ke/news/march09/2009120302.htm> (accessed 15 March 2014).

³⁰³ As above.

³⁰⁴ J Omolo 'Youth employment in Kenya: analysis of labour market and policy interventions' 2012 FES occasional paper no. 1, 7.

³⁰⁵ World Bank 'Statement from the World Bank on Kenya Youth Empowerment Project', 25 October 2011,
<http://www.worldbank.org/en/news/press-release/2011/10/25/statement-world-bank-kenya-youth-empowerment-project> (accessed 18 March 2014).

³⁰⁶ As above.

Kenya, although the employment outcomes are unknown.³⁰⁷ Other than the misappropriation of funds, the *kazi kwa vijana* programme was critiqued for failing to target the youth from the poorest households and not having an effective exit strategy to ensure that the youth transit to permanent employment.³⁰⁸ The recommendation is therefore not implemented.

The Constituency Development Fund was established in 2003 through the Constituency Development Fund Act to enhance development and fight poverty at the local level, the constituency.³⁰⁹ In particular, the Fund is aimed at correcting regional development imbalances that had resulted from the patronage politics of post-independence Kenya. The Fund is thus targeted at projects that meet basic socio-economic needs of a community such as healthcare, water, education, security and agricultural services.³¹⁰ The Fund comprises of an annual budgetary allocation equivalent to 2.5% of the government's ordinary revenue.³¹¹ Allocation of the Fund to the 210 constituencies is spelt out in the Act and encompasses elements of equity and redistribution. The Act dictates that 75% of the Fund is allocated equally among the 210 Constituencies, while 25% is allocated based on poverty levels and population size.³¹² The Fund is managed by four committees two at the national level – the Constituency Fund Committee and the National Management Board; and two at the local level – the District Projects Committee and the Constituency Development Committee.³¹³ Total national allocations to the Fund have been incremental from the initial 1.2 billion KES in 2003 to 16 billion in 2012.³¹⁴ The 2013/14 allocation was 23 billion KES of which 18.7 billion was shared equally while 4.9 billion was shared according to the poverty level.³¹⁵

In terms of actual realisation of basic socio-economic needs, the Fund has had a significant impact. It has financed building of schools thus supporting the realisation of the right to education, health facilities such as dispensaries, maternity facilities and purchase of medicines, building of police posts to enhance security and water projects to improve on water and sanitation rights.³¹⁶ Scholars attribute the success of the Fund to the fact that it allows for local decision making on expenditure of resources thus enabling finances to be channelled to the most immediate and main challenges of any given community.³¹⁷

³⁰⁷ Omolo (n 304 above) 6.

³⁰⁸ Omolo (n 304 above) 20.

³⁰⁹ Constituency Development Fund Act, 2003

³¹⁰ Constituency Development Fund, 2003 section 22 (1): 'Projects under this Act shall be community based in order to ensure that the prospective benefits are available to a widespread cross section of the inhabitants in an area.'

³¹¹ Constituency Development Fund Act, 2003 section 4 (1): 'There is established a Fund to be known as the Constituencies Development Fund which shall – (a) be a national fund consisting of monies of not less than 2.5% (two and half per centum) of all the national government ordinary revenue collected in every financial year.'

³¹² Constituency Development Fund Act, 2003 section 19 read together with the Constituency Development Fund Act, 2013 section 20.

³¹³ Constituency Development Fund Act 2013.

³¹⁴ Constituency Development Fund, allocation, <http://www.cdf.go.ke/downloads/viewcategory/7-allocation-reports> (accessed 18 March 2014).

³¹⁵ As above.

³¹⁶ Constituency Development Fund, projects, <http://www.cdf.go.ke/projects> (accessed 19 March 2014).

³¹⁷ O Bayaka 'An institutionalized view in the creation of the Constituency Development Fund in Kenya' (2010) 1 *Kenya Studies Review*; S Auya & P Oino 'The role of the Constituency Development Fund in rural development: experiences from North Mugirango constituency, Kenya' (2013) 2 *International Journal of Science and Research*, 306.

Nonetheless, the operation of the Fund is not without criticism. First, the Fund confers members of Parliament with power to expend public resources and account to themselves in Parliament, a practice that is difficult to justify in view of the doctrine of separation of powers. The High Court in 2005 declared the Constituency Development Fund Act unconstitutional on this basis.³¹⁸ Notably, some amendments were introduced in 2007, but these amendments did not remedy the separation of power concerns as members of Parliament retained broad powers in implementation.³¹⁹ Second, the Act vests the power to identify projects to be funded in the member of Parliament.³²⁰ The import is that most projects are driven by political factors and often do not reflect the most immediate needs of the community or reach the poorest since project selection is mainly driven by political factors. The 2013 amendments attempted to address the issue by transferring the project proposals responsibility to the Constituency Development Committee and changing the mode of appointment of the Constituency Development Committee members to incorporate public participation aspects.³²¹ Perhaps, the most incisive criticism is that, in light of the devolved system of government, the Fund is unjustifiable as it creates a parallel system which is duplicative. Based on this, the Budget Policy Statement of the 2013/14 recommended its abolition.³²² In September 2013, a petition was filed seeking to declare the Constituency Development Fund unconstitutional since it undermined devolution.³²³ The High Court in February 2015 declared the Fund unconstitutional for offending the doctrine of separation of power and the devolved system of government.³²⁴

The Kenya Vision 2030 was launched in 2008 as the national development blue-print which aims to transform Kenya to an industrialising, middle income country with improved quality of life in a clean and secure environment.³²⁵ This transformation is to be achieved under three key pillars: the economic, the social and the political. The economic pillar seeks to improve the economic prosperity of Kenyans while the social pillar envisions a just and cohesive society with equitable social development.³²⁶ The political pillar seeks to build a participatory and accountable democratic system.³²⁷ The Vision 2030 is to be implemented through five year plans that form the basis of the government medium term plans.³²⁸ The first medium term plan was implemented from 2008 to 2012.³²⁹ The second medium term plan is currently being implemented and runs from 2013 to 2017.³³⁰ The first medium plan aimed to reduce the number of Kenyans living in poverty from 46% to 28%, a target that was clearly missed

³¹⁸ *John Onyango Oyoo & 5 others versus Zaddock Syongo & 2 others* [2005] eKLR.

³¹⁹ The amendments introduced in the Act created a technical committee in charge of implementation of the Fund's projects.

³²⁰ Constituency Development Fund Act section

³²¹ Constituency Development Fund Act section 24.

³²² The National Treasury, Budget Policy Statement 2013/14, <http://www.treasury.go.ke/index.php/resource-center/cat/view/96-budget-policy-statement-> (accessed 19 March 2104).

³²³ *The Institute for Social Accountability and the Centre for Enhancing Democracy and Good Governance vThe Attorney General, the Constituency Development Fund Board & another* [2015] eKLR.

³²⁴ As above.

³²⁵ Kenya Vision 2030, <http://www.vision2030.go.ke/index.php/vision> (accessed 19 March 2014).

³²⁶ Kenya Vision 2030, pillars, <http://www.vision2030.go.ke/index.php/pillars> (accessed 19 March 2014).

³²⁷ As above.

³²⁸ Kenya Vision 2030, <http://www.vision2030.go.ke/index.php> (accessed 19 March 2014).

³²⁹ Kenya medium term plan 2013-2017, Vision 2030, library, <http://www.vision2030.go.ke/index.php/home/library> (accessed 19 March 2014)

³³⁰ As above.

in view of the fact that the Economic Report 2013 put the level of poverty in 2012 at 49.8%.³³¹ Nonetheless, review of the Vision 2030 Progress Report 2013 indicates that Vision 2030 has made significant progress particularly in regard to enactment of laws including the Constitution 2010, formulation of policies in different sectors and infrastructural development.³³² The Kenya National Human Rights Commission in its human rights assessment of the Vision 2030 for the period January 2008 - June 2010 found that the Vision 2030 had made remarkable progress in attainment of socio-economic rights.³³³ One shortcoming with Vision 2030 in the context of poverty alleviation is that there is no specific targeting of the poor, which partly explains the failure of the first medium term plan to reduce poverty as envisaged. The recommendations on implementation of the Constituency Development Fund and Vision 2030 are fully implemented through Kenya's development agenda although their implementation has not resulted in lowering the poverty levels.

2 Conclusion

In sum, most recommendations on socio-economic rights are partially implemented. Preliminarily this can be attributed to the legal and policy reforms initiated following the promulgation of the Constitution, 2010, For instance, the development of laws and policies on water, social security, land, evictions, food, housing and health rights. Further, incorporation of the socio-economic rights in the Constitution, 2010 has led to litigation enabling courts to also contribute to the implementation of the recommendations as demonstrated in relation to evictions. Notwithstanding the Constitutional provisions, the assessment has identified attempts by the state to regress on implementation of the recommendations, for instance through delayed enactment of law, delay in institutional reforms and poor resourcing of institutions. Similarly, failure to enforce court judgments on socio-economic rights seemingly defeats the constitutional protection of these rights

On the implementation pathways, the analysis finds that civil society organisations, transnational actors as well as the Judiciary have been instrumental. The assessment also finds that inclusion of aspects of the recommendations in the economic development blueprint, the Vision 2030, has also contributed to the implementation, particularly for the generally crafted recommendations.

It is difficult to conclude that the partial implementation of the recommendations has led to increased enjoyment of rights since much of the implementation relates to enactment of laws and policies that guarantee social changes in the long term.

³³¹ As above.

³³² Kenya Vision 2030 Fourth Annual Progress Report, 1 February 2013, Vision 2030, library, http://www.vision2030.go.ke/cms/vds/Vision_2030-score_booklet.pdf (accessed 19 March 2014).

³³³ Kenya National Commission on Human Rights, 'The third state of human rights report: a human rights assessment of Kenya Vision 2030 January 2008 -June 2010', 2011.

Chapter 5

Assessment of implementation of findings and recommendations of monitoring mechanisms on the rights of women, children and collective groups

The chapter assesses the implementation of findings and recommendations relating to the rights of women, children and collective groups. The chapter is divided into three sections each covering a thematic area. The first section assesses the implementation of recommendations relating to women, the second section, findings and recommendations on children's rights, while the third section reviews implementation of finding and recommendations of rights of collective groups. At the end of the chapter a review is made on the implementation of the findings arising out of adversarial monitoring processes.

1 Women's rights

The recommendations are clustered into four subsets for ease of analysis. These are: recommendations on non-discrimination against women, participation of women in political and public life, violence against women and recommendations on access to and enjoyment of economic, social and cultural rights.

1.1 Equality and freedom from discrimination

(i) Address the absence of constitutional protection against discrimination in relation to women and gender disparities (HRC Committee 1981, CEDAW Committee 1993, CEDAW Committee 2003, HRC Committee 2005); (ii) repeal Section 82 (4) (b) and (c) and 90 of the Constitution to guarantee equal rights of men and women (CEDAW Committee 1993, CEDAW Committee 2003, CEDAW Committee 2007, CESC Committee 2008); (iii) incorporate CEDAW into the domestic legal system (CEDAW 1993, CEDAW Committee 2003, CEDAW Committee 2007); (iv) include in the national constitution or other legislation a definition of discrimination against women encompassing both direct and indirect discrimination (HRC Committee 1981, CEDAW Committee 2007); (v) adopt the Family Protection (Domestic Violence) Bill, Equal Opportunity Bill and the Matrimonial Property Bill (CEDAW Committee 2003, APRM 2006, CEDAW Committee 2007, African Commission 2007, CECSR Committee 2008, CAT Committee 2009, CEDAW Committee 2011 [within 2 years]); (vi) prioritise the elaboration of new laws as well review and repeal of discriminatory provisions to achieve de jure equality for women (CEDAW Committee 2011); (vii) harmonize religious and customary law with Article 16 of CEDAW and consider bringing Kadhi courts under the equality provisions of the Constitution (CEDAW Committee 2011); (viii) eliminate polygamy and payment of bride price (HRC Committee 2005, CEDAW 2007, CEDAW 11, HRC Committee 2012).

1.1.1 Constitutional protection against discrimination

The repealed Constitution, 1963 embraced a pluralist system which incorporated customary and religious laws to which the constitutional provisions on non-discrimination were inapplicable. Although it prohibited discrimination on the grounds of sex, Section 82 (4) (b) and (c) exempted the application of the non-discrimination provisions to matters involving marriage, adoption, divorce, burial, devolution of property on death or other matters of

personal law.¹ The import of the exception was that women were subject to discriminatory customary and religious laws in various aspects of their lives. Equally, Section 90 of the Constitution also expressly discriminated against women as it barred women from conferring citizenship to foreign husbands or to their children born outside Kenya.² Further, the Constitution, 1963 lacked express provisions on equality or equal protection of laws and adopted a gender neutral approach that failed to acknowledge the structural inequalities of the Kenyan society, leading to gender disparities. The courts had addressed discrimination against women and particularly Section 82 (4) (b) of the repealed Constitution. In *Rono v Rono*, the High Court noted that although the repealed Constitution outlawed discrimination on the grounds of sex, the right was taken away, as the same Constitution allowed the application of discriminatory customary laws.³ The High Court reflecting on the international treaties that Kenya had ratified ruled that (African) customary law that had a discriminatory effect on women was inapplicable.⁴ Similarly in a subsequent case, the High Court stated that the exemption envisaged in the section 82 (4) could not be interpreted in a manner that resulted in discrimination against women as discrimination on the basis of sex was outlawed by the Constitution.⁵ The constitution review process addressed the absence of constitutional protections on non-discrimination against women.

The legal framework on the constitution-making process, the Constitution of Kenya Review Commission Act, 1997 identified the objects and purposes of constitution review process to include 'securing provisions in the constitution which enshrine gender equity'.⁶ Further, the review process was specifically required to examine and recommend improvements to the respect of human rights and gender equality, to examine the right to citizenship and particularly ensure gender parity in citizenship and to examine socio-cultural obstacles that promote various forms of discrimination and ensure equal rights for all.⁷ Accordingly, all initial drafts of the constitution published in 2002, 2004, 2005, 2009 contained comprehensive provisions on equality and non-discrimination against women.⁸ A detailed discussion on the constitution-making process in relation to non-discrimination against women is contained in chapter six.

¹ Constitution of Kenya, 1963 (as amended 2008) section 82 states that: (1) 'Subject to subsections 4, 5 and 8, no law shall make any provision that is discriminatory of itself or in its effect.' (4) 'Subsection 1 shall not apply to any law so far as that law make provision— (b) with respect to adoption, marriage, divorce, burial, devolution of property on death or other matter of personal law;' (c) 'For the application in the case of members of a particular race or tribe of customary law with respect to any matter to the exclusion any law with respect to that matter which is applicable in the case of other persons. '

² Constitution of Kenya, 1963 section 90 states: 'A person born outside Kenya after 11 December, 1963 shall become a citizen of Kenya at the date of his birth if at that date his father is a citizen of Kenya.' See also Section 91 relating to citizenship by marriage which is silent on men married to Kenyan citizens.

³ *Rono v Rono* (2005) AHRLR 107 (KeCA 2005).

⁴ As above.

⁵ *Re the Estate of Lerionka ole Ntutu (deceased)* (2008) eKLR.

⁶ Constitution of Kenya Review Commission Act, 1997 section 3 (b): 'The object and purpose of the review of the constitution is to secure provisions therein establishing a free and democratic system of Government that enshrines good governance, constitutionalism, rule of law, human rights and gender equity.'

⁷ Constitution of Kenya Review Commission Act, 1997 section 17 (d) (iii), (ix) and (x).

⁸ See Constitution of Kenya Review Commission draft Bill 27 September 2002 clause 35; Draft constitution of Kenya 15 March 2004 (Bomas draft) clause 37; Proposed new constitution of Kenya 22 August 2005 clause 38 ; Harmonised draft constitution of Kenya 17 November 2009 clause 38.

The Constitution, 2010 enshrines the principle of equality and non-discrimination by providing for equality before the law, the right to equal protection and equal benefit of the law.⁹ In relation to women, the Constitution, 2010 expressly provides that women and men have the right to equal treatment and equality of opportunities.¹⁰ Taking cognisance of the unequal status of women and men in the Kenyan society, the Constitution, 2010 moves beyond *de jure* equality and requires the state 'to take legislative and other measures, including affirmative action programmes and policies to redress any disadvantage suffered by individuals or groups because of past discrimination'.¹¹ In addition, it sets a numerical standard for representation of women in public and appointive bodies to address instances of direct or indirect discrimination.¹² For greater certainty in the application of the equality and non-discrimination provisions relating to women, the Constitution, 2010 in Article 56 addresses minorities and marginalized groups. While it is silent on the definition of minorities, marginalised groups are defined to include women, who in the past have suffered discrimination on the grounds of sex because of prevailing laws or practices.¹³ In addition, the Constitution, 2010 outlaws discrimination in the private sphere which arguably extends to and addresses structural relationships of inequality between men and women in private spaces such as the family, the clan, the community and associations.¹⁴ Illustratively, the High Court in March 2014 quashed the decision of a private member club to exclude participation of women members on the basis of discrimination.¹⁵

The recommendations on constitutional protection against discrimination are therefore fully implemented through the constitution review process. However, as discussed in section 1.2, there are attempts to reverse the constitutional gains as illustrated by government's failure to ensure participation of women in political representation.

1.1.2 Discrimination in citizenship rights

On repeal of section 90 of the repealed constitution, which provision dealt with discrimination in citizenship rights, the Constitution of Kenya 2010 embraces the principle of gender equality in conferment of citizenship rights. First, it allows women to confer citizenship on their children whether born in or out of Kenya.¹⁶ Second, it makes provision, without any distinction on sex, for any person married to a Kenyan citizen to apply for registration as a

⁹ Article 27 (1): 'Every person is equal before the law and has the right to equal protection and equal benefit of the law.'

¹⁰ Article 27 (3) provides that: 'Women and men have equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.'

¹¹ Article 27 (6).

¹² Article 27 (8) states that: '... the state shall take legislative and other measures to implement the principle that no more than two-thirds of the members of elective and appointive bodies shall be of the same gender.'

¹³ Article 260 provides that: ' "marginalised group" means a group of people who, because of laws or practices before, on, or after the effective date, were or are disadvantaged by discrimination on one or more of the grounds in Article 27 (4).'

¹⁴ Article 27 (5): 'A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).'

¹⁵ *Rose Wangui Mumbo & 2 others v Limuru Country Club & 17 others* [2014] eKLR.

¹⁶ Constitution of Kenya Article 14 provides that: (1) 'A person is a citizen by birth if on the day of the person's birth, whether or not the person is born in Kenya, either the mother or the father of the person is a citizen.'

citizen provided the marriage has lasted for at least seven years.¹⁷ These provisions are further elaborated in the Kenya Citizenship and Immigration Act, 2011.¹⁸

From the foregoing, the recommendations on addressing discrimination in citizenship rights are fully implemented through the constitutional review process.

1.1.3 Incorporation of CEDAW into domestic legal system and adoption of relevant laws

On incorporation of CEDAW into the domestic legal system, prior to the adoption of the Constitution of Kenya, 2010, Kenya was unquestionably dualist and international law only had effect in the national legal system if domesticated through legislation. Accordingly, to incorporate the CEDAW provisions in the national legal system a number of bills had been drafted. These include the Equal Opportunities Bill 2007, Employment Bill 2007, Family Protection (Domestic Violence) Bill 2007, Matrimonial Property Bill 2007 and the Marriage Bill 2007. Prior to the promulgation of the Constitution 2010, only the Employment Bill 2007 was enacted into law in 2007, all the other Bills were not published for parliamentary debate. The Employment Act 2007 on its part prohibits discrimination in employment on among other grounds sex and also makes provision for affirmative action to promote equality and eliminate discrimination in the workforce.¹⁹

The Constitution, 2010 makes provision for the application of international law in the national legal system. In relation to treaties and conventions the Constitution, 2010 states that: 'any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.'²⁰ As discussed previously in chapter two, section 6, treaties ratified by Kenya have legal effect at the national level. The courts appear to have taken the view that any treaty ratified prior to the Constitution, 2010 is directly enforceable in national courts.²¹ CEDAW has thus been incorporated into the national legal system.

On adoption of the Family Protection Bill, the Equal Opportunity Bill, the Matrimonial Property Bill and the Marriage Bill, as discussed above, these bills had been drafted to incorporate CEDAW provisions into the national legal system. Following the promulgation of the Constitution, 2010 the bills then became part of the legislation required to actualise the constitutional guarantees on the rights of women. The Marriage Act was enacted in March 2014 pursuant to Article 45 (3) of the Constitution, 2010 on equal rights for women and men in marriage.²² The Act enshrines the concept of equality in marriage by stating that the parties have equal rights at the time of marriage, during and at the dissolution of the marriage.²³ The Act also brings all marriages, with the exception of Islamic marriages, under

¹⁷ Article 15 (1) 'A person who has been married to a citizen for a period of at least seven years is entitled on application to be registered as citizen.'

¹⁸ Kenya Citizenship and Immigration Act of 2011 sections 7 & 11.

¹⁹ Employment Act 11 of 2007 section 5.

²⁰ Article 2 (6).

²¹ See *Re the matter of Zipporah Wambui Mathara* [2010] eKLR; *Beatrice Wanjiku & another v Attorney General & another* [2012] eKLR.

²² Article 45 (3): 'Parties to a marriage are entitled to equal rights at the time of marriage, during the marriage and at the dissolution of the marriage.'

²³ Marriage Act, 2014 section 3 (2): 'Parties to a marriage have equal rights and obligations at the time of marriage, during the marriage and at the dissolution of the marriage.'

the ambit of the equality provisions and accords all marriages the same legal status.²⁴ This is significant as previously customary marriages existed outside the legal purview and were often centres of discrimination against women.²⁵ Nonetheless, the Marriage Act has been criticised by women groups and churches for according legal recognition to polygamy, which it is argued negates the principle of equality in marriage.²⁶ A detailed discussion on polygamy is undertaken below.

Equally, the Matrimonial Property Bill was enacted in December 2013 to concretise the constitutional provisions on equality in devolution of property in marriage. The Matrimonial Property Act, 2013 confers equal rights in married men and women to own property.²⁷ The Act vests matrimonial property in both parties subject to the contribution made by each towards the acquisition of the property.²⁸ In addition, the Act defines contribution broadly to include both monetary and non-monetary compensation.²⁹ Further, the Act provides for acquisition of a beneficial interest in property for any of the parties through contribution.³⁰

However, the Act deviates from the constitutional principle of equal rights in marriage in two ways. First, it adopts a narrow definition of matrimonial property which is limited to household goods and effects in the matrimonial home and to immovable and movable property jointly owned by the parties.³¹ In addition, it introduces the concept of pre-nuptial agreements which impliedly further narrows the scope of matrimonial property.³² Second, it introduces the notion of 'contribution' in ownership of matrimonial property which fundamentally offends the concept of equality in marriage. Arguably, the equal rights at the time of marriage, during and at the dissolution of marriage do not exclude property rights so that the principle of equality should prevail in regard to matrimonial property. The Matrimonial Property Act, 2013 has been criticised by women rights groups as discriminatory against women for undermining women property rights in marriage.³³ Similarly, the UN working group on discrimination against women in February 2014 urged Kenya to repeal the

²⁴ Marriage Act, 2014 section 3 (3): 'All marriages registered under this Act have the same legal status'.

²⁵ See *RM & v Attorney General* [2006] AHRLR 256 (KeHC 2006).

²⁶ Standard Digital News 'FIDA vows to challenge Marriage Bill' 26 March 2014, <http://www.standardmedia.co.ke/?articleID=2000107845> (26 November 2014); Ecumenical News 'churches fail to stop Kenyan president from signing polygamy bill into law', <http://www.ecumenicalnews.com/article/churches-fail-to-stop-kenyan-president-signing-polygamy-bill-into-law-> (26 November 2014) .

²⁷ Matrimonial Property Act section 4.

²⁸ Matrimonial Property Act section 7 '...ownership of matrimonial property vests in the spouses according to the contribution of each spouse towards its acquisition, and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved.'

²⁹ Matrimonial Property Act section 2: 'contribution' means monetary and non-monetary contribution and includes - (a) domestic work and management of the matrimonial home; (b) child care (c) companionship; (d) management of the family business or property; (e) farm work.

³⁰ Matrimonial Property Act section 9: 'Where one spouse acquires property before or during the marriage and the property acquired during the marriage does not become matrimonial property, but the other spouse makes a contribution towards the improvement of the property, the spouse who makes a contribution acquires a beneficial interest in the property equal to the contribution made.'

³¹ Matrimonial Property Act section 6 (1).

³² Matrimonial Property Act section 6 (3).

³³ Solidarity for African Women Rights 'SOAWR strongly condemns discriminatory Kenyan legislation' 15 April 2014, <http://www.soawr.org/en/news/item/soawr-strongly-condemns-discriminatory-kenyan-legislation> (accessed 26 November 2014).

provisions of the Matrimonial Property Act, 2013 in view of the discriminatory aspects.³⁴ As of October 2015, the Matrimonial Property Act has not been amended neither has its constitutionality been challenged in court. Regardless, the Act is subject to the Constitution, 2010 which is unequivocal on equal rights in all spheres of marriage.

The Protection against Domestic Violence Act, 2015 (previously the Family Protection Bill) actualises the constitutional provisions of protection of the family unit by addressing itself to violence within the family.³⁵ The Act was enacted into law in March 2015 despite having been tabled in Parliament in October 2013.³⁶ The Act recognises violence within the family including marital rape and provides a framework for protection and relief.³⁷

The Equal Opportunity Bill 2007 which, prohibits discrimination in both public and private spheres and provides remedies for victims of discrimination, has not been submitted to Parliament as of October 2015.³⁸

In summary, the recommendations on incorporation of CEDAW in domestic law and enactment of relevant legislation are partially implemented through the constitution review process. The determination of partial implementation is informed by the fact that some of the relevant laws such as the Equal Opportunity Bill are yet to be enacted. In addition, the laws enacted such as the Matrimonial Property Act and the Marriage Act, as discussed above, does not meet international standards.

Instructively, the enactment of the bills on marriage and matrimonial property was delayed for years notwithstanding repeated recommendations calling for their enactment since 2003. Illustratively, development of legislations on divorce, marriage and discrimination against women in Kenya can be traced back to the 1967 establishment of a commission on marriage, divorce and status of women.³⁹ A Marriage Bill was tabled in Parliament in 1985 but was defeated for among other reasons alleged interfering with the husband's right to chastise his wife and objections to adultery being made a civil wrong.⁴⁰ The Marriage Bill was subsequently redrafted together with the bills on Matrimonial Property, Family Protection and Equal Opportunities between 2000 and 2007 but these bills never published for parliamentary debate.⁴¹ Notably, the drafting of these bills was an initiative of women rights groups. Although it may be argued that the bills concerned issues that were provided for in the draft constitutions since 2002 hence the need to await constitutional reform, the

³⁴ Office of the High Commissioner for Human Rights 'UN human rights experts urge Kenya to repeal discriminatory aspects in Matrimonial Property Act' 17 February 2014, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14254&LangID=E> (accessed 26 November 2014).

³⁵ Constitution of Kenya article 45 (1): 'The family unit is the natural and fundamental unit of society and the necessary basis of social order, and shall enjoy the recognition and protection of the State.'

³⁶ Parliament of Kenya, The National Assembly (eleventh session) bills tracker as at 14 November 2014, <http://www.parliament.go.ke/plone/national-assembly/business/bills-tracker/the-national-assembly-eleventh-parliament-second-session-bills-tracker-as-at-friday-24th-october-2014/view> (accessed 26 November 2014).

³⁷ See Protection against Domestic Violence Act, 2015

³⁸ The Bill was shelved and consultations are underway to develop a more comprehensive legislation.

³⁹ 'Commissions on the laws of marriage and succession in Kenya' (1967) 11 *Journal of African Law* 1-4.

⁴⁰ P Kameri-Mbote & M Nzomo 'The coverage of gender issues in the draft bill of the Constitution of Kenya 2002: have the hens finally come home to roost for Kenyan women' (2004)1 *University of Nairobi Law Journal* 5.

⁴¹ Kenya Law, Bills, unpublished (draft) bills 2006 - 2007, <http://kenyalaw.org/kl/index.php?id=526> (1 February 2014).

argument can nonetheless be countered at least on two fronts. First, some of the bills such as Family Protection Bill and Equal Opportunities Bill had no bearing on constitutional reform yet they were never enacted despite repeated recommendations since 2003. Second, the subsequent delay in enacting Bills that were mandated as part of the constitution implementation process. For instance, the CEDAW Committee in 2011 recommended enactment of certain bills within two years, but by the end 2013 only the Matrimonial Property Act had been enacted. It is therefore evident that the laws have only been enacted because of the operation of the constitutional review process which set strict timelines for enactment of various laws.

1.1.4 Kadhi's courts and the constitutional provisions on equality

The Constitution 2010, excludes the application of the equality and non-discrimination provisions to Muslim law in matters relating to personal status, marriage, divorce and inheritance for persons of Muslim faith adjudicated Kadhi's courts.⁴² This creates ambiguity on the reach of personal law in the Kadhi's courts. With particular regard to women, it is not in dispute that Kadhi's courts in their application of Muslim law are often at variance with international human rights norms. For instance, in devolution of property women are regarded as inferior to men, and illustratively the share of a son is equal to that of two daughters.⁴³ Further, the low status accorded to women in public life for example in legal proceedings the evidence of two women is equal to the evidence of one man.⁴⁴ The High Court of Kenya in 2010, while declaring the Kadhi's courts unconstitutional, assessed the compatibility of Islam with individual rights and particularly women rights, and concluded that 'the application of such beliefs of faith are contrary to the Constitution.'⁴⁵ Although the case was decided in the context of the repealed Constitution, the High Court's assessment retains relevance in the current constitutional dispensation as the provisions relating to the Kadhi's courts are identical. The Constitution 2010, attempts to mitigate the ambiguity created by the exemption by providing that all parties must submit to the jurisdiction of the Kadhi's courts.⁴⁶ Additionally, the provision requiring Kadhi's to be appointed by the Judicial Service Commission,⁴⁷ based on the notion that better qualified Kadhi's would render non-discriminatory decisions for women.

Nonetheless, Kadhi's courts and the Constitution of Kenya have a rather long history that informed the makeup of the territory of Kenya at independence. The constitution making process embraced the limitation on the application of equality provisions to persons of

⁴² Constitution of Kenya 2010 article 24 (4): 'The provisions of this Chapter on equality shall be qualified to the extent strictly necessary for the application of Muslim law before Kadhi's courts to persons who profess the Muslim religion, in matters relating to personal status, marriage, divorce and inheritance'.

⁴³ CS Warren 'Lifting the veil: women and Islamic law' (2008) 15 *Cardozo J. L & Gender* 40-41.

⁴⁴ As above.

⁴⁵ *Jesse Kamau and 25 others v Attorney General* [2010] eKLR.

⁴⁶ Article 170 (5) provides that: 'The jurisdiction of a Kadhi's court shall be limited to the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion and *submit to the jurisdiction of the Kadhi's courts.*'

⁴⁷ Article 170 (2): 'A person shall not be qualified to be appointed to hold or act in the office of the Kadhi unless the person – (a) professes the Muslim religion; and possess such knowledge of the Muslim law applied to any sects of Muslims as qualifies the person, in the opinion of the Judicial Service Commission, to hold a Kadhi's court.'

Islamic faith in all the draft constitutions published in 2002, 2004, 2005 and 2009.⁴⁸ A key variation in the limitation clause is that the initial draft constitution of September 2002, allowed persons professing Muslim faith to elect whether or not to apply Islamic law in cases affecting them and by implication the application of the equality provisions.⁴⁹ The 2003-2004 constitution making process took the position that the limitation of the equality provisions guaranteed greater rights for women as Islam is about equity as opposed to equality.⁵⁰ This issue is further discussed in chapter six. The limitation clause was thus modified in the 2004 draft constitution to remove the option of persons professing Muslim faith electing to have their cases determined under any other law.⁵¹ In 2009 during the finalisation of the constitution making process, it was argued that the genesis of the limitation clause was to provide the foundation of the Kadhi's courts in the constitution.⁵² Accordingly, as already cited above, the general limitations clause in the Constitution, 2010 makes reference to the Kadhi's courts.⁵³ Therefore, one may observe that the limitation in the application of the constitutional guarantees on equality and non-discrimination in Kadhi's courts in specified areas of Muslim law (personal status, marriage, divorce and inheritance) is aimed at promoting religious freedom and protection of the rights of a religious minority. As of October 2015, there is no evidence of any measures to bring Kadhi's courts within the ambit of the equality provisions. The High Court in December 2014 addressed itself on whether application of Islamic law was mandatory to all Muslims in personal matters.⁵⁴ The court stated that compelling all Muslims to subject themselves to Kadhi's courts would be contrary to all notions of choice.⁵⁵

This recommendation is therefore not implemented.

1.1.5 Polygamy and payment of bride price

In relation to prohibition of polygamy, polygamy, the practice of a man having more than one wife simultaneously, is often viewed as an embodiment of patriarchy and hence incompatible with the notion of gender equality. Human rights advocates have critiqued polygamy in its traditional and contemporary version. Although no international treaty expressly prohibits polygamy, human rights advocates argue that it violates the dignity of women, the right to

⁴⁸ See Constitution of Kenya Review Commission draft Bill 27 September 2002, clause 31 (4); Draft constitution of Kenya (Bomas draft) 15 March 2004, clause 31 (5); Proposed new constitution of Kenya, 22 August 2005, clause 34 (5); Harmonised draft constitution of Kenya, 17 November 2009, clause 33 (4).

⁴⁹ Constitution of Kenya Review Commission draft Bill 27 September 2002 clause 31 (4): 'The provisions of this chapter on equality shall be qualified to the extent necessary for the application of Islamic law to persons who profess the Muslim faith **and chose the application of Islamic law in any particular case** in relation to personal status, marriage, divorce and inheritance.'

⁵⁰ Constitution Review Commission of Kenya, National Constitutional Conference, 'verbatim report of the technical working committee B (TWC B) chapter 4 & 5 on citizenship and the bill of rights held in tent no.2 at the Bomas of Kenya 19 September 2003' HAC/6/B/13, 68-78 (accessed from the Kenya National Archives 8 October 2014).

⁵¹ See Draft constitution of Kenya (Bomas draft) 15 March 2004, clause 33 (5).

⁵² Committee of Experts on the Constitutional Review 'verbatim record of the proceedings of plenary meeting of the Committee of Experts on Constitutional Review held on 2 January 2010 in Delta house, Nairobi' HAC/1/1/97, 176-180 (accessed from the Kenya National Archives on 16 October 2014).

⁵³ Article 24 (4): 'The provisions of this Chapter on equality shall be qualified to the extent strictly necessary for the application of Muslim law before Kadhi's courts, to persons who profess the Muslim religion, in matters relating to personal status, marriage, divorce and inheritance.'

⁵⁴ *In the matter of Shaheed Pervez Butt*, Mombasa High Court (2014) (unreported).

⁵⁵ As above.

equality in marriage and women's right to equal protection under the law.⁵⁶ The Committee on the Elimination of All Forms of Discrimination against Women in its General Recommendation 21 on equality in marriage and family relations finds that polygamy violates a woman's right to equality with men and has both emotional and financial consequences for women.⁵⁷ Similarly, the Human Rights Committee in General Comment 28 took the view that polygamy negates the principle equality of treatment in the context of the right to marry.⁵⁸ These arguments are well taken but can be countered primarily on the basis that the formal equality sought to be achieved through prohibition of polygamy does not necessarily result in substantive equality as an outcome. The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women recognises monogamy as the preferred form of marriage but also requires states to ensure that the rights of women in marriage including polygamous unions are protected and promoted.⁵⁹

In Kenya polygamy was, prior to the May 2014 enactment of the Marriage Act, recognised for marriages conducted under African customs and those conducted under the Mohammedan Marriage, Divorce and Succession Act which governs marriages to persons allied to or professing the Islamic faith.⁶⁰ Empirical evidence indicates that polygamous unions in Kenya in 2008 stood at 13% and reportedly declining.⁶¹

The Constitution, 2010 embodies the principle of equality as one of the values and principles of governance in Kenya.⁶² Gender equality is guaranteed under the bill of rights which also contains specific provisions guaranteeing equal rights in marriage.⁶³ Equally, the Constitution, 2010 guarantees the right of every person to participate in the cultural life of their choice,⁶⁴ and the right to manifest, practice and observe any religion individually or in community with others.⁶⁵ Notwithstanding, the Constitution, 2010 subordinates all African customary law to itself.⁶⁶ In relation to polygamy, although the text of the Constitution, 2010 is silent on polygamy, recognition of polygamous marriages can be read in provisions of

⁵⁶ JM Gher 'Polygamy and same sex marriage – allies or adversaries within the same sex marriage movement' (2008) 14 *Wm & Mary J. Women and L.* 597-598.

⁵⁷ Committee on the Elimination of Discrimination against Women, General Recommendation 21 Equality in Marriage and Family Relations UN Doc A49/38 (1994) para 14.

⁵⁸ Human Rights Committee, General Comment 28 Equality of Rights between Men and Women UN Doc CCPR/C/21/Rev.1/Add.10 (29 March 2000) para 24.

⁵⁹ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, adopted by the 2nd Ordinary Session of the Assembly of the Union, Maputo, CAB/LEG/66.6 (entered into force 25 November 2004).

⁶⁰ Mohammedan Marriage and Divorce Act,

⁶¹ Kenya National Bureau of Statistics, 'Kenya Demographic and Health survey 2008/09' 81; The Kenya Demographic and Health survey indicates that at 2003 the rate of polygamy was 16%. See Kenya National Bureau of Statistics 'Kenya Demographic and Health Survey 2003' 92.

⁶² Article 10 (2) provides: 'The national values and principles of governance include – (b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;'

⁶³ Constitution of Kenya, 2010 Bill of Rights.

⁶⁴ Article 44(1): 'Every person has the right to use the language, and to participate in the cultural life, of the person's choice.'

⁶⁵ Article 32 (2): 'Every person has the right, either individually or in community with others, in public or in private, to manifest any religion or belief through worship, practice, teaching or observance, including observance of a day of worship.'

⁶⁶ Constitution of Kenya article 2 (4) states: 'Any law, including customary law that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.'

Article 45(4) which require enactment of legislation for marriages conducted under traditional law or any system adhered to by persons professing a particular religion to the extent that the marriages are consistent with the Constitution.⁶⁷ It is argued that Article 45(4) is an acknowledgment of the plurality of the Kenyan society, which at times is at variance with formal and universalised notions of women rights. The constitution making process did not generate robust debate on polygamy in the context of equality of marriage. The initial draft constitution published in September 2002 contained provisions that granted legal recognition to polygamous unions.⁶⁸ Accordingly, at the outset of the constitution making process in 2003 it was unanimously agreed that the draft constitution should not define 'family' as such definition would lock out certain types of unions and also in view of the African concept of family which differs from the Western concept.⁶⁹ Instructively, vigorous debate on polygamy during the finalisation of the review process in 2009 and 2010 was obscured by the more contested issue of the character of marriage, heterosexual and same-sex marriages.

The Marriage Act, 2014 which gives effect to Article 45 of the Constitution legalises polygamy under two categories. First, the Act recognises polygamous marriages as valid marriages at par with monogamous marriages.⁷⁰ Second, the Act presumes marriages conducted under customary and Islamic marriages to be polygamous or potentially polygamous.⁷¹ To bring polygamous unions in line with international obligations, the Act accords the polygamous unions equal legal status with monogamous marriages thus requiring the polygamous marriages to be governed by the principle of equality at the time, during the marriage and at its dissolution.⁷² Further regulation of polygamous marriages is found in provisions of the Act that: prohibit child marriages⁷³, require registration of polygamous marriages for certainty as to their existence,⁷⁴ and place dissolution of

⁶⁷ Article 45 (4) 'Parliament shall enact legislation that recognises – (a) marriages concluded under any tradition, or system of religious, personal or family law; and any system of personal and family law under any tradition, or adhered to by persons professing a particular religion, to the extent that any such marriage or systems of law are consistent with this Constitution.'

⁶⁸ Constitution of Kenya Review Commission draft Bill, 27 September 2002 clause 38 (5): 'Parliament shall enact legislation that in a manner consistent with this article and other provisions of this Constitution recognises - (a) marriages concluded under any tradition or system of religious, personal or family law; or (b) systems of personal or family law under any tradition, or adhered to by persons professing a particular religion.'

⁶⁹ Constitution of Kenya Review Commission, National Constitutional Conference 'verbatim report of the technical working committee B (TWC B) on chapter 4 & 5 citizenship and the bill of rights held in tent no. 2 at the Bomas of Kenya on 24 September 2003' HAC/6/B/20, 13 -21.

⁷⁰ Marriage Act, 2014 section 3 (1) provides that: 'Marriage is the voluntary union of a man and a woman whether in a monogamous or polygamous union as and registered in accordance with this Act.'

⁷¹ Marriage Act, 2014 section 6 (3) 'A marriage celebrated under customary law or Islamic law is presumed to be polygamous or potentially polygamous.'

⁷² Marriage Act, 2014 section 3 (2): 'Parties to a marriage have equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage;' section 3 (3) 'All marriages registered under this Act have the same legal status.'

⁷³ Marriage Act, 2014 section 4: 'A person shall not marry unless that person has attained the age of eighteen years.'

⁷⁴ Marriage Act, 2014 section 55: 'Where parties to a marriage under Part V have completed the necessary rituals for their union to be recognised as a marriage under the customary law of any of the parties both shall apply to the Director within six months for a certificate and both shall appear in person before the director to be issued with the certificate of marriage.'; Section 57: 'Where a Kadhi, sheikh or imam authorised by the Director celebrates a marriage under Part VII of this Act, the Kadhi, sheikh or imam shall- (a) record the details of the marriage; (b) issue the parties to the marriage with a certificate of marriage; and (c) deliver the record and certificate to the Director.'

polygamous marriages under the ambit of the courts.⁷⁵ In addition, the Matrimonial Property Act, 2013 addresses matrimonial property in polygamous unions by defining the property rights among the different parties to the marriage.⁷⁶ The Marriage Act has nonetheless been criticised by women rights organisations and churches as negating the principle of equality in marriage.⁷⁷

The question to be posed is how best to protect the equality rights of women in marriage, is it by outlawing polygamy or legalisation and regulation of polygamy? Prohibition of polygamy is premised on the view that monogamy is synonymous with equality in marriage. Drawing from this view, protective measures, which are suggestively criminal measures,⁷⁸ are required to ensure equality in marriage by prohibiting polygamy. The suggestion is problematic at least because other moderate measures beside criminalisation are not unavailable nor have such measures been demonstrated to be ineffective. Further, criminalisation of polygamy does not offer any remedies to or protection of the rights of women who are already in polygamous unions. The rights of women who are and those who choose to be in polygamous unions are better protected by according polygamous marriages the same legal status and rights that are accorded to monogamous marriages.

On prohibition of bride price, bride price is the exchange of marital gifts in the form of cows, goats, camels and foodstuffs and in contemporary practice money, from the groom's family to the family of the bride.⁷⁹ Traditionally, the concept of bride price symbolized the transfer of the bride's productive and reproductive capacities to the man's family and was used to validate customary law marriages.⁸⁰ The terms of bride price were fairly constant across different cultures. This was then beneficial to women as it accorded the marriage formal recognition, protected the wives against abuse and strengthened relationships between the two families.⁸¹ However, viewed from a gender equality perspective, the exchange of bride price purportedly instils in men a sense of autonomy over the woman's productive or reproductive capabilities, a right which is socially enforced.⁸² Accordingly, any attempt by women to be autonomous or to enter marriage in their own terms is socially disapproved

⁷⁵ Marriage Act, 2014 section 68: 'The parties to a marriage celebrated under Part V may undergo a process of conciliation or customary dispute resolution before the court may determine a petition for the dissolution of the marriage.'

⁷⁶ Matrimonial Property Act, 2013 section 8.

⁷⁷ Standard Digital News 'FIDA vows to challenge Marriage Bill' 26 March 2014, <http://www.standardmedia.co.ke/?articleID=2000107845> (accessed 26 November 2014); Ecumenical News 'churches fail to stop Kenyan president from signing polygamy bill into law', <http://www.ecumenicalnews.com/article/churches-fail-to-stop-kenyan-president-signing-polygamy-bill-into-law-> (accessed 26 November 2014) .

⁷⁸ See Human Rights Committee 2005 concluding observations for Kenya; Committee on the Elimination of All Forms Discrimination Against Women 2007 & 2011 concluding observations for Kenya.

⁷⁹ S Ngutor *et al* 'The effects of high bride price on marital stability' (2013) 17 *IOSR Journal of Humanities and Social Sciences* 66.

⁸⁰ As above.

⁸¹ As above.

⁸² C Horne *et al* 'The shadow of indebtedness: bride wealth and norms constraining female reproductive autonomy' (2013) 78 *American Sociological Review* 504.

thus reinforcing notions of inequality in marriage and often leading to violence against women.⁸³

In Kenya bride price was prior to May 2014 recognised for marriages conducted under African customary law and the Mohammedan Marriage, Divorce and Succession Act for marriages between persons professing Islamic faith. Under customary law in Kenya, bride price is associated with formal recognition of customary marriage, a notion that has been upheld by the courts. Findings of a study conducted in 2009 on bride price in Kenya indicated that bride price had in modern day lost its traditional symbolism and was viewed as a commercial transaction thus leading to domestic violence.⁸⁴ Majority of the respondents, 81%, opined that bride price should be abolished as it had lost its traditional value and on the contrary instilled a sense of ownership over women, thus creating unequal rights in marriage.⁸⁵ The respondents were however wary that abolition of bride price would result in non-recognition of marriages conducted under customary law,⁸⁶ a concern that is conclusively addressed in the Marriage Act, 2014.

The Marriage Act, 2014 preserves payment of bride price in relation to customary law marriages. It however removes the ambiguity associated with formal recognition of marriage when full bride price has not been paid, thus creating certainty in customary law marriages. The Act provides that payment of token amount of dowry/bride price is sufficient to prove existence of a customary marriage.⁸⁷

The above recommendations on polygamy and payment of bride price are partially implemented since the Marriage Act does not prohibit but rather regularises and brings under the legal ambit both polygamy and payment of bride price.

1.2 Participation of women in political and public life

(i) Take concrete measures and policies to allow for participation of women in government and appointment to key positions (CEDAW Committee 1993, 2003, African Commission 2007, UPR 2010); (ii) speedy adoption of the Political Parties Bill for greater gender balance in leadership positions in the political parties (APRM 2006, CEDAW Committee 2007); (iii) adopt positive measures with a view to raising representation of women in Parliament, Judiciary and senior civil service positions (CEDAW Committee 1993, 2003, APRM 2006, CESCRC Committee 2008, UPR 2010); (iv) speedily put in place the institutional and legal framework to implement the 2006 Presidential Decree and the constitutional principle of a 30 percent recruitment and promotion of women in all public offices (CEDAW Committee 2011); (v) revise the Political Parties Bill so as to re-introduce a provision to ensure a quota for female candidates and speedily enact it (CEDAW Committee 2011).

It is often said that public offices, judiciaries and legislatures remain unrepresentative, and particularly under-representative of women. Globally, as of July 2014 women constituted

⁸³ As above.

⁸⁴ Centre for Rights Education and Awareness 'Bride price: is it modern day slavery?' (undated)16-19 (Bride price: is it modern day slavery?)

⁸⁵ Bride price: is it modern day slavery? (n 84 above) 22.

⁸⁶ As above.

⁸⁷ Marriage Act, 2014 section 43 (2): 'Where payment of dowry is required to prove a marriage under customary law, the payment of a token amount of dowry shall be sufficient to prove a customary marriage.'

only 22% of national parliamentarians, while only 10 women served as heads of State and 14 as heads of Government as of January 2015.⁸⁸ In regard to public office, globally only 17% of government ministers were women with majority serving in social sectors as of January 2015.⁸⁹ Kenya is no exception. In 2006 Parliament comprised 18 women legislators out of 222 legislators,⁹⁰ while the Judiciary in 2006 had 10 women judges in the High Court and none in the Court of Appeal out of the 58 High Court and Court of Appeal of Judges.⁹¹ Similarly, senior public service positions comprised two women ministers out of 34 ministers, six women assistant ministers out of a total of 46, five permanent secretaries out of 30 and 21 deputy secretaries out of a total of 98.⁹² Kenya adopted affirmative action in 2006. On 20 October 2006, the President issued a directive for affirmative action with a 30% minimum threshold in recruitment, promotion and appointment of women in the public service as well as setting up of a legal framework to implement the decree.⁹³ The presidential directive was issued following the July 2006 African Peer Review Mechanism assessment of Kenya in which recommended increased the participation of women in senior civil service positions.⁹⁴ Sessional Paper No. 2 of 2006 on Gender Equality and Development was also adopted in Parliament on 26 October 2006.⁹⁵ The Sessional Paper provided a framework for mainstreaming gender in all public sector institutions and recommended creation of gender divisions to link gender with government policies.⁹⁶ A survey conducted in 2009 indicated that the 30% presidential decree had so far achieved marginal results. The survey found an overall increase of women in the public service to 30.9%, although only 20.3% of these occupied senior decision making positions while 72% were in lower cadre jobs.⁹⁷ In the Judiciary, women judges in the High Court and Court Appeal increased from 20.4% to 25%.⁹⁸ The report attributed the marginal results to lack of a strong enforcement mechanism to ensure compliance with the directive and consequently recommended the setting up of a strong enforcement mechanism.⁹⁹ Notably, the presidential directive had required the setting up of a legal framework to implement the directive. However, no legislation has been enacted on affirmative action as of October 2015.

With reference to representation of women in the political life, and in particular raising the number of women in Parliament, in August 2007, a constitutional amendment bill was tabled in Parliament seeking to create 50 special and exclusive seats for women to be elected

⁸⁸ UN Women, facts and figures: women and political leadership, <http://www.unwomen.org/en/what-we-do/leadership-and-political-participation/facts-and-figures> (accessed 19 June 2015).

⁸⁹ As above.

⁹⁰Ministry of Gender, Children and Social Development, 2nd bi-annual report on 30% affirmative action on employment and recruitment of women in the public service, 30 June 2011, 27. [Ministry of Gender, 2nd bi-annual report]

⁹¹ Ministry of Gender 2nd bi-annual report (n 90 above) 26.

⁹² Ministry of Gender 2nd bi-annual report (n 90 above)27.

⁹³ Ministry of Gender 2nd bi-annual report (n 90 above) 3.

⁹⁴ Statement by H.E Hon. Mwai Kibaki President of the Republic of Kenya on Kenya during the 18th Ordinary African Union Summit 29-30 January 2012 in Addis Ababa, Ethiopia, 7 (accessed from NEPAD Kenya 10 November 2014) (Statement by the President to the AU Summit January 2012).

⁹⁵ Parliament of Kenya National Assembly official report, 26 October 2006, 16-27, <http://www.parliament.go.ke/plone/archive/archive-9th-parliament/hansard/official-report-26.10.06/view> (25 January 2014).

⁹⁶ Sessional Paper 2 of 2006 on Gender Equality and Development.

⁹⁷ Ministry of Gender 2nd bi-annual report (n 90 above) 18.

⁹⁸ Ministry of Gender 2nd bi-annual report (n 90 above) 26-27.

⁹⁹ Ministry of Gender, 2nd bi-annual report (n 90 above) 37.

through proportional representation.¹⁰⁰ The bill, however, was not passed.¹⁰¹ When moving the bill, the government indicated that there was need to raise the representation of women to be at par with other countries in region based on studies conducted by the Inter-Parliamentary Union.¹⁰² The bill featured in the national debate with the Kenyan public polling 51.6% in support of the bill against 48.4%.¹⁰³ Further opposition for the bill came from the workers body, Central Organization of Trade Unions, which took the view that women should compete equally with men and from the Law Society of Kenya which found the bill to be discriminatory as it favoured women.¹⁰⁴ In addition, the Political Parties Act 2007 was enacted which provided a framework for registration, regulation and funding of political parties.¹⁰⁵ In relation to women, the Act required political parties to include women in their membership in order to qualify for registration.¹⁰⁶ Notably, the level of women representation in Parliament in the following general election of December 2007 rose to 9.8%.

The Constitution, 2010 embodies significant guarantees to increase representation of women in the political and public life. Besides, the equality and non-discrimination provisions discussed earlier, it contains the most robust measure to redress gender disparities in political and public life by fixing a gender quota for representation of either gender in elective and appointive bodies.¹⁰⁷ As discussed in the previous section, the Constitution of Kenya Review Commission Act, 1997 required the constitution review process to ensure gender equity. Accordingly, the draft constitutions published in 2002, 2004 and 2005 contained specific provision requiring the State to put in place measures for the advancement of women and realisation of their full potential.¹⁰⁸ It is arguable that these provisions impliedly referred to the participation of women in political and public office. However, subsequent draft constitutions published in 2009 and January 2010 did not contain any specific provisions relating to the participation of women in political and public office.¹⁰⁹ Notably, none of the draft constitutions enshrined the gender quota on representation of either gender elective or appointive offices - the two thirds gender principle. The two thirds gender principle was first provided for in the final draft of the constitution published in May 2010 for approval in the August 2010 referendum. This provision was introduced in May 2010 as a result of

¹⁰⁰ Constitution of Kenya Amendment Bill 32 of 2007; Parliament of Kenya National Assembly official report, 15 August 2007, 18-34, <http://www.parliament.go.ke/plone/archive/archive-9th-parliament/hansard/official-report-15.08.07p/view> (accessed 25 January 2014).

¹⁰¹ As above.

¹⁰² As above.

¹⁰³ African Woman and Child Feature Service 'The 50 special seats for women debate and media coverage report', 2007, 5, <http://www.awcfs.org/dmdocuments/research/50%20SPECIAL%20SEATS.pdf> (accessed 25 January 2014). [The 50 special seats for women debate report]

¹⁰⁴ The 50 special seats for women debate report (n 103 above) 6.

¹⁰⁵ Political Parties Act 2007.

¹⁰⁶ Political Parties Act 2007 section 14 (1) (a).

¹⁰⁷ Article 27 (8) states that: '...the state shall take legislative and other measures to implement the principle that no more than two-thirds of the members of elective and appointive bodies shall be of the same gender.'

¹⁰⁸ Constitution of Kenya Review Commission, draft Bill, 27 September 2002 clause 35 (5): 'The State shall provide reasonable facilities and opportunities to enhance the welfare of women to enable them to realise their full potential and advancement.' See identical clause in the: Constitution of Kenya, 15 March 2004, clause 37 (4) (b); Proposed new constitution of Kenya, 22 August 2005, clause 38 (4) (b).

¹⁰⁹ See Harmonised draft constitution of Kenya, 19 November 2009, clause 38; Revised harmonised draft constitution of Kenya from the Parliamentary Service Committee, 29 January 2010 clause 26.

extensive lobbying by women groups following removal of provisions that would have ensured increased women representation in Parliament.¹¹⁰

With respect to raising representation of women in Parliament, the Constitution, 2010 introduces gender quotas through a mix of constitutional and legislative provisions. First, it sets out gender parity principle of 'not more than two-thirds of the members of elective public bodies shall be of the same gender' as one of the principles of the electoral system.¹¹¹ Accordingly, national legislation is to be enacted to operationalise the 'not more than two-thirds' gender principle.¹¹² Second, it sets aside 47 reserved seats in the National Assembly and 16 seats in the Senate to be allocated to women nominated by political parties based on the proportion of seats won in the Senate.¹¹³ Third, the Constitution, 2010 introduces mandatory rules on the rank order of candidates on the party nomination lists.¹¹⁴ A radical fifty-fifty regulation of party nominations lists requires political parties to alternate between male and female candidates in their party lists to guarantee 50% nomination of women. This provision is also reflected in the Elections Act, 2012.¹¹⁵

In actual numbers, following the March 2013 elections, representation of women in Parliament stands at 19% in the National Assembly and 26% in the Senate which does not comport with the 'not more than two-thirds' gender principle.¹¹⁶ Instructively, the gender principle was not implemented during the 2013 elections as Parliament failed to enact the necessary legislation defining workable mechanisms to operationalise the principle.¹¹⁷ Following Parliament's failure to enact the requisite legislation, the Attorney General in October 2012 moved the Supreme Court seeking an advisory opinion on whether application of the gender principle in the parliamentary elections was of immediate or progressive

¹¹⁰ Interview with O Amollo, Member Committee of Experts on the Constitutional Review 2009/10 Kenya, Nairobi, 1 April 2015.

¹¹¹ Article 81 (b).

¹¹² Constitution of Kenya Article 100 states: 'Parliament shall enact legislation to promote the representation in Parliament of (a) women (b) persons with disabilities (c) youth (d) ethnic and other minorities; and (e) marginalised communities.'

¹¹³ Article 97 (1) 'The National Assembly shall consist of - (b) forty-seven women, each elected by the registered voters of the counties, each county constituting a single member constituency'; Article 98 (1) 'The Senate shall consist of- (b) sixteen women members who shall be nominated by political parties according to their proportion of members of the senate elected under clause (a) in accordance with Article 90';

¹¹⁴ Article 90 (b) states: 'Except in the case of the seats provided for under Article 98 (1) (b), each party list comprises the appropriate number of qualified candidates and alternates between male and female candidates in the priority in which they are listed;'

¹¹⁵ Elections Act 24 of 2011 (revised 2012) section 36 (2) requires political parties to submit party lists for nomination to the National Assembly and Senate alternating between male and female candidate and listed in the order of priority.

¹¹⁶ Parliament of Kenya National Assembly, members <http://www.parliament.go.ke/plone/national-assembly/members-of-the-national-assembly/members> (28 December 2013); Parliament of Kenya Senate, senators <http://www.parliament.go.ke/plone/senate/senators-of-the-senate/senators> (28 December 2013).

¹¹⁷ Parliament of Kenya National Assembly official report, 13 September 2012, 29, <http://www.parliament.go.ke/plone/archive/archive-10th-Parliament/hansards/official-report-13-september-2012-2/view> (25 January 2014). The bill was tabled in Parliament on 23 November 2011. Public participation was sought in February 2012 with half the population supporting the bill and the other half opposing it, See Parliament of Kenya 'The Constitutional Oversight Implementation Committee report on the public hearings on the Constitution of Kenya (amendment) Bill 2011', March 2012, <http://www.parliament.go.ke/plone/archive/archive-10th-Parliament/reports> (accessed 25 January 2014).

realisation.¹¹⁸ The Supreme Court took the view that the this principle as formulated in Article 81 (b) of Constitution had not matured into an enforceable right hence to be realised progressively as opposed to immediate realisation and set the implementation date by August 2015.¹¹⁹ The Supreme Court opinion is unpersuasive mainly because the principle was implemented in the county governments elections since the Constitution expressly provided for the mechanism for implementation.¹²⁰ It therefore cannot be that the principle was an enforceable right for the county government county assemblies but an unenforceable for the national Parliament.

Despite the constitutional and legal measures in place, representation of women in the current Parliament compares unfavourably to the previous Parliament. For instance, only 16 women were directly elected to the National Assembly, outside the 47 reserved seats, amounting to 6% which compares poorly against 8% directly elected women in the previous National Assembly.¹²¹ Further, only five women were nominated to the National Assembly out of the 12 nominated members compared to six women nominated in the previous National Assembly.¹²² The situation is worse in the Senate where no woman was directly elected, and consists of 18 women, the constitutional minimum provided for in the Constitution.¹²³

A number of reasons may be advanced for the unfavourable results. Scholars writing on the effect of quotas suggest that compatibility with the electoral system, rules on the rank order in party nomination and political will are necessary for quotas to bring about improved representation.¹²⁴ In the Kenyan context, in addition to non-implementation of the two third gender principle, there was lack of political will. First, the laws enacted adopted a narrow approach in operationalisation of constitutional provisions. The Elections Act for instance should have provided mechanisms for implementation of the two third gender principle through proportional representation. In addition, the Act ought to have expounded on the Constitutional rules on the rank order of party nomination lists and required that party nomination lists start with the name of a woman to further increase the probability of nomination of women. Equally, the Political Parties Act only extended the gender principle to party membership and the governing bodies of political parties. The Act ought to have provided for candidate quotas thus require setting aside a given proportion of contested seats for women especially in the party's strongholds.

¹¹⁸ *In the matter of the principle of gender representation in the National Assembly and Senate*, reference no. 2 of 2012, Supreme Court of Kenya, advisory opinion, 11 December 2012.

¹¹⁹ As above

¹²⁰ Constitution of Kenya, 2010 article 177 (1) 'A county assembly consists of - (b) the number of special seat members necessary to ensure that no more than two thirds of the membership of the assembly are of the same gender;' (2) 'The members contemplated in clause (1) (b) and (c) shall, in each case, be nominated by political parties in proportion to the seats received in that election in that county by each political party under paragraph (a) in accordance with Article 90.'

¹²¹Parliament of Kenya National Assembly, members, <http://www.parliament.go.ke/plone/national-assembly/members-of-the-national-assembly/members>; Parliament of Kenya, Archive 10th Parliament, <http://www.parliament.go.ke/plone/archive/archive-10th-Parliament> (accessed 25 January 2014).

¹²² As above.

¹²³Parliament of Kenya Senate, senators, <http://www.parliament.go.ke/plone/senate/senators-of-the-senate/senators> (accessed 25 January 2014).

¹²⁴ MM Hughes 'Intersectionality, quotas and minority women's political representation worldwide' (2011) *American Political Science Review* 13; D Dahelrup and L Freidenvall 'Quotas as a 'fast track' to equal representation of women' (2003) 1-23.

In regard to raising representation of women in the Judiciary, the appointment of judges and magistrates vests in an independent body, the Judicial Service Commission, which is obligated to promote gender equality in the appointments.¹²⁵ As at October 2015, the number of women judges stands at 37 women judges in the High Court out of 97 High Court Judges, signifying 38% and eight women judges in the Court of Appeal out of 26 Court of Appeal judges representing 29%.¹²⁶ The Supreme Court comprises of two women judges against a total of seven Supreme Court judges.¹²⁷ The composition of the Supreme Court was a subject of litigation for not adhering to the gender principle. The High Court ruled that the composition of the Supreme Court did not violate the gender principle as the rights under Article 27 (8) had not crystallised thus subject to progressive realization.¹²⁸

In regard to raising representation of women in senior civil service positions, the gender principle applies to all public bodies for appointive positions. Further, the Constitution 2010 requires the public service to adhere to the principles of adequate and equal opportunity for men and women in appointment, training and promotion.¹²⁹ As of October 2015, the Executive comprises of 18 cabinet secretaries, six of whom are women and 26 principal secretaries, among them seven women.¹³⁰ It is notable that although the numbers indicate an increase from previous governments,¹³¹ it is barely above the 30% minimum and under representative for a country which women constitute 52% of the total population. However, progress in the achievement of the gender principle in senior public service positions is measured. This is due in part to lack of legal and institutional mechanisms to implement the 30% presidential directive on recruitment and promotion of women in the public service.

The implementation of the gender principle has featured in the national discourse. Civil society organisations have on a number of occasions moved to court to enforce compliance with the principle particularly by the Executive. In May 2012, following the appointment of 47 county commissioners comprising of 10 women and 37 men,¹³² civil society organisations challenged the appointments in the High Court citing among others grounds failure to comply with the gender principle.¹³³ The High Court found that the Executive had failed to comply with the gender principle. In this petition the court also took the view progressive realisation of the gender principle only applied in instances where the state needed to allocate resources.¹³⁴ This position was however overruled on appeal.¹³⁵ In addition, the petition on the composition of the Supreme Court which related to the implementation of the gender

¹²⁵ Constitution of Kenya Article 172 (c) and (2b).

¹²⁶ The Judiciary, list of judges, <http://www.judiciary.go.ke/portal/judges-of-the-judiciary.html> (accessed 27 November 2014).

¹²⁷ As above.

¹²⁸ *Federation of Women Lawyers Kenya (FIDA -K) & 5 others v Attorney General & another* [2011] eKLR, petition 102 of 2011.

¹²⁹ Article 232 (1) 'The values of the public service include- (i) affording adequate and equal opportunities for appointment, training and advancement, at all levels of the public service, of – (i) men and women'.

¹³⁰ Executive order 2 of 2013 Organization of the Government of the Republic of Kenya, May 2013.

¹³¹ In the previous government (2007-12) there were 6 women cabinet secretaries out of a total of 42 and 7 women principal secretaries out of a total of 44, Presidential circular no. 1 / 2008 Organization of the Government of the Republic of Kenya May 2008.

¹³² Kenya Gazette Notice 6937 of 23 May 2012.

¹³³ *Centre for Rights Education and Awareness (CREAW) & 8 others v Attorney General and another* [2012] eKLR.

¹³⁴ As above.

¹³⁵ *Minister for Internal Security and Provincial Administration v CREAW & 8 others* [2013] eKLR.

principle was filed by civil society organisations. Similarly, civil society organizations also made representations opposing the Attorney General in the advisory opinion on application of the gender principle in the March 2013 elections.

The recommendations relating to participation of women in public and political life are therefore partially implemented, mainly through the constitution reform process. It is also notable that prior to the promulgation of the Constitution 2010, the analysis indicates that the state made a number of deliberate government efforts to implement the findings. Of note is the October 2006 presidential directive on affirmative action for 30% minimum recruitment, appointment and promotion of women in the public service and the subsequent passage of Sessional Paper 2 of 2006 on Gender Equality and Development. The history of affirmative action in Kenya dates back to 1997 when a motion was tabled in Parliament seeking to introduce legislation requiring all political parties to nominate 30% women for all national and local elections and to amend the Constitution to create 18 reserved seats for women.¹³⁶ The motion was defeated. In 2000, women legislators moved a motion to introduce in Parliament the Affirmative Action Bill to improve the representation of marginalised groups, in particular women in decision making institutions.¹³⁷ The motion was debated and the Bill referred to the Constitution of Kenya Review Commission so that affirmative action could be made part of the constitutional review process.¹³⁸ Although all draft constitutions contained affirmative action provisions, this does not adequately explain the 2006 presidential directive and the 2007 constitutional amendment Bill on seeking to create 50 special seats for women. The Presidential directive was a conscious effort to implement June 2006 findings of the African Peer Review Mechanism (APRM).¹³⁹

Notwithstanding the Constitutional framework which encompasses explicit provisions on participation of women in the public and political life, there have been attempts to regress. First, the Judiciary has issued a series of contradicting decisions on the application of the gender principle. While some decisions have found that the principle is to be realised progressively, other decisions have opined that it should be realised immediately.¹⁴⁰ Although the Supreme Court clarified the matter in relation to gender representation in the national legislative bodies, finding that the principle lends itself to progressive implementation, the decision was rather unpersuasive.¹⁴¹ Second, the Executive has not been keen to adhere to the principle. For instance, in May 2011, the President appointed 47 senior administration officers of whom only 10 were women thus violating the gender principle. Although the High Court ruled that the appointments were unconstitutional, the Court of Appeal overturned the decision and validated the appointments. In December 2013 the President appointed 26 heads of public corporations and boards of whom only two were

¹³⁶ WM Kabira & EN Kimani 'The historical journey of women leadership in Kenya' (2012) 3 *Journal of Emerging Trends in Educational Research and Policy Studies*, 843.

¹³⁷ Kabira & Kimani (n 136 above) 844.

¹³⁸ As above.

¹³⁹ Statement by the President to the AU Summit January 2012 (n 94 above).

¹⁴⁰ *Federation of Women Lawyers Kenya (FIDA –K) and 5 others v the Attorney General and Another* [2011] eKLR, petition 102 of 2011; *Milka Adhiambo Otieno & another v Attorney General & 2 others* [2012] eKLR, petition 33 of 2011; *Centre for Rights and Awareness (CREAW) and 8 others v Attorney General and another* [2012] eKLR, petition 208 & 207 of 2012.

¹⁴¹ *In the matter of the principle of gender representation in the National Assembly and Senate*, reference no. 2 of 2012, Supreme Court advisory opinion, 11 December 2012.

women.¹⁴² Equally, Parliament in 2012 failed to enact the requisite legislation putting in place mechanisms for the implementation of the gender principle in representation in the National Assembly and Senate. The arguments put forward by Parliament for failure to enact legislation include: that the proposed mechanisms to implement the gender principle sought to give women preferential treatment in an arena in which there should be open and free competition. Additionally, it was argued that implementing the gender principle would unproportionally raise the numerical numbers of Parliament thus unduly burdening the tax payer. This argument on raising the numbers of Parliament and the subsequent cost to the tax payer raises a valid point. Indeed, in the county government legislative assemblies where the gender principle was implemented, it resulted in nomination 850 women to bring the number of women representatives to the one third constitutional minimum, which will cost the tax payer KES 570 million. However, it must be noted that in relation to the national parliamentary elections which the Constitution had not prescribed a given formula, the option to include workable mechanisms of proportional representation in the Elections Act, without raising the number of members of Parliament, existed.

1.3 Violence against women

The recommendations are clustered in the following sub-sets: prohibition of female genital mutilation; sexual violence against women; and trafficking in persons and prostitution.

1.3.1 Female genital mutilation

- (i) Criminalise, eradicate and enforce laws relating to female genital mutilation (APRM 2006, CEDAW Committee 2007, UPR 2010; HRC Committee 2012);(ii) criminalise female genital mutilation against all adult women (HRC Committee 2005, CESCR Committee 2008); (iii) expedite enactment of the Prohibition of Female Genital Mutilation Bill 2010 (CEDAW Committee 2011).

The practice of female genital mutilation was criminalized in Kenya against children in 2001 through the Children Act. The Act outlaws practicing and facilitating female circumcision against a child and imposes penalties thereto.¹⁴³ Further attempts by women rights activists to expressly criminalize female genital mutilation for adult women were rejected by Parliament in 2006 during the enactment of the Sexual Offences Act.¹⁴⁴ Although statistical evidence suggests a decline in the practice among all women from 32% in 2003 to 27% in 2008 and 21% in 2014,¹⁴⁵ it is inconclusive that criminalization led to the decline as the practice has been on the decline since 1998.¹⁴⁶ The circumcising constituents argue that the decline is as a result of the practice being conducted secretly following a 1983

¹⁴² Kenya Law: Kenya gazette special issue CXV – No. 182, 27 December 2013.

¹⁴³ Children's Act 8 of 2001 section 14 provides that: No person shall subject a child to female circumcision, early marriage or other cultural rites, customs or traditional practices that are likely to negatively affect the child's life, health, social welfare, dignity, or physical or psychological development. Section 20 provides the penalty as '... a term of imprisonment not exceeding twelve months, or to a fine not exceeding fifty thousand shillings or to both such imprisonment or fine.

¹⁴⁴ Parliament of Kenya National Assembly official report, 27 April 2006, 23-30, <http://www.parliament.go.ke/plone/archive/archive-9th-parliament/hansard/official-report-27.04.06/view> (27 January 2014).

¹⁴⁵ Kenya Demographic and Health Survey 2003 (n 61 above) 250; Kenya Demographic and Health Survey 2008 (n 61 above) 264; Kenya Demographic Health Survey 2014, March 2015, 61-62.

¹⁴⁶ Kenya National Bureau of Statistics 'Kenya Demographic and Health Survey 1998', April 1999, 167. It indicates that the prevalence of female circumcision was at 38% in 1999.

presidential decree banning the practice hence making it difficult to prosecute and eradicate.¹⁴⁷ Nonetheless, the Children Act is inadequate in addressing female genital mutilation in Kenya for a number of reasons. First, it is argued that the penalties imposed by the Act are not punitive enough to deter the practice. Second it does not prohibit female genital mutilation among adult women resulting in girls undergoing the practice upon attaining the age of majority. Finally, the Act does not holistically address the practice of female genital mutilation as it only criminalizes practicing and facilitating leaving out a range of actors such as the procurers, owners of premises where female genital mutilation is practiced and abettors.

In June 2010, a National Policy for the Abandonment of female genital mutilation was adopted to address some of the gaps identified in the existing legal framework. The Policy adopts an integrated approach in eradicating female genital mutilation through legislation, advocacy, public education, media coverage, empowerment of women and access to reproductive health and other support services.¹⁴⁸ Further, the Policy puts in place institutional framework, the National Steering Committee, responsible for education, sensitization and coordination.¹⁴⁹ The Prohibition of Female Genital Mutilation Act was enacted in October 2011. The Act imposes a total ban for all women in Kenya and criminalizes all forms of female genital mutilation.¹⁵⁰ It also criminalizes practicing, procuring women, trafficking, owning premises where female genital mutilation is conducted, possessing tools for female genital mutilation, failing to report and stigmatising women who have not undergone the practice.¹⁵¹ The Act imposes similar penalties for practitioners, procurers, traffickers, owners of premises, those in possession of tools and those who fail to report.¹⁵² A more severe penalty of life imprisonment is imposed if female genital mutilation causes death.¹⁵³ Additionally, the Act confers extra-territorial jurisdiction to Kenyan courts in a bid to address trafficking of women and girls to neighbouring countries to carry out female genital mutilation.¹⁵⁴ The Act however deficient waives judicial oversight in its enforcement by allowing law enforcement officers to search without a warrant premises where female genital mutilation is suspected to be practiced.¹⁵⁵ This provision is counter-productive in prosecution of cases of female genital mutilation as the constitutional safeguards on the right

¹⁴⁷ Ministry of Public Health & Sanitation and National Council for Population Development Policy Brief no. 32 'Ending female genital mutilation: laws are just the first step' June 2013 [Ministry of Public Health & Sanitation Policy Brief no. 32].

¹⁴⁸ National Policy on the Abandonment of Female Genital Mutilation, June 2010.

¹⁴⁹ As above.

¹⁵⁰ Prohibition of Female Genital Mutilation Act of 2011 section 2.

¹⁵¹ Prohibition of Female Genital Mutilation Act of 2011 sections 19 -25.

¹⁵² Prohibition of Female Genital Mutilation Act of 2011 section 29 imposes a penalty of imprisonment for a term of not less than three years, or to a fine of not less than two hundred thousand shillings, or both.

¹⁵³ Prohibition of Female Genital Mutilation Act of 2011 section 19 (2) states that: 'If in the process of committing an offence under subsection (1) a person causes death of another, that person shall, on conviction be liable to imprisonment for life'.

¹⁵⁴ Section 28 provides that: '(1) A person who, while being a citizen of, or permanently residing in Kenya, commits an act outside Kenya which act would constitute an offence under section 19 had it been committed in Kenya, is guilty of such an offence under this Act.'

¹⁵⁵ Prohibition of Female Genital Mutilation Act of 2011 section 26: 'A law enforcement officer may, without a warrant, enter any premises for the purposes of ascertaining whether there is or has been, or in connection with such premises any contravention of this Act.'

to a fair trial are inclined towards exclusion of evidence obtained in violation of the bill of rights.¹⁵⁶

Notwithstanding the passage of the Act, political will for eradication of the female genital mutilation is lacking. It is noted that the Act was initiated as a private member Bill, hence not a government initiative. Moreover, the institutional framework for the implementation of the Act, the Anti-Female Genital Mutilation Board, was constituted in January 2014 despite the Act having been operational since October 2011.¹⁵⁷ Interviews with human rights experts attributed the delay in operationalising the Act to lack of political consensus on the practice due to the political costs associated with eradication of female genital mutilation.¹⁵⁸

The recommendations on criminalisation and enactment of laws prohibiting female genital mutilation for children and adult women are fully implemented. The implementation of these recommendations is mainly through the initiative of civil society organisations, specifically initiating draft bills and sponsoring their introduction to Parliament as private member bills. In addition, the assessment reveals lack of political will to implement the findings evinced by failure to put in place institutional mechanisms to execute the laws or delayed commencement of the laws.

1.3.2 Sexual violence

(i) Ensure prosecution of perpetrators of sexual violence and protection of victims (HRC Committee 2005, UPR 2010); (ii) guarantee effective to services for victims of gender based violence (UPR 2010, CEDAW Committee 2011); (iii) repeal Section 38 of the Sexual Offences Act (CESCR Committee 2008, CAT Committee 2009; CEDAW Committee 2011); (iv) criminalise marital rape (CESCR Committee 2008, CEDAW Committee 2011).

Prior to July 2006, sexual violence related offences were criminalized by the Penal Code which classified them as 'offences against morality'.¹⁵⁹ The classification was problematic as sexual offences carried lighter sentences than other offences such as murder or manslaughter which were classified as 'offences against the person'. Deriving from this classification the Penal Code did not also provide for minimum sentences resulting in lenient sentences for sexual offences including payment of fines. This led to an initiative by civil society organizations to draft a comprehensive law on sexual offences which was tabled in Parliament as a private member bill in August 2005 and enacted in July 2006.¹⁶⁰ The Act broadens the range of criminalized sexual acts to include gang rape, deliberate transmission of HIV, child pornography, trafficking for sexual exploitation and sexual harassment and also introduces severe penalties and minimum sentences.¹⁶¹ Additionally, the Act provides

¹⁵⁶Constitution of Kenya article 50 (4) states: 'Evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice.'

¹⁵⁷ Kenya Gazette Notice 15737 The Prohibition of the Female Genital Mutilation Act, 27 December 2013.

¹⁵⁸ Interview with Dr M Ruteere, UN Special Rapporteur on Xenophobia, Racism and Contemporary Forms of Intolerance, Nairobi, 9 March 2015; Interview with M Njau- Kimani, Legal Secretary Justice and Constitutional Affairs, Office of the Attorney General and Department of Justice, Kenya, Nairobi, 4 March 2015.

¹⁵⁹ Penal Code of Kenya chapter XV.

¹⁶⁰ W Onyango-Ouma *et al The making of the Kenya sexual offence act, 2006: behind the scenes* (2009) 16.

¹⁶¹ Sexual Offences Act 3 of 2006.

mechanisms to safeguard the dignity of victims during trial and for free medical treatment including counselling and psychosocial support in public health facilities.¹⁶²

The Act has however been criticised for failing to criminalize marital rape. The legislative history of the Act is informative in this regard. Review of the history indicates that a number of compromises were made to secure passage of the Act by Parliament. Two stand out. First, the draft Sexual Offences bill contained a provision criminalizing marital rape which was deleted during the parliamentary debate and instead a provision which exempted the application of the Act to married persons adopted.¹⁶³ Second, a provision was introduced to safeguard against abuse of the Act through making of false allegations.¹⁶⁴ This provision, section 38 of the Act (repealed in 2012), criminalized making of false of allegations under the Act and imposes a sentence equivalent to that which the accused person would have served if convicted.¹⁶⁵ The specific grounds for rejecting the provision on marital rape were that it is difficult to prove and that the marriage covenant automatically confers conjugal rights, hence there cannot be rape in African marriages.¹⁶⁶

The Protection Against Domestic Violence Act, 2015 addresses the issue of marital rape. The Act defines domestic violence to include 'sexual violence within marriage',¹⁶⁷ thus marital rape. The Act provides for legal intervention to prevent violence in domestic relationships and mechanisms to offer legal protection to victims when such violence occurs.¹⁶⁸ The Act does not however criminalize marital rape.

Section 38 of the Sexual Offences Act which criminalised the making of false allegations under the Act was repealed in June 2012.¹⁶⁹ Review of the Parliamentary proceedings during the repeal of the provisions does not indicate any reference to the findings of monitoring mechanisms.¹⁷⁰ As noted earlier, the provision was incorporated in the Act ostensibly to guard against making of false allegations of sexual offences. In practice, the provision was widely abused by the police and misinterpreted by the public creating fear that if the accused person is acquitted the victim may be charged with making false allegations.¹⁷¹ The provision was discriminative against victims of sexual offences as the Penal Code contains general provisions that punish the making of false allegations regardless of the nature of the crime. The courts had applied the section and convicted a

¹⁶² As above.

¹⁶³ Parliament of Kenya National Assembly official report, 31 May 2006, 44-51, <http://www.parliament.go.ke/plone/archive/archive-9th-parliament/hansard/official-report-31.05.06p-1/view> (28 January 2014).

¹⁶⁴ As above.

¹⁶⁵ Sexual Offences Act section 38 states that: 'Any person who makes false allegations against another person to the effect that the person has committed a sexual offence under this Act is guilty of an offence and shall be liable to punishment equal to that for the offence complained of.'

¹⁶⁶ Parliament of Kenya National Assembly official report, 27 April 2006, 23-45, <http://www.parliament.go.ke/plone/archive/archive-9th-parliament/hansard/official-report-27.04.06/view> (28 January 2014).

¹⁶⁷ Protection Against Domestic Violence Act, 2015 section 3(a).

¹⁶⁸ Protection Against Domestic Violence Act, 2015 section 6.

¹⁶⁹ Parliament of Kenya National Assembly official report, 20 June 2012, 66-73 <http://www.parliament.go.ke/plone/archive/archive-10th-Parliament/hansards/official-report-20-june-2012-pm/view> (accessed 28 December 2013).

¹⁷⁰ As above.

¹⁷¹ K Waweru, 'Sexual Offences Act: omissions and ambiguities' (2007) *Kenya Law Journal*.

number of children. For instance, in the case of *Republic v Beatrice Wambura Mwangi*, a 16 year old girl was charged and admitted to making a false allegation of defilement under the Act. The minor was to be sentenced for a minimum of fifteen years, the equivalence of the sentence prescribed for the offence of defilement.¹⁷² The court taking cognisance of the fact that she was a minor placed her on probation for three years.¹⁷³

The Federation of Women Lawyers in Kenya, FIDA -Kenya, had filed a petition in the High Court in 2010 seeking to have the provision expunged from the Act on the ground that it hindered access to justice for victims of sexual violence.¹⁷⁴ The High Court however, declined to grant the order arguing that FIDA-Kenya failed to demonstrate that any victim(s) had suffered miscarriage of justice arising from the provision.¹⁷⁵ Further, a May 2011 workshop organised by civil society actors and the University of California Berkeley which brought together state, non-state and transnational actors lobbied the Attorney General to repeal the provision.¹⁷⁶

On ensuring prosecution of perpetrators of sexual violence and guaranteeing effective services for victims, implementation of the Sexual Offences Act remains weak and uncoordinated thus denying victims of sexual violence effective services. Following the enactment of the Act, a task force was set up in March 2007 to monitor the implementation of the Act across different government agencies.¹⁷⁷ The mandate of the task force expired in December 2012 and as of August 2015 there is no institutional mechanism in place for the implementation of the Act.¹⁷⁸ Additionally, a national policy to guide on the multi-sectoral implementation of the Act which was submitted to the Attorney General in June 2011 for cabinet approval has not been adopted as of August 2015.¹⁷⁹ Taken together, it is undoubted that political will to address sexual violence is lacking. The High Court has addressed Government's failure to effectively implement the Sexual Offences Act. In a case filed by 11 minors, all victims of distinct acts of defilement, the court took the view that the National Police Service and the Director of Public Prosecutions had violated the minors' rights to equal benefit and protection of the law, dignity and security by failing to effectively investigate and prosecute the perpetrators.¹⁸⁰ Although the court had been called upon to order the government to adopt and implement the national policy on the Act, it declined.¹⁸¹ Similarly, as discussed in chapter three, in regard to response to sexual violence during the 2007/08 post election violence, eight victims of sexual violence and civil society organisations in 2013 sued the government for its continued failure to bring the perpetrators

¹⁷² Karatina Law Courts 479/06 (unreported).

¹⁷³ As above.

¹⁷⁴ *FIDA Kenya & another v Attorney General*, petition 22 of 2010 (unreported).

¹⁷⁵ As above.

¹⁷⁶ University of California Berkeley, Human Rights Center 'Report of the workshop on the Implementation of the Sexual Offences Act 2012' (on file with author).

¹⁷⁷ Kenya Gazette Notice 2155 of 26 March 2007, Task Force on the Implementation of the Sexual Offences Act.

¹⁷⁸ Interview with S Mainye, Office of the Attorney General Joint Secretary, Task Force on the Implementation of the Sexual Offences Act, Nairobi, 30 January 2014.

¹⁷⁹ As above.

¹⁸⁰ *CK (A child through Ripples International as her guardian and next friend) & 11 others v Commissioner of Police/ Inspector General of the National Police Service and 3 others* [2013] eKLR.

¹⁸¹ As above.

of sexual violence to account and to provide reparations for the victims.¹⁸² As of October 2015, the petition is yet to be determined.

From the foregoing, the recommendation on repeal of section 38 of the Sexual Offences Act is fully implemented through executive action. On criminalisation of marital rape, the recommendation is partially implemented as the Protection from Domestic Violence Act, 2015 recognises it as a form of violence and provides for protective measures, although without criminalising it. Recommendations on prosecution of perpetrators of sexual violence and provision of effective services are not implemented particularly in view of the government's reluctance to adopt and put in place the necessary policies and institutional framework.

1.3.3 Trafficking in persons and prostitution

(i) Expediently enact legislation criminalizing trafficking in persons (CEDAW Committee 2007, CESCR Committee 2008, CAT Committee 2009); (ii) implement legislation on trafficking and sexual exploitation of women and girls (UPR 2010, CEDAW Committee 2011); (iii) review laws on prostitution to ensure women in prostitution are not criminalized (CEDAW Committee 2007); (iv) enact legislation to sanction the demand side of prostitution (CEDAW Committee 2011); (v) adopt a comprehensive approach to address prostitution including exit programmes (CEDAW Committee 2007, 2011).

With respect to trafficking, prior to 2010 Kenya had a patchwork of laws criminalizing trafficking in persons. The Penal Code contains offences against liberty which criminalize all forms of abduction and kidnapping including kidnapping to cause grievous bodily harm, slavery or sexual exploitation.¹⁸³ Similarly the Children's Act criminalizes exploitation of children including sale, trafficking or abduction by any person.¹⁸⁴ The Sexual Offences Act also criminalizes child trafficking by natural and juristic persons and trafficking of all persons for sexual exploitation within or across the borders of Kenya.¹⁸⁵ However these laws did not adequately address trafficking in persons. The gaps identified were: (i) lack of a proper definition of trafficking in persons in line with the UN Palermo Protocol which Kenya ratified in 2005; (ii) the penalties meted out on traffickers were lenient; and (iii) the laws did not provide for support systems for victims of trafficking. The Counter-Trafficking in Persons Act was enacted by Parliament in July 2010 to implement Kenya's international obligations particularly the Palermo protocol and to prevent, suppress and punish trafficking in persons.¹⁸⁶ The Act provides a comprehensive definition of the criminal nature of trafficking in persons, prescribes severe penalties of 30 years imprisonment or a fine of 30 million Kenya shillings for trafficking in persons and provides for support mechanisms for victims of trafficking such as return to and from Kenya, resettlement, reintegration and psychosocial

¹⁸² *Coalition of Violence Against Women & 3 Others v Attorney General & 3 others*, petition 122/2013.

¹⁸³ Penal Code of Kenya chapter XXV sections 254-266.

¹⁸⁴ Children Act 8 of 2001 section 13 (1): 'A child shall be entitled to protection from physical or psychological abuse, neglect or any form of exploitation including sale trafficking or abduction by any person.'

¹⁸⁵ Sexual Offences Act 3 of 2006 sections 13 and 18. These provisions were repealed by the Counter Trafficking in Persons Act 8 of 2010.

¹⁸⁶ Parliament of Kenya National Assembly official report, 15 July 2010, 28-42, <http://www.parliament.go.ke/plone/archive/archive-10th-Parliament/hansards/official-records-06.07.10/view> (30 January 2014).

support.¹⁸⁷ The Act also establishes an advisory board for implementation of the Act which is mandated to submit annual reports to the National Assembly on programmes, policies and activities relating to the implementation of the Act.¹⁸⁸

Questions abound on the government's political will to implement the Counter-Trafficking in Persons Act. Pointedly, the Act was tabled in Parliament as a private member bill in 2009 despite having been forwarded to the Attorney General in 2006.¹⁸⁹ While the Act was passed by Parliament in July 2010, it was not assented to until October 2010 after civil society organisations pressured the President.¹⁹⁰ In addition, the Act provided that the commencement date would be 'on such date as the minister may by gazette appoint'. The Act was gazetted two years later in October 2012 after civil society organisations moved to court in September 2012 to compel the government to operationalise the Act.¹⁹¹ On implementation of the Act, in 2015 the government had not set up the fund contemplated in the Act to assist victims in return to Kenya, resettlement, re-integration and psychosocial support. As a result civil society organisations in March 2015 sued the government to seek orders compelling the government to establish the Fund.¹⁹²

On prostitution, the Counter Trafficking in Persons Act, 2010, the Act is silent on male demand of prostitution that fosters trafficking for sexual exploitation.¹⁹³ However, the language of the Palermo protocol on the demand side of prostitution appears suggestive rather than imposing obligations on state parties.¹⁹⁴ The law in Kenya criminalizes persons living on the earnings of prostitution and those aiding or abetting prostitution for gain.¹⁹⁵ Further, on comprehensive approaches to address prostitution including exit programmes, there is no evidence of government programmes to assist persons willing to leave prostitution.

The above recommendation on enactment of legislation on trafficking is fully implemented through the initiative of civil society actors. It is notable however that the commencement of the Act was delayed for close to two years. Similarly, institutional framework for implementation of the Act, the Counter-Trafficking in Persons Board, was established in January 2014 notwithstanding that the Act commenced operation in October 2012. The recommendations relating to sanctioning male prostitution, de-criminalisation of prostitution and development of prostitution exit programmes are not implemented.

¹⁸⁷ Counter Trafficking in Persons Act 8 of 2010.

¹⁸⁸ As above.

¹⁸⁹ Parliament of Kenya National Assembly official report, 4 February 2009, 24-43, <http://www.parliament.go.ke/plone/archive/archive-10th-Parliament/hansards/official-records-04.02.09a/view> (accessed 8 February 2014).

¹⁹⁰ The Cradle 'Assent to and implementation of the law to combat human trafficking an urgent necessity' 24 September 2010, <http://www.thecradle.or.ke/news-events/40-assent-to-and-implementation-of-the-law-to-combat-human-trafficking-an-urgent-necessity> (accessed 30 January 2014).

¹⁹¹ *CRADLE v the Attorney General & another* petition 28 of 2012 [unreported].

¹⁹² Interview with P Mutiso, Programme Officer, CRADLE Kenya, Nairobi 23 March 2015. See *CRADLE v Minister of Labour, Social Security and Services*, petition 68 of 2015.

¹⁹³ Counter Trafficking in Persons Act 8 of 2010.

¹⁹⁴ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Against Transnational Organized Crime article 9 (5).

¹⁹⁵ Penal Code sections 153-156.

1.4 Women's access to and enjoyment of socio-economic rights

The recommendations are further categorised as follows: education, fair labour practices, health, access to land and poverty alleviation among women including rural women.

1.4.1 Right to education

(i) Ensure equal access of girls and women to all levels of education (APRM 2006 CEDAW Committee 2007, CEDAW Committee 2011); (ii) implement measures to retain girls in school and re-entry policies so that girls go back to school after giving birth (CEDAW Committee 2007, CEDAW Committee 2011, CESCRC Committee 2008).

The 2003 introduction of the free primary school education in Kenya significantly increased the percentage of children going to school. Statistical data indicates that the rate of enrolment of boys and girls in primary school compares favourably with gender disparity ratios of 1.9% in 2008, 2.1% in 2009, 1.3% in 2010 and 0.9% in 2011.¹⁹⁶ Transition to secondary school indicates widening gender disparities with fewer girls undertaking secondary school education. Statistical data puts the gender disparity ratio in relation to secondary school enrolment at 8% in 2008, 7% in 2009, 7% in 2010, 7% in 2011 in favour of boys.¹⁹⁷ The gender paradox is more evident in transition to university education, with fewer women enrolling for university education. The gender disparity ratio was 20% in 2008, 24% in 2009, 21% in 2010 and 19% in 2011.¹⁹⁸

In 2007 the government launched the Gender Policy in Education whose objective is to establish mechanisms to eliminate gender disparities in education, training and research in relation to access, enrolment, retention, completion, performance, transition, quality and outcomes.¹⁹⁹ In the specific context of equal access for women and girls to education, the policy provides for advocacy and lobbying of parents to support education of girls, provision and distribution of sanitary materials and prohibition of sexual abuse and harassment in primary schools.²⁰⁰ In secondary education, the policy provides for implementation of an affirmative component in the award of bursaries to female students transitioning to secondary school and enforcement of rules prohibiting sexual harassment.²⁰¹ To increase access to university education for women the policy calls for implementation of affirmative action in admission of women, award of grants and loans and elimination of gender based violence and sexual harassment.²⁰²

Additionally, there are constitutional and legal guarantees on equal access to the right to education. The Constitution 2010 guarantees equal access to the right to education by providing that, 'every person has the right to education'.²⁰³ In relation to children, the Constitution, 2010 guarantees every child the right 'to free and compulsory basic

¹⁹⁶ Kenya National Bureau of Statistics 'Facts and Figures 2012', 2012, 20.

¹⁹⁷ As above.

¹⁹⁸ As above.

¹⁹⁹ Ministry of Education 'Gender policy in education' July 2007, 7. (Gender policy in education).

²⁰⁰ Gender policy in education (n 199 above) 12-13.

²⁰¹ Gender policy in education (n 199 above) 13-15.

²⁰² Gender policy in education (n 199 above) 26.

²⁰³ Article 43 (1) (f).

education'.²⁰⁴ The Basic Education Act, 2013 gives effect to the realization of this right through specific provisions. The Act provides for the right of every child to free and compulsory basic education²⁰⁵ and requires parents to ensure that children attend compulsory primary and secondary school education.²⁰⁶ The Act places the responsibility to the government to: 'provide free and compulsory basic education to every child, to ensure compulsory admission and attendance of children of compulsory schooling age at a school or an institution offering basic education and to ensure that children belonging to marginalised, vulnerable or disadvantaged groups are not discriminated against and prevented from pursuing and completing basic education.'²⁰⁷ Moreover, other initiatives such as raising the minimum age of marriage to 18 years and efforts towards eradication of female genital mutilation are aimed at ensuring girls participation and retention of girls in school.²⁰⁸

On implementation of re-entry policies so that girls return to school after giving birth, although data on teenage pregnancy in schools is unavailable, the 2013 State of the World Population Report puts the rate of child pregnancy in Kenya at 26%.²⁰⁹ The Ministry of Education jointly with the Ministry of Public Health and Sanitation in 2009 launched the National School Health Policy which contains comprehensive guidelines for schools in handling cases of pregnancy. The policy expressly states that girls who get pregnant in school should remain in school for 'as long as possible' and places great emphasis on counselling of the affected girls, the parents and other school girls.²¹⁰ On re-entry, the policy encourages the parents of the girls to seek re-admission in schools different from those previously enrolled in to avoid psychological and emotional trauma.²¹¹ In practice, the policy is inadequate in a number of ways. First, the policy is not anchored in any legal framework thus making its enforcement weak. Second, there are no clear mechanism of determining how long a girl should remain in school has resulted in contrasting interpretations by parents and teachers which often keep girls out of school.

The recommendations are therefore partially implemented as the school re-entry policies are vague and not anchored on a legislative framework. Similarly, in relation to access to education for women and girls at all levels, the policy framework is not anchored on legislation. The Equal Opportunities legislation which would incorporate provisions on affirmative action relating to access to education is yet to be enacted.

²⁰⁴ Article 53 (1) (b).

²⁰⁵ Basic Education Act of 2013 section 28 (1) 'The Cabinet Secretary shall implement the right of every child to free and compulsory education.'

²⁰⁶ Basic Education Act of 2013 section 30 (1) 'Every parent whose child is Kenyan or resides in Kenya shall ensure that the child attends regularly as a pupil at a school or such other institution that may be authorised and prescribed by the Cabinet Secretary for purposes of physical, mental intellectual or social development of the child.'

²⁰⁷ Section 39 (a), (b), (c).

²⁰⁸ See generally Marriage Act, 2014 & Prohibition of Female Genital Mutilation Act, 2011.

²⁰⁹ UNFPA *State of the World Population Report 2013: motherhood in childhood – facing the challenge of adolescent pregnancy*, 4.

²¹⁰ Ministry of Public Health and Sanitation 'National school health policy' 2009, 23.

²¹¹ As above.

1.4.2 Right to fair labour practices

(i) Ensure speedy enactment of the Employment Bill and that it applies to and is enforced in public and private sectors (CEDAW Committee 2007) (ii) increase the percentage of women in paid work (CEDAW Committee 2007, 2011); (iii) ensure equal opportunities for women in the labour market (CEDAW Committee 2007, 2011).

With regard to employment, prior to 2007, employment legislation did not outlaw discrimination in labour practices particularly in relation to women. This law was repealed through the enactment of the Employment Act, 2007 in October 2007. The Constitution 2010, addresses discrimination in labour practices by securing the right to fair labour practices for all persons, and the right to fair remuneration and reasonable working conditions.²¹² Empirical evidence indicates that the number of women in paid employment compared to men rose to 44% in 2011 from 40% in 2010.²¹³

The Employment Act, 2007 contains a range of measures aimed at eliminating discrimination against women in the field of employment. The Act outlaws direct and indirect discrimination on the basis of race, colour, sex, language, disability, opinion, religion, pregnancy status, social origin, mental or HIV status.²¹⁴ The provisions against discrimination apply to both the public and private sectors,²¹⁵ and extend to recruitment, training, promotion, terms and conditions of employment, termination of employment and other matters arising out of employment.²¹⁶ To eliminate the wage gap between men and women, the Act provides for equal pay for similar work.²¹⁷ Additionally, to increase the percentage of women in paid employment, the Act permits affirmative action measures to promote equality or eliminate discrimination in the workplace and requires employers to promote equality of opportunity between men and women.²¹⁸ Similarly, government agencies such as the Ministry of Labour, labour officers and the Industrial court have a duty to promote equality of opportunity in employment to eliminate discrimination.²¹⁹ The Act also outlaws sexual harassment in both its direct and indirect forms.²²⁰ The Act however, does not impose any obligation on employers to take affirmative action, it only allows.

²¹² Constitution of Kenya article 41 (1): 'Every person has the right to fair labour practices.' (2) 'Every worker has the right to – (a) fair remuneration; (b) reasonable working conditions'.

²¹³ Facts and figures 2012 (n 196 above) 34.

²¹⁴ Employment Act 11 of 2007 section 5 (3): 'No employer shall discriminate directly or indirectly against and employee or prospective employee or harass an employee of prospective employee – (a) on the grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, mental or HIV status.'

²¹⁵ Employment Act 11 of 2007 section 3 (1): 'This Act shall apply to all employees employed by any employer under a contract of service.'

²¹⁶ Section 5 (3) (b).

²¹⁷ Section 5 (4): 'An employer shall pay his employees equal remuneration for work of equal value.'

²¹⁸ Section 5 (2): 'An employer shall promote equal opportunity and strive to eliminate discrimination in any employment policy or practice'; section 5 (3) (a): 'It is not discrimination to take affirmative action measures consistent with the promotion of equality or elimination of discrimination.'

²¹⁹ Section 5 (1) (a): 'It shall be the duty of the Minister of Labour, labour officers and the Industrial court to promote equality of opportunity in employment in order to eliminate discrimination in employment.'

²²⁰ Section 6.

As at October 2015, there is no evidence of other policy or programmes put in place to increase opportunities of women in the labour market and the number of women in paid employment. The recommendation is therefore not been implemented.

1.4.3 Right to health

(i) Review abortion laws to ensure access to safe abortion (HRC Committee 2005, CEDAW Committee 2007, CESCR Committee 2008); (ii) amend legislation to grant victims of rape and incest the right to abortion independently of any medical professional's discretion (CEDAW Committee 2011).

Abortion in Kenya is a hotly debated issue as elsewhere. Despite shared outrage on abortion related statistics and deaths in Kenya, debate on how to address the problem is sharply divided. While official statistics on abortion in Kenya are unavailable, independent research studies indicates that nearly 465,000 abortions were carried out in Kenya in 2012 by women between 15-49 years.²²¹ Prior to the Constitution, 2010 abortion in Kenya was regulated through criminal law.²²² Abortion was only permitted as a surgical operation when the life of the mother was in danger and subject to fulfilment of lengthy bureaucratic procedures.²²³ The criminal sanctions against abortion were readily enforced by the courts. In *Elnora Kulolallongo v Republic* the appellant was convicted for procuring an abortion.²²⁴

The Constitution 2010, contains specific provisions on abortion juxtaposed with the provisions protecting the right to life. First, the Constitution, 2010 provides that life begins at conception.²²⁵ Second, on abortion it provides that 'abortion is not permitted, unless in the opinion of a trained health professional, there is need for emergency treatment, or the life or health of the mother is in danger, or if permitted by any other written law.'²²⁶ In essence the Constitution, 2010 adopts the medical model of abortion by privileging of the centrality of professional medical judgement as opposed to a woman's individual choice in access to abortion rights. In addition, it is also arguable that the Constitution, 2010 makes it permissible to move beyond the medical model of abortion by providing that abortion may be permitted by national law. Nonetheless these provisions are subject to varied interpretations. On the one hand it has been argued that the provisions repeal the restrictive abortion laws

²²¹ Ministry of Health 'Incidence and complications of unsafe abortion in Kenya: key findings of a national study' 2013, 24, <http://www.guttmacher.org/pubs/abortion-in-Kenya.pdf> (1 February 2014).

²²² Penal Code section 158: 'Any person who with intent to procure the miscarriage of a woman, whether she is or not with child, unlawfully administers to her or causes her to take any poison or other obnoxious thing or uses any force of any kind, or uses any other means whatever, is guilty of a felony and is liable to imprisonment for fourteen years'; Section 159: 'Any woman who being with child, with intent to procure her own miscarriage, unlawful administers to herself any poison or any other obnoxious thing or uses any force of any kind or uses any other means whatever, or permits any such thing or means to be administered or used to her, is guilty of a felony and liable to imprisonment for seven years'; Section 160: 'Any person who unlawfully supplies to or procures for anything whatever knowing that it is intended to be unlawfully used to procure the miscarriage of a woman whether she is or is not with child, is guilty of a felony and liable to imprisonment for three years.'

²²³ Penal Code section 240: 'A person is not criminally responsible for performing in good faith and with reasonable care and skill a surgical operation upon any person for his benefit, or upon an unborn child for the preservation of the mother's life, if the performance of the operation is reasonable having regard to the patient's state at the time and to all the circumstances of the case.'

²²⁴ Criminal Appeal no. 43 of 2007 (unreported). Although the conviction was set aside on appeal, it nonetheless demonstrates that criminal sanctions were enforced in abortion cases.

²²⁵ Article 26 (2): 'The life of a person begins at conception.'

²²⁶ Article 26 (4).

and policies that existed hitherto the promulgation of the Constitution, 2010 thus abortion is permitted. On the contrary, it has also been suggested that the Constitution, 2010 did not change much but maintained with exceptions the restrictive approach to abortion that existed prior to its promulgation. These varied interpretations are indicative of a clash of the absolutes of, life against those of liberty, non-discrimination and equality, issues that were hotly contested during the constitution making process.

The initial draft Bill of the constitution published in September 2002 did not make any mention of abortion nor did it provide for when life begins.²²⁷ The provisions on when life begins and abortion were introduced by delegates representing the Catholic Church during the National Constitutional Conference in March 2004.²²⁸ During the finalisation of the constitution making process in 2009, the abortion provisions were expunged from the draft constitution on the grounds that: protection of the rights of the unborn was a theological position with no legal foundation; and the draft constitution was unequivocal on separation of religion and the state.²²⁹ It was agreed that the provisions relating to the right to life should be expressed in neutral terms as 'every person has the right to life' leaving the arising issues to statutory law.²³⁰ However, the abortion provisions were reinstated in January 2010 by the Parliamentary committee on the constitution review process as a political settlement between the church and the government to secure approval of the draft constitution by the religious fraternity at the national referendum.²³¹ Ironically, despite the inclusion of the abortion provisions religious groups voted against the draft constitution in the 2010 national referendum on the grounds that it would allow abortion on demand.²³²

The unresolved question is how to achieve the reproductive health rights of women without creating a second set of rights (rights of an unborn child) that trump the reproductive health rights. Experts involved in the finalisation of constitution review process in 2009/10 indicate that the abortion provisions are couched as to lend themselves to an interpretation that either prohibits or allows abortion.²³³ Therefore the question of how to achieve reproductive health rights while securing the rights of the unborn child is a question for judicial interpretation.

The Reproductive Health Care Bill, 2014, drafted by civil society and women rights organisations, addresses itself to the issue of abortion. First, the Bill adopts the less controversial term of 'termination of pregnancy'. It defines termination of pregnancy as 'the

²²⁷ Constitution of Kenya Review Commission, draft Bill, 27 September 2002 clause 32.

²²⁸ Constitution of Kenya Review Commission, National Constitutional Conference 'The votes and proceedings of the plenary session of the National Constitutional Conference' 30 November 2005, 159 (accessed from Kenya National Archives on 1 October 2014).

²²⁹ Committee of Experts on Constitutional Review 'Verbatim record of the proceedings of the plenary meeting of the Committee of Experts on Constitutional Review held on 2 January 2010 in Delta House, Nairobi' HAC/1/1/97, 161 (accessed from the Kenya National Archives 16 October 2014).

²³⁰ As above.

²³¹ Committee of Experts on Constitutional Review 'Verbatim record of the proceedings of the Committee of Experts with the Parliamentary Select Committee on Constitutional Review held on 16 February 2010 at Cooperative Bank Management Centre, Karen Nairobi' 34-35 (accessed from the Kenya National Archives 16 October 2014).

²³² Committee of Experts on Constitutional Review 'Final report of the Committee of Experts on Constitutional Review' 11 October 2010, 12-15 (accessed from the Kenya National Archives 8 July 2015).

²³³ Interview with O Amollo, Member Committee of Experts on the Constitutional review 2009/10, Kenya, Nairobi, 1 April 2015.

separation and expulsion by medical or surgical means of the contents of the uterus of a pregnant woman before the foetus has become capable of sustaining an independent life outside the uterus.²³⁴ Second, the Bill states situations in which pregnancy may be terminated subject to professional medical judgment.²³⁵ Third, the Bill provides for non-mandatory and non-directive counselling prior to and after the termination of pregnancy.²³⁶ Although, the Bill does not make any express provision on termination of pregnancy in cases of rape and incest, it is reasonable to argue that such termination can be read from the provisions. The Reproductive Health Care Bill, 2014 was tabled in the Senate for Parliamentary debate in June 2014.²³⁷ However, the Bill was stood down for further stakeholder consultations following public outrage on the provisions relating to access to reproductive health services for school going children. While the issue of termination of pregnancy was not mentioned in the June 2014 public outrage, it is not unlikely that these provisions will also be contentious in view of the fact that strong opposition to the Bill was spearheaded by the religious fraternity.

The government's position on abortion remains uncertain. In October 2010, while ratifying the African Union Protocol to the Rights of Women in Africa, Kenya entered a reservation to Article 14 (2) (c) that seeks to authorise legal abortion in cases rape or incest. This is notwithstanding that Kenya ratified the Protocol in October 2010 after the promulgation of the Constitution, 2010. In October 2012, the government launched standards and guidelines for termination of pregnancy which provide elaborate directives on who can provide abortion services, where such services can be provided, procedures to be used and counselling and consent requirements.²³⁸ Further, the standards and guidelines provide that abortion should not be provided on demand or request but only as emergency treatment to preserve the life of the mother or foetus, where pregnancy constitutes a danger to the life and health of the other or where permitted by any other written law.²³⁹ In addition the standards and guidelines provide who can offer termination of pregnancy services, where the services can be offered and the procedure depending on the period of gestation and for counselling and informed consent.²⁴⁰ However, the Ministry of Health withdrew the guidelines in December 2013 on the grounds that there was need for further and wider stakeholder consultations on the standards and guidelines.²⁴¹ As of October 2015, the standards and guidelines are not operational, hence the constitutional provisions have not been actualised. In June 2015, women rights organisations filed a petition in the High Court to seeking to compel the

²³⁴ Reproductive Health Care Bill, 2014 clause 2.

²³⁵ Reproductive Health Care Bill, 2014 clause 19 (1).

²³⁶ Reproductive Health Care Bill, 2014 clause 19 (2).

²³⁷ Parliament of Kenya, Senate, bill tracker 2014 as at 25 September 2014,

<http://www.parliament.go.ke/plone/senate/business/bills/11th-parliament-the-senate-second-session-bills-tracker-2014-as-at-july-24th-2014/view> (accessed 5 December 2014).

²³⁸ Ministry of Medical Services 'Standards and guidelines for reducing morbidity and mortality from unsafe abortion in Kenya' September 2012, 10-11 (on file with author).

²³⁹ As above.

²⁴⁰ Ministry of Medical Services 'Standards and guidelines for reducing morbidity and mortality from unsafe abortion in Kenya', 12-15.

²⁴¹ Standard Digital News 'Doctors in limbo as abortion rules withdrawn' 19 May 2014,

<http://www.standardmedia.co.ke/lifestyle/article/2000121617/doctors-in-limbo-as-abortion-rules-withdrawn> (accessed 5 December 2014).

Ministry of Health to reinstate the standards and guidelines and to train health practitioners on abortion services.²⁴²

The High Court in September 2014 determined a case on the right to life in the context of abortion. The case was brought before the High Court as a murder charge against a nurse who assisted a woman to procure an abortion resulting in her death.²⁴³ The Court found the accused guilty of causing the death of the victim by assisting her to procure an abortion and sentenced him to death.²⁴⁴ However, the Court did not engage in an analysis of the provisions relating to abortion under the right to life, such as whether the foetus had a right to life and the character of that right, perhaps for the reason that the accused was charged before the promulgation of the Constitution, 2010.

The above recommendations on review of abortion laws are therefore not implemented. On the contrary, the government action of withdrawing the standards and guidelines for medical abortion negate the kind of response envisaged in the recommendations.

1.4.4 Access to land

(i) Eliminate all forms of discrimination against women in land ownership (CEDAW Committee 2007); (ii) expand legal aid to women to bring claims on non-discrimination on land (CEDAW Committee 2007).

With reference to discrimination in land ownership, African customary law systems exclude women from inheriting, owning or possessing land on the assumption that women will leave the community upon marriage and that women are part of community wealth.²⁴⁵ Equally, prior to the Constitution 2010, interpretation and implementation of the statutory land law regime mirrored customary law biases towards women land rights. The Registration of Land Act, the substantive law for individual land ownership, vested absolute ownership, unchallengeable and free from all other claims on the registered owner.²⁴⁶ Ordinarily, such registration of land often excluded women since women had no inheritance or ownership rights under customary law.²⁴⁷ Additionally, women's customary land rights of access and use were not accommodated as overriding interests on the registered land.²⁴⁸ The bodies that govern land were also under-representative of women and applied customary law further perpetuating discrimination in land ownership against women. The Land Disputes Tribunal which adjudicated disputes in agricultural land relating to use and occupation, determination of boundaries and trespass applied customary and its decisions could not be appealed in courts of law.²⁴⁹

²⁴² 'FIDA sues government over failure to provide abortion training', Daily Nation mobile news, 29 June 2015, <http://mobile.nation.co.ke/news/Fida-Health-Ministry-Safe-Abortions/-/1950946/2769180/-/format/xhtml/-/7cgyywz/-/index.html> (accessed 1 July 2015).

²⁴³ *Jackson Namunya Tali v Republic* [2014] eKLR.

²⁴⁴ As Above.

²⁴⁵ P Kameri-Mbote 'The land has its owners: gender issues in land tenure under customary law in Kenya' ILERC working paper 2005-09, 6, <http://www.ielrc.org/content/w0509.pdf> (accessed 1 February 2014).

²⁴⁶ Registration of Land Act section 27.

²⁴⁷ Kameri-Mbote (n 245 above) 8.

²⁴⁸ As above.

²⁴⁹ Georgetown University Law Center 'Women's land and property rights in Kenya' (2009) 40 *Georgetown Journal of International Law* 11-13.

The National Land Policy which addresses the need for protection of the rights of women, children and marginalised groups in access to and ownership of land was adopted in July 2009.²⁵⁰ It lists gender sensitivity as one of its guiding principles and expressly recognises the need for special intervention in regard to women land rights.²⁵¹ To secure the rights of women in land, the policy calls for review of succession, matrimonial property and other related laws. The policy provides for the protection of the rights of widows, widowers and divorcees through enactment of laws on joint-ownership of matrimonial property.²⁵² Finally, the policy requires the adoption of legal measures to ensure equal rights to land and land based resources for both men and women during and at the termination of marriage and at death and measures to safeguard selling and mortgaging of family land without the knowledge of spouses.²⁵³

The Constitution 2010, protects the rights of women to own property by expressly prohibiting enactment of national legislation that limits or restricts the right to property on the basis of the protected grounds of non-discrimination.²⁵⁴ The provision remedies discrimination previously perpetuated by the repealed constitution which relegated matters of property ownership to personal law, thus customary law which, as discussed above, was exempted from the application of the equality and non-discrimination clause. On land, the Constitution, 2010 lists elimination of land discrimination in law, customs and practices related to land and property in land as one of the principles governing usage and management of land in Kenya.²⁵⁵ It also requires Parliament to enact legislation to review, consolidate and rationalise all laws relating to land.²⁵⁶ Further, on protection of the rights of women, the Constitution, 2010 provides for national legislation to regulate the protection and recognition of matrimonial property during and at the dissolution of the marriage and to protect the rights of dependants of deceased persons holding interest in any land including interests of spouses in actual occupation.²⁵⁷ The Land Act, 2012 and the Land Registration Act, 2012 provide for the realisation of these rights by granting right to access and protection of matrimonial property for both spouses - men and women.²⁵⁸ The Acts also secures statutory land rights for both spouses in relation to land, for instance by requiring lenders or purchasers to inquire whether the consent of the other spouse has been obtained in land transactions and annulling transactions where such consent was not obtained.²⁵⁹ In addition,

²⁵⁰ Ministry of Land, sessional paper no. 3 of 2009 on National Land Policy, August 2009.

²⁵¹ As above.

²⁵² As above.

²⁵³ As above.

²⁵⁴ Article 40:

²⁵⁵ Article 60

²⁵⁶ Article 68.

²⁵⁷ Article 68

²⁵⁸ Land Registration Act of 2012 section 28: 'unless the contrary is expressed in the register, all registered land shall be subjected to the following overriding interests as may for the time being exist and affect the same without their being registered on the register - (a) spousal rights over matrimonial property.'

²⁵⁹ Land Registration Act of 2012 section 93 (3): ' Where a spouse who holds land or a dwelling house individually in his or her name undertakes a disposition of that land or dwelling house-(a) the lender shall if that disposition is a charge be under a duty to inquire from the borrower whether the spouse or spouses, as the case may be, have consented to that charge or (b) the assignee or transferee shall, if that disposition is an assignment or transfer of land, be under a duty to inquire from the transferor or assignor on whether the spouse or spouses have consented to that assignment. ' (4) 'If the spouse undertaking the disposition deliberately misleads the lender or, the assignee or transferee by the answers to the inquiries made in accordance to subsection (3) (a) or

the Act recognises and protects spousal interest acquired in the land through labour or other means of productivity or upkeep or improvement of land in instances in which land is owned in the name of one spouse only.²⁶⁰ This is especially significant for women since, as discussed above majority do not own land but till, cultivate and work on family land to maintain the household. Similarly, the Matrimonial Property Act, 2013 provides for the right of women in marriage to own property including land at par with men.²⁶¹

The recommendations on land ownership are fully implemented through the constitution review process.

1.4.5 Poverty alleviation among women

(i) Adopt a comprehensive affirmative action policy to address structural challenges and imbalances faced by women in the economic sphere (APRM 2006); (ii) develop targeted programmes and policies aimed at alleviating and reducing poverty among women especially rural women (CEDAW Committee 2007, 2011).

On adoption of affirmative action policies to address structural challenges and imbalances of women in the economic sphere, the government in 2007 launched the Women Enterprise Fund to promote gender equality and women empowerment in the social and economic spheres.²⁶² The Fund provides women with alternative access to loans to support opening up of income generating businesses or expansion of existing ones.²⁶³ In the 2011/12 financial year the Fund provided loans to 170,307 women nationally and has since its launch in 2007 funded 484,245 women. The Fund is available at the local level through government selected financial intermediaries. In addition, the Fund supports women in creating market access and training on business management and entrepreneurship.²⁶⁴ The Fund is a flagship project within the Kenya Vision 2030.²⁶⁵

Further, the government in June 2013 put in place a regulatory framework to accord at least 30% government supply contracts to enterprises run by women, youth and persons with disabilities.²⁶⁶ For compliance, all government procuring entities are required to submit annual returns to the Public Procurement Oversight Authority for auditing on compliance.²⁶⁷ In addition, the government in October 2013 launched the Uwezo Fund, an alternative

(3) (b), the disposition shall be void at the option of the spouse or spouses who have not consented to the disposition.'

²⁶⁰ Land Registration Act, 2012 section 93 (2): 'If land is held in the name of one spouse only but the other spouse or spouses contribute by means of their labour or other means to the productivity, upkeep or improvement, that spouse or spouses shall be deemed by virtue of that labour to have acquired an interest in the land in the nature of an ownership in common of that land with the spouse in whose name the certificate of ownership or customary certificate of ownership has been registered and the rights gained by contribution of the spouse or spouses shall be recognised in all cases as if they were registered.'

²⁶¹ Matrimonial Property Act, 2013 section 4 (a): 'Despite any other law, a married woman has the same right as a married man to acquire, administer, hold, control, use and dispose of property whether movable or immovable'.

²⁶² Women Enterprise Fund, www.wef.co.ke/ (accessed 9 February 2014).

²⁶³ As above.

²⁶⁴ As above.

²⁶⁵ Kenya Vision 2030, Flagship projects, social pillar, women enterprise fund, <http://www.vision2030.go.ke/index.php/projects/details/Social/4> (accessed 23 December 2014).

²⁶⁶ Kenya Gazette Legal Notice 114 of 2013 The Public Procurement and Disposal (Preference and Reservations) (Amendment), Regulations 2013.

²⁶⁷ As above.

framework for funding community driven development.²⁶⁸ The Fund has an initial allocation of six billion and is set aside for women and the youth to expand access to grants and interest free loans and to provide capacity building to take advantage of the 30% government supply contracts.²⁶⁹

In the specific context of poverty alleviation among rural women, CEDAW embraces the rural-urban dichotomy by paralleling gender equality and rurality, thus categorising geography a basis of disadvantage among women.²⁷⁰ Although, CEDAW does not define rural, the concept of rurality is synonymous with underdevelopment. These provisions increase the visibility of rural women and require states to put in place policies beneficial to rural women. Turning to Kenya and in relation to poverty alleviation, there is no evidence of any policies specific to rural women. It is nonetheless arguable that the reforms relating to access to land, discussed above significantly contribute to their economic development particularly when viewed from the perspective of access to credit services and economic productivity.

From the foregoing, the recommendation on affirmative action policies to address structural challenges of women in the economic sphere is fully implemented through the establishment of the Women Enterprise Fund and other policy frameworks such as the Uwezo Fund. In relation to establishment of the Women Enterprise Fund, there is a direct correlation between the action and the 2006 African Peer Review Mechanism recommendation on affirmative action policy to improve women's economic status.²⁷¹ The recommendation on specific policies to alleviate poverty among rural women is however not implemented.

²⁶⁸ Uwezo Fund, <http://www.uwezo.go.ke/mobi/index.php> (9 February 2014).

²⁶⁹ As above.

²⁷⁰ Article 14.

²⁷¹ Statement by the President to the AU January 2012 (n 94 above).

2 Children's rights

The findings and recommendations on children's rights are clustered in the following broad groups: definition of a child in national law; protection from violence and harmful practices, enjoyment of economic, social and cultural rights, juvenile justice, rights relating to special needs children, civil rights and freedoms, participation rights and general recommendations on implementation of the rights of children. For ease of analysis, these groups are subdivided further. One finding on nationality rights for children of Nubian descent in Kenya made by the African Committee on the Rights of the Child is considered in this section.

2.1 Harmonisation of the definition of a child in national law

- (i) Harmonise the definition of a child in the national context (CRC Committee 2001, 2007, African Committee on the Child 2009).

Prior to the 2001 enactment of the Children Act, a child was variously described as a minor, infant, or juvenile with different legislation assigning different age categorisations for each term.²⁷² Following Kenya's ratification of the Convention of the Rights of the Child in 1990, a multi-sectoral task force was established in 1991 to review the existing laws on the welfare of children and make recommendations for their improvement to give effect to the principles enshrined in the Convention on the Rights of the Child and the African Charter on Human and Peoples' Rights.²⁷³ The task force submitted its findings in May 1994 which recommended the drafting of a Children Bill.²⁷⁴ Accordingly, a draft Children Bill was first presented to Parliament in February 1995.²⁷⁵ The Children Act was eventually enacted in 2001.²⁷⁶ The Children Act thus codified the definition of a child under the Convention on the Rights of the Child.²⁷⁷ However, despite the express definition of a child in the Children Act, a number of statutes providing different ages in matters relating to children remained in force. For instance in regard to employment, the Employment Act, repealed in 2007, recognised a child for purposes of gainful employment in an industrial undertaking as a person above 16 years.²⁷⁸ Similarly in relation to marriage, Hindu Marriage and Divorce Act recognised a sixteen year old girl as an adult having legal capacity to contract a marriage.²⁷⁹ Further, the Matrimonial Causes Act provided the age of an African child as below 16 years for males and 13 years for females.²⁸⁰ These disparate definitions of a child occasioned

²⁷² For instance, the Age of Majority Act defined a minor as one under the age of 18 years; The Child and Young Persons Act defined a child as one under 14 years, a juvenile as a person between 14 and 16 and a young person as between 16 and 18 years.

²⁷³ Kenya National Assembly official Hansard 2 August 2001, 2083 - 2084
<https://books.google.com/books?id=IPKSfE0-IAC> (23 December 2014).

²⁷⁴ As above.

²⁷⁵ As above.

²⁷⁶ Children Act, 2001.

²⁷⁷ Children Act 8 of 2001 section 2.

²⁷⁸ Employment Act (Repealed 2007) section 2: "child" means an individual, male or female, who has not attained the age of sixteen years'.

²⁷⁹ Hindu Marriage and Divorce Act section 3 (1): 'A marriage may be solemnized if the following conditions are fulfilled – (c) the bridegroom has attained the age of eighteen years and the bride the age of sixteen years at the time of marriage.'

²⁸⁰ Matrimonial Causes Act section 2: "children" means in the case of Africans (including Somalis, Abyssinians (Amhara, Tigre and Shoa), Malagasies and Comoro Islanders), Arabs and Baluchis born in Africa males who have not attained the age of sixteen years and females who have not attained thirteen years...'

practical challenges in the protection of the rights of children, for instance in relation to prohibited child labour and child marriages.

The discrepancy in the definition of a child between the Children Act and other national laws was settled by the Constitution, 2010. The Constitution, 2010 defines a child as ‘an individual who has not attained the age of eighteen years’.²⁸¹ Accordingly, a number of statutes have been amended to reflect the constitutional definition of a child. The Employment Act which was amended in 2007 defines a child for purposes of employment as ‘a person who has not attained the age of eighteen years’.²⁸² The Marriage Act, 2014 which repeals all laws and harmonises practices relating to marriage, defines a child as a person below eighteen years.²⁸³

The recommendation is therefore fully implemented across all relevant areas of law through the constitution review process. The legal framework for the constitution review process, the Constitution of Kenya Review Commission Act, 1997 specifically directed that the review process to examine the rights of the child and recommend mechanisms to guarantee protection of such rights.²⁸⁴ In line with this, the initial draft constitution of September 2002 expressly defined a child as person under the age of eighteen years.²⁸⁵ This provision was non-contentious and was adopted in subsequent drafts of the constitution.²⁸⁶ The rationale given for the express definition of a child in the draft constitutions was that the Children Act was amenable to invalidation by Parliament.²⁸⁷

2.2 Protection from violence and harmful practices

The recommendations relate to: child marriages, corporal punishment, child labour, drug abuse, commercial sexual exploitation, sex tourism and child prostitution.

2.2.1 Child marriages

- (i) Prohibit child marriages (CRC Committee 2001, 2007, HRC Committee 2005, CEDAW Committee 2007, African Committee on the Child 2009, UPR 2010)

The Children Act expressly prohibits early marriage,²⁸⁸ which is defined as ‘marriage or cohabitation with a child or any arrangement for such marriage or cohabitation’.²⁸⁹ However,

²⁸¹Article 260.

²⁸²Employment Act 11 of 2007 section 2.

²⁸³Marriage Act, 2014 section 2: “Child” means an individual who has not attained the age of eighteen years’.

²⁸⁴Constitution of Kenya Review Act, 2000 section 17 (d) (ix): ‘examine and review the rights of the child and recommend mechanisms that will guarantee protection thereof.’

²⁸⁵Constitution of Kenya Review Commission, draft Bill, 27 September 2002, clause 37 (8): ‘In this article ‘child’ means a person under the age of eighteen years.’

²⁸⁶See Constitution of Kenya Review Commission, National Constitutional Conference ‘Verbatim record of the proceedings of technical working committee B (TWC B) chapter 4 and 5 on citizenship and the bill of rights held in tent no. 2 at the Bomas of Kenya on 23 September 2003’ HAC/6/B/17, 68 in which the technical committee unanimously voted for the definition of the child in the draft constitution.

²⁸⁷As above. See also GO Odongo ‘Caught between progress, stagnation and reversal of some gains: reflections on Kenya’s record in implementing children’s rights norms’ (2012) 12 *AHRLJ* 123 for a similar discussion on constitutional protection of rights of children.

²⁸⁸Children Act section 14: ‘No person shall subject a child to female circumcision, early marriage or other cultural rights, customs or traditional practices that are likely to negatively affect the child’s life, health, social welfare, dignity, physical or psychological development.’

²⁸⁹Children Act section 2.

as discussed above, prior to the Constitution, 2010 the legal framework governing marriage retained provisions that allowed children below 18 years to contract marriages as long as consent of the parent or guardian was obtained. The Marriage Act, repealed in 2014, allowed persons under 18 to contract a marriage provided consent was obtained from the guardian of the child.²⁹⁰ Equally, the Hindu Marriage and Divorce Act allowed girls above sixteen years to get married subject to consent from the guardian.²⁹¹ In addition, for customary and Islamic marriages, which were not governed by statutory provisions, capacity to contract a marriage was linked to circumcision and puberty thus allowing girls as young as 12 to contract marriages. In 2011, the prevalence of child marriages was at 33% for girls and 10% for boys.²⁹²

The Constitution, 2010 outlaws child marriages. It provides for the right of every adult to marry based on the free consent of the parties.²⁹³ Further to this, Article 53 which deals with the specific rights of children protects children from abuse, neglect and harmful cultural practices.²⁹⁴ The Marriage Act, 2014 which concretizes the constitutional provisions on marriage, expressly prohibits child marriages.²⁹⁵ The Act consolidates and brings under its ambit all the systems of marriages, thus the prohibition of child marriages applies to all marriages conducted in Kenya. Instructively, during the Parliamentary debate on the enactment of the Act, there were unsuccessful amendments to have the minimum age for marriages conducted under Islamic law left under the determination of Sharia law.²⁹⁶

Assessing implementation of the recommendation, debate on prohibition of child marriages in Kenya dates back to 1966 when the President established a commission on marriage and divorce to review family law and recommend a uniform code of marriage and divorce.²⁹⁷ The Commission found child marriages detestable and recommended the minimum age of marriage as 18 years for boys and 16 years for girls applicable to all communities.²⁹⁸ These recommendations were incorporated in the Marriage Bill which was rejected by Parliament in 1985. Although the Children Act entered into force in 2002 prohibiting child marriages whether formal or informal, the practice continued. Moreover, laws permitting child marriages

²⁹⁰ Marriage Act (Repealed) section 19: 'If either party to an intended marriage not being a widower or a widow, is under eighteen years of age, no licence shall be granted or certificate issued unless there is produced ...a written consent to the intended marriage signed by the person having lawful custody of any such party.'

²⁹¹ Hindu Marriage and Divorce Act (Repealed) section 3 (1): 'A marriage may be solemnised if the following conditions are fulfilled –(c) the bridegroom has attained the age of eighteen years and the bride the age of sixteen years at the time of marriage; (d) where the bride has not attained the age of sixteen years, the consent of her guardian in marriage, if any, has been obtained for the marriage'.

²⁹² National Council of Children Services 'A study on child marriages in Kenya', September 2011, 6, http://www.nccs.go.ke/index.php?option=com_docman&Itemid=73&limitstart=15 (24 March 2014).

²⁹³ Article 45 (2): 'Every adult has the right to marry a person of the opposite sex, based on the free consent of the parties.' Article 260 of the Constitution defines an adult as 'an individual who has attained the age of eighteen years'.

²⁹⁴ Article 53 (1) (d): 'Every child has the right to be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment and hazardous or exploitative labour'.

²⁹⁵ Marriage Act, 2014 section 4: 'A person shall not marry unless that person has attained the age of eighteen years.'

²⁹⁶ Parliament of Kenya National Assembly official report, Hansard, 21 March 2014, 29-32, <http://www.parliament.go.ke/plone/national-assembly/business/hansard/thursday-20th-march-2014/view> (24 March 2014).

²⁹⁷ 'Commissions on the laws of marriage and succession in Kenya' (1967) 11 *Journal of African Law* 1-4.

²⁹⁸ Report of the Commission on the laws of marriage and succession in Kenya 1968, para 63.

such as the Marriage Act and the Hindu Customary and Divorce Act were never amended to reflect the position of the Children Act. The Sexual Offences Act, 2006 sought to provide for the age of consent for marriage at 18 years, but the provision was expunged from the Bill at the behest of Members of Parliament from Muslim and pastoralist communities.²⁹⁹ Despite the fact that the recommendation to prohibit child marriages was made from 2001 through to 2011, it was only after the Constitution, 2010 outlawed child marriages that laws relating to marriage were reviewed. Notably, the Constitution, 2010 sets strict timelines for enactment of laws, with the laws relating to marriage required to be enacted within five years from August 2010.³⁰⁰ In terms of causality, it is thus argued that the impulse to implement the finding was occasioned by the constitution review process and not as a result of a conscious and deliberate effort by the government. This view finds support in the fact that a prior attempt to criminalise child marriages under the Sexual Offences Bill, 2005 were rejected in 2006, while the Marriage Bill, 2007 which sought to prohibit child marriages was never presented to Parliament despite recommendations made by monitoring bodies in 2007, 2009 and 2010.

The recommendation is fully implemented.

2.2.2 Child labour

- (i) Take effective steps to address child labour (HRC Committee 2005, UPR 2010);
- (ii) adopt and implement the National Child Labour Policy, 2002 (CESCR Committee 2008, African Committee on the Child 2009, UPR 2010, CEDAW Committee 2011),
- (iii) strengthen capacity of institutions responsible for control and protection of child labour (CRC Committee 2007), (iv) enact legislation focussed on child labour and rehabilitation of victims (UPR 2010).

Current figures on the prevalence of child labour in Kenya are unavailable as of June 2015. Nonetheless, the 2008 Child Labour Analytical report based on 2005/06 data indicated that 1.01 million children between 5-17 years were working for pay, profit or family gain,³⁰¹ representing a decline from 1.9 million in the 1998/99 child labour study.³⁰² The number of compulsory school going children who were out of school children in Kenya in 2011 was estimated at one million,³⁰³ further suggesting that these children could be engaged in work-related activities. While the Basic Education Act, 2013 provides the compulsory school going age as four years, it does not fix the age of completion of compulsory schooling.³⁰⁴ Weighing in on what constitutes basic education, the court in October 2014 determined that basic education constitutes both primary and secondary education.³⁰⁵ Drawing from the above, the age of completion of schooling is impliedly 18 years. The Basic Education Act obligates

²⁹⁹ Onyango-Ouma *et al* (n 160 above) 24.

³⁰⁰ Constitution, 2010 article 261 (1) fifth schedule.

³⁰¹ Kenya National Bureau of Statistics '2005/06 Kenya Integrated Household Survey/ Child Labour Analytical Report' June 2008, 29, http://www.ilo.org/ipec/Informationresources/WCMS_IPEC_PUB_16175/lang--en/index.htm (21 April 2014).

³⁰² As above.

³⁰³ UNESCO 'The hidden crisis: armed conflict and education' 2011, 41, <http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/ED/pdf/gmr2011-UNESDOC.pdf> (21 April 2014).

³⁰⁴ Basic Education Act, 2013 section 33.

³⁰⁵ *Gabriel Nyabola v Attorney General & 2 others* [2014] eKLR.

every parent to ensure that their child attends compulsory primary and secondary education.³⁰⁶

The Children Act protects children from economic exploitation and any hazardous work or work that interferes with the education of a child.³⁰⁷ In the specific context of labour laws, the Employment Act, 2007 contains a comprehensive framework that protects children in employment including protection from the worst forms of child labour. The Act sets the minimum age which a child cannot be engaged in labour or employment at 13 years.³⁰⁸ It also prohibits the employment of children in the worst forms of child labour and authorizes the Minister of Labour to declare any activity, work or contract of service harmful to the health, morals or safety of the child as worst forms of child labour.³⁰⁹ The Act allows employment of children between the age of 13 and 16 years to perform light work which must not be harmful or interfere with school attendance.³¹⁰ Additionally, the Act prohibits employment of a child between 13 and 16 years in an industrial undertaking to attend to machinery unless the child is under a contract of apprenticeship under the Industrial Training Act.³¹¹ The Act equally prohibits employment of children in 'opencast or sub-surface workings entered by means of adit or shaft.'³¹²

The Constitution, 2010 protects children from exploitative and harmful labour thus strengthening the legal framework on protection from child labour in the Children Act and in the Employment Act.³¹³ Further, it protects all persons from slavery, servitude and forced labour.³¹⁴

Notwithstanding the above legal provisions, a number of gaps exist in child labour protection. Kenya has ratified the ILO Convention on Minimum Age in which it specified the minimum age for admission to work and employment as 16 years.³¹⁵ However, under the Employment

³⁰⁶ Basic Education Act, 2013 section 30.

³⁰⁷ Children Act section 10 (1): 'Every child shall be protected from economic exploitation and any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.'

³⁰⁸ Employment Act section 56 (1): 'No person shall employ a child who has not attained the age of thirteen years whether gainfully or otherwise in any undertaking'.

³⁰⁹ Employment Act section 54(1): 'Notwithstanding any provision of any written law, no person shall employ a child in any activity that constitutes worst form of child labour.' (2): 'The Minister, shall in consultation with the Board, make regulations declaring any activity, work or contract of service harmful to the health, safety and morals of a child and subsection (1) shall apply to the such activity, work or contract of service.'

³¹⁰ Employment Act section 56 (2): 'A child of between thirteen years of age and sixteen years of age may be employed to perform light work which is (a) not harmful to the child's health and development; (b) not such as to prejudice a child's attendance to school, his participation in vocational orientation or training programmes approved by the Minister or his capacity to benefit from the programmes received.'

³¹¹ Employment Act section 58 (1): 'No person shall employ a child between thirteen and sixteen years of age, other than one serving under a contract of apprenticeship or indentured learnership in accordance with the provisions of the Industrial Training Act, in an industrial undertaking to attend to machinery.'

³¹² Employment Act section 58 (2): 'No person shall employ a child in any opencast workings or sub-surface workings that are entered into by means of a shaft or adit.'

³¹³ Article 53(1) (d): 'Every child has the right to be protected from...hazardous or exploitative labour.'

³¹⁴ Article 30 (1): 'A person shall not be held in slavery or servitude.' (2): 'A person shall not be required to perform forced labour.'

³¹⁵ International Labour Organization, ratification of conventions, ratification of C 138,

http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300_INSTRUMENT_ID:312283

(accessed 21 June 2015).

Act puts the age of employment at 13 years. Although, the Act provides that children between 13 and 16 years may only perform light work, as of August 2015, there are no regulations defining what constitutes 'light work' meaning that children between 13 and 16 years are subject to exploitative labour in the absence of a clear definition. In addition, while Kenya ratified the ILO Convention on the Worst Forms of Child Labour,³¹⁶ the government is yet to operationalise the regulations of what constitutes worst forms of child labour. The import is that children are engaged in all forms of employment and labour. The Children Act (Amendment) Bill, 2014 sought to include protection of children from the worst forms of child labour which it defined to include slavery, trafficking, debt bondage and other forms of forced labour, forced recruitment of children for use in armed conflict and use of children for pornography, prostitution and illegal activities.³¹⁷ The Bill was however defeated in Parliament in March 2015.³¹⁸ With reference to the listing of light work and hazardous work for children, the 2012 Annual Report of the Labour Commissioner indicated that the list was waiting to be gazetted.³¹⁹

Additionally, the Constitution, 2010 provides for the right to free and compulsory basic education.³²⁰ The link between compulsory education and elimination of child labour is undoubted as it is argued that children attending school will not engage in labour or employment. The Basic Education Act prohibits employment of a child of compulsory school going age and imposes heavy penalties thereto.³²¹

On programmatic measures, the state with support from the International Labour Organization and the European Community in 2008 launched the Tackling Child Labour through Education (TACKLE) programme.³²² The primary objective of TACKLE is to reduce poverty by providing access to education and training skills for disadvantaged children and youth.³²³ At inception in 2008, TACKLE targeted to withdraw 4,000 children from the worst forms of child labour.³²⁴ In March 2010, the Federation of Kenya Employers joined the initiative to support combating child labour through school feeding programmes.³²⁵ Children

³¹⁶International Labour Organization, ratification of conventions, ratification of C 182, http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300_INSTRUMENT_ID:312327 (accessed 21 June 2015).

³¹⁷ Children Act (Amendment) Bill, 2014 clauses 2 and 8.

³¹⁸ Parliament of Kenya, National Assembly, Hansard 5 March 2015, <http://www.parliament.go.ke/the-national-assembly/house-business/hansard?start=60> (accessed 3 August 2015).

³¹⁹ Ministry of Labour, Social Security & Services, Labour Commissioner's Annual Report 1st January to 31st December 2012, 17, <http://www.labour.go.ke/> (25 March 2014). (Labour Commissioner's report)

³²⁰ Constitution, 2010 article 53 (1) (b).

³²¹ Basic Education Act section 36 (1): 'No person shall employ a child of compulsory school age in any occupation or labour that prevents such child from attending school.' (2): 'Any person who employs or prevents a child who is subject to compulsory attendance from attending school is guilty of an offence and is liable to a fine not exceeding five million or to a period not exceeding five years or to both. '

³²² International Labour Organization, Tackling child labour through education in Kenya, http://www.ilo.org/addisababa/whats-new/WCMS_221987/lang--en/index.htm (25 March 2014).

³²³ As above.

³²⁴ International Labour Organization, Combating child labour through corporate social responsibility in Kenya: Tackling child labour through education (ILO/TACKLE) project, http://www.ilo.org/public/english/region/afpro/daressalaam/download/tackal_kenya.pdf (25 March 2014).

³²⁵ As above.

are supported to attend school through the funds given by TACKLE and the income generated from the school feeding programmes.³²⁶

Moreover, the government in 2013 adopted the Social Assistance Act which provides for children social protection through cash transfer to orphans and vulnerable children. In relation to child labour, the specific objectives of the cash transfer programme include increasing enrolment, attendance and retention in basic school for children between six and 17 years.³²⁷ The programme provides regular cash transfers to families living with orphans and vulnerable children to encourage fostering and retention of the children and their human capital development.³²⁸ A 2012 study on the impact of the cash transfer programme between 2007 and 2011 found a 12% reduction of child labour on farms particularly for boys.³²⁹

On strengthening the capacity of institutions responsible for control and protection of child labour, the child labour division under the Ministry of Labour is charged with the responsibility of development, implementation, coordination and monitoring of all programmes on the elimination of child labour and its worst forms.³³⁰ The division is both understaffed and under resourced. The 2012 annual report of the Labour Commissioner indicated that the labour inspectorate department within which the child labour division is situated has a staff capacity of 94 officers against the required 298 officers.³³¹ The child labour protection institutions also include the National Steering Committee on Child Labour, a multi-sectoral body composed of Government departments, private employers, workers organizations and civil society organisations, whose mandate is to oversee efforts to eliminate child labour.³³² Similarly, the National Steering Committee is underfunded.³³³

The National Child Labour Policy is yet to be adopted as of October 2015. The Policy was finalised in October 2012 but has not yet been adopted by Cabinet for subsequent implementation.³³⁴ Similarly, there is no legislation on child labour as of October 2015. The National Child Labour Policy addresses the inconsistencies between the Children Act and the Employment Act, 2007. The Ministry of Labour strategic plan 2013-2017 indicates that the Child Labour Policy will be adopted by 2017.³³⁵

³²⁶ As above.

³²⁷ Ministry of Labour, Departments, Social Protection secretariat, National Safety Net programme, cash transfer – orphaned and vulnerable children, <http://www.socialprotection.go.ke/index.php/national-safety-net-program/cash-transfer-orphaned-and-vulnerable-children-ct-ovc> (25 March 2014). Orphans and vulnerable children is defined as a household resident between 0 to 17 years with at least one deceased parent or one who is chronically ill or whose main care giver is chronically ill.

³²⁸ As above.

³²⁹ S Asfaw *et al* 'The impact of the Kenya CT-OVC programme on productive activities and labour supply' (2014) *Journal of Development Studies* 1189- 1190.

³³⁰ Ministry of Labour, Social Security and Services, Department of Labour, Divisions in the Department, <http://www.labour.go.ke/index.php/2013-11-19-06-15-24/2013-11-19-06-55-28> (25 March 2014).

³³¹ Labour Commissioner's report (n 320 above) 7.

³³² Kenya Gazette Notice 10696 of 2 August 2013.

³³³ Labour Commissioner's report (n 319 above) 7.

³³⁴ Labour Commissioner's report (n 319 above) 15.

³³⁵ Ministry of Labour, Social Security and Services, strategic plan 2013 – 2017, <http://www.labour.go.ke/downloads/Ministry%20of%20Labour%20Strategic%20Plan%20201-2014.pdf> (accessed 25 December 2014).

Assessing the implementation of the recommendations on child labour, the recommendations are partially implemented. Only recommendations relating to programmatic measures on child labour are implemented. These programmatic measures are mainly an initiative of the International Labour Organization. However, specific recommendations on legislation, policy and strengthening of the labour protection institutional framework have not been implemented.

2.2.3 Corporal punishment

(i) Take legislative measures to prohibit physical and mental violence against children including corporal punishment in the juvenile system, care institutions and within the family (CRC Committee 2001); (ii) explicitly prohibit corporal punishment and torture against children (CRC Committee 2007).

The Children Act guarantees the right to a child not to be subjected to torture or cruel treatment or punishment.³³⁶ The Act also prohibits corporal punishment for child offenders.³³⁷ The point of concern however, is lack of explicit provisions on corporal punishment and torture against children in schools, children/foster homes and households. The Children Act provisions on corporal punishment are ambiguous. On the one hand the Act outlaws any ill-treatment by a parent or person having custody, charge or care of the child that is likely to occasion injury or suffering to the health of the child.³³⁸ On the contrary, it reserves the right of a parent or a person having lawful control or charge over the child to administer reasonable punishment.³³⁹ A number of questions arise: what constitutes reasonable punishment under the Act? Can the person having parental responsibility over a child administer corporal punishment at home or anywhere; and impliedly are teachers allowed to administer corporal punishment in schools when they have control and charge of the child? The Committee on the Rights of the Child in its General Comment 8 takes the view that the international obligations on protection of children from torture, cruel and degrading treatment or punishment are in absolute terms, hence corporal punishment whether at home or school is prohibited.³⁴⁰ Further the Committee states that the Convention on the Rights of the Child leaves no room for any level of legalised violence against children.³⁴¹ While corporal punishment as a form of discipline in schools was expressly banned via the 2001 Education

³³⁶ Section 18 (1): 'No child shall be subjected to torture or cruel treatment or punishment, unlawful arrest or liberty, deprivation of liberty'.

³³⁷ Section 191 (2): 'No child offender shall be subjected to corporal punishment.'

³³⁸ Children Act section 127 (1): 'Any person having parental responsibility or custody, charge or care of any child and who – (a) wilfully assaults, ill-treats, abandons or exposes in any manner likely to cause him unnecessary suffering or injury to health (including injury or loss of sight, hearing, limb or organ of the body or any mental derangement); or (b) by any act or omission, knowingly or wilfully causes that child to become or contributes to his becoming, in need of care and protection, commits an offence and is liable on conviction to a fine not exceeding two hundred thousand shillings or to imprisonment for a term not exceeding five years or to both.'

³³⁹ Children Act section 127 (5): 'Nothing in this section shall affect the right of any parent or other person having the lawful control or charge of a child to administer reasonable punishment to him.'

³⁴⁰ UN Committee on the Rights of the Child, General Comment No. 8: The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment (articles 19; 28 para 2 and 37 inter alia) (2006) U.N. Doc. CRC/C/GC/8 (2006) para 22. (General Comment 8)

³⁴¹ UN Committee on the Rights of the Child General Comment 8, para 18.

(School Discipline) Regulations,³⁴² prohibition of corporal punishment as a form of parental discipline is unclear.

The Constitution, 2010 does not expressly prohibit corporal punishment in schools, within the family and care institutions although it guarantees the protection of children from all forms of violence.³⁴³ In addition, the Constitution, 2010 outlaws any form of violence from either public or private spheres.³⁴⁴ This express prohibition of any form of violence, from all places and in regard to all persons implies that any violence against children whether in school or in the family or in foster care is outlawed. These Constitutional provisions outlawing all forms of violence in all spheres trump all other statutory provisions so that in effect corporal punishment is outlawed whether in schools, homes, borstal institutions or prison facilities.³⁴⁵

As discussed previously, the constitution review process was mandated to make specific provision for the protection of the rights of children. In line with this, initial draft constitutions expressly outlawed corporal punishment against children in schools and institutions responsible for the care of children.³⁴⁶ The provisions were however removed in the final stages of the constitution review process in 2010 on the grounds that the general constitutional provisions protecting children from all forms of violence incorporate prohibition of corporal punishment.³⁴⁷ In regard to corporal punishment in schools, the Basic Education Act, 2013 expressly prohibits torture or cruel, degrading inhuman treatment or punishment in schools and imposes penalties thereto.³⁴⁸ Additionally, the Act lists elimination of corporal punishment as one of the guiding principles in the provision of basic education in Kenya.³⁴⁹

This recommendation is thus fully implemented through the constitution review process. First, the Constitution guarantees the protection of children from all forms of violence and inhuman and degrading punishment in all places. Second, Basic Education Act, 2013 enacted to concretise the right to free and compulsory basic education for every child expressly prohibits corporal punishment in schools.

³⁴² Kenya Legal Notice 56 of 2001

³⁴³ Constitution, 2010 article 53(1)(d): 'Every child has a right to be protected from...all forms of violence'.

³⁴⁴ Article 29 (c): 'Every person has the right to freedom and security of the person which includes the right not to be subjected to any form of violence from either public or private sources'.

³⁴⁵ Odongo (n 287 above) 133.

³⁴⁶ Constitution of Kenya Review Commission draft constitution 27 September 2002, clause 37 (3) (g): 'Every child has a right to be free of corporal punishment or other forms of violence or cruel and inhuman treatment in schools and other institutions responsible for the care of children.' See similar provisions in draft constitution of Kenya, 15 March 2004 (Bomas draft) clause 40 (6) (g); proposed new constitution of Kenya clause 41 (6) (g).

³⁴⁷ Committee of Experts on the Constitutional Review 'Verbatim record of the proceedings of the plenary meeting of the Committee of Experts held on 2 January 2010 at Delta house, Nairobi' HAC/1/1/98, 5 - 6.

³⁴⁸ Basic Education Act, 2013 section 36 (1): 'No pupil shall be subjected to torture or cruel, inhuman or degrading treatment or punishment in any manner whether physical or psychological.' (2): 'A person who contravenes the provisions of sub-section (1) commits an offence and shall be liable on conviction to a fine not exceeding one hundred thousand shillings or to imprisonment not exceeding six months or to both.'

³⁴⁹ Basic Education Act section 4 (p): 'The provisions of basic education shall be guided by the following values and principles – elimination of gender discrimination, corporal punishment or any form of cruel and inhuman treatment or torture'.

2.2.4 Commercial sexual exploitation, sex tourism and child prostitution

(i) Legislative prohibition of commercial sex exploitation of children in the Children's Act (SR STC 1998; CRC Committee 2001), (ii) formulate laws governing extraterritoriality to prosecute and deter child sex tourism and commercial sex exploitation (SR STC 1998).

The Children Act contains explicit provisions prohibiting sexual exploitation and use in prostitution, inducement or coercion to engage in any sexual activity and exposure to obscenity.³⁵⁰ However, the Act imposes a lenient penalty of a term of imprisonment not exceeding twelve months or a fine of fifty thousand shillings or both.³⁵¹ This is not unique to commercial sexual exploitation as the Act imposes a general penalty for all the prohibited acts. The Sexual Offences Act, 2006 also prohibits child sex tourism, child prostitution and child trafficking and imposes stiffer penalties of a minimum of ten years imprisonment for natural persons, without the option of a fine, and minimum fines of two million for juristic persons.³⁵² There is no documented evidence of prosecution of child commercial sexual exploitation under the Children Act or the Sexual Offences Act putting into question the impact of the prohibition. In practice, child commercial sexual exploitation is rampant in Kenya. A 2006 study by UNICEF on the extent of child commercial sexual exploitation revealed that 10,000 to 15,000 girls in the Kenyan coastal towns were engaged as informal sex workers on casual and ad hoc basis.³⁵³ In addition, 2,000 to 3,000 of the girls work full time in the sex industry with about half having joined at 12 to 13 years.³⁵⁴

On laws governing extraterritoriality to deter child sexual exploitation and child sex tourism, the Sexual Offences Act extends extraterritorially to cover sexual offences and most significantly child sexual exploitation and child sex tourism.³⁵⁵ The law applies to citizens and permanent residents and does not require double criminality to prosecute or a complaint from the victims.³⁵⁶ An accused person is however exempt from prosecution in instances in which the destination country has prosecuted him or her.³⁵⁷ Similarly, the Counter-Trafficking in Persons Act, 2010 which prohibits child trafficking and exploitation contains similar provisions on extra-territorial jurisdiction.³⁵⁸

The recommendations relating to enactment of legislation are fully implemented through the enactment of the Children Act and Sexual Offences Act. As discussed earlier, the Children

³⁵⁰ Children Act section 15: 'A child shall be protected from sexual exploitation and use in prostitution, inducement or coercion to engage in any sexual activity, and exposure to obscene materials.'

³⁵¹ Children Act section 20: 'Notwithstanding penalties contained in any other law, where any person wilfully or as a consequence of culpable negligence infringes any of the rights of the child specified in sections 5 to 19 such person shall be liable upon summary conviction to a term of imprisonment not exceeding twelve months or to a fine not exceeding fifty thousand shillings or to both such imprisonment and fine.'

³⁵² Sexual Offences Act, 2006 sections 13-15.

³⁵³ UNICEF 'Report on the extent and effects of sex tourism and sexual exploitation of children at the Kenyan Coast', 2006, http://lastradainternational.org/lisidocs/418%20extent_n_efect_1007.pdf (26 March 2014).

³⁵⁴ As above.

³⁵⁵ Sexual Offences Act, 2006 section 41 (1): 'A person, who while being a citizen of, or permanently residing in Kenya, commits an act outside Kenya which Act would constitute a sexual offence had it been committed in Kenya, is guilty of such an offence and is liable to the same penalty prescribed for such offence under this Act.'

³⁵⁶ As above.

³⁵⁷ Sexual Offences Act section 41 (2): 'A person may not be convicted of an offence contemplated in subsection (1) if such a person has been acquitted or convicted in the country where that offence was committed.'

³⁵⁸ Counter-Trafficking in Persons Act, 2010 section 25.

Act was enacted to domesticate provisions of the Convention on the Rights of the Child. It is thus argued that the prohibition of commercial sexual exploitation of children was a result of domestication of the provisions of the Convention on the Rights of the Child which expressly require states to enact legislation against sexual abuse.³⁵⁹

2.2.5 Child drug abuse

- (i) Enforce law on exposure of drug abuse to children (African Committee on the Child 2009)

Statistical data based on a 2012 survey indicates that the median age for initiation to drug and substance abuse in Kenya is ten years.³⁶⁰ In relation to specific drugs and substances, the median age for abuse of tobacco products is ten years with the minimum age being eight years, the median age for alcohol use is ten years while the minimum is four years and the median age for initiation to *bhang* and *miraa* use is ten years.³⁶¹

The Children Act entitles children to protection from the use of drugs and substances that may be harmful and from being used in their production, trafficking or distribution.³⁶² The National Children Policy, 2008 recognises the need to protect children from drug and substance abuse through strengthening the enforcement of laws against drug trafficking and abuse.³⁶³ The Alcoholic Drinks Control Act enacted in 2010 provides elaborate measures for protection of children from use of drugs and substances. First, the Act prohibits access of children to places where alcoholic drinks are manufactured, stored or consumed.³⁶⁴ Second, it prohibits sale, supply or provision of alcoholic drinks to children.³⁶⁵ Third, the Act prohibits promotion of alcoholic drinks in events or activities associated with children.³⁶⁶ However, enforcement of the law remains weak. There is no documented evidence of prosecution of persons for selling and/or exposing children to drugs and substances despite prevalence of drug abuse among children. Media reports in May 2014 in which 87 people died as a result of consuming illicit liquor indicated that the dead included children aged between thirteen and sixteen years.³⁶⁷

³⁵⁹ Convention on the Rights of the Child, 20 November 1989, UNTS 1577 (Kenya ratified 30 July 1990) article 19 (1): 'State parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent (s), legal guardian (s) or any other person who has the care of the child.'

³⁶⁰ National Authority for the Campaign against Alcohol and Drug Abuse 'A rapid assessment of the status of drug and substance abuse in Kenya, 2012', 2012, 47.

³⁶¹ As above.

³⁶² Children Act section 16: 'Every child shall be entitled to protection from the use of hallucinogens, narcotics, alcohol, tobacco products or psychotropic drugs and any other drugs that may be declared harmful by the Minister responsible for health and from being involved in their production, trafficking or distribution.'

³⁶³ National Children Policy, 2008, 8.

³⁶⁴ Alcoholic Drinks Control Act section 24(1): 'No person holding a licence to manufacture, store or consume alcoholic drinks under this Act shall allow a person under the age of eighteen years to enter or gain access to the are the alcoholic drink is manufactured, stored or consumed.'

³⁶⁵ Alcoholic Drinks Control Act section 28(1): 'No person shall sell, supply or provide knowingly an alcoholic drink to a person under the age of eighteen years.'

³⁶⁶ Alcoholic Drinks Control Act section 46(1): 'No person shall promote an alcoholic drink – (a) at any event or activity associated with persons under the age of eighteen years; (b) using such things or materials associated with persons under the age of eighteen years.'

³⁶⁷ 'Survivors' fear as death toll rises' *Daily Nation* 9 May 2014 5.

This recommendation has not been implemented as there is no evidence of programmes put in place to specifically protect children from drug and substance abuse and there is no evidence of enforcement of the law through prosecutions for selling and exposing children to drugs.

2.3 Enjoyment of economic, social and cultural rights

The following recommendations were made in relation to children's right to education, health, nutrition, family support and maintenance.

2.3.1 Right to education

(i) Review education law in regard to the age of children to benefit from free primary education (African Committee on the Child 2009); (ii) ensure all children complete eight years of compulsory free education (CRC Committee 2007); (iii) extend free education to secondary level (CRC Committee 2007, CEDAW Committee 2007, African Committee on the Child 2009); (iv) increase public expenditure in education particularly pre-primary, primary and secondary (CRC Committee 2007).

The free primary education in Kenya was re-introduced in January 2003 to universalise access to primary school education.³⁶⁸ The 2003 Free Primary Education Policy sought to grant access to education to all children and imposed no restrictions or guidelines on admission of older children and persons.³⁶⁹ In principle, any pupil was entitled to enrol in any school resulting to increased enrolment and also enrolment of a large number of over-age children and persons who previously could not afford primary education. Statistics indicate that enrolment rates increased from 5.9 million in 2002 to 7.2 million in 2003.³⁷⁰ While the specific numbers of over-age students who enrolled in school are unknown, the government in its report to the 34th UNESCO conference on education indicated the 2003 gross enrolment rate was 102.8% against a net enrolment rate of 80.4%, the large gap accounting for over-age students.³⁷¹ A number of scholarly accounts have documented the adverse effects of free primary education programme in Kenya pointing out concerns relating to educational quality, equity and learning outcomes.³⁷² The specific problems associated with enrolment of over-age students are documented as short attention span, patchy education

³⁶⁸Ministry of Education, basic education, free primary education, <http://www.education.go.ke/Home.aspx?department=2> (27 March 2014). Free primary school education was first introduced in Kenya in 1971 targeting specific districts that had been marginalised by the British colonial rule which included parts of Rift Valley, Coast and North Eastern province. In 1974, free primary education was introduced throughout Kenya. Its gains were eroded by a decline in quality. It was re-introduced in 1979 but due to a stagnated economy in the 1980's a cost sharing policy was introduced in the early 80's.

³⁶⁹ Ministry of Education.

³⁷⁰ Ministry of Education, Education, Education Monitoring Information System database.

³⁷¹ Ministry of Education, national report presented at the International Conference on Education, November 2008, 17-18.

³⁷² FO Ogola 'Free education in Kenya's public primary schools: addressing the challenges', Organization for social science research in Eastern and Southern Africa, 2010, 20; R Vandekemp 'Universal primary education in Kenya: the incongruence between its perceived success and the current situation' (2013) 1 Bridges: an undergraduate journal of contemporary connections, 3-4; M Musembi 'Universalising access to primary education in Kenya: myths and realities' (2010) *Canadian Journal of New Scholars in Education*, 4-8; A Chuck 'Disparities in the system: the effects of free primary education on the quality of education in Nairobi's public schools' 2009, 12-13, http://digitalcollections.sitedu/cgi/viewcontent.cgi?article=1715&context=isp_collection (27 March 2014).

background and indiscipline for instance in the case of street children, which all lower the quality of education.³⁷³

Review of the education law in Kenya occurred in 2012 against the background of the Constitution, 2010 provision of the right to education. The Constitution guarantees that 'every person has the right to education',³⁷⁴ and in the specific context of children, 'the right to free and compulsory basic education'.³⁷⁵ While the Basic Education Act, 2013 does not address the issue of over-age children or students, the Basic Education Regulations, 2015 outlaw admission of learners over the age of eighteen years to institutions of basic education.³⁷⁶ The Regulations provide for admission of these learners to alternative basic, adult and continuing learning institutions.³⁷⁷ These learners are not eligible for the provision of free basic education thus ensuring that only children benefit from free basic education.³⁷⁸ The recommendation is thus fully implemented.

With reference to ensuring that all children complete eight years of free compulsory education, the Free Primary Education Policy contained no measures on retention. A 2005 Education and Training Policy formulated subsequent to the introduction of the free primary education committed the government to ensure universal completion of free and compulsory education by 2010.³⁷⁹ The Policy is however silent on the specific measures to be undertaken to ensure completion. Existing literature on completion of eight years of free primary education in 2012 cited high drop-out rates attributed to child labour and early marriages.³⁸⁰ The Basic Education Act, 2013 obligates the government to put in place measures to ensure all children complete basic education.³⁸¹ Further, the Act places the responsibility for completion of basic education by all children on the government,³⁸² including requiring head teachers to take action against child absenteeism.³⁸³ It also criminalises engagement of children in any occupation or labour which prevents school attendance.³⁸⁴ The primary school completion rate in 2012 was 80.3% an increase from 76.8% in 2010 and 74.6% in 2011.³⁸⁵ However, the government target of universal completion by 2010 was not achieved.

The recommendation has thus been fully implemented through legislative provisions. The implementation can be traced to provisions of the Constitution, 2010 which requires the

³⁷³ Ogola (n 372 above) 20-12.

³⁷⁴ Article 43(1) (f).

³⁷⁵ Article 53 (1) (b).

³⁷⁶ The Basic Education Regulations, 2015, Legal Notice no. 39, Kenya Gazette Supplementary 8 April 2015, Regulation 71.

³⁷⁷ As above.

³⁷⁸ The Basic Education Regulations (n 376 above) Regulation 69.

³⁷⁹ Ministry of Education, Science and Technology, Sessional paper 1 of 2005 on a policy framework for education training and research, 23-24.

³⁸⁰ Odongo (n 287 above) 135.

³⁸¹ Basic Education Act, 2013 section 5 (2) (d).

³⁸² Section 39 (h): 'It shall be the duty of the Cabinet Secretary to ensure compulsory admission, attendance and completion of every pupil'.

³⁸³ Section 40 (1): 'Where a child fails to attend school, the Head Teacher shall cause investigation of the circumstances of the child's absence from school'.

³⁸⁴ Section 38 (1): 'No person shall employ a child of compulsory school age in any labour or occupation that prevents such child from attending school.'

³⁸⁵ Kenya National Bureau of Statistics 'Kenya Economic Survey 2013' 59.

government to provide free and compulsory basic education for every child. Although policy measures were put in place in 2005 to ensure completion, as pointed out above there was no measurable commitment by the government. Similarly there is no documented evidence of any action taken to implement the recommendation from 2007 to the 2012 drafting of the Basic Education Act.

On free secondary education, basic education in Kenya includes four years of secondary education beyond eight years of primary education.³⁸⁶ The government in 2008 introduced free tuition secondary education which covers only the cost of teaching, learning materials and examinations, while the parents meet all the other costs including meals, accommodation, administrative costs, transport, medical and repairs and maintenance.³⁸⁷ Therefore, free secondary education in Kenya only extends to teaching, learning materials and examinations. In October 2014, following recommendations by a task force set up to probe the escalating costs of secondary education and recommend an affordable fee structure for secondary education, the government committed to reduce the cost of secondary education by more than half.³⁸⁸ This review of the escalating cost of secondary education was as a result of complaints from the non-state actors who sought an intervention on the rising costs of secondary education.³⁸⁹ Parliament petitioned the task force to recommend free secondary education with a view to improving access.³⁹⁰ In line with the recommendations of the task force, the government in February 2015 reduced secondary school fees by almost half.³⁹¹ The recommendation is thus partially implemented.

With reference to increasing the public expenditure on basic education (pre-primary, primary and secondary), available data reveals an increase in budgetary allocation. The allocation for basic education was KES 15 billion for 2009/10, 15.9 billion for 2010/11, 13.4 billion for 2011/12, 14.3 billion for 2012/13, 31.9 billion in 2013/14 and 41.7 billion in the 2014/15 financial year.³⁹² Focussing on the actual expenditure per student on education, since the 2003 introduction of free primary education the allocation per student has been Kenya shillings 1,020, while that of secondary school was set at 10,265 at the introduction of free day secondary school education in 2008.³⁹³ These capitation grants are used to purchase books, desks and learning materials.³⁹⁴ Notably, there have been numerous calls to adjust the capitation grants to reflect inflation rates. For instance, In November 2011 school heads petitioned the government to increase the capitation grant from KES 1,020 for primary

³⁸⁶ *Gabriel Nyabola v Attorney General & 2 others* [2014] eKLR.

³⁸⁷ See Kenya Gazette Notice no. 1555, 10 March 2015, Secondary school fees structure, http://kenyalaw.org/kenya_gazette/gazette/volume/MTEyNw--/Vol.CXVII-No.23 (accessed August 2015).

³⁸⁸ 'Secondary education 'to be free from 2015' The Star, 30 October 2014, <http://www.the-star.co.ke/news/secondary-education-be-free-2015> (10 December 2014).

³⁸⁹ As above.

³⁹⁰ G Keter 'Four MPs want free secondary schools' *The Star* 9 May 2014 <http://www.the-star.co.ke/news/article-166353/four-mps-want-free-secondary-schools> (10 May 2014).

³⁹¹ Kenya Gazette Notice 1555, 10 March 2015, Secondary school fees structure.

³⁹² Kenya Economic Survey 2013 (n 385 above) 55-58; National Treasury, budget, budget outlook and review paper, September 2014, http://www.treasury.go.ke/downloads/2014%20FINAL_Budget%20Outlook%20and%20Review%20Paper%20%28BR0P%29.pdf (accessed 25 December 2014).

³⁹³ Ministry of Education, <http://www.education.go.ke/Home.aspx?department=3> (10 May 2014).

³⁹⁴ As above.

school to 7,250 and from KES 10,265 for secondary school to 20,000.³⁹⁵ A February 2012 report by a task force commissioned by the government to review the education sector in accordance with the right to education in the Constitution recommended an increase of the capitation grants to KES 5,185 for primary education and KES 20,000 for secondary education.³⁹⁶ Similarly in November 2013, Parliament also petitioned the government to raise the capitation grants for primary school education from KES 1,020 to 3,060.³⁹⁷ The government in its 2014/15 budget raised the capitation grant for primary school education to KES 1,520 per child and KES 13,000 for secondary school education.³⁹⁸ Instructively, the increase is much below the amounts proposed by different stakeholders including the task force on the alignment of the education sector with the Constitution, 2010.

The recommendations on increasing budgetary allocation for basic education have thus been partially implemented. The implementation is thus linked to public demands for lowering the cost of secondary education.

2.3.2 Right to health

- (i) Develop reproductive programmes to reduce teenage pregnancy (African Committee on the Child 2009, CRC Committee 2007).

Studies based on 2014 data indicate that 15% of girls between 15 and 19 years are mothers.³⁹⁹ Teenage pregnancy increases from 3% for girls aged 15 years to 40% for girls aged 19 years.⁴⁰⁰ The 2013 State of World Population Report puts the rate of child pregnancy in Kenya at 26%.⁴⁰¹ The high teenage pregnancy has been attributed to barriers in accessing contraceptives and lack of proper information on contraceptives.⁴⁰² The prevalence of contraceptive use by sexually active teenage girls in Kenya in 2008/09 was 6%.⁴⁰³ A number of policy documents expressly make provision for adolescent sexual and reproductive health. The 2007 National Reproductive Health Policy identifies the priority actions for adolescents as: provision of full access to sexual and reproductive health information and services, establishment of integrated youth friendly reproductive health services and promoting a multi-sectoral approach in addressing adolescent reproductive health needs.⁴⁰⁴ The 2009 National School Health Guidelines make provision for sex

³⁹⁵ 'Pressure to double capitation grant in Kenya mounts' *Standard Digital News* 15 November 2011 <http://www.twaweza.org/pressure-to-double-capitation-grant-in-kenya-mounts> (10 May 2014).

³⁹⁶ Republic of Kenya 'Report of the Task Force on the re-alignment of the education sector to the Constitution of Kenya 2010' 131-138.

³⁹⁷ Parliament of Kenya, National Assembly official report, Hansard 6 November 2013, <http://www.parliament.go.ke/plone/national-assembly/business/hansard/wednesday-6th-november-2013-a.m/view> (10 May 2014).

³⁹⁸ 'Ministry will increase funds for free education, says PS' *Standard Digital News* 20 May 2014, <http://www.standarddigitalworld.co.ke/lifestyle/article/2000121833/ministry-will-increase-funds-for-free-education-says-ps> (accessed 21 May 2014).

³⁹⁹ Kenya Demographic and Health Survey 2014(n 145 above) 56.

⁴⁰⁰ National Council for Population and Development 'Teenage pregnancy is harmful to women's health in Kenya' June 2013 Policy brief, 1.

⁴⁰¹ UNFPA *State of the World Population 2013: motherhood in childhood*, 2013, 5 <http://www.unfpa.org/webdav/site/global/shared/swp2013/EN-SWOP2013-final.pdf> (accessed 28 March 2013).

⁴⁰² Kenya Human Rights Commission 'Teenage pregnancy and unsafe abortion' August 2010, 3.

⁴⁰³ Kenya Demographic and Health Survey 2008/09 (n 61 above) 61-63.

⁴⁰⁴ Ministry of Health National Reproductive Health Policy, 2007, 14-16.

education in schools with a view to preventing incidences of teenage pregnancy.⁴⁰⁵ However, in the specific context of teenage pregnancy, the major shortcoming of the National Reproductive Health Policy and the School Health Guidelines, discussed above, is that the programmes provided for are impliedly ‘abstinence only’ which exclude services and information on contraceptives.

According to the 2009 Kenya Demographic and Health Survey, the median age for sexual activity among children in Kenya is 17 years,⁴⁰⁶ which demonstrates the inadequacy of abstinence only programmes. As discussed in chapter 4, the Reproductive Health Care Bill, provides for adolescent friendly reproductive health services. The Bill requires the government to facilitate provisions of reproductive health information and education and services to adolescents.⁴⁰⁷

The recommendation has therefore been partially implemented. The policy documents developed make no reference of the findings of monitoring mechanisms. Similarly, the memorandum and objects of the Reproductive Health Care Bill, 2014 do not reference the findings of monitoring mechanisms.

2.3.3 Right to food

(i) Adopt national strategies to address critical nutritional needs of children (CRC Committee 2001, 2007)

According to the 2014 Demographic and Health Survey, 26% of children under five in Kenya are stunted, 11% are underweight, while 4% are wasted.⁴⁰⁸ The Children Act places the primary obligation to provide adequate nutrition for children on the parents or the person having parental responsibility over the child.⁴⁰⁹ The state obligation is impliedly secondary and fundamentally that of assisting in the event of inability or unwillingness of the parent to provide for the child. It has however been argued that the recognition of parental responsibility does not in any way absolve the state of its primary obligations towards children.⁴¹⁰ The Constitution, 2010 obligates the state to create an environment to facilitate access to basic nutrition for children.⁴¹¹ This is in addition to the state’s general obligation to provide adequate food of acceptability quality for all.⁴¹² The National Food and Nutrition Security Policy 2011 encompasses the policy framework for implementation of the right to food and basic nutrition for children. The children’s right to basic nutrition has been interpreted as requiring the state to adopt ‘child specific measures on basic nutrition’ beyond

⁴⁰⁵ Ministry of Public Health and Sanitation and Ministry of Education National School Health Guidelines, 2009, 15-19.

⁴⁰⁶ Kenya Demographic and Health Survey 2008/09 (n 61 above) 84-86.

⁴⁰⁷ Reproductive Health Care Bill, 2014 clauses 33-34.

⁴⁰⁸ Kenya Demographic and Health Survey 2014 (n 145 above) 35-37.

⁴⁰⁹ Children Act section 23 (1): ‘In this Act “parental responsibility ” means all the duties, rights, powers, responsibilities and authority which by law a parent of a child has in relation to the child and the child’s property in a manner consistent with the evolving capacities of the child’. (2): ‘The duties referred in sub-section (1) include in particular – (a) the duty to maintain the child and in particular to provide him with (i) adequate diet...’.

⁴¹⁰ DM Chirwa *Child poverty and children’s rights of access to food and basic nutrition in South Africa: a contextual, jurisprudential and policy analysis* (2009) 12.

⁴¹¹ Constitution, 2010 article 53 (1) (c): ‘Every child has the right to basic nutrition...’

⁴¹² Constitution, 2010 article 43(1) (c): ‘Every person has the right to be free from hunger, and to have adequate food of acceptable quality’.

the general policy framework that exists in relation to the right to food for all.⁴¹³ The National Food and Security Policy states that the government will protect and promote exclusive breastfeeding through enactment of legislation to regulate marketing of breast milk substitutes, increase equitable access to high impact nutrition and support the school feeding programmes.⁴¹⁴ The Breast Milk Substitutes (Regulation and Control) Act, 2012 was enacted in October 2012 to provide for safe and adequate nutrition for infants by promoting breastfeeding and proper use of substitutes.⁴¹⁵ The school meals feeding programme has been in existence since 1980 mainly funded by the World Food Programme. In 2009, the Government introduced the Home-Grown School Meals programme as a nationally owned alternative to the World Food Programme. At its launch in 2009, the Home-Grown School Meals programme had a targeted beneficiary population of 538,000 which increased to 592,638 in 2011.⁴¹⁶ As of 2012, the beneficiary population stood at 729,000.⁴¹⁷ In terms of resource allocation, the Government has gradually increased funding for the Home-Grown School Meals programme from KES 400 million in 2009/10,⁴¹⁸ to a proposed 2.3 billion in the 2014/15 financial year.⁴¹⁹

The recommendation has therefore been fully implemented. The implementation pathway does not however point to specific action by the government to implement the recommendation. The impetus for the development of the National Food and Nutrition Security policy was the Constitution, 2010 which provided for the right to food and the right to basic nutrition for children, hence requiring the state to adopt policies and programmes for its implementation. The 2009 introduction of the Home-Grown School Meals programme can be traced to a 2003 NEPAD initiative designed to link school feeding and agriculture development.⁴²⁰ Kenya was among the 12 countries picked to pilot the programme,⁴²¹ hence the introduction of the Home-Grown School Meals programme in Kenya.

2.3.4 Right to family support

(i) Review maternity legislation to provide 14 weeks paid maternity leave (CRC Committee 2007); (ii) remove reservation to para 2 Article 10 of the International Covenant on Economic, Social and Cultural Rights (CRC Committee 2007); (iii) strengthen measures for child maintenance (CRC Committee 2007).

The Kenyan labour laws protect the right to paid maternity leave. However, prior to the 2007 review of the labour laws, the Employment Act provided for two months paid maternity leave

⁴¹³ Chirwa (n 410 above) 20.

⁴¹⁴ National Food and Nutrition Security Policy 2011, 25-29.

⁴¹⁵ Breast Milk Substitutes (Regulation and Control) Act, 2012.

⁴¹⁶ Republic of Kenya, Home-Grown School Meals Programme Technical Development Plan August 2012, 11 (Home-Grown Meals Technical Development Plan)

⁴¹⁷ World Food Programme *State of School Feeding Worldwide 2013*, 57

https://openknowledge.worldbank.org/bitstream/handle/10986/13536/WFP_StateofSchoolFeeding2013_web.pdf?sequence=1 (29 March 2014).

⁴¹⁸ Home-Grown Meals Technical Development Plan (n 416 above) 20.

⁴¹⁹ The National Treasury, Budget, Budget summary for the fiscal year 2014/15, April 2014, 9, http://www.treasury.go.ke/index.php/component/docman/cat_view/79-budget/144-budget-2014 (29 April 2014).

⁴²⁰ Home-Grown School Meals Technical Development Plan (n 416 above) 1-2.

⁴²¹ Home -Grown School Meals Technical Development Plan (n 416 above) 2. Other countries invited to pilot the Home-Grown School Meals programme are: Angola, Democratic Republic of Congo, Ethiopia, Ghana, Malawi, Mali, Mozambique, Nigeria, Senegal, Uganda and Zambia.

which included forfeiture of annual leave.⁴²² Following the review, the Employment Act 2007 entitles women to three months fully paid maternity leave without forfeiture of their annual leave.⁴²³ The Act also provides two weeks fully paid paternity leave.⁴²⁴

Notwithstanding, it is to be noted that the Employment Act, 2007 covers only employees employed under a contract of service.⁴²⁵ Surveys based on 2011 data indicate that only 30% of employed women were in formal employment.⁴²⁶ The import is that majority of women in Kenya working in the informal sector do not enjoy three months of paid maternity leave. In practice, there is documented evidence of non-adherence to the maternity leave provisions. Illustratively, the Kenya Human Rights Commission in a 2011 study on impact of the new labour laws and Constitution, 2010 on the cut-flower industry found cases of unpaid maternity leave and a requirement that women proceed for annual leave before delivery thus limiting the post natal care time.⁴²⁷

The Industrial Court has adjudicated on the enforcement of the maternity leave provisions. In the case of *VMK v the Catholic University of Eastern Africa*, the Industrial Court addressed itself to the issue of unpaid maternity leave and ordered payment for maternity leave in addition to exemplary damages for discrimination based on HIV status.⁴²⁸

The recommendation is thus fully implemented. Assessing the implementation pathway, review of labour laws in Kenya was initiated in May 2001 with the establishment of a task force mandated to review labour laws for consistency with Conventions and recommendations of the International Labour Organisation which Kenya was party to.⁴²⁹ The task force submitted its final report in April 2004 which included five draft labour laws to repeal the existing labour law regime.⁴³⁰ The draft Employment Bill proposed two months of paid maternity leave without forfeiture of annual leave, a slight improvement from the previous provisions, though it was silent on paternity leave.⁴³¹ Notwithstanding, the Bill provided for reimbursement of employers who granted two months paid maternity leave from the National Social Security Fund,⁴³² a provision that would undoubtedly negate the maternity leave provisions. The Bill was tabled in Parliament in 2007, during which a female Parliamentarian moved amendments to the Bill providing for three months of fully paid

⁴²² Employment Act cap 226 (Repealed) section 7 (2): 'A woman employee shall be entitled to two months maternity leave with full pay: Provided that a woman who has taken two months maternity leave shall forfeit her annual leave.'

⁴²³ Employment Act 11 of 2007 section 29 (1): 'A female employee shall be entitled to three months maternity leave with full pay.' (7): 'No female employee shall forfeit her annual leave entitlement under section 28 on account of having taken her maternity leave.'

⁴²⁴ Employment Act section 29 (8): 'A male employee shall be entitled to two weeks paternity leave with full pay.'

⁴²⁵ Employment Act section 1: 'This Act shall apply to all employees employed by any employer under a contract of service.'

⁴²⁶ Kenya facts and figures 2012 (n 196 above) 33.

⁴²⁷ Kenya Human Rights Commission 'Wilting in bloom: the irony of women labour rights in the cut-flower sector in Kenya', 2012.

⁴²⁸ Cause 1161 of 2010.

⁴²⁹ Kenya Gazette Notice 3204 of May 2001.

⁴³⁰ International Labour Law Organization, National Labour Law profile: Kenya, http://www.ilo.org/ifpdial/information-resources/national-labour-law-profiles/WCMS_158910/lang--en/index.htm (31 March 2014).

⁴³¹ As above.

⁴³² As above.

maternity leave and two weeks paternity leave exclusive of the annual leave.⁴³³ The Employment Act, 2007 was eventually passed providing for three months paid maternity leave and two weeks paternity leave, both exclusive of annual leave.⁴³⁴

On the reservation to para 2 of Article 10 of the International Covenant on Economic, Social and Cultural Rights, the Government has not lifted the reservation as of June 2015.⁴³⁵ Para 2 of Article 10 of the Covenant on Economic, Social and Cultural Rights, requires States to provide paid maternity leave or leave with adequate social security benefits.⁴³⁶ While Kenya has progressive provisions on paid maternity leave for working mothers, majority of women remain outside the scope of these provisions as they are in informal employment. This could be addressed by provision of social security benefits to informal sector workers. Although recent reforms on social security extend to the informal sector, there is no provision of maternity cover. The recommendation has not been implemented as of October 2015.

In regard to strengthening measures for child maintenance, the Children Act embodied the legal position on child maintenance prior to the Constitution, 2010. The Act provides that in instances in which the mother and father of the child are married to each other, both have joint responsibility to maintain the child.⁴³⁷ Similarly, if the father and mother were not married to each other at the time of birth but subsequently get married both have joint responsibility to maintain the child.⁴³⁸ However, in instances in which the mother and father of the child are not married to each other and the father does not acquire parental responsibility the mother shall have parental responsibility of the first instance.⁴³⁹ The Act also gives a right to a mother to apply to court for orders for maintenance of a child where the father is unwilling to maintain a child.⁴⁴⁰ The problem arises from the fact that the Act

⁴³³ Parliament of Kenya, National Assembly official report, Hansard 16 October 2007, 4498 – 4501, <http://www.parliament.go.ke/plone/archive/archive-9th-parliament/hansard/official-report-16.10.07/view> (31 March 2014). While moving the amendment the Member of Parliament cited the International Conference of Population and Development 1994 which Kenya was signatory and the UN Millennium Development Goals which Kenya in the context of postnatal health of women and children in Kenya.

⁴³⁴ As above.

⁴³⁵ United Nations Treaty Collection, chapter iv, human rights, International Covenant on Economic, Social and Cultural Rights, https://treaties.un.org/pages/viewdetails.aspx?chapter=4&lang=en&mtdsg_no=iv-3&src=treaty#EndDec (31 March 2014).

⁴³⁶ International Covenant on Economic, Social and Cultural Rights article 10 (2): 'Special attention should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits.'

⁴³⁷ Children's Act section 90: 'Unless the court otherwise directs and subject to any financial contribution ordered to be made by any other person, the following presumptions shall apply with regard to the maintenance of a child- (a) Where the parents of the child were married to each other at the time of the birth of the child and are both living, the duty to maintain a child shall be their joint responsibility.'

⁴³⁸ Section 90 (e): 'Where the child's father and mother were not married to each other at the time of the child's birth and have not subsequently married, but the father has acquired parental responsibility for the child, it shall be the joint responsibility of the mother and the father of the child to maintain that child.'

⁴³⁹ Section 24(3): 'Where the child's father and mother were not married to each other at the time of the child's birth and have not subsequently married each other- (a) the mother shall have parental responsibility at the first instance; (b) the father shall subsequently acquire parental responsibility for the child in accordance to Section 25.'

⁴⁴⁰ Section 91: 'Any parent, guardian or custodian of the child, may apply to the court to determine any matter relating to the maintenance of the child and to make an order that a specified person make such periodical or lump sum payment for the maintenance of a child in this Act referred to as a 'maintenance order' as the court may deem fit.'

places maintenance of a child born outside wedlock on the mother while the father bears no responsibility to maintain the child and acquisition of responsibility is optional and conditional on the willingness of the putative father unless ordered by the court. Further, even in the instance that a woman may apply to the court for maintenance orders, access to courts is often hindered by cost and cultural attitudes. The court's interpretation of provisions of the Children Act on maintenance for children born outside wedlock has been varied. The High Court in 2006 reinforced the position that parental responsibility for children born without wedlock, should vest solely in the mother.⁴⁴¹ In 2008, the High Court found the same provisions relating to maintenance of children born out of wedlock discriminatory as the provisions resulted to differential treatment of children based on the marital status of the parents.⁴⁴² The High Court in the instant case implored on Parliament to amend the provisions.⁴⁴³

The Constitution, 2010 settles this long-standing debate on maintenance of children born without wedlock. It places equal responsibility on both the mother and the father to provide for the child regardless of their marital status.⁴⁴⁴ On the basis of the constitutional provisions, the High Court in 2013 found provisions of the Children Act relating to parental responsibility for children born outside wedlock and maintenance unconstitutional.⁴⁴⁵ Further, the Court pointed out that the parental care as provided for in the Constitution, 2010 extended to step children.⁴⁴⁶ Therefore, it is now settled that both parents have equal responsibility to maintain a child irrespective of their marital status.

The analysis traces the implementation of this finding to the constitution review process. National debates on child maintenance date back to 1969 when Parliament repealed the Affiliation Act, 1959.⁴⁴⁷ The Affiliation Act gave all single mothers the right to sue the fathers of their children for maintenance.⁴⁴⁸ Its repeal therefore meant that men had no legal responsibility to maintain their children born outside wedlock. Review of records of the Parliamentary debate during the enactment of the Children Act in 2001 reveal that efforts to strengthen the maintenance provisions in the Act were defeated by the male members of Parliament on the grounds that men would be victimised.⁴⁴⁹ As discussed above, in 2002, following the coming into force of the Children Act, civil society organisations moved to court challenging the maintenance provisions. Although the High Court in this case did not find the provisions unconstitutional, in a subsequent case determined in 2008, the High Court found the provisions unconstitutional. No reference was made to the 2007 concluding observations of the Committee on the Rights of the Child. The constitution review process accorded equal rights on maintenance and parental responsibility to children whether born in or outside

⁴⁴¹ *Rose Moraa & another v Attorney General* [2006] eKLR.

⁴⁴² *JGM v CNW* [2008] eKLR.

⁴⁴³ As above.

⁴⁴⁴ Constitution of Kenya article 53 (1) (e): 'Every child has the right to parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not'.

⁴⁴⁵ *ZAK & another v MA & another* [2013] eKLR.

⁴⁴⁶ As above.

⁴⁴⁷ L.M Thomas 'The politics of the womb': Kenyan debates over the Affiliation Act' (2000) 47 *Africa Today* 151-176.

⁴⁴⁸ As above.

⁴⁴⁹ Kenya National Assembly official record (hansard) 2 August 2001, 2087-2093

<https://books.google.co.ke/books?id=IPKSfE0-> (accessed 25 December 2014).

wedlock.⁴⁵⁰ Notably, during the finalisation of the constitution review process in 2010 it was agreed that provisions of the draft constitution relating to maintenance and parental responsibility must be retained to cure the deficiency in the Children Act.⁴⁵¹

Therefore, the recommendation has been implemented through the constitution review process. This proposition finds support in the fact that despite the existence of the recommendations since 2007 and a directive from the High Court to Parliament to amend the Children Act provisions on maintenance, there is no evidence of any action initiated by the government.

2.4 Juvenile justice

(i) Raise the minimum age of criminal liability to 12 years (CRC Committee 2001, HRC Committee 2005, CRC Committee 2007, African Committee on the Child 2009, CAT Committee 2009, UPR 2010, CAT Committee 2013); (ii) ensure separation of children in custody from adults (CRC Committee 2007); (iii) implement alternative measures for children in conflict with the law (CRC Committee 2007); (iv) ensure that children in conflict with the law have access to free legal aid and independent complaint mechanisms (CRC Committee 2007).

While the Children Act contains provisions relating to juvenile justice, the determination of the age at which a child is subject to the criminal justice system is governed by the Penal Code, which sets the minimum age of criminal responsibility in Kenya at eight years.⁴⁵² It also provides that a child under the age of twelve years cannot commit a criminal offence subject to assessment of the capacity of the child to know whether he/she is committing an offence.⁴⁵³ Instructively, the Penal Code neither makes provision for rebuttal of criminal capacity nor set standards for capacity assessment. The only express exception to criminal liability under the age of 12 years relates to sexual offences where it is presumed that a boy under the age of 12 years cannot commit a sexual offence.⁴⁵⁴ The Committee on the Rights of the Child in its General Comment 10 has criticised provisions that vest courts with discretion to assess the capacity of a child to determine criminal responsibility arguing that such provisions invariably result in use of a lower minimum age in serious crimes.⁴⁵⁵ Equally, the African Charter on the Rights and Welfare of the Child leaves determination of

⁴⁵⁰ See Constitution of Kenya Review Commission draft Bill, 27 September 2002 clause 37 (2): 'All children whether born within or outside wedlock are equal before the law and have equal rights under this Constitution.'; clause 37 (5): 'A child's mother and father, whether married to each other or not, have an equal duty to protect and provide for the child.' Draft constitution of Kenya, 15 March 2004 (Bomas draft) clause 40 (3) & (5); Proposed new constitution of Kenya, 22 August 2005, clause 41 (3) & (5); Harmonised draft constitution of Kenya 17 November 2009 clause 41 (3) & (5).

⁴⁵¹ Committee of Experts on the Constitutional Review 'Verbatim record of the proceedings of the plenary meeting of the Committee of Experts held on 3 January 2010 at Delta house, Nairobi' HAC/1/1/98, 5 -13 (accessed from the Kenya National Archives on 17 October 2014).

⁴⁵² Penal Code section 14 (1): 'A person under the age of eight is not criminally responsible for any act or omission.'

⁴⁵³ Penal Code section 14 (2): 'A person under the age of twelve years is not criminally responsible for an act or omission, unless it can be proved that at the time of doing the act or making the omission, he had capacity to know that he ought not do the act or make the omission.'

⁴⁵⁴ Penal Code section 14 (3): 'A male person under the age of twelve years is presumed to be incapable of having canal knowledge.'

⁴⁵⁵ UN Committee on the Rights of the Child General Comment 10: Children's rights in juvenile justice, U.N. Doc. CRC/C/GC/10 (2007) paras 30-35.

the minimum age of criminal culpability to state parties.⁴⁵⁶ This position of the Kenya Children Act is particularly odd taking into account that when the process of enactment of the Act was underway, the Committee on the CRC in 2001 recommended that Kenya should raise the age of criminal culpability. Odongo suggests that the anomaly is rooted on the restrictive interpretation of the CRC obligation by the agencies mandated to draft the Children Act.⁴⁵⁷

The Child Justice Bill, 2014 outlines its objectives as among others to raise the minimum age of criminal culpability and provides that a child below the age of eight years who commits an offence shall not be prosecuted for the offence.⁴⁵⁸ Further, in regard to children above eight years but under 12 years the Bill establishes a rebuttable presumption that the child has no capacity to differentiate right or wrong.⁴⁵⁹ The Bill requires the prosecution to prove beyond reasonable doubt that the child had capacity and provides for professional evaluation to determine the criminal culpability of such a child.⁴⁶⁰ Nonetheless, these provisions of the Child Justice Bill, 2014 when assessed against the international and regional standards do not essentially raise the minimum age of criminal liability. The provisions only introduce a rebuttable presumption for children under 12 years and for a procedure for capacity evaluation.

The drafting of the Child Justice Bill was initiated in 2006 by the Juvenile Justice Network, a grouping of civil society organisations working on child rights, and was spearheaded by the Law Society of Kenya.⁴⁶¹ Interviews with the Juvenile Justice Network indicate that the process of reviewing the minimum age of criminal responsibility was in response to the 2002 recommendations of the Committee on the Rights of the Child.⁴⁶² As of October 2015 the Bill has not been published for Parliamentary debate.

The recommendation is thus partially implemented as substantial steps have been taken towards implementation. The analysis traces the implementation to an initiative of civil society organisations and finds no concrete action on the part of the state to implement the recommendation. Notably, the recommendation to raise the minimum age of criminal responsibility was first made in 2001 a point at which the Children Act was being drafted in Kenya. However, the recommendation did not find expression in the Children Act despite the fact that the Children Act contains provisions on children in conflict with the law.

With regard to separation of children in custody from adults, the Children Act, Child Offender Rules, adopted at the time of enactment of the Act, prohibit detention of a child or association with adults while being detained at the police station, conveyed to, attending or

⁴⁵⁶ African Charter on the Rights and Welfare of the Child article 17 (4): 'There shall be a minimum age below which children shall be presumed not to have capacity to infringe the penal law.'

⁴⁵⁷ Unpublished: GO Odongo 'The domestication of international law standards on the rights of the child with specific reference to juvenile justice in the African context' unpublished LL.D Thesis, University of Western Cape, 2005, 171.

⁴⁵⁸ Child Justice Bill, 2014 clause 6 (1).

⁴⁵⁹ Child Justice Bill, 2014 clause 6 (2).

⁴⁶⁰ Child Justice Bill, 2014 clause 57 (1) & (2).

⁴⁶¹ R Otieno 'State drafts Bill to safeguard child justice' Standard Digital News 17 February 2012, <http://www.standardmedia.co.ke/?id=2000052272&cid=159&articleID=2000052272> (1 April 2014).

⁴⁶² Interview with P Mutiso, Programme Officer, CRADLE Kenya, Nairobi, 23 March 2015.

leaving court.⁴⁶³ Pointedly, the Court of Appeal in 2006 declared the Child Offender Rules unconstitutional in regard to detention of children convicted of capital offences.⁴⁶⁴ Nonetheless, the provisions on separation of children in custody from adults find textual expression in the Constitution, 2010 which provides that ‘every child has the right...to be held separate from adults and in conditions that take account of the child’s sex and age.’⁴⁶⁵ The draft Child Justice Bill, 2014 concretises the constitutional provisions on detention of children in conflict with the law. The Bill provides detention of a child in a detention facility only if a place of safety is unavailable and requires that children in detention facilities be separated from adults.⁴⁶⁶ The National Police Service Act, 2012 also regulates police detention facilities and in the specific context of children and juveniles requires that children be detained in lock-up facilities separate from adults.⁴⁶⁷ To ensure practical adherence to the provisions relating to detention, the Independent Policing Oversight Authority, is mandated to conduct inspections of police detention facilities.⁴⁶⁸ The recommendation is also thus partially implemented through the Child Justice Bill.

On ensuring children in conflict with the law have access to free legal aid and independent complaint mechanisms, the Children Act guarantees children access to legal representation or assistance in the preparation and presentation of their defence. Specifically, the Act states that ‘every child accused of having infringed any law shall if he is unable to obtain legal assistance be provided by the government with assistance in the preparation and presentation of his defence’.⁴⁶⁹ While the provision of ‘assistance’ is couched in mandatory terms, the Act fails to define the nature of the ‘assistance’ contemplated in the section. In 2007, the government launched the National Legal Aid and Awareness Programme on a three year pilot basis to offer legal advice in the short-term with a view to up scaling it to offer nationwide legal representation in the long-term.⁴⁷⁰ In the specific context of legal aid to children, pilot projects were launched the Nairobi Children’s Court and the Nakuru Children’s Court.⁴⁷¹ These Children’s court legal aid programmes are run by the Law Society of Kenya together with the Children Legal Aid Network (CLAN), a civil society organisation.⁴⁷² Assessments of the children legal aid schemes indicate that the schemes have been ineffective in provision of legal aid for children.⁴⁷³

The Constitution, 2010 is silent on free legal aid for children in conflict with the law. Contrastingly, prior draft constitutions published in 2002, 2004, 2005 and 2009 contained

⁴⁶³ Children Act, Fifth schedule, child offender rules, rule 6 (1): ‘No child while detained in a police station or while being conveyed to any court, or while waiting to attend in or leave court, shall be detained with or allowed to associate with any adult who is not a relative of the child.’

⁴⁶⁴ *Kazungu Kasiwa Mkunzo & another v Republic* [2006] eKLR.

⁴⁶⁵ Article 53 (1) (f) (ii).

⁴⁶⁶ Child Justice Bill, 2014 clause 37 (2) (b).

⁴⁶⁷ National Police Service Act, 2012 section 59 (2) Fifth schedule, Arrest and Detention Rules (5) (d): ‘A lock-up facility shall have juveniles and children kept separately from adults’.

⁴⁶⁸ Independent Policing Oversight Authority, 2012 section 6 (e): ‘The functions of the Authority shall be to conduct inspections to Police premises, including detention facilities under the control of the Service’.

⁴⁶⁹ Children Act section 186 (b).

⁴⁷⁰ Department of Justice, National Legal Aid and Awareness Programme,

<http://justice.go.ke/index.php/programs-commissions/national-legal-awareness-program-naleap> (2 April 2014).

⁴⁷¹ As above.

⁴⁷² As above.

⁴⁷³ Report of the Juvenile Justice Network Kenya, 2012, 7.

express provisions entitling children in proceedings affecting them to legal assistance and legal representation if injustice would arise in proceedings affecting them.⁴⁷⁴ These provisions were removed by the Parliamentary committee on the constitution review in January 2010 allegedly to reduce verbosity in the Constitution.⁴⁷⁵ Nonetheless, the Constitution, 2010 guarantees free legal aid to all accused persons if 'substantial injustice' would otherwise result.⁴⁷⁶ It is apparent that the Constitution envisages the right to legal representation as distinct from legal aid or 'assistance'. The question then is whether children are entitled to free legal aid under the Constitution.

The Court of Appeal in *David Njoroge Macharia v Republic*⁴⁷⁷ applied itself to what constitutes 'substantial injustice'. The Court enumerated grounds for determining if an accused person may be entitled to legal aid in non-capital offences as: cases involving complex cases of law or fact, where the accused is unable to conduct his or her own defence owing to disabilities or language difficulties or simply where public interest required that some form of legal aid be given to the accused because of the nature of the offence.⁴⁷⁸ It can thus be argued that children on account of their age may have inability in mounting a defence against criminal charges hence entitled to free legal aid. To refine the right to legal aid, the government has prepared the Legal Aid Bill, 2015. The Bill proposes to establish an accessible, accountable and sustainable legal aid scheme and the National Legal Aid Service to promote legal awareness and greater access to justice.⁴⁷⁹ The Bill defines legal aid broadly to include: legal advice and awareness, legal representation, assistance, provision of legal information and law related education and access to justice.⁴⁸⁰ It also establishes a Legal Aid Fund to be funded by Parliament, donations and monies levied by the National Legal Aid Service.⁴⁸¹ In the specific context of provision of legal aid for children, the Bill does not envisage automatic legal aid for children in conflict with the law, although it lists indigent children as eligible for legal aid. The Bill sets a two part test for eligibility of legal aid for all persons. First, a means test that requires one to be poor to be eligible for legal aid.⁴⁸² Second, a merits test which includes: availability of resources, reasonable probability of success by the litigant, public interest nature of the litigation and the likelihood of proceedings occasioning the individual loss.⁴⁸³ The recommendation is partially implemented.

The Child Justice Bill, 2014 provides for state funded legal representation which includes an advocate assigned to the child's case, if no legal representative has been appointed by the

⁴⁷⁴Constitution of Kenya Review Commission draft Bill, 27 September 2002, clause 37 (3) (l) & (n); Draft constitution of Kenya 15 March 2004 (Bomas draft) clause 40 (6) (i) & (j) Proposed new constitution of Kenya 22 August 2005, clause 41 (6) (j); Harmonised draft constitution of Kenya, 17 November 2009, clause 41 (6) (i) & (j).

⁴⁷⁵ Committee of Experts on the Constitution Review 'Verbatim record of Committee of Experts meeting with the Parliamentary Select Committee held on 16 February 2010 at Cooperative bank management centre, Nairobi' 38 (accessed from the Kenya National Archives on 14 October 2014).

⁴⁷⁶ Constitution of Kenya article 50 (2)(h): 'to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly'.

⁴⁷⁷ [2011] eKLR.

⁴⁷⁸ As above.

⁴⁷⁹ Legal Aid Bill, 2015.

⁴⁸⁰ Legal Aid Bill, 2015 clause 2.

⁴⁸¹ Legal Aid Bill clause 21.

⁴⁸² Legal Aid Bill clause 28 (4).

⁴⁸³ As above.

parent or guardian.⁴⁸⁴ As discussed above, drafting of the Child Justice Bill, 2014 was in response to the 2002 recommendations of the Committee on the Rights of the Child.

On implementation of diversion as an alternative measure for children in conflict with the law, the Children Act does not explicitly provide for diversion. However, upon a finding of guilty the Act outlines a number of alternative measures to the formal criminal justice system. The Act provides for discharge of the child, probation orders, counselling, committing the offender to a borstal institution, probation hostel or making a community service order.⁴⁸⁵ The problem however relates to pre-trial diversion which is not envisaged in the Act.⁴⁸⁶ In practice, a pilot pre-trial diversion programme was initiated in 2001 by Save the Children, an international non-government organisation, to ensure that children are diverted from the criminal justice system as soon as possible.⁴⁸⁷ A 2009 evaluation of the programme indicates that it was successful in diverting children out of the formal criminal justice system.⁴⁸⁸ According to the evaluation, a major setback of the programme was that most of the children who benefitted from the diversion programme were children in need of welfare rather than children in conflict with the law.⁴⁸⁹ In addition, the programme was run on a pilot basis hence did not benefit all children at the national scale.⁴⁹⁰

The Child Justice Bill, 2014 contains elaborate provisions on diversion. The Bill mandates the government to develop appropriate diversion options for children in conflict with the law and makes it permissible for non-state actors to develop diversion options.⁴⁹¹

Therefore the recommendations relating to juvenile justice are partially implemented. As discussed above the Child Justice Bill is an initiative of the Juvenile Justice Network and was in response to the Committee on the Rights of the Child.

2.5 Children with special needs

The recommendations include those relating to children with disabilities, HIV/AIDS orphans, refugee children and street children.

2.5.1 Children with disabilities

- (i) Encourage inclusion of children with disabilities in the regular education system and inclusion in society (CRC Committee 2001, 2007, African Committee on the Child 2009); (ii) increase financial allocation to schools for children with disabilities (CRC Committee 2001, 2007).

⁴⁸⁴ Child Justice Bill, 2014 clause 64.

⁴⁸⁵ Children Act section 191.

⁴⁸⁶ See Odongo (n 487 above) 225-228. The author however identifies two bases for pre-trial diversion under the Children Act. First, the provision that provides for detention as a measure of last resort, and second, the provision that gives the National Council for Children Services power to carry out any initiative that supports its objectives. Accordingly, pre-trial detention is legally mandated under the Children Act,

⁴⁸⁷ Sida review 'The diversion programme in Kenya' 2009, 6 (The diversion programme in Kenya), <http://www.sida.se/Publications/Import/pdf/sv/The-Diversion-Program-in-Kenya.pdf> (2 April 2014).

⁴⁸⁸ As above.

⁴⁸⁹ The diversion programme in Kenya (n 487 above) 12-13.

⁴⁹⁰ As above.

⁴⁹¹ Child Justice Bill, 2014 clause 47 (1) & (2).

The 2009 national census puts the number of persons with disability, defined as visual, physical, hearing mental, self-care, multiple and other disabilities, in Kenya at 1.3 million accounting for 3.5% of the total population.⁴⁹² Of these 647,689 are male while 682,623 are female.⁴⁹³ There is no conclusive data on the actual number of children with disabilities.

The 2007 Kenya national survey on persons with disabilities, defined as visual, physical, multiple, self-care, mental, hearing and other disabilities, puts the number of disabled persons at 1.7 million.⁴⁹⁴ Although the survey indicates the highest disability prevalence rate as above 69 years, it does not provide data on the number of children with disabilities.⁴⁹⁵

In 2003, the number of children with special needs enrolled in primary and secondary schools was 23,459 in 2003, and in 2006 following the introduction of the free primary education, total enrolment in special primary and secondary schools and special units was 36,239.⁴⁹⁶ Further, in 2008, 221,995 children with disabilities were enrolled in special needs education institutions.⁴⁹⁷

The Constitution, 2010 guarantees persons with disability access to education institutions that are integrated into society to the extent compatible with the interests of the person.⁴⁹⁸ The Basic Education Act operationalises the right by requiring the government 'to provide for establishment of special and integrated schools for learners with disabilities'.⁴⁹⁹ Additionally, the Act obligates the government to provide special education and training facilities to children with disabilities.⁵⁰⁰ It also outlaws discrimination in admission of children on the grounds of disability.⁵⁰¹ The Basic Education Regulations, 2015 provide for inclusion of children with disabilities in the regular school system.⁵⁰²

Both the Children Act and the Persons with Disabilities Act provide for the right to education for children with disabilities. The Children Act provides that children with disabilities have a right to education and training free of charge or at a reduced cost.⁵⁰³ The Persons with Disabilities Act, 2003 entitles persons with disability to education and prohibits discrimination

⁴⁹² Kenya National Bureau of Statistics, Kenya National Population and Housing Survey 2009.

⁴⁹³ As above.

⁴⁹⁴ National Coordinating Agency for Population and Development and Kenya National Bureau of Statistics 'Kenya National Survey of Persons with Disabilities', 2008, 72.

⁴⁹⁵ As above.

⁴⁹⁶ Ministry of Education, Gender Policy in Education, 2007.

⁴⁹⁷ Ministry of Education, special education section, statistics.

⁴⁹⁸ Constitution, 2010 article 54 (1) (b): 'A person with any disability is entitled to access to educational institutions and facilities for persons with disabilities that are integrated into society to the extent that is compatible with the interests of the person'.

⁴⁹⁹ Basic Education Act section 28 (2) (d).

⁵⁰⁰ Basic Education Act section 39 (g): 'It shall be the responsibility of the Cabinet Secretary to provide special education and training facilities...and pupils with disabilities'.

⁵⁰¹ Basic Education Act section 34 (2): 'A person or school responsible for admission shall not discriminate against any child seeking admission on any ground, including ethnicity, gender, sex, religion, race, colour or social origin, age disability, language or culture.'

⁵⁰² The Basic Education Regulations, 2015, Regulation 25

⁵⁰³ Children Act section 12: 'A disabled child shall have a right to be treated with dignity, and to be accorded appropriate medical treatment, special care, education and training free of charge or at a reduced cost whenever possible.'

in access to education for children with disabilities.⁵⁰⁴ Further, the Act requires the educational institutions to take into account special needs of children with disabilities in admission requirements, pass marks, curricula, examinations, schools facilities and class scheduling.⁵⁰⁵ The provisions of the Persons with Disabilities Act have however been criticised for failing to clearly stipulate government obligation in the provision of education for persons with disabilities.⁵⁰⁶ Additionally, a long-standing criticism of the Persons with Disabilities Act is that it adopts a charity model instead of a human rights approach modelled on the principle of equality.⁵⁰⁷ For instance in regard to education for children with disabilities, the Act requires the National Council on Persons with Disabilities to work in consultation with the relevant government agencies for provision of an integrated system of special and non-formal education.⁵⁰⁸ The express obligation of the government in provision of education for persons with disabilities is not defined.⁵⁰⁹ These deficiencies are addressed by the Constitution, 2010 which places an express obligation on the government which is also enforceable through the courts. This recommendation has been fully implemented through the constitution review process.

On increasing financial allocation to schools for children with disabilities, the government expenditure on special education from 2009 to 2012 averaged 0.2% of the total education expenditure,⁵¹⁰ which is grossly inadequate. The Kenya Free Primary Education Policy allocates Kenya shillings 1,020 per year for each pupil and a slightly enhanced grant of Kenya shillings 2,000 per child with disability.⁵¹¹ Notably these capitation grants have not been revised since 2003 to reflect the inflation rate, despite calls by different actors for their increment. The 2012 task force on re-alignment of the education sector with the Constitution estimated the special needs education unit cost per child at 18,000 to 55,000 KES depending on the nature of disability.⁵¹² These recommendations have not been implemented as of October 2015 as the capitation grant for children with disabilities remains KES 2,000. It is noted that the government does not accord adequate attention to education of children with disabilities. Illustratively, between 2009 and 2012 only 0.2% of the education budget was allocated for special needs education while there was no allocation for development of special needs education infrastructure in 2009 and 2010.⁵¹³ The

⁵⁰⁴ Persons with Disabilities Act, 2003 section 18 (1): 'No person or learning institution shall deny admission to a person with disability to any course of study, by reason only of such disability, if the person has the ability to acquire substantial learning in that course'.

⁵⁰⁵ Persons with Disabilities Act section 18 (2) 'Learning institutions shall take into account the special needs of persons with disabilities in respect to entry requirements, pass marks, curriculum, examinations, auxiliary services, use of school facilities, class schedules, physical education requirements and other similar considerations'.

⁵⁰⁶ Kenya National Commission on Human Rights 'Objects of pity or individuals with rights: the right to education for children with disabilities' 2007, 16.

⁵⁰⁷ As above.

⁵⁰⁸ Persons with Disabilities Act section 19.

⁵⁰⁹ Kenya National Commission on Human Rights (n 506 above) 16.

⁵¹⁰ Kenya economic survey 2013 (n 385 above) 56.

⁵¹¹ Ministry of Education, <http://www.education.go.ke/Home.aspx?department=1> (2 April 2014).

⁵¹² Report on Re-alignment of the education sector with the Constitution, 2010, 142-143. According to the Report the unit cost of educating a child with speech and language difficulties is Kenya shillings 40,000, a blind/deaf or multi-handicapped child 34,000, a physically handicapped child in a special school 30,000, a cerebral palsy child 55,000, an autistic child 40,000, a child with a mental handicap 18,300, a child with visual impairment 27,700 and a child with hearing impairment 27,200.

⁵¹³ Kenya Economic Survey, 2013 (n 385 above) 56.

government's projected budget for 2014/15 is silent on any increment in the capitation grant for special needs children. The recommendation has thus not been implemented.

2.5.2 HIV/AIDS orphans

(i) Provide financial support to families taking care of HIV/AIDS orphans (CRC Committee 2007);

In regard to provision of financial support to families taking care of HIV/AIDS orphans, the government has since 2004 been implementing the cash transfer- orphaned and vulnerable children programme which targets very poor households.⁵¹⁴ At inception the programme was piloted in three districts covering 500 households with a monthly cash transfer of KES 500.⁵¹⁵ In June 2006, the programme was extended to cover 30,000 orphans and vulnerable children in seven districts.⁵¹⁶ Similarly in 2007 the programme was approved by Cabinet and integrated in the annual budget with a target of 300,000 orphans and vulnerable children by 2011.⁵¹⁷ In line with the Constitution, 2010 which provides the right to social security, this programme was anchored on a legislative framework, the Social Assistance Act, 2013.⁵¹⁸ As of June 2015, the programme covers 155,000 households in all the 47 counties with each household receiving KES 2,000 per month.⁵¹⁹ The number of children orphaned by HIV/AIDS in Kenya was estimated at 1.1 million in 2011.⁵²⁰ The cash transfer programme presupposes that each receiving household is taking care of three to four HIV/AIDS orphans. Accordingly, the cash transfer programme covers at the maximum 620,000 orphans implying that a large number of orphans do not receive financial support. On targeting, selection for eligibility to the cash transfer programme is through a participatory community based process. Selection of the geographical areas to be covered by the programme is based on national statistics on the orphans and vulnerable children prevalence. The households to be covered in each geographical area are identified by community representatives and government officials working in the area. Research studies find that the criteria used to identify the poor households to be covered is not sensitive to the severity of poverty resulting in less poor households benefiting at the expense of very poor households.⁵²¹ The 2011 National Social Protection Policy commits the government to conduct research to inform its targeting strategies in social assistance programmes in order to enhance the impact of the programmes.⁵²²

⁵¹⁴ Ministry of Labour, Social Security and Services, National Social Protection secretariat, cash transfer – orphaned and vulnerable children, <http://www.socialprotection.go.ke/index.php/national-safety-net-program/cash-transfer-orphaned-and-vulnerable-children-ct-ovc> (13 April 2014).

⁵¹⁵ As above.

⁵¹⁶ G Ikiara Political economy of cash transfers in Kenya, Overseas Development Institute, August 2009, 6-7, <http://www.odi.org.uk/sites/odi.org.uk/files/odi-assets/publications-opinion-files/5749.pdf> (13 April 2014).

⁵¹⁷ S Asfaw *et al* (n 329 above) 7.

⁵¹⁸ Article 43 (3): 'The State shall provide appropriate social security to persons who are unable to support themselves and their dependants.'

⁵¹⁹ National Social Protection secretariat (n 514 above).

⁵²⁰ UNICEF, monitoring the situation of women and children, Kenya, http://www.childinfo.org/hiv_aids_orphanestimates.php (13 April 2014).

⁵²¹ J Byrant 'Kenya's cash transfer programme: protecting the health and human rights of orphans and vulnerable children' (2013) *Health and Human Rights Journal* <http://www.hhrjournal.org/2013/08/29/kenyas-cash-transfer-program-protecting-the-health-and-human-rights-of-orphans-and-vulnerable-children/> (13 April 2014).

⁵²² Ministry of Gender, Children and Social Development, Kenya National Social Protection policy, June 2011, 17-18.

Assessing implementation, the recommendation has been fully implemented. As discussed above, the recommendation related to an initiative that the government was already undertaking since 2004, hence it is difficult to attribute its implementation to the recommendation of the Committee on the Rights of the Child.

2.5.3 Refugee children

(i) Take measures to implement the Refugee Act, 2006 particularly in relation to unaccompanied children and separated from their country of origin (CRC Committee 2001, 2007).

In regard to implementation of the Refugee Act, 2006 on treatment of unaccompanied and separated children outside their country of origin, the Refugee Act, 2006 vaguely required the government to accord such children assistance and protection.⁵²³ While the Act was repealed by the Refugee Act, 2012, the provisions relating to unaccompanied children outside their country of origin remain the same.⁵²⁴ The Committee on the Rights of the Child in General Comment 6 outlines specific obligations which require States to: establish national legislation, administrative structures and conduct research as well as data compilation and training to support protection measures.⁵²⁵ The actual number of unaccompanied and separated refugee children in Kenya is unknown. UNICEF reports indicate that 600 unaccompanied and separated children were identified in the Kakuma and Dadaab refugee camps in 2013.⁵²⁶ Additionally at the end of 2013, Kenya registered 4,000 unaccompanied and separated children from South Sudan.⁵²⁷ In regard to protection, there is no refugee policy specific to issues relating to children. Equally, there is minimal and unstructured institutional engagement between the Department of Refugee Affairs and the Children's Department to ensure protection of unaccompanied and separated children.

The Constitution, 2010 addresses itself to the issue of unaccompanied and separated children for purposes of citizenship. It provides a rebuttable presumption of citizenship for unaccompanied children found in Kenya who appear to be less than eight years old.⁵²⁸ This provision on presumption of citizenship was widely debated during the constitutional review process.⁵²⁹ Opponents of the provision argued that in view of continued instability in the neighbouring countries, Kenya would be obliged to confer citizenship to large numbers of unaccompanied children from the region.⁵³⁰ The Parliamentary Select Committee on the constitutional review process in January 2010 recommended removal of the provision for

⁵²³ Refugee Act, 2006 (Repealed) section 23 (2): 'The Commissioner shall ensure that a child who is in need of refugee status or who is considered a refugee shall, whether unaccompanied or accompanied by his parents or any other person, receive appropriate protection and assistance'.

⁵²⁴ See Refugee Act, 2012 section 19 (2).

⁵²⁵ UN Committee on the Rights of the Child, General Comment No. 6: Treatment of unaccompanied and separated children outside their country of origin, U.N. Doc. CRC/CG/2005/6 (2005) para 13.

⁵²⁶ UNICEF Humanitarian Action for Children, Kenya, <http://www.unicef.org/appeals/kenya.html> (13 April 2014).

⁵²⁷ As above.

⁵²⁸ Constitution, 2010 article 14(4): 'A child found in Kenya who is, or appears to be, less than eight years of age, and whose nationality and parents are not known is presumed to be a citizen by birth.'

⁵²⁹ Constitution of Kenya Review Commission, National constitutional conference 'Verbatim report of technical working committee B (twc B) chapter 4 & 5 on citizenship and bill of rights held in tent no. 2 at the Bomas of Kenya on 12 September 2003' HAC/6/B/6, 49 (accessed from the Kenya National Archives on 2 October 2014).

⁵³⁰ As above.

fear of abuse.⁵³¹ Nonetheless, a compromise was reached to retain the provision with safeguards on revocation of such citizenship.⁵³²

The recommendation has been partially implemented to the extent that relates to legislative measures. Tracing the partial implementation, the analysis finds no evidence of government action outside the constitution review process to implement the recommendation. Further, no comprehensive data on refugees and asylum seeking children and a policy framework or mechanisms exist for protection of refugee children.

2.5.4 Street children

- (i) Develop a comprehensive strategy to address street children (CRC Committee 2001, 2007);
- (ii) provide shelter, reintegration and recovery services for street children (CRC Committee 2001, 2007).

A common definition on who is a street child remains elusive, mainly because street children have different relationships with the street hence the complexity in capturing the totality of the experiences of street children in a universal definition.⁵³³ Central to the definitional complexities are the concepts of a child 'of the street' and 'on the street'. A child 'of the street' has no home and lives on the street while a child 'on the street' spends large amounts of time on the street but goes home at the end of the day or periodically.⁵³⁴ The UN Human Rights Council in its March 2011 resolution on the protection and promotion rights of children working and/or living on the street adopts an inclusive approach of both "on" and "of" the street' children.⁵³⁵ In the absence of a common definition, there are few accurate statistics on the number of street children in Kenya as elsewhere globally. A study by UNICEF in 2007 estimated the number of street children in Kenya to be between 250,000 and 300,000.⁵³⁶ Subsequent studies in 2009 put the number at approximately 600,000.⁵³⁷ In relation to developing a comprehensive strategy to address the large number of street children in Kenya, there is no policy framework on street children in Kenya. Similarly the National Children Policy, 2008 makes no mention of street children.

Notwithstanding, a number of government efforts have been put in place to address street children. Initial efforts to address street children in Kenya date back to research studies commissioned by the Attorney General in 1991 to assess the problem of street children and

⁵³¹ See Kenya Harmonised Draft Constitution November 2009 which contained the provision at clause 20 (2) and the Parliamentary Select Committee Revised Harmonized Draft of the Constitution of Kenya January 2010 which deleted the provision in its clause 14 (3).

⁵³² Constitution, 2010 article 17 (2): 'The citizenship of a person who is presumed to be a citizen by birth, as contemplated in Article 14 (4), may be revoked if – (a) the citizenship was acquired by fraud, false representation or concealment of any material fact by any person; (b) the nationality or parentage of the person becomes known, and reveals that the person was a citizen of another country; or (c) the age of the person becomes known, and reveals that the person was older than eight years when found in Kenya.'

⁵³³ UU Elewukwa 'Litigating the rights of street children in regional or international fora: trends, options, barriers and breakthroughs' (2006) 9 *Yale Human Rights and Development Journal* 90-91.

⁵³⁴ Elewukwa (n 533 above) 91.

⁵³⁵ UN Human Rights Council Resolution 16/12 Rights of the child: a holistic approach to the protection and promotion of the rights of children working and/or living on the street, 12 April 2011.

⁵³⁶ IRIN 'Youth in crisis: coming of age in the 21st Century' February 2007, 52, <http://www.irinnews.org/pdf/in-depth/youth-in-crisis-irin-in-depth.pdf> (17 April 2014).

⁵³⁷ B Sorre and P Oino 'Family based factors leading to street children phenomenon in Kenya' (2013) 2 *International Journal of Science and Research* 148.

recommend appropriate courses of action in terms of programmes and policies.⁵³⁸ The report recommended formulation of short term policies on rehabilitation of street children and long term preventative policies.⁵³⁹ There is no documented evidence on the implementation of these recommendations. In March 2003 a Street Families Rehabilitation Trust Fund was set up to address the rising number of children and families living and working on the streets.⁵⁴⁰ The Fund is mandated to coordinate the rehabilitation of street children and families and to mobilise resources and manage a Fund.⁵⁴¹ At the inception of the Fund in 2003 approximately 6,000 children were rounded from the streets and enrolled in various rehabilitation programmes for vocational training.⁵⁴² In 2010 a baseline survey was conducted to establish the causes of street children and families.⁵⁴³ The Street Families Rehabilitation Fund launched its 2010-2015 strategic plan.⁵⁴⁴ In terms of resource allocation, the government in its 2014/15 budget projections allocated Kenya shillings 300 million for rehabilitation of street children.⁵⁴⁵ The recommendation is partially implemented through programmatic measures in the government planning process although no legislative and policy framework exists in regard to street children.

2.6 Civic rights and freedoms for children

The findings and recommendations under this sub-group relate to: a finding by the African Committee on the Child relating to nationality rights for children of Nubian descent in Kenya; and recommendations on birth registration, adoption and respect for the views and participation of the child.

2.6.1 Nationality – children of Nubian descent in Kenya

(i) Take all necessary legislative, administrative and other measures to ensure that children of Nubian descent in Kenya that are otherwise stateless, can acquire a Kenyan nationality and proof of such nationality at birth (African Committee on the Child 2011, CERD Committee 2011); (ii) ensure that Nubian children of Kenyan descent whose nationality is not recognised are systematically afforded the benefit of these new measures as a matter of priority (African Committee on the Child 2011); (iii) ensure children of Nubian descent are registered immediately after birth (African Committee on the Child 2011).

In Kenya debate surrounding nationality is contextualised on the basis of ethnicity and territory. For the Nubian community in Kenya their ethnicity and the territory they occupy, Kibera, have since 1963 been contested by the government, hence their citizenship has

⁵³⁸ Office of the Attorney General, 'A report on a study of street children in Kenya' May 1991, 1 (Report on street children in Kenya).

⁵³⁹ Report on street children in Kenya (n 538 above) 100-101.

⁵⁴⁰ Kenya Gazette Notice 1558 of 11 March 2003.

⁵⁴¹ As above.

⁵⁴² P Lunje 'Street families rehabilitation trust fund' (undated)

http://www.academia.edu/6701021/Street_families_rehabilitation_trust_Fund_BACKGROUND_Street_families (17 April 2014).

⁵⁴³ 'Street families headed for rehabilitation' *Standard Digital News* 10 November 2010, <http://www.standardmedia.co.ke/business/article/2000022112/street-families-headed-for-rehab?pageNo=2> (18 April 2014).

⁵⁴⁴ As above.

⁵⁴⁵ National Treasury, Budget summary for the Fiscal year 2014/15, April 2014, 10, http://www.treasury.go.ke/index.php/component/docman/cat_view/79-budget/144-budget-2014 (18 April 2014).

been doubted. The Constitution, 2010 guarantees that every child has the right to a name and nationality from birth.⁵⁴⁶ Acquisition of citizenship for both children and adults in Kenya is set out in the Constitution, 2010 and the Kenya Citizenship and Immigration Act, 2011. The Constitution, 2010 provides that citizenship can be attained through birth or registration.⁵⁴⁷ A child acquires citizenship by birth if at the time of the child's birth whether in Kenya or outside either the mother or father of the child is a citizen.⁵⁴⁸ However, according to the Kenya Citizenship and Immigration Act, where the child is born outside Kenya, the father or mother must be citizens by birth,⁵⁴⁹ a provision that has no constitutional foundation hence amenable to a constitutional challenge. Similarly, a child may be presumed to be a citizen by birth if the child is found in Kenya, appears to be less than eight years and the parents and nationality are unknown.⁵⁵⁰ This presumption is rebuttable. A child acquires citizenship by registration if the child is adopted by a citizen,⁵⁵¹ or through application by the parent or legal guardian if the child was born before the parent acquired citizenship by registration.⁵⁵² The Kenya Citizenship and Immigration Act also addresses itself to stateless persons who have continually lived in Kenya since 1963 by providing that they are eligible to apply for citizenship by registration subject to certain requirements.⁵⁵³

In relation to nationality for children of Nubian descent, although the legislative framework discussed above appears permissive to the extent that children born of Nubian parents who have acquired citizenship by registration can automatically acquire nationality at birth, the practice is far from ideal. A 2013-2014 study conducted by the Open Society Initiative in East Africa on acquisition of birth certificates by Nubian children, found that Nubians were ordinarily required to provide additional documents to support issuance of birth certificates.⁵⁵⁴ Additionally, blanket discretion exists for registration officers in relation to the additional documents and what information is to be furnished for birth registration.⁵⁵⁵ This leads to differential treatment of Nubians by requiring them to provide additional and often more documents when applying for birth certificates.⁵⁵⁶ Notably, a comparative analysis of the processes of obtaining birth certificates for Nubians and non-Nubians indicated that

⁵⁴⁶ Article 53 (1) (a).

⁵⁴⁷ Article 13(2): 'Citizenship may be acquired by birth or registration.'

⁵⁴⁸ Article 14 (1): 'A person is a citizen by birth if on the day of the person's birth, whether or not the person is born in Kenya, either the mother or father of the person is a citizen.'

⁵⁴⁹ Kenya Citizenship and Immigration Act, 2011 section 7: 'A person born outside Kenya shall be a citizen by birth if on the date of birth that person's mother or father was or is a citizen by birth.'

⁵⁵⁰ Constitution, 2010 article 14 (4): 'A child found in Kenya who is, or appears to be, less than eight years of age, and whose nationality and parents are not known, is presumed to be a citizen by birth.' See also Kenya Citizenship and Immigration Act section 9.

⁵⁵¹ Constitution, 2010 article 15 (3): 'A child who is not a citizen, but is adopted by a citizen is entitled on application to be registered as a citizen.' See also Kenya Citizenship and Immigration Act section 14.

⁵⁵² Kenya Citizenship and Immigration Act section 13 (2): 'A child of a citizen by registration who was born before the parent acquired citizenship may by application by the parent or legal guardian be registered as a Kenyan citizen...'

⁵⁵³ Kenya Citizenship and Immigration Act section 15(1): 'A person who does not have an enforceable claim to the citizenship of any recognised state and has been living in Kenya since 12 December 1963, shall be deemed to have been lawfully resident, and may, on application in the prescribed manner be eligible to be registered as a citizen of Kenya...'

⁵⁵⁴ Open Society Initiative for East Africa 'Briefing paper: implementation of Nubian minors versus Kenya' February 2014, 2-3 (Briefing paper: Implementation of Nubian minors versus Kenya).

⁵⁵⁵ As above.

⁵⁵⁶ As above.

Nubians are required to provide twice the number of supporting documents compared to non-Nubians.⁵⁵⁷

The National Identification and Registration Bill, 2012 which provides for notification and registration of births and deaths and for the identification of Kenya citizens makes registration of every birth in Kenya compulsory.⁵⁵⁸ The Bill makes no provision for additional vetting requirements for ethnic minorities such as Nubians in issuance of registration documents.⁵⁵⁹ However, this is hardly inspiring in view of the fact that the current registration framework on issuance of birth certificates, the Births and Deaths Registration Act, equally does not provide for additional vetting requirements for ethnic minorities. Yet in practice administrative circulars exist that require and enforce such vetting. As of October 2015, the National Registration and Identification Bill, 2012 has not been enacted despite having been finalised in 2012. Instructively the findings of the African Committee on the Child required the government to take administrative measures to address the issue of nationality. Such measures would include revocation of the discriminatory circulars. There is no evidence of any such measures.

The findings relating to Nubian children acquisition of nationality and birth certificates have not been implemented.

2.6.2 Birth registration

(i) Ensure free of charge registration at all stages of the registration process (CRC Committee 2001, 2007); (ii) take appropriate measures to register children not registered at birth (CRC Committee 2001, 2007); (iii) introduce mobile birth registration units for remote areas (CRC Committee 2007); (iv) remove prohibition of birth registration of children born to foreign fathers (CRC Committee 2007).

On free registration of births at all stages, there is no firm count on the number of registered and unregistered children in Kenya. In 2008, the rate of birth registration in Kenya was 64% in urban areas and 44% in rural areas with significant disparities across rural areas.⁵⁶⁰ Birth registration is free for all births registered within six months.⁵⁶¹ For births registered outside the six months period, the government imposes a punitive charge of Kenya shillings 150 in addition to requiring production of a non-exhaustive list of documents.⁵⁶² Whether the imposition of the penalties for late registration tips the balance in favour of timely registration is debatable particularly in the absence of statistical data. The National Registration and Identification Bill, 2012 makes birth registration compulsory and reduces the time period for free birth registration to three months.⁵⁶³ Further, the Bill places the duty to register a birth on both the mother and father and in the absence of parents an occupier of a house where the

⁵⁵⁷ Briefing paper: implementation of Nubian minors versus Kenya (n 554 above) 3.

⁵⁵⁸ National Registration and Identification Bill, 2012 clause 8: 'Subject to the provisions of this Act, registration of every birth in Kenya is compulsory. '.

⁵⁵⁹ National Registration and Identification Bill, 2012.

⁵⁶⁰ UNICEF 'State of the World Children 2009: maternal and newborn health'. The rate of birth registration in Central Province is 74-84% and 6-8% in parts of Eastern, North Eastern and Rift Valley Provinces.

⁵⁶¹ Office of the President, Ministry of Interior and Coordination of National Government, immigration and registration of persons, applying for a birth certificate, <http://www.crd.go.ke/index.php/applying-for-a-birth-certificate> (18 April 2014).

⁵⁶² As above.

⁵⁶³ National Registration and Identification Bill, 2012 clauses 8 and 10.

birth occurred or persons having charge over the child.⁵⁶⁴ The Bill also outlines the particulars required for registration of a birth thus simplifying the procedure of birth registration.⁵⁶⁵ In addition the Bill criminalises failure to register a birth.⁵⁶⁶

On mobile units for birth registrations, although the National Registration Bureau has mobile registration units, most areas in Kenya remain unreached.⁵⁶⁷ Illustratively in June 2010 a question was raised in Parliament relating to lack of district registration officers in Northern Kenya.⁵⁶⁸ While the question did not relate specifically to mobile birth registration units, the absence of birth registration services in the area demonstrates inadequacy in the implementation of the recommendation on mobile birth registration units. Similarly on taking measures to ensure that all unregistered children are registered, a number of government initiatives have been put in place. In October 2009 the government issued a directive requiring all children to present birth certificates as a condition for admission into the free primary education programme and registration for national examinations.⁵⁶⁹ While the directive resulted in increased birth registration, the government's motive was to reduce examination cheating through proper identification of students by preventing impersonation.⁵⁷⁰ In addition, birth registration is one of the specific objectives of the cash transfer programme for orphans and vulnerable children already discussed above.⁵⁷¹

The recommendations relating to birth registration are not implemented. The government has as of October 2015 not put in place measures to ensure free birth registration at all stages while penalties still exist for late registration. Similarly, the National Registration and Identification Bill, 2012 presupposes the imposition of penalties for late birth registration – those occurring after three months.

2.6.3 Child adoption

- (i) Establish a comprehensive policy and guidelines on adoptions in line with international standards (CRC Committee 2001, 2007, UPR 2010);
- (ii) ensure compliance with legislation governing adoption (CRC Committee 2007).

In relation to child adoption, the Children Act and the Children (Adoption) Regulations 2005 constitute the legal framework for adoption in Kenya.⁵⁷² The Act establishes an Adoption Committee mandated to formulate policy governing adoptions and monitor adoption activities

⁵⁶⁴ National Registration and Identification Bill, 2012 clause 11.

⁵⁶⁵ National Registration and Identification Bill, 2012 clause 12.

⁵⁶⁶ National Registration and Identification Bill, 2012 clause 46.

⁵⁶⁷ Ministry of Interior and Coordination of National Government, National Registration Bureau, <http://www.mirp.go.ke/index.php/departments/national-registration-bureau> (19 April 2014).

⁵⁶⁸ Parliament of Kenya, National Assembly official Hansard, 30 June 2010, <http://www.mirp.go.ke/index.php/departments/national-registration-bureau> (19 April 2014).

⁵⁶⁹ 'New rules for joining school' *Daily Nation* 29 October 2009, 60.

⁵⁷⁰ Parliament of Kenya, National Assembly official Hansard, 30 June 2010, <http://www.parliament.go.ke/plone/archive/archive-10th-Parliament/hansards/official-records-30.06.10p/view> (19 April 2014).

⁵⁷¹ Ministry of Labour, Social Security and Services, Departments, National Social Protection secretariat, <http://www.socialprotection.go.ke/index.php/national-safety-net-program/cash-transfer-orphaned-and-vulnerable-children-ct-ovc> (19 April 2014).

⁵⁷² See generally Children Act part XII section 154-183 and Children Adoption Regulations 2005.

in Kenya.⁵⁷³ The Act also provides for international adoptions subject to the international adopters satisfying the court that the country they intend to reside in will recognise the adoption order and grant the adopted child resident status.⁵⁷⁴ The jurisdiction to hear and determine adoption applications is solely vested in the High Court.⁵⁷⁵ In the specific context of international adoptions, a gap existed in the absence of the ratification of Hague Convention on Protection of Children and Cooperation in Respect of Inter-country Adoptions as there was no protection of children in international adoptions from child trafficking and other crimes. Kenya ratified the Hague Convention on Protection of Children and Cooperation in respect to Inter-country Adoption in February 2007, which became operational in June 2007.⁵⁷⁶ However, Kenya is yet to formulate guidelines and regulations that mirror the procedural framework set out in the Hague Convention. While the National Children Policy commits the state to domesticate the Hague Convention,⁵⁷⁷ as of October 2015 the guidelines and policy framework on international adoptions are not in place. In November 2014, the Cabinet adopted an indefinite moratorium on all international adoptions citing the Global Report on Trafficking in Persons, 2014 which reported an increase in child trafficking cases in Kenya.⁵⁷⁸

The recommendation is therefore not implemented.

2.6.4 Respect for the views and participation of the child

- (i) Promote, facilitate and implement the principle of respect for the views of children and their participation in all matters affecting them (CRC Committee 2001, 2007).

Although the Constitution, 2010 does not expressly provide for the right to participation including respect for the view of the child under the children's rights provision, scholars have argued that this right is implied.⁵⁷⁹ The basis for this argument is that the Constitution states that the rights listed in the provision on children are neither limiting nor qualifying of the general rights contained in the Bill of Rights.⁵⁸⁰

The Children Act designates children as subjects of rights and active agents. The Act requires children to be given an opportunity to express their opinion in matters affecting them and the opinions to be taken into account subject to the child's age and degree of

⁵⁷³ Children Act section 155 (1): 'The Minister shall establish a committee to be known as the Adoption Committee... (2) (a): 'formulating the governing policy in matters of adoption; (d) monitoring adoption activities in the country'.

⁵⁷⁴ Children Act section 162: 'An adoption order may be made in respect of a child upon the joint application of two spouses who are not Kenyan citizens and not resident in Kenya (in this Act referred to as an "international adoption")...'

⁵⁷⁵ Children Act section 154 (1): 'Subject to this Act, the High Court may upon an application made to it in the prescribed form make an order (in this Act referred to as an "adoption order") authorising an applicant to adopt a child.'

⁵⁷⁶ Hague Conference on Private International Law, Convention of 29 May 1993 on Protection of Children and Cooperation in Respect of Inter-Country Adoption, status table, http://www.hcch.net/index_en.php?act=conventions.status&cid=69 (19 April 2014).

⁵⁷⁷ National Children Policy 2008, 12.

⁵⁷⁸ Standard Digital News 'Kenya Government bans adoption of children by foreigners' 29 November 2014, <http://www.standardmedia.co.ke/article/2000142876/state-bans-adoption-of-children-by-foreigners> (12 December 2014).

⁵⁷⁹ Odongo (n 287 above) 120-121.

⁵⁸⁰ As above.

maturity.⁵⁸¹ Similarly, the National Children Policy provides for participation of children and commits the government to establish forums for children to promote expression of their opinions.⁵⁸² The National Guidelines on Child Participation were launched in 2008.⁵⁸³ The Guidelines outline the values and standards of child participation which include the principle of the best interests of the child and non-discrimination, provision of timely and full information to help the child decide whether to participate and upholding respect and dignity of the child.⁵⁸⁴ In 2011 the government established Children Assemblies in all the 47 counties to create a state funded formal and sustainable mechanism for children to participate and influence policy.⁵⁸⁵ The Guidelines for Establishment and Management of Child Assemblies were also developed in 2011 to provide strategies for participation of children.⁵⁸⁶ The second Children Assembly was held in April 2013.⁵⁸⁷ On dissemination of Guidelines on Children Participation, little progress has been made. Although, the National Children Policy 2008 commits the government to popularise child participation guidelines,⁵⁸⁸ reports indicate that child participation guidelines have not been distributed to marginalised areas and that participation of children with special needs and from marginalised areas remains a challenge.⁵⁸⁹ In addition to the Guidelines on Child Participation and the Children Assemblies, other forms of participation include participation of children in the collection and compilation of data on the initial and second periodic state report.⁵⁹⁰

The recommendations relating to respect of the views of the child and participation are fully implemented. However, dissemination of the Guidelines on Child Participation has been partially implemented. While the Guidelines on Child Participation make reference to the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child, no specific mention is made of the recommendations of monitoring mechanisms.

2.7 Mechanisms for the national implementation of children's rights

(i) Adopt a national action plan (CRC Committee 2007; UPR 2010); (ii) establish a children's rights unit in the Kenya National Human Rights Commission (CRC Committee 2007).

The National Action Plan on children and children rights was developed for 2008-12 with a view to providing operational guidelines for stakeholders and funding agencies for programming and implementing children rights. The Plan was however never adopted by

⁵⁸¹ Children Act section 4 (4): 'In any matters of procedure affecting child, the child shall be accorded an opportunity to express his opinion and that opinion shall be taken into account as may be appropriate taking into account the child's age and degree of maturity.'

⁵⁸² National Children Policy 2008, 12.

⁵⁸³ Save the Children 'Promoting child rights: reflections of key process of children sector in Kenya from 1989 onwards', 2012, 50.

⁵⁸⁴ As above.

⁵⁸⁵ Promoting child rights (n 583 above) 51.

⁵⁸⁶ As above.

⁵⁸⁷ UNICEF 'Devolution makes great strides in child participation' Nairobi, 3 May 2013, http://www.unicef.org/kenya/media_12538.html (19 April 2014).

⁵⁸⁸ National Children Policy, 12.

⁵⁸⁹ Promoting children rights (n 583 above) 53.

⁵⁹⁰ Odongo (n 287 above) 121.

government. The National Action Plan 2013-2017 has been finalised but is yet to be adopted as of October 2015, despite a commitment to adopt the National Action Plan by 2017.⁵⁹¹

In relation to establishment of a children's unit at the Kenya National Commission on Human Rights, the finding has not been implemented as of October 2015. The institutional framework for handling children related matters in Kenya comprises of the National Council on Children Services and the Department of Children's Services. The National Council on Children Services is mandated to exercise supervision and control on matters affecting children and to advise the government on policy matters.⁵⁹² Conversely, the Department of Children's Services, headed by a Director of Children's Services, is the technical unit mandated to implement the provisions of the Children Act.⁵⁹³ This institutional framework has a number of shortcomings. First, there is lack of clear separation of functions between the Council and the Department of Children's Services leading to a weak Council hence poor policy formulation.⁵⁹⁴ Second, there is no specific mechanism dealing with cases of human rights violations against children. Although, the Constitution, 2010 specifically addresses itself to the rights of children in Article 53, it does not establish any special mechanism to deal with rights of children. The Kenya National Commission on Human Rights is mandated to monitor, investigate and report on the observance of all rights contained in the Bill of Rights with the exception of human rights relating to special interest groups in the context of equality and non-discrimination which are under the ambit of the National Gender and Equality Commission.⁵⁹⁵

The Kenya National Human Rights Commission has designated one commissioner to deal with children matters,⁵⁹⁶ although there is institutional framework required to address violations to the rights of children. The creation of units to deal with the rights of children has featured in national debates particularly the constitutional review process. In 2002 proposals to the Constitution of Kenya Review Commission on gender rights recommended the creation of children ombudsmen to address the specific rights of children.⁵⁹⁷ The proposal

⁵⁹¹ Ministry of Labour, Social Security and Services, strategic plan 2013- 2017, 14.

⁵⁹² Children Act section 32 (1): 'The object and purpose for which the Council is established is to exercise general supervision and control over the planning, financing and coordination of child rights and welfare activities and to advise the Government on all aspects thereof.'

⁵⁹³ Children Act section 38 (1): 'The Director shall safeguard the welfare of children and shall in particular, assist in the establishment, promotion, co-ordination and supervision of services and facilities designed to advance the well being of children and their families.'

⁵⁹⁴ National Council for Children Services 'Summary of the outcome of mapping and assessing Kenya's children protection system: strengths, weaknesses and recommendations' December 2010, 11, <http://resourcecentre.savethechildren.se/library/summary-outcome-mapping-and-assessing-kenyas-child-protection-system-strengths-weaknesses> (19 April 2014).

⁵⁹⁵ Constitution, 2010 articles 59 (2) (d) read together with Kenya National Commission on Human Rights Act, 2010 section 8 (f). Article 59 (2) (d) : 'The functions of the Commission are – to monitor, investigate and report on the observance of human rights in all spheres of life in the Republic including observance by the national security organs'. Kenya National Commission on Human Rights Act, 2011 section 8 (f): 'The functions of the Commission shall be to – 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.'

⁵⁹⁶ Interview with D Rono, Principal Human Rights Officer, Kenya National Commission on Human Rights, Nairobi, 27 March 2015.

⁵⁹⁷ M Nzomo and P Kameri-Mbote 'Gender issues in the draft Bill of the Constitution of Kenya: an analysis' (2003) ILERC working paper, 6 <http://www.ielrc.org/content/w0301.pdf> (19 April 2014).

however was never incorporated in the Constitution. Nonetheless, the government in its 2013-2017 planning process undertakes to establish of a children's ombudsman by 2017.⁵⁹⁸

The recommendation relating to adoption of a national action plan on children's rights is partially implemented as the government has indicated its willingness to adopt it. Similarly, the recommendation on establishment of a child unit in the national human rights institutions is considered partially implemented in view of the government commitment to establish a children's ombudsman.

⁵⁹⁸ Ministry of Labour, Social Security and Services, strategic plan 2013-2017, 5.

3 Rights of collective groups

This final section reviews findings and recommendations of collective groups. The recommendations are grouped in the following broad categories: recommendations relating to indigenous peoples and minorities, internally displaced persons, refugees, persons with disability and ethnic discrimination. The findings from the African Commission and the African Court relating to the Endorois and the Ogiek community respectively are discussed separately under indigenous peoples and minorities rights.

3.1 Indigenous peoples and minorities

Although indigenous peoples have acquired distinct legal standing under international law, the question of ‘who are indigenous peoples?’ lacks a definitive answer despite much debate. The absence of a definitive answer at the international level has led to varying interpretations and uncertainty. The UN Declaration on the Rights of Indigenous Peoples (Declaration on Indigenous Peoples), though an authoritative instrument on the rights of indigenous people, provides no formal definition of ‘indigenous people’.⁵⁹⁹ Nonetheless, it contains indications of characteristics common to all indigenous peoples. These are: historical injustice as a result of colonisation and dispossession of their original lands and resources, a spiritual attachment to their traditional lands and resources and preservation and flourishing cultural heritage.⁶⁰⁰ Kenya abstained from voting during the adoption of the Declaration in September 2007.⁶⁰¹ At the regional level and in the specific context of Africa, the definition of indigenous peoples is even more contested. The African Commission on Human and Peoples’ Rights adopts a more flexible approach on the definition of indigenous peoples which is not based on aboriginality but instead identifies a set of characteristics common to indigenous peoples.⁶⁰² These characteristics include: marginalisation, discrimination, exclusion from developmental processes, occupation and use of specific territory, voluntary perpetuation of cultural distinctiveness and survival of their particular way of life which is premised to access and right to their traditional land and natural resources.⁶⁰³

Turning to treaty law on the definition of indigenous peoples, the International Labour Organization Convention 169 on Indigenous and Tribal Peoples states that it applies to people regarded as indigenous on account of their descent from populations that inhabited the country or a part of the country at the time of colonisation or the establishment of present day state boundaries.⁶⁰⁴ Under international law, a treaty only applies to those countries that

⁵⁹⁹ UN Declaration on the Rights of Indigenous Peoples, GA Res. 61/295, 13 September 2007.

⁶⁰⁰ UN Declaration on the Rights of Indigenous Peoples, p 2.

⁶⁰¹ Office of the High Commission for Human Rights, Declaration on the rights of indigenous people, <http://www.ohchr.org/EN/Issues/!Peoples/Pages/Declaration.aspx> (accessed 25 October 2015).

143 three States including 34 African States voted in favour of the Declaration. Burundi, Kenya and Nigeria abstained from voting. Ethiopia, Morocco, Rwanda and Uganda were absent from the Assembly.

⁶⁰² African Commission on Human and Peoples’ Rights, Advisory opinion of the African Commission on Human and Peoples’ Rights on the United Nations Declaration on the Rights of Indigenous Peoples para 12 & 13.

⁶⁰³ As above.

⁶⁰⁴ Convention concerning Indigenous and Tribal Peoples in Independent Countries, 27 June 1989, 28 ILM 1382 (entered into force on 5 September 1991).

have ratified it. As of August 2015, only 22 states had ratified the Convention. Kenya is not among the ratifying states.⁶⁰⁵

In Kenya, the position on indigenous peoples is rather contentious. The official government position is embodied in its response to recommendations on the rights of indigenous persons during the 2010 Universal Peer Review process.⁶⁰⁶ The government in that instance stated that the term 'indigenous peoples' is not applicable to Kenya as all Kenyans of African descent were indigenous to Kenya.⁶⁰⁷ Nonetheless, the government stated that it recognised marginalised communities and minorities.⁶⁰⁸ The Constitution, 2010 does not include a textual expression on the rights of 'indigenous peoples' in the Bill of Rights. It instead recognises and protects the rights of minorities and marginalised groups as a special category of persons.⁶⁰⁹ The term 'indigenous community' is expressly mentioned in the definition of 'marginalised community',⁶¹⁰ thus the Constitution of Kenya does recognise and protect the rights of indigenous peoples as a special category of peoples. In addition, Kenya's international obligations in relation to the rights of indigenous peoples flow from international instruments that Kenya is a state party.⁶¹¹

The assessment thus focuses on Kenya's implementation of the rights of indigenous persons in the context of the rights of minorities and marginalised groups. The Constitution uses the terms marginalised groups and minorities interchangeably. A marginalised group is defined to mean a group of people who have been disadvantaged by discrimination through the operation of laws or practices.⁶¹² This definition of marginalised group is too wide and has the effect of masking out real minorities. For instance, an analysis on women as a marginalised group will certainly obscure the situation of women from minority groups. On the other hand, a marginalised community is defined broadly to mean numerically inferior communities, traditional communities not assimilated in the integrated social economic life, indigenous community embracing a traditional lifestyle and livelihoods and pastoral persons

⁶⁰⁵ International Labour Organization, Ratifications of C169, Conventions that have not ratified this Convention, http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11310:0::NO:11310:P11310_INSTRUMENT_ID:312314:NO (accessed 25 October 2015).

⁶⁰⁶ UN General Assembly 'Report of the Working Group on the Universal Periodic Review: Kenya' A/HRC/15/8, para 109.

⁶⁰⁷ As above

⁶⁰⁸ As above.

⁶⁰⁹ Constitution, 2010 article 56: 'The State shall put in place affirmative action programmes designed to ensure that minorities and marginalised groups...'

⁶¹⁰ Constitution, 2010 article 260: 'In this Constitution, unless the context requires otherwise – "marginalised community" means – (c) an indigenous community that has retained and maintained a traditional lifestyle and livelihood based on a hunter or gatherer economy;'

⁶¹¹ The Human Rights Committee of the International Covenant on Civil and Political Rights in its General Comment 23 has interpreted Article 27 as requiring States to protect the rights of minorities and indigenous peoples. The Committee on Economic, Social and Cultural Rights in General Comment 21 sets out State obligations in relation to the right to culture under the International Covenant on Economic, Social and Cultural Rights. The Committee on the Elimination of Racial Discrimination in its General Recommendation 23 calls upon States to respect and ensure the rights of indigenous peoples. While General Comments and Recommendations of these UN treaty monitoring bodies are not legally binding on States, they are authoritative interpretations of the treaties that provide practical guidance for States in implementation of treaties.

⁶¹² Article 260: 'Marginalised group means a group of people who, because of laws or practices before, on, or after the effective date, were or are disadvantaged by discrimination on one or more of the grounds in Article 27 (4).'

and communities.⁶¹³ The Constitution, 2010 is silent on the definition of ‘minorities’, perhaps reflecting the fact that there exists no internationally accepted definition. The analysis will thus assess the rights of indigenous peoples in the context of minorities and marginalised communities. The controversy posed by equating the status of indigenous peoples to that of minorities is well acknowledged, since indigenous peoples may in some instances be a majority. However, in the Kenyan context there is convergence between indigenous peoples and ethnic minorities as most of the indigenous peoples also constitute the smaller ethnic groups. Hence it is possible to consider the rights of indigenous peoples in the context of minority rights without venturing into the broader debate on distinctions.

The general recommendations on rights of indigenous persons are grouped into: political rights, land rights, recognition of indigenous peoples and legal aid.

3.1.1 Political rights

(i) Reform the electoral system to facilitate political representation of indigenous people (African Commission SM 2011); (ii) review issuance of national Identity Cards to prevent discrimination against indigenous people (African Commission SM 2011, SR IP 2007).

Kenya has historically practised majoritarian system of electoral politics which gives undue advantage to large ethnic groups and disadvantages minorities. Minimal constitutional mechanisms for representation of minorities were introduced in the repealed Constitution in 1997, which provided for nomination of ‘special interest groups’.⁶¹⁴ The High Court in 2006 interpreted ‘special interest groups’ to include small marginalised communities.⁶¹⁵ The Constitution, 2010 embodies a range of general principles for fair representation and equality of vote: it guarantees the freedoms of all citizens to exercise their political rights, requires proportionate representation by providing that not more than two thirds of members of elective bodies will be of the same gender, fair representation of persons with disabilities and universal suffrage.⁶¹⁶

In relation to representation of minorities, the Constitution, 2010 binds all political parties to respect the rights of minorities to participate in the political process.⁶¹⁷ Further, the Constitution, 2010 obligates Parliament to enact legislation for the promotion of

⁶¹³Article 260: ‘“Marginalised community” means – (a) a community that, because of its relatively small population or for any other reason, has been unable to fully participate in the integrated social and economic life of Kenya as a whole; (b) a traditional community that, out of need or desire to preserve its unique culture and identity from assimilation, has remained outside the integrated social and economic life of Kenya as a whole; (c) an indigenous community that has retained and maintained a traditional lifestyle and livelihood based on a hunter and gatherer economy; or (d) pastoral persons and communities, whether they are – (i) nomadic; or (ii) a settled community that, because of its relative geographic isolation, has experienced only marginal participation in the integrated social and economic life of Kenya as a whole’.

⁶¹⁴Constitution, 1963 (2008) section 33 (2): ‘Subject to this section, there shall be twelve nominated members of the National Assembly appointed by the President following a general election to represent special interests.’

⁶¹⁵ *Lemeiguran and others v Attorney-General and others* (2006) AHRLR 281 (KeHC 2006).

⁶¹⁶ Article 81: ‘The electoral system shall comply with the following principles (a) freedom of citizens to exercise their political rights under Article 38; (b) not more than two-thirds of the members of elective public bodies shall be of the same gender; (c) fair representation of persons with disabilities; (d) universal suffrage based on the aspiration for fair representation and equality of vote’.

⁶¹⁷ Article 91(1) (e): ‘Every political party shall respect the right of all persons to participate in the political process, including minorities and marginalised groups’.

representation of ethnic and other minorities and marginalised communities.⁶¹⁸ These provisions fall short in concretizing the rights of minorities to representation for the following reasons. First, the requirement for parties to respect the rights of minorities to participate in political processes imposes no positive obligation on political parties. Second in regard to the envisaged legislation, the requirement is for 'promotion' of representation of marginalised groups. The word 'promotion' is ambiguous and makes the state duty in relation to representation of minorities less precise than if the word 'guarantee' was used. Notably, the envisaged legislation on promotion of representation of minorities was to be enacted by August 2015.⁶¹⁹

The electoral system at both the national and county level is based on single member electoral units elected on the basis of first-past-the-post. Representation of minorities in this system is pegged on their being elected in the single-member units thus bringing into focus the issue of electoral boundaries. The Constitution, 2010 outlines the factors to be taken into consideration in the delimitation of electoral units which include among others 'community of interest, historical, economic and cultural ties'.⁶²⁰ However, geographical size and number of persons in a constituency take primacy over 'community of interest, historical, economic and cultural ties'.⁶²¹

The Constitution, 2010 provides for delimitation of additional electoral units which would come into effect during the 2013 elections.⁶²² In practice the process was largely contested resulting in 77 judicial review petitions on the final outcome of the electoral units delimitation.⁶²³ In relation to minorities, the High Court addressed itself to the issue of 'community of interest' which it stated was broader than socio-economic factors and extended to shared history, values, culture, common ethnic and tribal background and other ties.⁶²⁴ In determining the petitions, the High Court made orders on re-adjustment of a number of boundaries to accommodate minority representation. In the particular case of the Ogiek community, the Court directed an adjustment of the ward boundaries to bring the Ogiek in one electoral unit thus securing representation by one of their own.⁶²⁵ However, in the petition concerning the Endorois community, the Court stated that it was not able to order their placement in one electoral constituency as they were scattered throughout the region.⁶²⁶ Therefore, it can be argued that the electoral system adopted in Constitution, 2010 does not contain tangible safeguards for minority representation.

⁶¹⁸ Article 100 (d) & (e): 'Parliament shall enact legislation to promote the representation in Parliament of ethnic and other minorities; and marginalised communities.'

⁶¹⁹ Constitution, 2010 article 260, fifth schedule.

⁶²⁰ Article 89 (5): 'The boundaries for each constituency shall be such that the number of inhabitants in the constituency is, as nearly as possible, equal to the population quota, but the number of inhabitants of a constituency may be greater or less than the population quota in the manner specified in clause (6) to take account of – (a) geographical features and urban centres, community of interest, historical, economic and cultural ties; and means of communication.'

⁶²¹ As above.

⁶²² Article 89; See also Legal Notice 14 of 2012

⁶²³ *Micah Kigen and 2 others v Attorney General and 2 others* [2012] eKLR.

⁶²⁴ *Republic v Independent Electoral and Boundaries Commission & another ex parte councillor Eliot Lidubwi Kihusa & 5 others* [2012] eKLR.

⁶²⁵ As above

⁶²⁶ As above.

On proportional representation, the Constitution, 2010 embodies a form of proportional representation. In regard to minorities, there is no quota allocated for marginalised communities. The Constitution, 2010 however, allocates 12 seats in the National Assembly for persons representing special interests.⁶²⁷ The special interests are defined to include the youth, persons with disabilities and workers.⁶²⁸ The question that arises is if the use of 'include' envisions incorporation of minorities in the special interests. The High Court has weighed in on what constitutes 'special interest' as provided for in the Constitution, 2010. The Court stated that the nature and extent of what constitutes minorities is to be defined by the party nominating candidates for the 'special interest' seats.⁶²⁹ Further, that special interests must be defined broadly to cover other interests identified by political parties and ought not to be restricted to the categories of special interests identified by the Constitution, 2010.⁶³⁰ The import of this interpretation is that it widened the definition of 'special interest' such that minorities would have to compete with other 'interests' thus limit their chances of nomination to the National Assembly. Following the 2013 elections of the 12 seats reserved for nomination of persons representing special interests in the National Assembly, only four were awarded to persons specifically representing minority communities.⁶³¹

In relation to minority representation in the county governments, the Constitution, 2010 requires Parliament to enact legislation to prescribe mechanism for protection of minorities within counties.⁶³² Consequently, the County governments Act requires political parties in nomination of persons to the county assembly to ensure representation of minorities.⁶³³

Further, the Constitution, 2010 includes a provision for independent candidates.⁶³⁴ However, the provision is likely to be unhelpful for minority representation since political party candidates are likely to remain dominant in the future. Illustratively, in the 2013 general election only three members of Parliament were elected as independent candidates out of 337 elective seats.⁶³⁵

The issue of representation of ethnic minorities has not featured much in the public debate, although as discussed above minority groups initiated litigation on the delimitation of electoral units for political representation.

⁶²⁷ Article 97 (1): 'The National Assembly consists of ... (c) twelve members nominated by parliamentary political parties according to their proportion of members of the National Assembly in accordance with Article 90, to represent special interests including youth, persons with disabilities and workers'.

⁶²⁸ As above.

⁶²⁹ *Micah Kigen and 2 others v Attorney General and 2 others* [2012] eKLR

⁶³⁰ As above.

⁶³¹ Parliament of Kenya, National Assembly, members, <http://www.parliament.go.ke/plone/national-assembly/members-of-the-national-assembly/members> (accessed 18 December 2014).

⁶³² Article 197 (2) (b): 'Parliament shall enact legislation to prescribe mechanisms to protect minorities within counties.'

⁶³³ County Government Act section 7(2)(b): 'The political party nominating persons under sub-section 1 shall ensure that there is adequate representation to protect minorities within the county in accordance with Article 197 of the Constitution.'

⁶³⁴ Article 99 (1) (c): '... a person is eligible for election as a member of Parliament if the person is nominated by a political party, or is an independent candidate who is supported – (i) in the case of election to the National Assembly, by at least one thousand registered voters in the constituency; or (ii) in the case of election to the Senate, by at least two thousand registered voters in the county.'

⁶³⁵ Parliament of Kenya, National Assembly, members, <http://www.parliament.go.ke/plone/national-assembly/members-of-the-national-assembly/members> (28 May 2014).

The recommendation on political representation of minorities has thus been partially implemented through the constitution review process. It is reasonable to argue that the recommendation could only be implemented through the constitution review process as it required an overhaul of the electoral system. However, the constitutional provisions as demonstrated above the constitutional provisions as of October 2015 are inadequate as they do not provide concrete safeguards to ensure representation of minorities. It is envisaged that the constitutionally mandated legislation on representation of minorities will incorporate concrete safeguards for minority representation.

On discrimination in issuance of identity cards for minorities, acquisition of a national identity card in Kenya enables the bearer to enjoy rights while also assuming a set of responsibilities, though it does not serve as proof of citizenship or nationality. Kenya privileges indigeneity and autochthonous ethnicity in its construction of citizenship.⁶³⁶ Resultantly, persons perceived to be 'ethnic strangers' or 'non-indigenous' Kenyans such as Nubians, Coastal Arabs, Asians and Kenyan Somali's are discriminated against in accessing national identification documents. A number of research studies have documented discriminatory practices against minorities in accessing national identification documents.⁶³⁷

The legal framework relating to registration and issuance of national identity cards is embodied in the Registration of Persons Act which is enforced by the National Registration Bureau.⁶³⁸ The Registration of Persons Act requires every person in Kenya upon attaining 18 years to register with the National Registration Bureau and obtain a national identity card.⁶³⁹ It criminalises failure to register. The registration process requires one to prove their age usually by a birth certificate and proof of citizenship.⁶⁴⁰ Proof citizenship is governed by the Constitution and the Kenya Citizenship and Immigration Act. The Registration of Persons Act does not specify which documents are required to prove citizenship but instead vests wide discretion on registration officers to determine the required documentation.⁶⁴¹ In practice, citizens by birth are required to produce their parent's identity cards while citizens by registration and naturalisation produce certificates of registration as a Kenyan citizen. The requirements for Nubians, Coastal Arabs, Asians and Kenyan Somali's where citizenship by birth is claimed vary since they are required to provide their grandparent's or great-grandparent's identity cards as proof of citizenship. In addition, 'non-indigenous' persons are also subjected to administrative vetting to determine whether they are Kenyans. The basis of

⁶³⁶S Balaton-Chrimes *Ethnicity, democracy and citizenship in Africa: political marginalisation of Kenya's Nubians* (2015) 129.

⁶³⁷ Kenya National Commission on Human Rights 'Identity crisis: A study on the issuance of national identity cards in Kenya' 2007, <http://www.knchr.org/Portals/0/EcosocReports/KNCHR%20Final%20IDs%20Report.pdf> (1 July 2014); Kenya Human Rights Commission 'Foreigners at home: the dilemma of citizenship in Kenya' 2008; Open Society 'Out in the cold: vetting for nationality in Kenya' 2011, <http://www.opensocietyfoundations.org/voices/out-cold-vetting-nationality-kenya> (1 July 2014).

⁶³⁸Office of the President, Ministry of Interior, National Government Coordination, Immigration and Registration of Persons, National Registration Bureau <http://www.mirp.go.ke/index.php/departments/national-registration-bureau> (28 May 2014).

⁶³⁹ Registration of Persons Act section 6.

⁶⁴⁰ Registration of Persons Act section 5.

⁶⁴¹ Registration of Persons Act section 8: 'A registration officer may require any person who has given any information in pursuance of this Act or rules made there under to furnish such documentary or other evidence of the truth of that information as it is within the power of such person to furnish.'

the requirement to produce grandparent's identity card and the vetting process is rooted in practice.

The Constitution, 2010 entitles every citizen identification documents.⁶⁴² The Registration and Identification of Persons Bill, 2014 contains the provisions for registration and issuance of national identity cards under the Constitution, 2010. The Bill does not expressly outline the documents required for issuance of a national identity card. It instead vests discretion to determine the documents or other evidence required to prove information provided for issuance of a national identity card in the registrar of persons.⁶⁴³ In instances in which citizenship is in doubt, the Bill provides for the establishment of an identification and registration committee to adjudicate over applications of registration and subsequent issuance of national identity cards.⁶⁴⁴ As of June 2015, the Registration and Identification of Persons Bill, 2014 is yet to be published for Parliamentary debate.

Viewed against the previous legal and administrative provisions on issuance of national identity cards, it is reasonable to argue that the Bill does not contain any safeguards to prevent discrimination against minority groups. This assertion is borne out of the fact that the Bill vests discretion in public officers to determine documents and evidence required to proof citizenship before effecting registration for a national identity card.

The Judiciary has on a number of occasions adjudicated on cases relating to discrimination of minorities in issuance of national identity cards. In 2003, the Nubian community in the case of *Yunis and 100,000 others v Attorney General & 2 others* filed a petition seeking the intervention of the High Court in relation to their denial of citizenship.⁶⁴⁵ Following delays in empanelment, the case was in 2005 submitted to the African Commission on Human and Peoples' Rights.⁶⁴⁶ An aspect of the case relating to the rights of Nubian children to birth registration was submitted to the African Committee on the Rights and Welfare of Children.⁶⁴⁷ Notably, the High Court petition filed in 2003 has as of August 2015 not been heard. The communication to the African Commission, was decided on merits in May 2015.⁶⁴⁸ In 2010 an Arab of Coastal origin petitioned the High Court after he was denied a national identity card on the ground that he failed to produce his grandfather's national identity card as proof of citizenship.⁶⁴⁹ In January 2011, the High Court suspended the application of a government circular that required production of such documents for Arabs and declared it unconstitutional for discrimination on the basis of ethnicity and religion in the

⁶⁴² Article 12 (b): 'Every citizen is entitled to a Kenyan passport and any other document of registration or identification issued by the State to citizens.'

⁶⁴³ Registration and Identification of Persons Bill 2014 clause 32.

⁶⁴⁴ Registration and Identification of Persons Bill 2014 clause 30.

⁶⁴⁵ HCCC Misc. case no. 467 of 2003.

⁶⁴⁶ *The Nubian Community in Kenya v The State of Kenya*, Communication 317/2006.

⁶⁴⁷ *Institute for Human Rights and Development in Africa and the Open Society Justice Initiative (on behalf of children of Nubian descent in Kenya) v the Government of Kenya*, communication 002 of 2009. In its decision the African Committee on the Rights and Welfare of Children found the State in violation of rights of Kenyan children of Nubian descent to nationality.

⁶⁴⁸ African Commission on Human and Peoples' Rights, communications, <http://www.achpr.org/communications/decision/317.2006/> (accessed 5 August 2015).

⁶⁴⁹ Open Society Foundations 'Out in the cold: vetting for nationality in Kenya' March 2011, <http://www.opensocietyfoundations.org/voices/out-cold-vetting-nationality-kenya> (4 July 2014).

issuance of national identity cards.⁶⁵⁰ In the measures discussed above no reference was made to the findings of monitoring mechanisms in regard to political representation of minorities.

The recommendation has thus not been implemented as of October 2015.

3.1.2 Recognition of minority (indigenous) groups

(i) Recognise pastoral, hunter-gatherer communities as indigenous (SR IP 2007); (ii) identify indigenous people through the 2009 Kenya Housing and Population Census (SR IP 2007); (iii) observe the African Commission position on indigeneity and rights of indigenous people (African Commission SM 2011); (iv) promote indigenous languages (African Commission SR 2011, SR IP 2007).

On recognition of pastoral, hunter-gatherer communities as indigenous peoples, the Constitution, 2010 gives credence to the concept of indigeneity by defining a marginalised community to include an indigenous community which is described as one 'that has retained and maintained a traditional lifestyle and livelihood based on a hunter-gatherer economy'.⁶⁵¹ Similarly, the definition of marginalised community also incorporates pastoral persons and communities whether nomadic or settled.⁶⁵² However, the Constitution, 2010 makes no mention of any specific group or enumerate any groups. Instructively, minority groups through their local organisations actively engaged with the constitution review process since 2000 mainly by collecting community views and submitting memoranda to the review process.⁶⁵³ The Ogiek and Sengwer groups made specific submissions in 2009 and 2002 to be recognised and listed as indigenous groups in the national constitution.⁶⁵⁴ However, none of the draft constitutions made mention of any specific minority group. Recognition of minority groups was first provided for in the draft constitution published in 2004 (Bomas draft). This draft recognised pastoralist, hunter and gatherer communities as marginalised communities. However, this provision was removed in the draft constitution published in 2005. The provisions were nonetheless reinstated during the finalisation of the constitution review process in 2009, which has been attributed to the 2007/08 post election violence and the subsequent political settlement which required the state among other things to address issues relating to ethnic minorities and exclusion.⁶⁵⁵ This view finds support in the fact that the Kenya National Dialogue and Reconciliation resolutions pointed out that inequitable distribution of resources and exclusion of segments of the Kenyan populace led to the violence.⁶⁵⁶

As discussed later in chapter six, this finding was expressly referenced by the Committee of Experts in 2009 during the finalisation of the constitution review process by a member of the

⁶⁵⁰ As above.

⁶⁵¹ Article 260.

⁶⁵² Article 260: 'marginalised community means – (d) pastoral persons and communities, whether they are (i) nomadic; or (ii) a settled community that, because of its relative geographic isolation, has experienced only marginal participation in the integrated social and economic life of Kenya as a whole'.

⁶⁵³ KS Abraham 'Kenya at 50: unrealized rights of minorities and indigenous peoples' 2012, 16.

⁶⁵⁴ Abraham (n 653 above) 16-19.

⁶⁵⁵ J Cottrel- Ghai *et al* 'Taking diversity seriously: minorities and political participation in Kenya' 2013, 2.

⁶⁵⁶ Kenya National Dialogue and Reconciliation, Agreements, 'Annotated agenda for the Kenya Dialogue and Reconciliation' <http://www.dialoguekenya.org/Agreements/1%20February%202008%20-Annotated%20Agenda%20for%20the%20Kenya%20Dialogue%20and%20Reconciliation.pdf> (28 May 2014).

Committee, himself a member of an indigenous community, in support to a proposal to expressly list indigenous groups in the draft constitution.⁶⁵⁷ The proposal was nonetheless rejected on the ground that there was need for flexibility in regard to which groups can be classified as indigenous.⁶⁵⁸ This position taken by the Committee of Experts not to expressly list any group in the draft constitution reflects the government view that all Kenyans are indigenous.⁶⁵⁹ The finding is fully implemented notwithstanding the lack of express listing of the groups. Further, it is notable that the Committee of Experts made express reference to the recommendation of the special rapporteur on indigenous persons. This issue is further taken up in chapter eight, section 4.2.

On observing the African Commission position on indigeneity, the African Commission identifies marginalisation, exclusion from developmental process, attachment to traditional and ancestral land for survival as distinct markers of indigeneity.⁶⁶⁰ The Constitution, 2010 interprets a marginalised community to include indigenous communities that have maintained a traditional lifestyle and livelihood based on a hunter-gatherer economy, a traditional community maintained a unique culture outside the integrated social and economic life of Kenya and pastoral persons and communities.⁶⁶¹ This definition recognises the concept of indigeneity and further links indigeneity with marginalisation and exclusion in line with the African Commission position. The recommendation has therefore been fully implemented.

The 2009 Kenya National Population and Housing Census provided disaggregated data based on ethnic affiliation.⁶⁶² Data on some minority/ indigenous communities was for the first time provided listed as ethnic groups or sub-groups.⁶⁶³ However, most hunter and gatherer communities such as the Ogiek, Yaaku and Sengwer were subsumed within the larger Kalenjin community.⁶⁶⁴ Nonetheless, some of the minority groups have disputed the accuracy of data in relation to their numbers. For instance, the Nubians argue that the community code during the census was only communicated to the Nubians in Nairobi, thus Nubians in parts of the country outside Nairobi were counted as 'other', hence the data publicised is not accurate.⁶⁶⁵ Similarly, the Endorois community has disputed that their population is 10,132 and instead claim that they number approximately 60,000.⁶⁶⁶ The

⁶⁵⁷ Committee of Experts on the Constitutional Review 'verbatim record of the proceedings of the plenary meeting of the Committee of Experts on the Constitutional Review held on 19 September 2009 at Delta House, Nairobi' HAC/1/2/11, 21-22 (accessed from the Kenya National Archives on 16 October 2014).

⁶⁵⁸ As above

⁶⁵⁹ Interview with O Amollo, Member Committee of Experts on the Constitutional Review, Kenya, Nairobi, 1 April 2015.

⁶⁶⁰ African Commission on Human and Peoples' Rights Advisory opinion on the United Nations Declaration on the Rights of Indigenous Peoples, November 2007 para 12.

⁶⁶¹ Article 260.

⁶⁶² Kenya National Bureau of Statistics, Kenya 2009 Population and Housing Census, <http://statistics.knbs.or.ke/nada/index.php/catalog/55> (28 May 2014). (Kenya Population and Housing Census 2009)

⁶⁶³ These minority communities included: Ilchamus, Burji, Njemps, Nubi, Endorois, Walwana, Dasenach, Waata.

⁶⁶⁴ Kenya 2009 Population and Housing Census (n 662 above).

⁶⁶⁵ Abraham (n 653 above) 6.

⁶⁶⁶ National Gender and Equality Commission 'Flares of marginalization among selected minority communities in Kenya' April 2014, 7 <http://www.ngeckkenya.org/Downloads/flares-of-marginalization-in-Kenya.pdf> (28 May 2014). (Flares of marginalisation among selected ethnic communities in Kenya).

finding has thus been partially implemented as only some of the indigenous peoples were identified through the 2009 census.

In regard to protection from extinction the language and culture of smaller communities, the Kenyan government has since independence championed an assimilation policy that privileged integration over ethnic diversity.⁶⁶⁷ The policy thus favoured assimilation of smaller tribes into the larger tribes.⁶⁶⁸ The practice of the assimilation policy is perhaps best exemplified by, first, failure to identify ethnic minorities as distinct tribes in the census and instead identifying them under larger tribes. Second, the government's submission's in the Endorois case in which it argued that the Endorois were a sub-tribe of the Tugen and challenged the Endorois to prove that they were a tribe.⁶⁶⁹ In a significant departure from the assimilation policy, the Constitution, 2010 recognises language and cultural rights as substantive rights and guarantees the rights of every person to use the language and participate in the cultural life of their choice.⁶⁷⁰ In the context of minorities, the Constitution, 2010 requires the state to put in place affirmative action programmes to enable minority groups and marginalised communities to 'develop their cultural values, languages and practices'.⁶⁷¹

However, as of October 2015, there is no documented evidence of any affirmative action programmes put in place to secure the languages and cultural practices of minorities. The recommendation has not been implemented.

3.1.3 Land rights

(i) Compensate and pay reparations to indigenous people for loss of ancestral land through gazettelement of national parks, reserves, forests, wildlife conservation (African Commission SM 2011); (ii) consult indigenous communities prior to exploring for exploitation of natural resources on their ancestral land (African Commission SM 2011); (iii) adopt Constitutional provisions on minority and community land (CERD Committee 2011); (iv) return ancestral land of indigenous people taken through land grabbing and other illegal means (African Commission SM 2011); (v) undertake a comprehensive study of the rights of indigenous people potentially affected by LAPSSET project (SR IP 2013); (vi) strengthen efforts to address the land tenure situation of indigenous people along the LAPSSET project (SR IP 2013).

On compensation and payment of reparations to indigenous people for loss of their ancestral land through gazettelement of national parks, reserves, forests and wildlife conservation, the recommendation has not been implemented as of October 2015. The repealed Constitution

⁶⁶⁷ International Labour Organization and the African Commission on Human and Peoples' Rights on constitutional and legislative protection of the rights of indigenous peoples: Kenya, 2009, 5.

⁶⁶⁸ As above.

⁶⁶⁹ *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of the Endorois Welfare Council) v Kenya, Communication 276/03*, para 142.

⁶⁷⁰ Article 44 (1): 'Every person has the right to use the language, and to participate in the cultural life, of the person's choice. (2): A person belonging to a cultural or linguistic community has the right to, with other members of that community- (a) to enjoy the person's culture and use the person's language; or (b) to form, join and maintain cultural and linguistic associations and other organs of civil society. (3) A person shall not compel another person to perform, observe or undergo any cultural practice or rite.'

⁶⁷¹ Article 56 (d): 'The State shall put in place affirmative action programmes designed to ensure that minorities and marginalised groups develop their cultural values, languages and practices'.

of Kenya recognised land rights regardless of nationality, with the practice then being that land settled by indigenous Kenyans would pass to their communities. However communities that occupied government land such as forests and unalienated land such as the Nubians, Ogiek and Sengwer were considered to be in unlawful occupation of government land. Over the years, these communities were continually evicted from government land without recognition of their ancestral claim to land and without compensation. The courts on the other hand were not amenable to claims of ancestral land rights as illustrated by the decisions in the Ogiek⁶⁷² and the Endorois cases.⁶⁷³ The Constitution, 2010 introduces land reforms aimed at addressing minority land problems in Kenya. First, it recognises ancestral claims to land and vests ownership of such land in communities, which it further places at par with private and public land ownership.⁶⁷⁴ In addition, it provides that community land vests in and will be held by communities to be identified on the basis of ethnicity, culture or similar community interest.⁶⁷⁵ Second, it provides for a mechanism to address historical land injustices through the National Land Commission.⁶⁷⁶ Beyond the above constitutional, legal and institutional reforms, the government has as of October 2015 not compensated or paid reparations to indigenous peoples for loss of ancestral land. The recommendation has therefore not been implemented.

The right to free, prior and informed consultation of indigenous people prior to exploring for exploitation of natural resources on their ancestral land is unsettled in international law. Although no international human rights treaty contains a textual expression of the right, monitoring mechanisms have consistently interpreted treaty provisions touching on indigenous peoples' rights as creating state obligations for such consultation.⁶⁷⁷ The UN Declaration on the Rights of Indigenous Peoples contains a textual expression of the right to free, prior and informed consent.⁶⁷⁸ The Declaration on the Rights of Indigenous Peoples is however non-binding although arguments have been advanced on either side on its status in reference to customary international law.

The Community Land Bill, 2015 which provides for recognition, protection, management and administration of community land contains no express provisions on consultation of indigenous communities in relation to exploitation of natural resources from their ancestral land.⁶⁷⁹ The Bill incorporates a vague provision requiring formulation of an agreement when an investment is to be put up on community land.⁶⁸⁰ It is reasonable to argue that the formulation of an agreement connotes consultation with the affected communities, but

⁶⁷² *Kemai and others v Attorney General & 3 others* (2006) 1 KLR (E&L) 326.

⁶⁷³ *William Yatich Siteatalia, William Arap Ngasia et al v Baringo County Council* Civil Case No. 183 of 2000

⁶⁷⁴ Constitution 2010 article 63 (2) (d).

⁶⁷⁵ Constitution 2010 article 63 (1).

⁶⁷⁶ Constitution article 67 (2) (e): 'The functions of the National Land Commission are to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress.'

⁶⁷⁷ See Human Rights Committee General Comment 23 para 7; Committee on Economic, Social and Cultural Rights General Comment 21 para 37; Committee on the Elimination of Racial Discrimination General Recommendation 23 para 4(d).

⁶⁷⁸ UN Declaration on the Rights of Indigenous Persons article 19.

⁶⁷⁹ Community Land Bill, 2015..

⁶⁸⁰ Community Land Bill, 2015 clause 52 (2): 'Where any investment is to put up in a community land, it shall be on the basis of an agreement drawn up in accordance with Section 53.' Clause 53 (a): 'An agreement relating to investment in community land shall contain provisions relating to the following aspects - requirement for an environmental, social, cultural and economic impact assessment and measures to mitigate any negative effects.'

nonetheless, in line with evolving international standards, it would be expected that the Bill would include express provisions on prior consultation. The Mining Act, 2014, passed in November 2014, contains provisions requiring consent before the grant of a mineral right over community land.⁶⁸¹ The Mining Act, 2014 however does not apply to exploration for oil and hydrocarbons. The Community Land Bill is as of October 2015 under-going Parliamentary debate.⁶⁸² The Petroleum (Exploration, Development and Production) Bill, 2015 which will govern negotiation of oil and gas contracts between the government and private companies is similarly under-going Parliamentary debate.⁶⁸³

In practice, there is evidence that no prior consultation of indigenous peoples prior to exploration on their ancestral lands. Illustratively, pastoral communities living in Turkana have opposed exploration and production of oil in the area on the grounds that there was no prior consultation before granting the oil licenses.⁶⁸⁴ Further to this, public announcement on discovery of oil in Turkana was made in March 2012, two years after the exploration had begun.⁶⁸⁵

The analysis thus finds that the finding is partially implemented through the Community Land Bill, 2013 which contains an implied framework for consultation with indigenous peoples prior to exploration. The Community Bill as discussed has been drafted pursuant to the constitutionally mandated land reforms. There is therefore no deliberate effort by the government on implementation also illustrated by the fact that no reference was made to the findings in drafting of the Community Land Bill and the Mining Act, 2014.

In relation to policies to adoption of the constitutional provisions on minority and community land, the Constitution, 2010 obligates Parliament to enact legislation for the implementation of the provisions relating to community land.⁶⁸⁶ The constitutional timeline set for the adoption of the legislation is five years which sharply contrasts with legislation governing private and public land was to be enacted within eighteen months.⁶⁸⁷ These policies are contained in the Community Land Bill, 2014 discussed above. Instructively, the constitutional timeline for the enactment of the Bill was August 2015. The recommendation has thus been partially implemented.

On indigenous peoples land rights in relation to the LAPSSET project, the Lamu Port-South Sudan-Ethiopia Transport corridor (LAPSSET) was initiated as one of Kenya's transport and infrastructural flagship projects under Kenya Vision 2030 aimed at transforming Kenya into a

⁶⁸¹ Mineral Act, 2014 section 36: 'A mineral right shall not be granted under this Act or any other written law over community land without the consent of – (a) the authority obligated by the law relating to administration and management of community land to administer community land; or (b) the National Land Commission in relation to community land that is un-alienated.'

⁶⁸²Parliament of Kenya, National Assembly, bill tracker as at 23 October 2015, <http://www.parliament.go.ke/the-national-assembly/house-business/bills-tracker/item/1979-bills-tracker-as-at-october-23rd-2015> (accessed 25 October 2015).

⁶⁸³ Parliament of Kenya, National Assembly, bill tracker as at 23 October 2015, <http://www.parliament.go.ke/the-national-assembly/house-business/bills-tracker/item/1979-bills-tracker-as-at-october-23rd-2015> (25 October 2015).

⁶⁸⁴ PI Vasquez 'Kenya at crossroads: hopes and fears concerning the development of oil and gas reserves' 2013 *International Development Policy* paras 45-49 <http://poldev.revues.org/1646> (1 June 2014).

⁶⁸⁵ As above.

⁶⁸⁶ Article 63 (5): 'Parliament shall enact legislation to give effect to this article.'

⁶⁸⁷ Constitution, 2010 fifth schedule, article 261 (1).

newly industrialised middle income country.⁶⁸⁸ The components of LAPSSET are: a 1700 km new road network, railway line, oil refinery at Lamu, oil pipeline, Lamu airport and free port at Lamu and resort cities in Mombasa and Isiolo.⁶⁸⁹ The LAPSSET corridor will connect Lamu, Kenya's North Eastern Region, Ethiopia and South Sudan.⁶⁹⁰ The project was launched in March 2012 with projected completion dates by 2030.⁶⁹¹ The estimated cost of the LAPSSET corridor is 30 billion US Dollars which will consume 6-16% of Kenya's Gross Domestic Product between 2013 and 2018.⁶⁹² The LAPSSET Corridor Development Authority was established in March 2013 to manage and coordinate the implementation of the project.⁶⁹³

The LAPSSET corridor passes through regions primarily occupied by indigenous communities which include the Awer, Orma, Rendile, Samburu, Borana and Turkana.⁶⁹⁴ It is suggested that these indigenous communities will be adversely affected by the LAPSSET corridor. In relation to land rights, many of the regions occupied by indigenous communities that practise communal land tenure systems without individualised title. The import is that these communities are likely to be displaced without any compensation since they do not hold legal claim to the land.⁶⁹⁵ In regard to livelihoods for indigenous communities, many of the communities along the LAPSSET corridor are fishermen, hunters-gatherers and pastoralists.⁶⁹⁶ In terms of land loss and displacement for pastoralist communities, it is estimated that the 2000km length of rail, road and oil pipeline will excise over 100 square kilometres of prime pastoralist land which also coincides with prime pasture and watering areas.⁶⁹⁷ For the fishing communities, the dredging at Manda Bay is expected to take up to 1000 acres of land thus decimating the fish and resulting in loss of livelihoods.⁶⁹⁸ In regard to the cultural heritage, the Lamu archipelago is a UNESCO world heritage site for its cultural properties. It is argued that the expected urbanisation of Lamu will result in increased demand for housing thus changing its cultural values.⁶⁹⁹

⁶⁸⁸ Kenya Vision 2030, 2008,16.

⁶⁸⁹ As above.

⁶⁹⁰ As above.

⁶⁹¹ Kenya Vision 2030, flagship projects, Lamu Port and New Transport Corridor Development to Southern Sudan and Ethiopia (LAPSSET) http://www.vision2030.go.ke/index.php/pillars/project/macro_enablers/181 (3 June 2014).

⁶⁹² As above.

⁶⁹³ Kenya Gazette Supplement No. 51, Legal Notice 58 of 1 March 2013.

⁶⁹⁴ International Work Group on Indigenous Affairs 'Lamu Port-South Sudan-Ethiopia Transport (LAPSSET) corridor and indigenous peoples in Kenya' 2012, 8, http://www.iwgia.org/iwgia_files_publications_files/0599_LAPSSET_report.pdf (3 June 2014) (LAPSSET corridor and indigenous peoples in Kenya).

⁶⁹⁵ LAPSSET corridor and indigenous peoples in Kenya (n 694 above)12; Kenya Human Rights Commission 'Forgotten in the scramble for Lamu: a position paper on the LAPSSET project and the Aweer and the fisherfolk' June 2014, 20, http://www.khrc.or.ke/resources/publications/doc_details/69-forgotten-in-the-scramble-for-lamua-position-paper-in-the-case-of-the-aweer-and-the-fisherfolk.html (4 June 2014).

⁶⁹⁶ LAPSSET corridor and indigenous peoples in Kenya (n 694 above) 12; A Noor, 'Development or fraud?: another coastal paradise to die for big oil' February 2014, <http://www.pambazuka.org/en/category/features/90644> (4 June 2014).

⁶⁹⁷ O Nyanjom 'Remarginalising Kenyan pastoralists: the hidden curse of national growth and development' (2014) *African study monographs* 54.

⁶⁹⁸ LAPSSET corridor and indigenous peoples in Kenya (n 694 above) 12; Nyanjom (n 697 above) 55.

⁶⁹⁹ LAPSSET corridor and indigenous peoples in Kenya (n 694 above) 12.

Debate on the LAPSSET corridor is often construed as a case of contending visions: development and conservation. Arguments advanced in favour of the LAPSSET corridor centre on its development benefits and its potential to open up otherwise marginalised areas which will benefit indigenous communities. On the converse it is argued that the LAPSSET corridor is likely to displace indigenous communities leading to loss of livelihoods without any guaranteed direct benefit to these communities. Either way, there is broad consensus on the need for development but there are contentious issues which include loss of land and displacement, loss of livelihoods and loss of cultural and historical sites for the indigenous communities on the LAPSSET corridor.

A feasibility study on the LAPSSET corridor was conducted between March 2010 and May 2011.⁷⁰⁰ This study however did not assess the land, natural resources and other substantive rights likely to be affected by the LAPSSET corridor. A 2013 government assessment of the impact of LAPSSET in the Coastal region identified at least 300 households without title to the land they occupy that would be displaced for the construction of the Lamu port and a highway.⁷⁰¹ The assessment proposed compensation and resettlement of the affected families. In February 2015, the government released compensation to pay households displaced by the LAPSSET project.⁷⁰² These initiatives do not make reference to the 2013 recommendations of the special rapporteur on indigenous persons.

In 2012, a petition was filed by the inhabitants of Lamu citing government failure to involve the people in decision making on the LAPSSET project in relation to relocation, compensation, environmental and social impact.⁷⁰³ The petition is on-going at the time of this writing. It is inconclusive whether the petition was influenced by the 2013 recommendations of the special rapporteur on indigenous persons since the petition has not been heard on merit as of October 2015. The recommendations have therefore been partially implemented.

3.1.4 Legal aid

- (i) Extend the legal aid scheme to indigenous peoples (African Commission SM 2011, CERD Committee 2011).

While the Constitution, 2010 guarantees access to justice for all persons,⁷⁰⁴ it is silent on any special category of persons to be accorded legal aid as a matter of right. Similarly, the Legal Aid Bill, 2015 does not provide for any category of persons as entitled to legal aid, instead it introduces an eligibility test. To be eligible for grant of legal aid, one must be poor and a citizen of Kenya or a resident, a child, a refugee, a victim of human trafficking or an internally displaced or stateless person or raise a matter for which legal aid is provided or a matter of

⁷⁰⁰ Kenya Vision 2030, flagship projects, Lamu port and new transport corridor development to Southern Sudan and Ethiopia, http://www.vision2030.go.ke/index.php/pillars/project/macro_enablers/181 (4 June 2014).

⁷⁰¹ Internal Displacement Monitoring Centre 'Unfinished business: Kenya's efforts to address displacement and land issues in Coast region' July 2014, 19.

⁷⁰² The Mipakani project, tracking LAPSSET and development in northern Kenya, <http://lapsset.asiatest.com/> (23 June 2015).

⁷⁰³ *Mohamed Ali Baadi & 9 others v the Attorney General* [2012] eKLR.

⁷⁰⁴ Article 48: 'The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.'

public interest.⁷⁰⁵ Nonetheless, in regard to extending the legal aid scheme to indigenous peoples, the Bill outlines the functions of the Legal Aid Service to include undertaking and promoting research in the field of legal aid, legal awareness and access to services with special reference to the needs of the poor and marginalised groups.⁷⁰⁶ Additionally, the Legal Aid Service is required to promote public interest litigation on matters of special concern to marginalised groups. In practice, it is however doubtful that these provisions will translate to legal aid for indigenous peoples particularly in view of the fact that the provisions refer to 'marginalised group', a term which as earlier discussed refers to a broader category of persons hence the likelihood of obscuring indigenous peoples/ minorities. The Legal Aid Bill, 2015 is as of October 2015 undergoing parliamentary debate.⁷⁰⁷

This recommendation is thus partially implemented through inclusion of provisions relating to marginalised groups in the Legal Aid Bill, 2015. However, the Bill fails to expressly designate marginalised communities or minorities in the category of persons eligible for legal aid. The impetus for the implementation can be traced to the constitution review process which enshrines the right to access to justice as right thus requiring the government to review the existing national legal aid scheme.

3.1.5 Endorois community

(i) Recognise the rights and ownership of the Endorois and reconstitute the Endorois ancestral land (African Commission 2009); (ii) ensure unrestricted access of the Endorois community to Lake Bogoria and surrounding sites for cultural rites and cattle grazing (African Commission 2009); (iii) pay adequate compensation to the Endorois for the loss suffered (African Commission 2009); (iv) pay royalties to the Endorois from existing economic activities and ensure that they benefit from employment possibilities within the game reserve (African Commission 2009); (v) grant registration to the Endorois welfare committee (African Commission 2009, UPR 2010, CERD Committee 2011); (vi) engage in dialogue with the Endorois for effective implementation of the recommendations of the Endorois decision (African Commission 2009, UPR 2010, CERD Committee 2011).

The Endorois community is one of the five clans that make up the Tugen sub-tribe of the Kalenjin tribe.⁷⁰⁸ According to the 2009 Kenya Housing and Population Census, the Endorois number 10,000,⁷⁰⁹ a figure that the Endorois have disputed.⁷¹⁰ The Endorois community is

⁷⁰⁵ Legal Aid Bill, 2015 clause 28 (1): 'A person is eligible for the grant of legal aid if that person is indigent and – (a) a citizen of Kenya or is resident in Kenya; or (b) is a child; or (c) a refugee under the Refugee Act; or (d) is a victim of human trafficking; or (e) is an internally displaced person or stateless person; or (f) the matter in which legal aid is sought is in an area of law and is a type of case and type of proceedings for which the service provides legal aid services; or (g) the matter is of public interest'.

⁷⁰⁶ Legal Aid Bill, 2013 clause 6 (1): 'The functions and the powers of the Service shall be to – (d) undertake and promote research in the field of legal services, legal awareness and access to justice with special reference to the need for such services among the poor and marginalised groups; (e) take necessary steps by way of promoting public interest litigation with regard to consumer protection, environmental protection and any other matter of special concern to the marginalised groups'.

⁷⁰⁷ Parliament of Kenya, National Assembly, bills tracker as at 23 October 2015, <http://www.parliament.go.ke/the-national-assembly/house-business/bills-tracker/item/1979-bills-tracker-as-at-october-23rd-2015> (accessed 25 October 2015).

⁷⁰⁸ MO Makoloo 'Kenya: minorities, indigenous peoples and ethnic diversity' 2005, 17.

⁷⁰⁹ Kenya Housing and Population Census 2009 (n 662 above).

agro-pastoralist and settled mainly in Lake Bogoria area of Baringo district.⁷¹¹ The landmass around Lake Bogoria is significant for their livelihood and cultural and religious activities of the community and mainly used for sacred rites such as healing, cleansing and blessing.⁷¹²

In 1973, the government in exercise of its statutory power over land declared Lake Bogoria a game reserve to be managed by the Kenya Wildlife Services.⁷¹³ The Lake Bogoria land mass and the adjacent land, which the Endorois occupied, was then trust land registered under the county councils of Baringo and Koibatek.⁷¹⁴ Subsequently, the government evicted the Endorois community from the area surrounding Lake Bogoria without prior consultation or compensation. In addition the Endorois community was never involved in the management of the game reserve or paid any benefits that accrued from the game reserve.⁷¹⁵ In 1997, the Endorois sought the intervention of the High Court regarding their rights as the beneficiaries of the trust land within the Lake Bogoria game reserve. In particular, the Endorois sought to abolish the Baringo and Koibatek county councils on the grounds that they had failed to exercise the trusteeship of the land over which the Lake Bogoria game reserve is situated to benefit the Endorois community. The High Court however took the view that the declaration and subsequent gazettment of the Lake Bogoria as a game reserve had nationalised it, hence the community could not claim its direct control or to benefit from it.⁷¹⁶ An appeal was lodged although it was never heard.⁷¹⁷

In 2003, the Endorois community through Centre for Minority Rights and Development and Minority Rights International filed a complaint with the African Commission for restitution of their ancestral land and compensation for loss of livelihood including cultural and religious sites.⁷¹⁸ In November 2009, the African Commission decided in favour of the Endorois.⁷¹⁹

On implementation of the findings, in March 2010, the Kenya National Commission on Human Rights in partnership with the Endorois community organised a festival to celebrate the adoption of the decision of the African Commission by the AU Assembly.⁷²⁰ This occasion was attended by the Minister for Lands who committed to implement the decision.⁷²¹ However, there is no documented evidence of any Government follow-up action in 2010. In January 2011, a Parliamentary question was raised regarding the delayed

⁷¹⁰ National Gender and Equality Commission 'Flares of marginalisation among selected minority communities of Kenya' 2014, <http://www.ngeckkenya.org/Downloads/flares-of-marginalization-in-Kenya.pdf> (accessed 4 June 2014).

⁷¹¹ Makoloo (n 708 above) 17-18.

⁷¹² As above

⁷¹³ *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of the Endorois Welfare Council) v Kenya*, Communication 276/03.

⁷¹⁴ As above.

⁷¹⁵ As above.

⁷¹⁶ *William arap Ngasia et al v Baringo County Council* civil case 183 of 2000 Judgement 19 April 2002.

⁷¹⁷ Communication 276/03.

⁷¹⁸ Communication 276/03.

⁷¹⁹ As above.

⁷²⁰ Kenya National Commission on Human Rights, our work, minorities and marginalised, indigenous peoples, <http://www.knchr.org/OurWork/Minoritiesandmarginalisedgroups/Indigenouspeople.aspx> (4 June 2014).

⁷²¹ As above.

implementation of the findings of the African Commission.⁷²² The Minister for Lands attributed the delayed implementation to the fact that he had not received a sealed copy of the African Commission decision from the African Union.⁷²³ In postscript, the Minister informed Parliament that the Ministry of Lands had written to the African Union seeking a sealed copy of the decision.⁷²⁴ In February 2012, the Attorney General following a meeting with representatives of the Endorois community set up a tripartite committee consisting of officers from the Attorney General's office, an inter-ministerial team, representatives of the Endorois community and other stakeholders mainly non-state actors to examine modalities of implementing the decision and its impact on other communities in Kenya.⁷²⁵ The findings of the tri-partite committee have not been made public as of August 2015.

In terms of non-state actors' initiatives, in April 2013 the Kenya Human Rights Commission at the 53rd Ordinary Session of the African Commission requested for an implementation hearing in relation to the Endorois findings.⁷²⁶ Responding to the issue of non-implementation, the government representative indicated that there were adequate national mechanisms for implementation of the findings and specifically recognised the competence of the Office of the Ombudsman.⁷²⁷ In September 2013, the Ombudsman initiated correspondence with the Attorney General on the implementation.⁷²⁸ In response, the Attorney General indicated that the matter was under consideration in Cabinet.⁷²⁹ In addition, a workshop jointly organised by the African working group on indigenous populations/ communities and Endorois Welfare Council to assess the extent of the implementation of the Endorois decision was held in September 2013.⁷³⁰

In September 2014, the President established a government task force to look into the modalities of the implementation of the African Commission findings in relation to the Endorois community.⁷³¹ The one year task force is mandated to advise on the political, security and economic implications of the decision, examine the practicality of restitution of Lake Bogoria back to the community in view of its gazettment as a UNESCO World Heritage Site and the potential environmental impacts on Lake Bogoria and surrounding areas that would result from implementation of the findings.⁷³² In regard to compensation, task force is required to assess the compensation payable to the Endorois community for

⁷²² Parliament of Kenya, National Assembly official report, Hansard 18 January 2011, 17-22
<http://www.parliament.go.ke/plone/archive/archive-10th-Parliament/hansards/official-report-18.01.11p/view> (4 June 2014).

⁷²³ As above.

⁷²⁴ As above.

⁷²⁵ Personal interview with state counsel, Department of Justice 3 July 2014.

⁷²⁶ Correspondence between the Kenya Human Rights Commission and the Office of the Ombudsman, dated 5 July 2013 (accessed from the Office of the Ombudsman).

⁷²⁷ As above.

⁷²⁸ Correspondence between the Office of the Ombudsman and the Attorney General, dated 5 September 2013 (accessed from the Office of the Ombudsman).

⁷²⁹ Correspondence between the Attorney General and the Office of the Ombudsman, dated 21 September 2013 (accessed from the Office of the Ombudsman).

⁷³⁰ African Commission on Human and Peoples' Rights 'Final communiqué of the workshop on the status of the implementation of the Endorois decision of the African Commission on Human and Peoples' Rights ' 23 September 2013, <http://www.achpr.org/news/2013/10/d96/> (accessed 22 December 2014).

⁷³¹ Kenya Gazette Notice no. 6708, 19 September 2014.

⁷³² As above.

loss of land and settlement of royalties accruing from existing economic activities.⁷³³ Interim recommendations on the implementation of the decision were expected by April 2015.⁷³⁴

Notwithstanding, some of the findings have been partially implemented. For instance, the Endorois community has limited access to the Lake Bogoria game reserve for grazing purposes, perform religious and cultural rituals at Lake Bogoria including collection of medicinal herbs and access the game reserve free of charge.⁷³⁵ Additionally, the Endorois Welfare Committee is registered as a society under the Societies Act of Kenya since 2011.⁷³⁶ There is therefore deliberate effort by the government to implement the findings of the African Commission on the Endorois, particularly demonstrated by the establishment of the government high level task force. A detailed discussion is undertaken in chapter eight, section 4.4.1.

The findings are therefore partially implemented.

3.1.6 Ogiek community

(i) Reinstate restrictions on land transactions for the Mau Forest Complex (African Court 2013); (ii) establish a comprehensive mechanism to provide reparations for Ogiek individuals and families removed from their traditional lands in the Mau complex (African Court 2013).

The Ogiek community are a hunter-gatherer peoples who inhabit Mau Forest of central Rift Valley as their ancestral land.⁷³⁷ Although the Ogiek speak a dialect of Kalenjin depending on which sub-tribe of the Kalenjin they border, the Ogiek consider themselves as culturally distinct from the Kalenjin.⁷³⁸ The 2009 Kenya Population and Housing Census put the population of the Ogiek's at 78,691.⁷³⁹ The Mau Forest complex is closed canopy forest measuring 412,000 acres and situated in the Rift Valley region.⁷⁴⁰ It is a regional water catchment area for 12 main rivers that drain into five major lakes: Baringo, Nakuru, Natron, Turkana and Victoria.⁷⁴¹ The Ogiek community claim to be the indigenous owners of Mau Forest while the government's position is that Mau Forest is national resource and gazetted government land. This dispute between the Ogiek and the government over Mau Forest raises complex issues of the rights of indigenous peoples to ancestral land, and the doctrine of permanent sovereignty of the state over natural resources.

The history of the repeated eviction of the Ogiek from Mau Forest complex is well documented dating back to the 1932 gazettement of Mau Forest as a forest reserve.⁷⁴² The eviction orders giving rise to these findings were issued in October 2009 by the government

⁷³³ As above.

⁷³⁴ As above.

⁷³⁵ Personal visit by the author of this thesis to Lake Bogoria game reserve 1 June 2014.

⁷³⁶ Minorities Rights Group International 'A solution to the forced displacement of the Endorois in Kenya: working towards the implementation of the African Commission on Human Rights decision November 2008 – October 2011' February 2012, 15.

⁷³⁷ J Kamau 'Ogiek: history of a forgotten tribe' <http://www.ogiek.org/report/ogiek-ch1.htm> (4 June 2014).

⁷³⁸ As above.

⁷³⁹ 2009 Kenya Population and Housing Census (n 662 above).

⁷⁴⁰ Republic of Kenya 'Report of the Prime Minister's task force on the conservation of the Mau Forests complex' 2009, 17.

⁷⁴¹ As above.

⁷⁴² Kamau (n 737 above).

directing the Ogiek and other settlers to vacate East Mau Forest within 30 days on the grounds that the forest needed to be conserved.⁷⁴³ A similar eviction directive issued 1997 had been a subject of a court challenge filed by the Ogiek community in 1997.⁷⁴⁴ Following protracted delays in hearing the case and the renewed eviction orders of October 2009, the Ogiek community in November 2009, submitted a communication to the African Commission.⁷⁴⁵ In addition a second case filed in 1999 challenging eviction from Tinet Forest of the Mau Forest Complex and seeking a declaration that the eviction contravened the rights to life and protection under the law and compensation was in 2006 decided against the Ogiek.⁷⁴⁶

The African Commission on 23 November 2009 issued provisional measures requiring the government not to take any measures that would prejudice the case and cause irreparable damage and in particular not to evict the Ogiek.⁷⁴⁷ As discussed previously in chapter two, section 4.4, in July 2012, the African Commission submitted the communication to the African Court following failure by the government to adhere to the provisional measures. The African Commission sought orders restraining the government from evicting the Ogiek from East Mau Forest, recognising the Ogiek historic right to the Mau Forest and compensating the Ogiek for loss of their property and culture.⁷⁴⁸ In November 2012, while the case was pending before the African Court, the government lifted the ban against all land transaction in the Mau Forest which had the likelihood of further violating the Ogiek rights to the land.⁷⁴⁹ The African Commission sought provisional measures from the African Court reinstating the ban on all land transactions in the Mau Forest until the case was determined.⁷⁵⁰ In March 2013, the African Court issued an order for provisional measures directing the government to reinstate the ban on land transactions in the Mau Forest Complex.⁷⁵¹ The African Court completed a full merit hearing of the case in December 2014.⁷⁵² As of October 2015, the judgment has not been issued.

In September 2013, the government launched a cash payment programme for the resettlement of 2,098 Ogiek households evicted from the Mau Forest.⁷⁵³ The programme paid compensation of KES 400,000 to each of the evicted families in a drive targeted at closure of all internally displaced persons camps in the country.⁷⁵⁴ Notably, during the

⁷⁴³ 'Ogiek threatened with eviction from Mau forest, Kenya' <http://www.redd-monitor.org/2009/11/19/ogiek-threatened-with-eviction-from-mau-forest-kenya/> (7 July 2014).

⁷⁴⁴ *Joseph Letuya & 21 others v Attorney General & 5 others* [2014] eKLR.

⁷⁴⁵ *African Commission on Human and Peoples' Rights v Republic of Kenya*, Application 006/2012 provisional measures, 15 March 2013.

⁷⁴⁶ *Kemai and others v Attorney General & 3 others* (2006) 1 KLR (E&L) 326.

⁷⁴⁷ Application 006/2012 (n 745 above).

⁷⁴⁸ As above.

⁷⁴⁹ As above.

⁷⁵⁰ As above.

⁷⁵¹ As above.

⁷⁵² African Court on Human and Peoples' Rights, press releases, <http://www.african-court.org/en/index.php/news/latest-news/564-african-court-on-human-and-peoples-rights-concludes-hearing-of-application-concerning-kenya-s-ogiek-community-land-rights> (28 July 2015).

⁷⁵³ Ministry of Devolution and Planning, Special Programmes, Mitigation and Settlement department, <http://www.devolutionplanning.go.ke/> (accessed 27 December 2014).

⁷⁵⁴ As above.

payment the President directed the Cabinet Secretary incharge of lands to lift all restrictions on land transactions in the Mau area as it was hindering development.⁷⁵⁵

In March 2014, the case filed in 1997 challenged eviction of the Ogiek community from East Mau Forest was decided in favour of the Ogiek.⁷⁵⁶ The High Court found that the Ogiek right to life had been and was being contravened by their forcible eviction from the Mau Forest without resettlement.⁷⁵⁷ The Court also found ruled that the eviction of the Ogiek from the Mau Forest violated their right not to be discriminated against as the eviction prevented them from living as hunters and gatherers.⁷⁵⁸ On resettlement, the Court directed the National Land Commission to within one year settle all members of the Ogiek community who had not been resettled following their eviction from the Mau Forest Complex.⁷⁵⁹ However, in April 2014 the government lodged an appeal against the decision particularly taking issue with the directive to the National Land Commission to resettle the Ogiek within one year.⁷⁶⁰ This appeal has not been determined as of August 2015.

From the above, the African Court findings relating to the Ogiek have not been implemented. In addition, the government's decision to appeal the favourable ruling for the Ogiek is indicative of lack of political will to address the rights of indigenous peoples and disregard for the findings of monitoring mechanisms. While the government is aware of the provisional measures issued by the African Court, no measures have been taken to implement the decision.⁷⁶¹ A discussion on the non-implementation is undertaken in chapter eight, section 4.4.

The findings have not been implemented.

3.2 Internally displaced persons

(i) Enact a clear policy on internally displaced persons (APRM 2006); (ii) ensure return of internally displaced persons to their land or otherwise properly resettle them by providing adequate financial assistance (CESCR Committee 2008, SR IDPs 2010, CERD Committee 2011, HRC Committee 2012); (iii) develop a comprehensive policy on internally displaced persons taking into account the Guidelines on Internal Displacement (SR IDPs 2011); (iv) adopt the necessary laws consistent with the State obligation under the Great Lakes Protocol on Internal Displacement (SR IDPs 2009); (v) adopt the internally displaced persons policy and enact the Internally Displaced Persons Act (SR IDPs 2012).

⁷⁵⁵ Standard Digital News 'IDPs get new lease of life after years in the cold' 8 September 2013, http://www.standardmedia.co.ke/m/?articleID=2000093022&story_title=IDPs-get-new-lease-of-life-after-years-in-the-cold (accessed 27 December 2014).

⁷⁵⁶ *Joseph Letuya & 21 others v Attorney General & 5 others* [2014] eKLR.

⁷⁵⁷ As above.

⁷⁵⁸ As above.

⁷⁵⁹ As above.

⁷⁶⁰ 'Ogiek to wait longer to be resettled' *Daily Nation* 7 April 2014, 4.

⁷⁶¹ Interview with Maryann Njau-Kimani, Legal Secretary Justice and Constitutional Affairs, Office of the Attorney General and Department of Justice, Kenya, Nairobi, 4 March 2015.

Kenya has a long history of internal displacement. In post colonial Kenya, the first mass displacements were linked to the 1991 and 1997 electoral cycles.⁷⁶² Illustratively, between 1991 and 1996, 300,000 persons were displaced from Rift Valley, Coast, Nyanza, Western and Central Provinces, while 100,000 persons were displaced just before the 1997 general election.⁷⁶³ However, there was no government acknowledgement of internal displacement until the 2007/2008 post election violence. The 2007/08 post election violence witnessed the largest electoral related internal displacement with approximately 663,921 persons displaced.⁷⁶⁴ Of these, 350,000 took refuge in refugee camps while 313,000 were sheltered by their host communities or moved to urban areas and 3,200 persons fled to Uganda.⁷⁶⁵ Besides electoral violence related displacement, small scale displacement is also rampant triggered by armed conflict, on-set of disasters, localised political violence and exploration and extraction of natural resources. Statistics put the number persons displaced by internal conflict in Kenya at 309,200 as of February 2015.⁷⁶⁶

Following the 2007/08 post election violence in Kenya, resettlement of internally displaced persons was listed as a priority action to be undertaken by the government in the Kenya National Dialogue and Reconciliation Accord.⁷⁶⁷ A number of efforts have been put in place by the government for resettlement of internally displaced persons since 2008. First, registration of internally displaced persons was carried by the Kenya National Bureau of Statistics and the Ministry of State for Provincial Administration and Internal Security, with internally displaced persons required to register before 30 December 2008.⁷⁶⁸ In May 2008, the government launched the *Operation Rudi Nyumbani* (Operation Return Home) programme which was expected to oversee return of all internally displaced persons to their original homes by June 2008.⁷⁶⁹ The internally displaced persons who agreed to return to their pre-displacement homes were paid KES 10,000 to facilitate their return, while those who demonstrated that their houses had been destroyed were paid a further 25,000 for reconstruction.⁷⁷⁰ According to government records 350,000 internally displaced persons returned to their farms through this operation.⁷⁷¹

Prior to 2013, Kenya had no legal or policy framework for internal displacement against which the *Operation Rudi Nyumbani* could be assessed. Regardless, Kenya has ratified the Internally Displaced Persons Protocol of the Great Lakes Region which strengthens and sub-regionalises the UN Guiding Principles on Internally Displaced Persons.⁷⁷² Measured

⁷⁶² Internal Displacement Monitoring Centre, Kenya, 2014, Kenya: too early to turn the page on IDPs, more work is needed, 3 June 2014, <http://www.internal-displacement.org/sub-saharan-africa/kenya/2014/kenya-too-early-to-turn-the-page-on-idps-more-work-is-needed> (23 June 2015).

⁷⁶³ As above.

⁷⁶⁴ Ministry of Devolution and Planning, Special Programmes, Mitigation and Settlement Department.

⁷⁶⁵ As above.

⁷⁶⁶ Internal Displacement Monitoring Centre (n 762 above).

⁷⁶⁷ Kenya National Accord and Reconciliation Agreement (n 656 above).

⁷⁶⁸ Ministry of Devolution and Planning, Special Programmes, Mitigation and Resettlement Department

⁷⁶⁹ As above.

⁷⁷⁰ As above.

⁷⁷¹ As above.

⁷⁷² International Conference on the Great Lakes Region, Protocol on the Protection and Assistance to Internally Displaced Persons. The Protocol was signed on 15 December 2006 by the 11 Members States of the Great Lakes Region. See also UN Guiding Principles on Internal Displacement, June 2001. Kenya has not ratified the AU Convention on Internally Displaced Persons, African Union,

against the Internally Displaced Persons Protocol and the UN Guiding Principles, *Operation Rudi Nyumbani* is subject to criticism for a number of reasons. First, there are documented accounts indicating that the government forcibly removed the internally displaced persons from the camps to return to their pre-displacement homes.⁷⁷³ Second, although the government conducted nationwide registration of internally displaced persons up to 30 December 2008, the process did not meet the required standards. The registration process was flawed due to poor planning and corruption.⁷⁷⁴ Two parallel registration processes were conducted by the Ministry of Special Programmes and the Provincial Administration thus creating confusion.⁷⁷⁵ Additionally, in some areas registration fees were imposed yet the process was supposed to be free of any charges.⁷⁷⁶ The Internally Displaced Persons Protocol on protection and assistance to internally displaced persons requires states to assess the needs of internally displaced persons and to the extent possible assist them with registration.⁷⁷⁷

Besides the *Operation Rudi Nyumbani*, 6,978 families of internally displaced persons who did not return to their original homes through the *Operation Rudi Nyumbani*, have been resettled on government procured land measuring approximately 20,163 acres.⁷⁷⁸ Further an addition, 313,000 'integrated' internally displaced persons who sought refuge within their host communities or in urban settings including slums were to be paid ex-gratia payment of KES 10,000 to assist them restart their livelihoods.⁷⁷⁹ The issue of the integrated internally displaced persons remains the most contentious in relation to resettlement. First, a number of reports document the skewed manner in which the payment was made resulting in many genuine internally displaced persons not receiving any payment.⁷⁸⁰ Second, the amount paid, Kenya shillings 10,000, has been criticised as being inadequate to assist displaced

http://www.au.int/en/sites/default/files/Convention%20on%20IDPs%20-%20displaced..._0.pdf (accessed 5 August 2015).

⁷⁷³ Kenya Human Rights Commission 'A tale of force, threats and lies: 'Operation Rudi Nyumbani' in perspective' October 2008, 21-23,

<http://resource.khrc.or.ke:8181/khrc/bitstream/handle/123456789/182/IDP%27s%20Resettlement%20Monitoring%20Report-%20DRAFT%20OCT%2028.pdf?sequence=1> (7 June 2014) (Operation Rudi Nyumbani in perspective); United States Institute for Peace 'Internal displacement and local peace building Kenya: challenges and innovations' 2010, <http://www.usip.org/publications/internal-displacement-and-local-peacebuilding-in-kenya> (7 June 2014).

⁷⁷⁴ Operation Rudi Nyumbani in perspective (n 773 above) 23-24; Kenya National Assembly 'Report of the Parliamentary Select Committee on the resettlement of the internally displaced persons in Kenya' April 2012, http://www.knchr.org/Portals/0/Reports/PSC_Fial_IDPs_report_2012-2.pdf (7 June 2014).

⁷⁷⁵ As above.

⁷⁷⁶ As above.

⁷⁷⁷ International Conference on the Great Lakes Region, Protocol on the Protection and Assistance to Internally Displaced Persons, Article 3 (4): 'Member States shall be responsible for assessing the needs of internally displaced persons, and shall to the extent necessary, assist them with registration and, in such cases, Member States shall maintain a national database for the registration of internally displaced persons.'

⁷⁷⁸ Ministry of Devolution and Planning, Special Programmes, Mitigation and Settlement Department.

⁷⁷⁹ As above.

⁷⁸⁰ United National Development Programme 'Durable solutions to internal displacements, reconciliation and restoration of human dignity of IDPs in Kenya: a situation report' September 2011, 9, http://www.ke.undp.org/content/dam/kenya/docs/Peace%20Building/IDP_report_final-doc-1-.pdf (8 June 2014) (Durable solutions to internal displacements, reconciliation and restoration of human dignity of IDPs in Kenya); Report of the Parliamentary select committee on resettlement of internally displaced persons in Kenya (n 774 above).

persons re-start their livelihoods.⁷⁸¹ Third, there have been reports of discrimination in the payment of ex-gratia payment with internally displaced persons from Nyanza and Western regions not receiving any payment while those from Rift Valley were paid.⁷⁸²

In addition, in September 2013 the government terminated the earlier resettlement programmes and instead offered internally displaced households KES 400,000 to facilitate their choice resettlement.⁷⁸³ A total 8,298 households were paid KES 3.3 billion.⁷⁸⁴ The government in June 2014 indicated that all documented and registered internally displaced persons have been resettled, a position that was criticised by the Special Rapporteur on Internally Displaced Persons during his visit to Kenya in May-June 2014.⁷⁸⁵

The issue of resettlement of internally displaced persons has been a matter of public debate since 2008. In October 2010 a motion was moved in Parliament seeking to constitute a Parliamentary committee to assess the Executive's response in resettlement of internally displaced persons.⁷⁸⁶ The Parliamentary committee in its findings indicated that the Executive's efforts in resettlement of internally displaced persons were unsatisfactory. In particular the Parliamentary committee's report observed that the government had only resettled 24% of the internally displaced persons within a period of four years, that the government failed to meet its own deadlines in resettlement of displaced persons and that the resettlement process was not transparent, hence profiling and vetting of displaced persons needed to be done.⁷⁸⁷ Similarly, in 2013 three civil society organisations and 25 internally displaced persons filed a constitutional petition challenging the government's failure to implement sufficient measures to protect internally displaced persons in the camps.⁷⁸⁸ The petitioners are seeking reparations including compensation and participation in decision making for those displaced persons still living in the camps.⁷⁸⁹ The petition has not been decided as of August 2015.⁷⁹⁰

From the analysis, the recommendation has been partially implemented. The impetus for the implementation is traced to the fact that resettlement of internally displaced persons was

⁷⁸¹ Kenya Human Rights Commission 'Gaps and gains: a status report on IDPS in Kenya 2008-2010' February 2011, 19, www.khrc.or.ke/.../17-gains-and-gaps-a-status-report-on-idps-in-kenya (8 June 2014).

⁷⁸² Report of the Parliamentary select committee on resettlement of internally displaced persons in Kenya (n 774 above); Durable solutions to internal displacements, reconciliation and restoration of human dignity of IDPs in Kenya (n 780 above) 11.

⁷⁸³ The Presidency 'State of the nation address at Parliament by H.E President Uhuru Kenyatta' 27 March 2014, <http://www.president.go.ke/state-at-the-nation-address-at-parliament-by-h-e-president-uhuru-kenyatta/> (8 June 2014).

⁷⁸⁴ As above.

⁷⁸⁵ UN News centre 'Solutions for Kenya displaced must be determined by reality not politics – UN expert', 7 May 2014, <http://www.un.org/apps/news/story.asp?NewsID=47744#U8K93JSSxNw> (8 June 2014).

⁷⁸⁶ Parliament of Kenya, National Assembly official records, Hansard, 21 October 2010, <http://www.parliament.go.ke/plone/archive/archive-10th-Parliament/hansards/official-records-21.10.10p/view> (8 June 2014).

⁷⁸⁷ Report of the Parliamentary Select Committee on resettlement of internally displaced persons (n 774 above) 65-67.

⁷⁸⁸ *Federation of Women Lawyers (FIDA)-Kenya and others versus Attorney General and others*, petition 132/2013.

⁷⁸⁹ As above.

⁷⁹⁰ As above.

identified as agenda item two in the 2007/08 post election violence political settlement.⁷⁹¹ Thus, the internally displaced persons agenda formed part of Kenya's transitional justice issues following the 2007/08 election related violence which has been key in maintaining the displaced persons agenda in the national debate. This proposition finds support in the fact that a number of initiatives conducted by both state and non-state actors make reference to the National Dialogue and Reconciliation process. These include the Parliamentary Select Committee on resettlement of internally displaced persons and reports of civil society organisations. There is therefore no deliberate effort by government to implement the recommendations of monitoring mechanisms.

On adoption of a policy framework for internally displaced persons in Kenya, the Internally Displaced Persons Policy was finalised in July 2012 and submitted to the Cabinet for consideration and approval.⁷⁹² The Policy was considered by Cabinet in October 2012,⁷⁹³ but has not as of August 2015 been adopted for implementation. Initial discussions on development of a national policy on internally displaced persons date back to 2007, although actual drafting of the Policy began in July 2009.⁷⁹⁴ This process was driven by the government and non-state actors with technical support from the office of the Special Rapporteur on internally displaced persons. The development of the policy was informed by the 2006 APRM recommendations.⁷⁹⁵

On adoption of the necessary laws on internal displacement, the Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act (Internally Displaced Persons Act) was enacted in December 2012.⁷⁹⁶ While the Act commenced operation in January 2013, the government is yet to operationalise it as of August 2015. Illustratively, the National Consultative Coordination Committee which the Act establishes as the lead agency in the implementation of the Act is yet to be constituted.⁷⁹⁷ In terms of resource allocation Parliament allocated KES 600 million to implementation of the Internally Displaced Persons Act in the 2014/15 financial year,⁷⁹⁸ a figure that is grossly inadequate in view of the frequent incidences of displacement in Kenya. The Internally Displaced Persons

⁷⁹¹ Kenya Dialogue and Reconciliation Agreement, Annotated Agenda and Timetable, 1 February 2008, <http://www.dialoguekenya.org/Agreements/1%20February%202008%20-Annotated%20Agenda%20for%20the%20Kenya%20Dialogue%20and%20Reconciliation.pdf> (7 June 2014).

⁷⁹² Danish Refugee Council 'Behind the scenes: lessons learnt from developing a national policy framework on internal displacement in Kenya', January 2013, http://drc.dk/fileadmin/uploads/pdf/IA_PDF/Great_Lakes_PDF/BehindTheScenes_KenyaIDPReport.pdf (7 June 2014) (Behind the scenes).

⁷⁹³ Behind the scenes (n 792 above) 22.

⁷⁹⁴ Behind the scenes (n 792 above) 22. The need to develop a legal and policy framework on internal displacement in Kenya was first considered in April 2007 at a regional workshop convened by the International Refugee Rights Initiative, Internal Displacement Monitoring Centre and the Norwegian Refugee Council.

⁷⁹⁵ Interview with D Rono, Principal Human Rights Officer, Kenya National Commission on Human Rights, Nairobi, 23 March 2015. The Kenya National Commission on Human Rights is a member of the Internally Displaced Persons Network.

⁷⁹⁶ Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act, 56 of 2012 (Internally Displaced Persons Act)

⁷⁹⁷ Internally Displaced Persons Act section 13 (c): 'The functions of the Committee shall be – coordinate prevention and preparedness efforts, protection and assistance to internally displaced persons throughout their displacement until a durable and sustainable solution is found, and to host communities as needed, among relevant Government Departments, the United Nations and Non-state actors.'

⁷⁹⁸ National Treasury, Budget, budget statement 2014/15 <http://www.treasury.go.ke/index.php/budget> (7 June 2014).

Act incorporates the Great Lakes Protocol on Protection and Assistance to Internally Displaced Persons and the UN Guidelines by specifically providing for their application to all displaced persons in Kenya.⁷⁹⁹

Similar to the internally displaced persons policy, the development of the Internally Displaced Persons Act was initiated by non-state actors among them United Nations Office Coordinating Humanitarian Affairs, Internal Displacement Monitoring Centre and civil society organisations in 2007. The impetus for the finalisation and enactment of the Act was the establishment of the Parliamentary Select Committee on resettlement of internally displaced persons in Kenya (Parliamentary Committee).⁸⁰⁰ The Parliamentary Committee was mandated to review all laws and policies relating to displacement in Kenya and formulate a draft Bill on forced displacement in Kenya.⁸⁰¹ In its final report, the Parliamentary Committee recommended the enactment of legislation on internally displaced persons to ensure coordination, resourcing and that the government fulfilled its international obligations in regard to displaced persons.⁸⁰² The Parliamentary Committee engaged with non-state actors and relevant government agencies to revise and finalise the Bill initiated in 2007.⁸⁰³ A member of the Parliamentary Committee then introduced the internally displaced persons Bill as a private member Bill in June 2012.⁸⁰⁴ The Bill on internal displacement was subsequently passed in October 2012.⁸⁰⁵

Summarizing the above, the recommendations on development of a clear policy and laws on internally displaced persons in Kenya are partially implemented. Despite the fact that the internally displaced persons legislation has been enacted and policy submitted to Cabinet, the Act is yet to be operationalised, while the policy has not been adopted hence the finding of partial implementation. Tracing the implementation pathway, the analysis finds that the drive for implementation has been the activities of transnational actors in drafting the policy and Bill and Parliament in backing the enactment of the Act. Notably, the Special Rapporteur on the rights of internally displaced persons played a critical role in the drafting of the policy by offering technical assistance. While the recommendation on the policy was first made in 2006, there is no documented government action towards implementation. Similarly, the recommendation on enactment of legislation was made in 2009 and was only actualised

⁷⁹⁹ Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act section 3: 'Subject to the Constitution and this Act (a) the provisions of the Protocol; and (b) the provisions of the Guiding Principles shall apply to all internally displaced persons in Kenya.'; Section 10: 'Every person including any public body, state officer or public officer or private body or individual involved in the protection and assistance to internally displaced persons in Kenya shall act in accordance with the Protocol and Guiding Principles and as provided for in this Act.'

⁸⁰⁰ Behind the scenes (n 792 above) 9.

⁸⁰¹ Kenya National Assembly, Official records, Hansard, 17 November 2010, <http://www.parliament.go.ke/plone/archive/archive-10th-Parliament/hansards/official-records-17.11.10a/view> (7 June 2014).

⁸⁰² Report of the Parliamentary Select Committee on resettlement of internally displaced persons (n 774 above) 70.

⁸⁰³ Behind the scenes (n 792 above) 10-11.

⁸⁰⁴ Parliament of Kenya, National Assembly, official records, Hansard 13 June 2012, <http://www.parliament.go.ke/plone/archive/archive-10th-Parliament/hansards/official-report-13-june-2012-pm/view> (7 June 2014).

⁸⁰⁵ Kenya National Assembly, Official records, Hansard, 4 October 2012, <http://www.parliament.go.ke/plone/archive/archive-10th-Parliament/hansards/official-report-04-october-2012/view> (7 June 2014).

following the establishment of the Parliamentary Committee. The initiatives undertaken by the transnational actors in enactment of the Act and development of the policy were in response to the recommendations of monitoring mechanisms.

3.3 Refugees

(i) Enact and implement a clear refugee policy (APRM 2006); (ii) eliminate all discriminatory screening processes for refugees (APRM 2006); (iii) take special measures to increase employment opportunities for refugees (CESCR Committee 2008); (iv) issue work permits to refugees in accordance with the Refugee Act (2006) (CESCR Committee 2008); (v) relax the encampment policy requiring refugees to live in the camps for prolonged periods (CESCR Committee 2008).

Kenya has historically been a host to refugees from neighbouring countries such as Burundi, Democratic Republic of Congo, Ethiopia, Rwanda, Somalia, Sudan and Uganda. As of January 2015, the total number of refugees and asylum seekers stood at 650,610 with a majority, 77%, being from Somalia.⁸⁰⁶ The Refugee Act was enacted in December 2006 and commenced operations in May 2007.⁸⁰⁷ The Act domesticates the OAU Convention on Refugees, the UN Convention Related to the Status of Refugees and provides for the legal and institutional framework for managing refugees in Kenya.⁸⁰⁸

The Refugee Act, 2006 recognises the need for a policy framework for effective implementation of the Act and ‘mandates the Commissioner of Refugees to formulate policy on refugee matters in accordance with international standards.’⁸⁰⁹ As of October 2015 a national refugee policy has not been drafted. The finding has therefore not been implemented.

On issuance of work permits, the Refugee Act imposes on refugees the same wage-earning restrictions as foreigners.⁸¹⁰ While the Act recognises the rights of refugees to wage-employment, it however obligates the Commissioner of Refugee Affairs to ‘ensure that refugee economic and productive activities do not have a negative impact on the host communities, natural resources or the local environment.’⁸¹¹ The Immigration Act (repealed in 2011) provided for issuance of Class M work permits to refugees recognised by the government.⁸¹² In practice however, the government stopped issuing work permits to refugees in 2004.⁸¹³ Following pressure by civil society organisations, the government undertook to start issuing work permits to refugees.⁸¹⁴ However, the grant of work permits to

⁸⁰⁶ UN High Commission for Refugees, Horn of Africa, Kenya, <http://data.unhcr.org/horn-of-africa/country.php?id=110> (23 June 2015).

⁸⁰⁷ Refugee Act, 2006

⁸⁰⁸ As above.

⁸⁰⁹ Refugee Act section 7(2) (c): ‘...the functions of the Commissioner shall be to formulate policy on refugee matters in accordance with international standards’.

⁸¹⁰ Refugee Act section 16 (4): ‘Subject to this Act, every refugee and member of his family in Kenya shall, in respect to wage earning employment be subject to the same restrictions that are imposed on persons that are non citizens’.

⁸¹¹ Refugee Act section 7 (2) (o).

⁸¹² Immigration Act, 2010 (repealed) section 6 (3).

⁸¹³ Hidden and exposed: urban refugees in Nairobi, Kenya’ March 2010, Humanitarian Policy Group Working Paper, 21, <http://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/5858.pdf> (9 June 2014).

⁸¹⁴ As above.

refugees only began in 2012 with 70 Class M work permits being issued to refugees between 2012 and 2013.⁸¹⁵ The Refugee Bill, 2012 drafted to amend the Refugee Act, 2006 in accordance to the Constitution, 2010 contains the same provisions relating to wage-employment for refugees.⁸¹⁶ The Kenya Citizens and Immigration Act, 2011 and the 2012 Regulations made pursuant to the Act impose no charges for grant of Class M work permits for refugees.⁸¹⁷ There is no reference to the recommendations of monitoring mechanisms in the civil society advocacy initiatives.

On relaxing the application of the encampment policy, Kenya's official policy prioritises the notion of accommodating refugees in refugee camps to facilitate their protection, assistance and for national security. As of April 2014, the number of urban refugees in Kenya was estimated at 50,000,⁸¹⁸ although this figure could be higher due to non-registration.

Uncertainty exists in relation to the legality and application of the encampment policy. First, the Constitution, 2010 and the Refugee Act, 2006 entitle refugees to the freedom of movement.⁸¹⁹ Second, while the Refugee Act requires the government to designate certain areas and places as refugee camps,⁸²⁰ it does not expressly state that the refugee camps are the only places that refugees may live. Notably, designated refugee camps were only gazetted in March 2014 despite the Act being operational since May 2007.⁸²¹ The Security Law Amendment Act, 2014 makes it mandatory for refugees and asylum seekers to obtain permission from a refugee camp officer before leaving the designated camps.⁸²²

The High Court has in the recent past addressed itself to the encampment policy without providing certainty. In January 2013, following a government directive issued in December 2012 requiring all urban refugees to relocate to the camps,⁸²³ civil society organisations and urban refugees moved to court to challenge the constitutionality of the encampment policy.⁸²⁴ In July 2013, the High Court ruled that the encampment policy was unconstitutional as it violated the freedom of movement for urban refugees, their right to dignity and fair administrative action.⁸²⁵ The government however lodged an appeal against the judgement, which has not been decided by October 2015. In a similar case filed by refugees

⁸¹⁵ Parliament of Kenya, National Assembly Hansard 30 October 2013, <http://www.parliament.go.ke/plone/national-assembly/business/hansard/wednesday-30th-october-2013-at-2.30pm/view> (9 June 2014).

⁸¹⁶ Refugee Bill, 2012 clause 14 (1)(b): 'Subject to this Act, every refugee and member of his family in Kenya shall in respect of wage-earning employment be subject to the same restrictions as are imposed on persons who are not citizens of Kenya.'

⁸¹⁷ Kenya Citizenship and Immigration Regulations, 2012 Legal Notice 64 of 2012, ninth schedule, <http://kenyalaw.org/kl/index.php?id=786> (9 June 2014).

⁸¹⁸ United Nations High Commissioner for Refugees, Horn of Africa, Kenya statistics package, <https://data.unhcr.org/horn-of-africa/documents.php?page=1&view=grid&Country%5B%5D=110> (9 June 2014).

⁸¹⁹ Refugee Act, 2006 section 16 (1) (a): 'Subject to this Act, every recognized refugee and every member of his family in Kenya – shall be entitled to the rights and be subject to the obligations contained in the international conventions to which Kenya is a party'.

⁸²⁰ Refugee Act section 16 (2) (b): 'The Minister may, by notice in the Gazette, in consultation with the host community designate places and areas in Kenya to be – refugee camps.'

⁸²¹ Kenya Gazette Notice 1927 of 17 March 2014 'Designation of areas as refugee camps'.

⁸²² See Security Law Amendment Act, 2014 section 47.

⁸²³ Department of Refugee Affairs, press release 13 December 2012.

⁸²⁴ Petitions 19 & 115 of 2013, Constitutional and Human Rights Division.

⁸²⁵ *Kituo cha Sheria & 8 others v Attorney General* [2013] eKLR (Petition 19 of 2013 consolidated with Petition 115 of 2013)

challenging a subsequent March 2014 directive requiring all urban refugees to relocate to the camps, the High Court in June 2014 ruled that the encampment policy was constitutional.⁸²⁶

In practice, the application of the encampment policy has been mixed. The government has since December 2012 enforced the encampment policy. As discussed above, in December 2012, the government issued a directive requiring termination of all urban aid and registration to refugees and relocation of all refugees to the camps.⁸²⁷ Similarly, in April 2014 the government following its March 2014 directive launched *Operation Usalama Watch* (Operation Security Watch), a security operation designed as an anti-terrorism operation. Consequently, all urban refugees were rounded up and taken to a temporary administrative detention camp for screening with about 2,000 being forcibly relocated to the camps.⁸²⁸ The rounding up and transfer of urban refugees to the camps was heavily condemned by the Kenya National Commission on Human Rights and civil society organisations.⁸²⁹

Notably, the constitution review process incorporated provisions relating to refugees and asylum seekers. Initial draft constitutions published in 2002, 2004 and 2005 contained express provisions requiring Parliament to enact national legislation in line with international law to govern refugees and asylum seekers.⁸³⁰ However, in 2009, the Committee of Experts removed the provisions relating to refugees on the grounds that refugees would demand socio-economic rights enshrined in the Constitution.⁸³¹ The Constitution, 2010 thus contains no textual provisions relating to refugees.

Drawing from the above analysis, the recommendations relating to refugees have not been implemented as of October 2015. There is no evidence that the petition filed by civil society organisations and the condemnation of the forcible transfer of urban refugees by the Kenya National Commission on Human Rights was in response to the recommendations of monitoring mechanisms.

3.4 Persons with disabilities

(i) Take special measures to increase employment opportunities for persons with disabilities (CESCR Committee 2008).

⁸²⁶ *Samow Mumin Mohammed & 9 others v Cabinet Secretary, Ministry of Interior Security and Coordination & 2 others* [2014] eKLR.

⁸²⁷ Department of Refugee Affairs, press release 13 December 2012.

⁸²⁸ 'Kenya police operation strands 300 children' 20 June 2014, <http://reliefweb.int/report/kenya/kenyan-police-operation-strands-300-children> (8 July 2014).

⁸²⁹ Kenya National Commission on Human Rights, newsroom, press statements, 10 April 2014 <http://www.knchr.org/Portals/0/PressStatements/Press%20Release%20on%20Operation%20Rudisha%20Usama.pdf> (8 July 2014); Human Rights Watch, 'Kenya: halt crackdown on Somalis' 11 April 2014, <http://www.hrw.org/news/2014/04/11/kenya-halt-crackdown-somalis> (8 July 2014).

⁸³⁰ Constitution of Kenya Review Commission, draft Bill 27 September 2002 clause 52 (3) '...Parliament shall enact law in compliance with international law and practice governing persons who seek refuge or asylum in Kenya.' See similar provisions in the Draft constitution of Kenya, 15 March 2004 (Bomas draft) clause 56 (2); Proposed new constitution of Kenya, 22 August 2005 clause 56 (2).

⁸³¹ Committee of Experts on the Constitutional Review 'Verbatim record of the proceedings of the drafting retreat of the Committee of Experts on the Constitutional Review held on 18 September 2009 in Delta House, Nairobi' HAC/1/1/92, 33 (accessed from the Kenya National Archives on 8 October 2014).

According to the 2009 Kenya Population and Housing census, the number of persons with disabilities, defined as physical, mental, speech, visual, self care and hearing, in Kenya was 1,330,312 of whom 647,689 are male and 682, 623 female.⁸³² However, the Kenya National Disabilities Survey 2008 put the number at 1.7 million.⁸³³ Statistics on number of persons with disability in wage-employment are unavailable.

Prior to the Constitution, 2010, the Persons with Disability Act, 2003 was the primary legislation dealing with employment opportunities for persons with disability. The Act prohibits denial of access to employment opportunities for a person with disability.⁸³⁴ It also provides that persons with disability are entitled to the same terms and conditions of employment as other employees and outlaws discrimination by employers against persons with disabilities.⁸³⁵ Specifically on increasing employment opportunities for persons with disabilities, the Act requires the National Council on Persons with Disabilities to strive to ensure reservation of 5% casual, emergency and contractual positions in employment in the public and private sectors for persons with disability.⁸³⁶ This provision is however subject to criticism as it fails to expressly require of the State to take measures to ensure the 5% reservation. Nonetheless, the Act also provides incentive for private employers through tax reliefs with a view to increasing employment of persons with disabilities.⁸³⁷

Equally, the Employment Act, 2007 criminalises discrimination against an employee or prospective employee on the grounds of disability in recruitment, training, promotion, terms and conditions of service and termination of employment.⁸³⁸

In terms of specific measures taken to increase employment opportunities in the public sector, the government in 2008 introduced disability mainstreaming as a performance contract target for all public institutions.⁸³⁹ Accordingly, public institutions are required to meet the 5% statutory obligation in employment of persons with disabilities. In practice, these measures have achieved little. The Public Service Commission evaluation report 2014 indicated that the representation of persons with disability in the public service was 1%.⁸⁴⁰

⁸³² Kenya Population and Housing census 2009 (n 662above).

Kenya National Survey for Persons with Disabilities (n 494 above) 72.

⁸³⁴ Persons with Disability Act section 12 (1): 'No person shall deny a person with a disability access to opportunities for suitable employment.'

⁸³⁵Persons with Disability Act section 12 (2) and 15.

⁸³⁶ Persons with Disability Act section 13: 'The Council shall endeavour to ensure the reservation of five percent of all casual, emergency and contractual employment in the public and private sectors for persons with disability.'

⁸³⁷ Persons with Disability Act section 16 (1) : 'A private employer who engages a person with disability with the required skills or qualifications either as a regular employee, apprentice or learner shall be entitled to apply for a deduction from his taxable income equivalent to twenty five percent of the total amount paid as salary or wages to such employee',

⁸³⁸ Employment Act section 5 (3)(a): 'No employer shall discriminate directly or indirectly against an employee or a prospective employee or harass an employee or a prospective employee on the grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, mental or HIV status; (b) in respect of recruitment, promotion, training, terms of and conditions of employment, terminating of employment or other matters arising out of the employment. '

⁸³⁹ Kenya Performance contracting guidelines 2008/09 (on file with author).

⁸⁴⁰ Public Service Commission 'Public service compliance with values and principles in Articles 10 and 232 of the Constitution 2013/14 evaluation report' December 2014, 28.

The Constitution, 2010 fixes a numerical quota for persons with disability in elective and appointive bodies. It binds the state to progressively implement the principle that at least five percent of members of the public in elective and appointive bodies are persons with disabilities.⁸⁴¹ The principle is to be implemented progressively thus requiring the government to enact laws, policies and other measures for its achievement. Similarly, the Constitution outlaws discrimination on the ground of disability.⁸⁴² To concretize the 5% principle, the Persons with Disabilities (Amendment) Bill, 2013 was drafted. The Persons with Disabilities (Amendment) Bill, 2013 provides for the right to employment for persons with disabilities.⁸⁴³ Further, the Bill binds the National Council on Persons with Disabilities to ensure reservation of 5% in all casual, emergency and contractual employment in public and private institutions for persons with disabilities.⁸⁴⁴ It criminalises failure to observe the 5% reservation principle but only after being approached by the National Council for Persons with Disabilities.⁸⁴⁵ In addition, to increase employment opportunities for persons with disabilities in the private sector, the Bill grants twenty five per cent tax relief for any employer who engages a person with disability.⁸⁴⁶ The Bill was tabled for debate in the National Assembly as a private members Bill in February 2014 and has however not been enacted in October 2015.⁸⁴⁷

The Constitution, 2010 makes further provisions in regard to employment of persons with disabilities in the public service. It outlines the principles and values of the public service to include 'affording adequate and equal opportunities for appointment, training and advancement, at all levels of the public service, to persons with disabilities.'⁸⁴⁸ The Public Service Values and Principles Act, 2015 allows appointment and promotion of public officers

⁸⁴¹ Constitution, 2010 article 54 (2): 'The State shall ensure the progressive implementation of the principle that at least five percent of the members of the public in elective and appointive bodies are persons with disabilities.'

⁸⁴² Constitution, 2010 article 27 (4): 'The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.'

⁸⁴³ Persons with Disabilities Amendment Bill, 2012 clause 28: 'A person shall not deny a person with disability access to opportunities for employment; (2) An employee with disability shall be subject to the same terms and conditions of employment, and the same compensation, privilege, benefits, fringe benefits, incentives or allowances as an equal basis with any other employee; (3) An employee with a disability shall be entitled to exemption from tax on all income accruing from his or her employment.'

⁸⁴⁴ Persons with Disabilities Amendment Bill, 2012 clause 29 (a): 'The Council shall secure the reservation of 5% of all casual, emergency or contractual positions in employment in public and private sectors for persons with disability.'

⁸⁴⁵ Persons with Disabilities Amendment Bill, 2012 clause 29 (b): 'An employer who fails to observe the provisions of subsection (1) on being approached by the Council commits an offence.'

⁸⁴⁶ Persons with Disabilities Amendment Bill, 2012 clause 32: 'A private employer who engages a person with disability with the required skills or qualifications either as a regular employee, apprentice or learner shall be entitled to apply for a deduction from his or her taxable income equivalent to twenty five percent of the total amount paid as salary or wages to the employee with disability.'

⁸⁴⁷ Parliament of Kenya, National Assembly, bills tracker as at 23 October 2015, <http://www.parliament.go.ke/the-national-assembly/house-business/bills-tracker/item/1979-bills-tracker-as-at-october-23rd-2015> (accessed 25 October 2015).

⁸⁴⁸ Article 232 (1) (i) (iii).

without undue reliance on fair competition and merit in instances in which person with disabilities are not adequately represented in the public service.⁸⁴⁹

The recommendation has been fully implemented through constitution reform process. Although the requirement for reservation of five percent of employment opportunities for persons with disabilities in employment has been in existence since the entry into force of the Act in 2004, the government did put in place binding mechanisms for its implementation. Following incorporation of the requirement in the Constitution, 2010 the government has put in place legal mechanisms for implementation.

3.5 Ethnic discrimination

(i)Address ethnic discrimination in employment and housing (CERD Committee 2011); (ii) address ethnic and regional disparities in allocation of resources in addition to the Equalisation Fund for provision of and access to public services in marginalised areas (CERD Committee 2011).

On ethnic discrimination in employment and housing, the Constitution, 2010 prohibits direct and indirect discrimination on the grounds of race and ethnic or social grounds among other protected grounds.⁸⁵⁰ In addition, the state is required to remedy any instances of disadvantage suffered by individuals or groups due to past discrimination.⁸⁵¹ In relation to ethnic discrimination in employment, the Constitution addresses itself to public service employment. First, it enshrines the principle of representation of Kenya's ethnic diversity in the public service.⁸⁵² Second, it requires the state to ensure equal opportunities for appointment, training and advancement at all levels of the public service for members of all ethnic groups.⁸⁵³ Third, it emphasizes representation of ethnic diversity as a consideration in appointments and promotion in the public service over and above fair competition and merit.⁸⁵⁴ Additionally, the Constitution, 2010 also makes provision requiring that the composition of constitutional commissions and independent offices should reflect the regional and ethnic diversity of Kenya.⁸⁵⁵

⁸⁴⁹ Public Service Values and Principles Bill clause 10 (2) (d): 'The public service may appoint or promote public officers without undue reliance on fair competition or merit if persons with disabilities are not adequately represented in the public service.'

⁸⁵⁰ Article 27(4): 'The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.' Article 27 (5): 'A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).'

⁸⁵¹ Article 27 (6): 'to give full effect to the realisation of the rights guaranteed under this Article, the State shall take legislative and other measures including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.'

⁸⁵² Constitution article 232 (1) (h): 'The values and principles of the public service include representation of Kenya's diverse communities'.

⁸⁵³ Article 232(1)(i): 'The values and principles of public service include affording adequate and equal opportunities for appointment, training and advancement at all levels of the public service, of - ...the members of all ethnic groups'.

⁸⁵⁴ Article 232 (1) (g): 'Subject to paragraphs (h) and (i), fair competition and merit as the basis of appointments and promotions'.

⁸⁵⁵ Article 250 (4): 'Appointments to commissions and independent offices shall take into account the national values referred to in Article 10, and the principle that the composition of the commissions and offices, taken as a whole, shall reflect the regional and ethnic diversity of the people of Kenya'.

Similarly, the National Cohesion and Integration Act, which outlaws ethnic discrimination in Kenya,⁸⁵⁶ contains specific provisions on ethnic discrimination in employment. The Act expressly prohibits ethnic discrimination in employment opportunities and in the terms of employments.⁸⁵⁷ Further, the Act requires public establishments to reflect the ethnic diversity of Kenya in employment of staff,⁸⁵⁸ and provides that no public establishment shall have more than one third of its staff from the same ethnic community.⁸⁵⁹ The Employment Act also prohibits discrimination on the grounds of race and ethnic or social origin.⁸⁶⁰

In practice, the effectiveness of these legislative provisions is contestable. A 2011 audit study by the National Cohesion and Integration Commission on ethnic diversity in the civil service in Kenya found that two ethnic communities take up nearly 40% of all civil service jobs,⁸⁶¹ while the five large ethnic communities account for 67% of all civil service employment.⁸⁶² The 2009 Kenya Population and Housing census put the number of ethnic communities at 43. The five communities' proportion in the civil service far exceeds their population share.⁸⁶³ A similar audit conducted in public universities in 2012 found that the five largest communities account for 81% of employment positions in public universities,⁸⁶⁴ while some communities had no representation in the public university employment.⁸⁶⁵ In its 2014 evaluation report, the Public Service Commission indicated that five ethnic communities account for 70% of all public service jobs in Kenya, while some communities account for only one person in the entire public service.⁸⁶⁶ These statistical patterns of ethnic

⁸⁵⁶ National Cohesion and Integration Act, 2009, preamble: 'An Act of Parliament to encourage national cohesion and integration by outlawing discrimination on ethnic grounds...'

⁸⁵⁷ National Cohesion and Integration Act, section 7 (3): 'It is unlawful for a person, his representative or assigns in relation to employment by him at an establishment to discriminate against another – (a) in the arrangements he makes for the purpose of determining who should be offered that employment; (b) in the terms he offers him that employment; or (c) by refusing or deliberately omitting to offer him that employment'. Section 7 (4): 'It is unlawful for a person in cases of a person employed by him at an establishment to discriminate against that employee – (a) in the terms of employment in which he affords him; (b) in the way he affords him access to opportunities for promotion, transfer or training or any other benefits, facilities or services, or by refusing or deliberately omitting to afford him access to them; or (c) by dismissing him or subjecting him to any other detriment'.

⁸⁵⁸ Section 7(1): 'All public establishments shall seek to represent the diversity of the people of Kenya in employment of staff.'

⁸⁵⁹ Section 7(2): 'No public establishment shall have more than one third of its staff from the same ethnic community'.

⁸⁶⁰ Employment Act, 2007 section 5(3): 'No employer shall discriminate directly or indirectly against an employee or prospective employee or harass an employee or prospective employee – (a) on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, mental status or HIV status; (b) in respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of employment.'

⁸⁶¹ National Cohesion and Integration Commission 'Towards national cohesion and unity in Kenya: ethnic diversity audit of the civil service' April 2011, vol.1

<http://www.cohesion.or.ke/images/downloads/ethnic%20diversity%20of%20the%20civil%20service.pdf> (20 June 2014). The Kikuyu represent 22.3% of all civil service jobs while the Kalenjin represent 16.7%.

⁸⁶² As above.

⁸⁶³ As above.

⁸⁶⁴ National Cohesion and Integration Commission 'Briefs on ethnic diversity of Kenyan universities' March 2012, vol. 3

<http://www.cohesion.or.ke/~cohesion/images/downloads/briefs%20of%20ethnic%20audit%20of%20public%20universities%20-%20final.pdf> (20 June 2014).

⁸⁶⁵ As above. These communities include Tharaka, Gabra, Orma, Burji, Gosha, Dasnach and Njemps.

⁸⁶⁶ Public Service Commission evaluation report 2013/14 (n 840 above) 70-71.

discrimination in public service employment point to indirect discrimination due to systemic disadvantage and a history of discrimination against certain ethnic groups.

The Public Service (Values and Principles) Act, 2015 makes provision for appointment and promotion of public officers without undue reliance on fair competition and merit in instances in which a community is underrepresented in public service appointments or promotion and an ethnic group is disproportionately represented in a public institution.⁸⁶⁷

In regard to commissions and independent offices established by the Constitution, 2010, the requirement of ethnic diversity has largely been adhered to. This is in part because the appointments have required Parliamentary approval hence the ethnic diversity requirement has been enforced through parliamentary oversight.⁸⁶⁸ In some instances, the courts have been called to adjudicate upon allegations of ethnic discrimination in appointments relating to the composition of commissions and independent offices. In *John Waweru Wanjohi & others v Attorney General & others* the petitioners sought a nullification of the appointments to the nine-member National Land Commission on the basis that the appointments were not representative of the ethnic diversity and regions of Kenya.⁸⁶⁹ In particular it was argued that Central, Coast, Kisii, Masaailand and the Kalenjin community was unrepresented while the Somali community was over-represented.⁸⁷⁰ In this case, the High Court weighed in on the meaning of 'regional and ethnic diversity'. The Court pointed out that the requirement of 'regional and ethnic diversity' does not imply reservation of seats for specific ethnic groups based on their populations or that certain ethnic groups be excluded from consideration but was meant to achieve diversity.⁸⁷¹

On ethnic discrimination in housing, a 2014 study on housing in Kibera, an informal settlement in Nairobi, indicates that landlords impose higher house rents for tenants who do not belong to their ethnic community.⁸⁷² Equally, landlords are unwilling to rent houses to persons belonging to ethnic communities other than their own or to certain ethnic communities.⁸⁷³ The Housing Act does not address the issue of ethnic discrimination in housing. Similarly, the Housing Bill, 2013 contains no provisions on addressing ethnic discrimination.

The issue of ethnic discrimination in public service employment has featured in national debates. However, these debates often take political undercurrents which obscures debate on the substantive issues. Illustratively, in December 2013 appointments by the President to state corporations positions raised public furore for being ethnically skewed and riddled with

⁸⁶⁷ Public Service (Values and Principles) Bill clause 10 (2): '...public service may promote or appoint officers without undue reliance to fair competition and merit if – (a) a community in Kenya is not adequately represented in appointments to or promotions in the public service; (c) an ethnic group is disproportionately represented in a public institution'.

⁸⁶⁸ See for instance National Assembly debate during the vetting of members of the Transitional Authority, National Assembly official records, Hansard 13 June 2012, <http://www.parliament.go.ke/plone/archive/archive-10th-Parliament/hansards/official-report-13-june-2012-pm/view> (20 June 2014).

⁸⁶⁹ [2012] eKLR.

⁸⁷⁰ As above.

⁸⁷¹ As above.

⁸⁷²B Marx *et al* 'There is no free house: ethnic patronage and property rights in a Kenyan slum' 2014, 3 http://www.mit.edu/~tavneet/Marx_Stoker_Suri.pdf (20 June 2014).

⁸⁷³ As above.

political clientelism.⁸⁷⁴ The Commission on the Implementation of the Constitution issued a public advisory on the appointments which fell short of pointing out the ethnically skewed nature of the appointments.⁸⁷⁵

The issue has in the recent past been subjected to judicial scrutiny. In July 2014, the Attorney General was sued for promoting tribalism in the State Law office.⁸⁷⁶ The petitioners argue that the senior management in the State Law office comprised only members of the Kikuyu community.⁸⁷⁷ The case is yet to be determined as of June 2015.

From the foregoing, the recommendation relating to employment in the public service is partially implemented through constitution reform process. While the Constitution, 2010 contains overarching provisions outlawing discrimination on among other grounds ethnicity, as discussed above, no mechanisms have been put in place to address ethnic discrimination in the private spheres for instance as it relates to housing. The government has not yet enacted the Equal Opportunities Bill, 2007 which prohibits discrimination and promotes equal opportunities for all. The Bill contains a general prohibition of discrimination on in different areas including in employment and in housing.⁸⁷⁸ As of October 2015, the Equal Opportunities Bill has not been published for Parliamentary debate. The government position is that the Bill has been shelved awaiting review in light of the constitutional provisions on discrimination.⁸⁷⁹ The recommendation relating to ethnic discrimination in housing has not been implemented.

On addressing ethnic and regional disparities in allocation of resources, Kenya's ethno-regional disparities are rooted in history and politics and often manifest in lack of services, power, resources and voice. The extent of the ethno-regional disparities is well documented. A 2013 study on inequality in East Africa ranks Kenya as the second most unequal country after Rwanda.⁸⁸⁰ According to the United Nations Development Programme 2013 report, Kenya's Human Development Index is 0.519.⁸⁸¹ However, when the value is discounted for inequality across the population it falls by 33.6% to 0.344.⁸⁸² The Constitution, 2010 specifies equity as an expected outcome. In the context of allocation of public resources, the Constitution, 2010 provides the budgeting process as the primary tool for addressing ethno-regional inequalities. First, the Constitution, 2010 outlines the principles of the public finance system as promotion of equity particularly though equitable development of the country

⁸⁷⁴ Kenya Special Gazette Notice vol. CXV-No. 182 of 27 December 2013.

⁸⁷⁵ Commission on the Implementation of the Constitution, newsroom 'Public advisory by the Commission on the Implementation of the Constitution on appointments to public offices' 14 January 2014, <http://www.cickenya.org/index.php/newsroom/item/360-public-advisory-by-the-commission-for-the-implementation-of-the-constitution-on-appointments-to-public-offices#.U8GFZSSxNw> (20 June 2014).

⁸⁷⁶ Petition 292 of 2014.

⁸⁷⁷ As above.

⁸⁷⁸ Equal Opportunities Bill, 2007 clause 9: 'Every person is entitled to equality with respect to the following without discrimination and it shall be an offence to discriminate against any person on the basis of any of the prohibited grounds in- (a) employment; (e) housing, goods, facilities and services including financial services'.

⁸⁷⁹ See State report to the Committee Against Torture, CAT/C/KEN/2, November 2012 para 26.

⁸⁸⁰ Society for International Development 'State of East Africa 2013: one people, one destiny? The future of inequality in East Africa', 8

⁸⁸¹ United Nations Development Programme 'Human Development report 2013 Kenya' <http://hdr.undp.org/sites/default/files/Country-Profiles/KEN.pdf> (26 June 2014).

⁸⁸² As above.

including by making special provision for marginalised groups and areas.⁸⁸³ Second, the Constitution, 2010 embodies a redistribution policy through the Equalisation Fund. The Equalisation Fund provides for distribution of one half per cent of the annual revenue collected by the national government to poorer regions for twenty years to assist in the provision of basic services including water, roads, health facilities and electricity.⁸⁸⁴ The rationale is to bring the level of services in the poorer regions to the level of services enjoyed by the rest of the country.⁸⁸⁵ Third and in addition to the Equalisation Fund, the Constitution, 2010 introduces the devolved system of government with the objectives of ensuring equitable sharing of national and local resources in the country and promoting social economic development and accessibility of services.⁸⁸⁶ On revenue sharing to the devolved governments, the Constitution, 2010 provides that the revenue is to be shared equitably,⁸⁸⁷ and sets the minimum share of revenue to be allocated to the devolved governments at fifteen per cent of all national government revenue.⁸⁸⁸ The criteria for sharing of national revenue to the devolved governments is set out to include the developmental and other needs of counties, need to remedy economic disparities among counties and the need for affirmative action in relation to disadvantaged groups.⁸⁸⁹ Further, a Commission on Revenue Allocation is established with the principal mandate of making recommendations for the equitable sharing of revenue between the national government and devolved governments, and among counties.⁸⁹⁰

In practice, the formula for allocation of resources among counties was passed by the National Assembly in November 2012 as: 45% population density, 20% poverty index, 8% land area, 25% basic equal share and 2% fiscal responsibility.⁸⁹¹ This formula addresses ethno-regional disparities by allocating more resources to counties with less developed

⁸⁸³Article 201 (b) (iii): ‘the public finance system shall promote an equitable society, and in particular – expenditure shall promote the equitable development of the country, including by making special provision for marginalised groups and areas’.

⁸⁸⁴ Article 204(1) : ‘There is established an Equalisation Fund into which shall be paid one half per cent of all the revenue collected by the national government each year calculated on the basis of the most recent audited accounts of revenue received, as approved by the National Assembly.’ (2): ‘The national government shall use the Equalisation Fund only 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 is possible.’ (6): ‘The article lapses twenty years after the effective date subject to clause 7.’

⁸⁸⁵ As above.

⁸⁸⁶Article 174: ‘The objects of the devolution of government are – (f) to promote social and economic development and the provision of proximate, easily accessible services throughout Kenya; (g) to ensure equitable sharing of national and local resources throughout Kenya’.

⁸⁸⁷Article 202(1): ‘Revenue raised nationally shall be shared equitably among the national and county governments’.

⁸⁸⁸ Article 203 (2): ‘For every financial year, the equitable share of the revenue raised nationally that is allocated to county government shall be not less than fifteen percent of all revenue collected by the national government.’

⁸⁸⁹ Article 203 (1): ‘The following criteria shall be taken into account in determining the equitable shares provided for under Article 202 and in all national legislation concerning county government enacted in terms of this Chapter – (f) developmental and other needs of counties; (g) economic disparities within and among counties and the need to remedy them; (g) the need for affirmative action in respect of disadvantaged areas and groups’.

⁸⁹⁰ Article 216 (1): ‘The principal function of the Commission on Revenue Allocation is to make recommendations concerning the basis for the equitable sharing of revenue raised by the national government – (a) between the national and county governments; and (b) among the county governments.’

⁸⁹¹ Commission on Revenue Allocation, basis for sharing revenue among counties, <http://www.crakenya.org/> (28 June 2014).

socio-economic indicators. In essence counties with higher population and high poverty index get the highest allocation. Nonetheless, this formula is imperfect in particular in regard to land area which though allocated a lower weight results in higher disparities in per capita allocation since counties with large land areas tend to have low population density. Illustratively, five largest counties by land mass in Kenya have a combined population of 6.2% of the total population of Kenya and are also found in marginalised areas.⁸⁹² Based on the formula for resource allocation, the counties get less revenue as the criteria for land is weighted lower than the population criterion.⁸⁹³

From the analysis, this finding has been fully implemented through the constitutional implementation process.

3.6 Ratification of instruments relating to the rights of women, children and collective groups

(i) Ratify the Protocol on Rights of Women in Africa (African Commission 2007); (ii) ratify the African Charter on the Rights and Welfare of the Child (SR STC 1998); (iii) ratify optional protocol on sale of children, child prostitution and pornography (SR STC 1998); (iv) ratify Hague Convention No. 33 on protection of children and cooperation in inter-country adoptions (CRC Committee 2001, 2007); (v) ratify ILO Convention 169 (African Commission 2011, UPR 2010, SR IP 2007); (vi) adopt the UN Declaration on the Rights of Indigenous Persons and to ensure its incorporation to domestic law (African Commission, UPR 2010, SR IP 2007); (vii) ratify the African Union Convention on Protection and Assistance of Displaced Persons in Africa (Kampala Convention) (SR IDPs 2012); (viii) ratify the International Convention on Migrant Workers and Members of their Families (CERD Committee 2011).

The Protocol on the Rights of Women in Africa was ratified on 8 October 2010. The impetus for ratification can be traced to the launch of AU African Women Decade which was scheduled in Nairobi, Kenya on 10 October 2010. In addition, the African Charter on the Rights and Welfare of the Child was ratified in July 2000. The Hague Convention on Protection of Children and Cooperation in respect to Inter-country Adoption was ratified in February 2007.⁸⁹⁴ The other instruments have not been ratified as of October 2015. A detailed discussion on ratification of treaties is undertaken in chapter eight, section 4.2.

The recommendations relating to ratification of treaties are not implemented except in relation to the Protocol on the Rights of Women in Africa and the Hague Convention on Protection of Children and Cooperation in Inter-Country Adoptions.

⁸⁹² 'Shallow understanding of the problems devolution was to solve could lead to its failure' *The East African*, 28 September 2013, <http://www.theeastafrican.co.ke/news/Why-devolution-will-not-end-inequality-in-Kenya/-/2558/2010884/-/item/1/-/gmquuqz/-/index.html> (8 July 2014). These counties are: Marsabit, Turkana, Wajir, Garissa and Tana River.

⁸⁹³ As above.

⁸⁹⁴ Hague Conference on Private International Law, Convention of 29 May 1993 on Protection of Children and Cooperation in Respect of Inter-Country Adoption, status table, http://www.hcch.net/index_en.php?act=conventions.status&cid=69 (19 April 2014).

4 Review of implementation of findings arising from adjudicative processes of monitoring mechanisms

This chapter has assessed implementation of three sets of findings arising from adjudicative processes. These are: the decision of the African Committee on the Child in the communication on children of Nubian descent in Kenya; the decision of the African Commission in the Endorois communication; and the African Court order for provision measures in the Ogiek community case. Of the three, only the findings relating to the Endorois communication are categorised as partially implemented, as the state in September 2014 put in place an Executive mechanism to provide guidance on the implementation of the findings.

In regard to the findings on the children of Nubian descent in Kenya communication and the Ogiek case, there is no evidence of any action taken by government actors. In the Ogiek case there is evidence of the government having taken action contrary to the court order, as already discussed in section 3.1.6. Notably, the three findings touch on indigenous peoples' and minority rights which remain contested at the national level. The partial implementation of the findings in the Endorois communication points to the sustained initiatives of non-state actors to facilitate implementation. This discussion is taken up in chapter eight.

5 Conclusion

The assessment on rights of women, children and collective groups reveals minimal implementation of the findings and recommendations of monitoring mechanisms. In all the three thematic areas implementation has mainly occurred as a result of the constitutionally mandated reforms.

In relation to the assessment on women's rights, the most recommendations have been implemented as a result of the Constitution, 2010 which provided for reforms associated with the recommendations and set strict timelines for implementation. The recommendations that had no connection with constitutional reforms have been implemented mainly through the initiatives of non-state actors such as initiating draft laws. Notably, in relation to the recommendations made by the APRM, the government, specifically the President, took deliberate actions to facilitate their implementation. However, despite the constitutional provisions, there are attempts to reverse on implementation, for instance as demonstrated on rights on equality and discrimination and participation of women in political life.

On whether the implementation of these recommendations has led to greater enjoyment of human rights by women, the answer must be no. As it stands today, equality is constitutionally guaranteed, discrimination in all spheres of life is outlawed and violence against women criminally sanctioned, but women do not enjoy substantive equality. Women rights are still saddled with the yoke of patriarchy. This is illustrated for instance by development of laws based on patriarchal norms that contradict the concept of equality such as the Matrimonial Property Act, the Marriage Act and failure to put in place mechanisms for realisation of the gender principle in women representation in Parliament.

On children's rights, similarly the assessment reveals that a minimal number of findings and recommendations have been implemented. Further, implementation has mainly been as a result of the constitutionally mandated reforms, particularly resulting from the constitutional protection of children's rights.

On the rights of collective groups, equally most of the findings and recommendations are partially implemented. The partial implementation is largely through the constitutionally mandated reforms which necessitated review of laws and policies linked to the recommendations made in regard to indigenous persons, minorities and other groups. The Constitution imposes timelines within which laws are to be passed. Further, the analysis finds no evidence of implementation of recommendations that had no bearing on Constitutional reforms. For instance, the findings on the Ogiek requiring the State to halt land transactions, recommendations on refugees and on review of the National Cohesion and Integration Commission Act.

Chapter 6

Assessment of the impact of the findings and recommendations of monitoring mechanisms in the constitution-making process

1 Introduction

This brief overview of the constitution making process in Kenya provides a contextual background of the assessment of the impact of the findings and recommendations of monitoring mechanisms.

Kenya has had a protracted constitution-making process spanning more than two decades and characterised by minimal amendments, drafting and re-drafting. Although history locates debate on Kenya's constitution-making process in the late 80s and early 90s,¹ formal review of the independence Constitution anchored on a legislative framework was initiated in 1997.² The clamor for the constitution review process in Kenya was informed by prior constitutional amendments whose net effect was distortion of the division of power between the Executive on one hand with both the Judiciary and Parliament and limitation of individual rights and freedoms. In the context of human rights, the amendments: restricted the enjoyment of political rights by designating Kenya as a one party state,³ limited the rights of arrested persons by making offences punishable by the death sentence non bailable,⁴ allowed for pre-trial detention capital offences suspects for 14 days without arraigning them in court,⁵ and interfered with the independence of the Judiciary through removal of the security of tenure for judges.⁶

The legal framework for the constitution making process in Kenya was the Constitution of Kenya Review Act enacted in 1997.⁷ This Act was amended numerous due to political struggles on the structure of the constitution review process,⁸ resulting in the Constitution of Kenya Review Act, 2001 (Review Act, 2001) which eventually guided the process. The Review Act, 2001 provided for the objects and purposes of reviewing the Constitution, the organs of the review and the procedure of the review process.⁹ The organs of the review were: (i) the Review Commission which was mandated to collect and collate public views to amend or rewrite the constitution and to draft a Bill to alter the independence Constitution; (ii) the National Constitutional Conference which consisted of 629 delegates and was mandated to debate, amend and adopt the Review Commission's draft constitution by a two thirds majority; (iii) the national referendum which was not as a final act, but as a mechanism to decide on issues which National Constitutional Conference would not reach an

¹ A L Bannon 'Designing a constitution-drafting process: lessons from Kenya' (2007) 116 *Yale Law Journal* 1831; J T Gathii 'Popular authorship and constitution-making: comparing and contrasting DRC and Kenya' (2008) 49 *William and Mary Law Review* 1116; Media Development Association & Konrad Adenauer Foundation History of constitution making in Kenya (2012) 29-31.

² See Constitution of Kenya Review Act, 1997.

³ Constitution of Kenya (Amendment) Act no. 7, 1982.

⁴ Constitution of Kenya (Amendment) Act no. 20, 1987.

⁵ Constitution of Kenya (Amendment) Act no. 4, 1988.

⁶As above.

⁷ The Constitution of Kenya Review Act, 1997.

⁸ See Media Development Association (n 1 above) 31-33.

⁹ See Constitution of Kenya Review Act, 2001

agreement; and (iv) Parliament which was mandated to accept or reject the proposed constitution in a up or down vote without amendments.¹⁰

The actual constitution making process was provided in the Review Act, 2001 as a three step process involving: (i) public consultation and drafting of a draft Bill by the Review Commission (ii) revision of the draft Bill by a national conference; and (iii) ratification of the final draft by Parliament.¹¹ This process commenced in December 2001 and the draft Bill of the constitution was published in September 2002.¹² Instructively, the drafting of the Bill was preceded by visits by the Review Commission to all 210 electoral constituencies, listening to oral views and collection of 35,015 memoranda from the public.¹³ The second step of the review, the National Constitutional Conference, commenced in April 2003.¹⁴ The National Constitutional Conference held three rounds of negotiations ending in March 2004 and resulting in the draft constitution, known as the Bomas draft.¹⁵ However, the National Constitutional Conference process, was characterised by political and legal challenges.¹⁶ Consequently, the third step, which constituted the ratification of the Bomas draft constitution by Parliament, never happened as the Bomas draft constitution was never submitted to Parliament. From August 2004 to July 2005, Parliament re-negotiated the Bomas draft constitution with a view to reaching political consensus on the contentious constitutional issues.¹⁷ Parliament's re-negotiated draft constitution, known as the Proposed New Constitution, 2005, was subjected to a national referendum in November 2005, and disapproved with 57% vote against it.¹⁸

The constitution making process re-emerged in the national agenda in February 2008 as a primary component of the political settlement of the 2007/08 post election violence.¹⁹ In December 2008, Parliament enacted two key legislations, the Constitution of Kenya Review Act, 2008 and Constitution of Kenya (Amendment) Act, 2008, to restart the constitution making process. The Constitution of Kenya (Amendment) Act, 2008 anchored the constitution making process in the Constitution and provided for a national referendum to

¹⁰ Constitution of Kenya Review Act, 2001 section 4(1).

¹¹ Constitution of Kenya Review Act, 2001 section 26 (2).

¹² Constitution of Kenya Review Commission 'The people's choice. Report of the Constitution of Kenya Review Commission 18 September 2002', 14.

¹³ As above.

¹⁴ Constitution of Kenya Review Commission 'The report of the rapporteur-general to the National Constitutional Conference on the general debate held between 28 April 2003 and 6 June 2003 at the Bomas of Kenya' 17 July 2003(accessed Kenya National Archives 28 September 2014).

¹⁵ Constitution of Kenya Review Commission 'The report of the rapporteur-general to the National Constitutional Conference on its deliberations between 18 August 2003 and 26 September at the Bomas of Kenya' 17 November 2003; Constitution of Kenya Review Commission 'The report of the rapporteur-general to the National Constitutional Conference on its deliberations between 12 January 2004 and 23 March 2004 at the Bomas of Kenya' 17 April 2004 (accessed from the Kenya National Archives 30 September 2014).

¹⁶ The legal challenges included law suits which challenged the legitimacy of the entire constitutional review process and its outcome (*Njoya versus Attorney General* (2004) 1 K.L.R 261) and a court order that prohibited the Attorney General from receiving the Bomas draft constitution (*Njuguna Michael Kungu, Gacuru wa Kareng'e & Nicholas Mugo versus The Republic, Attorney General & CKRC* High Court Misc. Application No. 309 of 2004). On the political front, the government side withdrew from the National Constitutional Conference in March 2004 following disagreements on the proposed structure of the executive.

¹⁷Media Development Association (n 1 above) 40-43.

¹⁸ Kenya Gazette Notice no. 9510 of 27 November 2005.

¹⁹ Kenya National Dialogue and Reconciliation 'long-term issues and solutions', 4 March 2008, <http://www.dialoguekenya.org/index.php/agreements.html> (28 September 2014).

ratify the new constitution.²⁰ Similarly, the Constitution of Kenya Review Act, 2008 (Review Act, 2008) provided for finalisation constitution making process.²¹ The Review Act, 2008 outlined step by step procedures to be followed in constitution-making and established the organs of the process as the Committee of Experts, the Parliamentary Select Committee, the National Assembly and the referendum.²² The Committee of Experts was mandated to identify and resolve contentious issues, harmonise agreed upon issues and prepare a draft constitution to be subjected to a national referendum.²³

The Review Act, 2008 considered contentious issues as issues which the three draft constitutions; the 2002 draft Bill by the Review Commission, the Bomas draft constitution and the Proposed New Constitution, 2005 differed in principle.²⁴ Accordingly, the Committee of Experts identified three contentious issues as: (i) the system of government that is the nature of the executive and legislature, (ii) devolution and (iii) transitional clauses on bringing the new constitution into effect.²⁵

The actual process of finalizing the constitution-making process commenced in March 2009.²⁶ In November 2009, a draft harmonised constitution was published for public debate and comments.²⁷ A revised harmonised draft constitution which was amended incorporating views from the public was submitted to the Parliamentary Select Committee on the constitution review process on 8 January 2010.²⁸ A further draft, the revised harmonised draft constitution of Kenya which, included amendments made by the Parliamentary Select Committee, was submitted to the National Assembly on 23 February 2010.²⁹ The National Assembly failed to pass more than one hundred proposed amendments to the draft constitution thus adopting the proposed constitution without any amendments on 1 April 2010.³⁰ The proposed constitution was then submitted to a national referendum on 4 August 2010, which approved it with 67% voting in support.³¹ The new constitution became effective on 27 August 2010.³²

1.1 Kenya's constitution making and human rights

The legal framework for Kenya's constitution making, the Review Act, 2001, made express references to human rights in the constitution review process. First, the Review Act, 2001, required the process to examine and make recommendations to facilitate respect for human

²⁰ Constitution of Kenya (Amendment) Act, 2008.

²¹ Constitution of Kenya Review Act, 2008.

²² Constitution of Kenya Review Act, 2008 section 5.

²³ Constitution of Kenya Review Act, 2008 section 23 (a) & (b).

²⁴ Constitution of Kenya Review Act, 2008 section 23 (a) & (b), section 29 & section 30.

²⁵ Committee of Experts on Constitutional Review 'The preliminary report of the Committee of Experts on constitutional review' 17 November 2009, 44. (Committee of Experts preliminary report 17 November 2009).

²⁶ Committee of Experts on Constitutional Review 'Final report of the Committee of Experts on Constitutional Review' 11 October 2010, 17 (accessed from Kenya National Archives 29 September 2014) (Committee of Experts final report 11 October 2010).

²⁷ As above.

²⁸ As above.

²⁹ As above.

³⁰ Parliament of Kenya, National Assembly Hansard 1 April 2010, <http://www.parliament.go.ke/plone/archive/archive-10th-Parliament/hansards/official-records-1.04.10p/view> (1 October 2014).

³¹ Kenya Gazette Notice 9361 of 6 August 2010 National referendum results.

³² Kenya Gazette supplement 55 The Constitution of Kenya, 27 August 2010.

rights and gender equity.³³ Second, the Act expressly directed specific attention to the rights of women and children.³⁴ Third, the Act took cognisance of the principle of equal rights and required the review process to address the socio-economic obstacles to the enjoyment of equal rights for all.³⁵ Fourth, on gender rights, the review process was specifically obliged to examine gender parity in conferment of citizenship.³⁶ Fifth, the Act directed examination and recommendation for better enjoyment of land and other property rights.³⁷

The presence of these express provisions is not without context. First, the agitation of the constitution review process was in part informed by blatant violation of human rights as discussed earlier and the inadequacy of the existing bill of rights. Second, the aspiration that every written constitution should guarantee fundamental rights is well established.

1.2 Assessing the impact of the findings and recommendations of monitoring mechanisms

This section assesses whether the findings and recommendations of monitoring mechanisms influenced the constitution making exercise in Kenya. Impact is understood as influence of the findings and recommendations of monitoring mechanisms on domestic processes and on actions of key government actors leading to changes in human rights practices. In the context of the constitution-making process, impact is assessed as the influence of the findings and recommendations of monitoring mechanisms on the constitution-making process. Therefore, influence is observed in three ways. First, in the relevant hansard proceedings on the enactment of the Constitution of Kenya Review Act. Second, in the submissions made by individuals, delegates and civil society organisations during the various stages of the constitution-making process. Third, in the discussions of the technical committees and experts charged with the drafting of the constitution during their drafting sessions. To this end, documentary analysis of archival materials relating to the constitution making process was conducted. Further, key informant interviews were conducted with experts involved in the constitution making process to establish if the findings and recommendations provided inspiration in the review process. The timeline adopted for the analysis of constitution making process was 1997 to 2010 divided into three phases that situate the different processes. These phases were: (i) drafting of the Constitution of Kenya Review Commission Act, 1997; (ii) the constitution-making process by the Constitution of Kenya Review Commission leading to the November 2005 national referendum; and (iii) the finalization of the constitution making process by the Committee of Experts leading to the adoption of the Constitution in August 2010.

The materials reviewed are: (i) hansard of the Parliamentary debate on the enactment of the Constitution of Kenya Review Commission Act, 1997; (ii) hansard of verbatim recording of the public hearings conducted by the Review Commission in all the 210 constituencies in Kenya between December 2001 and July 2002; (iii) public memoranda submitted to the Review Commission between December 2001 and July 2002; (iv) hansard of the verbatim recording of the presentation of the draft Bill to the National Constitutional Conference at Bomas between 28 April and 6 June 2003; (v) hansard of the verbatim recording of the

³³Constitution of Kenya Review Act, 2001 section 17 (d) (iii).

³⁴ Constitution of Kenya Review Act, 2001 section 17 (d)(xi).

³⁵ Constitution of Kenya Review Act, 2001 section 17 (d) (x).

³⁶ Constitution of Kenya Review Act, 2001 section 17 (d) (ix).

³⁷ Constitution of Kenya Review Act 2001 section 17 (d) (vii).

technical committees of the National Constitutional Conference on the chapters relating to the bill of rights and citizenship between September 2003 and January 2004; (vi) hansard of the verbatim record of the proceedings of the plenary of the whole National Constitutional Conference in March 2004 (vii) public submissions to the Review Commission in October 2002 to April 2003 following the publication of the draft Bill in September 2002; (viii) hansard of the verbatim recording of public hearings conducted by the Committee of Experts between July and August 2009; (ix) public memoranda submitted to the Committee of Experts on issues the public considered contentious between April and July 2009; (x) hansard of the verbatim recording of proceedings of the Committee of Experts consultative meetings with civil society organisations, the Kenya National Human Rights Commission and other government agencies in January 2010; (xi) hansard of the verbatim recording of proceedings of the Committee of Experts drafting sessions in April, September and October 2009 and in January and February 2010 on the chapters relating to the bill of rights, citizenship, land and representation of the people; and (xii) hansard of the verbatim recording of the proceedings of the Committee of Experts meeting with the Parliamentary Select Committee in February 2010.

A number of limitations were encountered in the assessment. First, most of the documents were in hard copy and in some instances handwritten thus resulting in a large volume of material for manual analysis. Second, the documents particularly, the public submissions and hearings were indexed according to the regions as opposed to thematic areas or specific chapters thus making the analysis complex. Third, a large number of public submissions particularly to the Committee of Experts were templates that contained similar information thus making the analysis uninformative. Fourth, some critical material was not available for instance copies of memoranda submitted to the Committee of Experts by civil society organisations in December 2009 thus making the analysis reliant on summaries by the Committee of Experts.

1.2.1 1st phase – Drafting of the Review Act, 1997

As discussed earlier, the Review Act, 1997 required the constitution making process to address human rights issues such gender equality in citizenship, protection of children rights, protection of economic, social and cultural rights and women rights. An examination of Kenya's engagement with monitoring mechanisms indicates that in 1997 Kenya had engaged with monitoring mechanisms resulting to a number of recommendations.³⁸ These recommendations included: abolition of the death penalty, constitutional and domestic protection of children rights, constitutional protection of socio-economic rights, elimination of gender inequality in citizenship, women political participation, protection of the rights of detained persons, fair trial rights, unification of marriage and divorce laws and equality of the sexes. The aim in this section is to assess if the recommendations of the monitoring mechanisms had an impact on drafting of the Review Act, 1997 and in particular provisions on the bill of rights.

³⁸ Kenya had received recommendations from the Committee on Civil and Political Rights following submission of its initial report in 1981, the Committee on Economic, Social and Cultural Rights following its review of Kenya in the absence of a state report in 1993, the Committee on the Elimination of All Forms of Discrimination Against Women on review of the 1st and 2nd periodic report in 1994, the Committee on Rights of the Child on its consideration of 1st and 2nd combined state report in 2001, the Special Rapporteur on Torture following a mission to Kenya in 1996, the Special Rapporteur on extra-judicial, summary and arbitrary execution on Kenya's situation in 1997.

An examination of the memorandum of objects and reasons accompanying the Constitution of Kenya Review Commission Bill published on 31 July 1997 reveals that although the mandate of the review process included examining and making recommendations on Kenya's observance of its international treaty obligations, no reference was made the recommendations of monitoring mechanisms.³⁹ The primary object and reason of the Bill was stated as 'to enable Kenyans and Kenya to originate reform proposals to bring a constitution that can stand the test of time'.⁴⁰ Similarly, review of the Parliamentary debate on the enactment of the Constitution of Kenya Review Bill reveals no reference to recommendations of monitoring mechanisms although issues that had been raised by monitoring mechanisms were constantly referred to during the debate. For instance, on equality of the sexes, it was pointed out that there was need to expand the functions of the Review Commission to include gender equality which was an emerging concept.⁴¹ In addition, on elimination of gender disparities in citizenship, it was noted that the review process ought to look into the principle of gender equality in citizenship and recommend amendment of the constitution.⁴² On constitutional protection of socio-economic rights, it was pointed out that there was need to enshrine a certain minimum standard of living for all Kenyans in the constitution.⁴³

1.2.2 2nd phase – Constitution making process under the Review Commission

This phase constitutes the most expansive phase of the constitution making process spanning more than four years from 2001 to 2005. The recommendations made by the monitoring mechanisms at the beginning of the review process in 2001 which were considered and/or implemented through the constitution review process included: constitutionalisation of socio-economic rights, abolition of the death penalty, elimination of discrimination against women in the political, social and economic life, gender discrimination in citizenship, ensuring equality of the sexes, harmonisation of marriage and divorce laws, ensuring conformity of the Convention on the Rights of the Child in the constitution and in domestic law, review of the rights on protection of detained persons, removal of provisions allowing derogation in the freedom against torture and general provisions on limitations in the bill of rights. The analysis assesses the influence of these recommendations through submissions of individuals and civil society organisations in the various stages of the constitution review process. For ease of analysis the phase is assessed in the following clusters: review of public hearings and public memoranda, review of minutes of presentation of the draft Bill to the National Constitutional Conference, review of minutes of technical committees of the National Constitutional Conference and review of minutes of plenary of the whole Conference.

The public hearings of the constitution review process were conducted between December 2001 and July 2002 in all the 210 constituencies. The hearings were guided by a set of

³⁹ Constitution of Kenya Review Commission Bill, 1997, 548.

⁴⁰ As above.

⁴¹ Kenya National Assembly Hansard 5 November 1997, 3288-3289, <http://books.google.co.ke/books?idKenya+Parliamentary+hansard+5+November+1997> (accessed 2 October 2014).

⁴² Kenya National Assembly Hansard 30 October 1997, 3211, <http://books.google.co.ke/books?idKenya+Parliamentary+hansard+30+October++1997> (accessed 2 October 2014).

⁴³ As above.

issues and questions identified by the Review Commission. In relation to the recommendations of monitoring mechanisms, the issues and questions related to: (i) abolition of the death penalty, (ii) entrenchment of economic, social and cultural rights in the constitution, (iii) constitutional protection of the rights of children, (iv) gender disparity in citizenship, and (v) constitutional protection of the rights of women.⁴⁴

The assessment reviewed public hearings in the Nairobi region covering eight of the 210 constituencies. The justification for limiting the analysis to Nairobi is that given the technical nature of state engagement with monitoring mechanisms, it is unlikely that recommendations of monitoring mechanisms would feature in submissions in regions outside Nairobi. Further, non-state actors that participate in international human rights monitoring mainly through submission of shadow reports are primarily based in Nairobi. Review of the verbatim record of the public hearings indicates the following proposals were made by individual members of the public and representatives of organisations. On the death penalty, the Review Commission received mixed views with majority of the oral submissions calling for abolition of the death penalty.⁴⁵ On economic, social and cultural rights, public submissions were undivided that these rights should be included in the bill of rights.⁴⁶ In relation to the rights of children, submissions were made to incorporate the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child into the constitution.⁴⁷ On gender equality in citizenship, public submissions recommended that women should enjoy the same rights as men.⁴⁸ In regard to the rights of women, public submissions unanimously recommended that women should enjoy inheritance rights, affirmative action to address past injustice and equal rights in marriage.⁴⁹ However, the issue of reserved special seats for women was overwhelmingly opposed.⁵⁰ Although the hansard reveals direct reference to international human rights instruments, for instance the Convention of the Rights of the Child, the African Charter on the Rights and Welfare of the Child and the Convention on Elimination of all Forms of Discrimination Against Women, the International Covenant on Economic, Social and Cultural Rights and the African Charter on Human and Peoples' Rights no reference was made to the recommendations of monitoring mechanisms.

Following the publication of the draft Bill to amend the constitution on 27 September 2002, the Review Commission received public submissions between October 2002 and April 2003. In relation to elimination of gender discrimination against women in the political life, particularly the gender principle and reservation of special seats for women, the draft Bill had provided for special seats for women.⁵¹ Public submissions opposed the provision on at least

⁴⁴ Constitution of Kenya Review Commission 'The main report of the Constitution of Kenya Review Commission volume I' 4 March 2003, 378 – 391 (accessed from the Kenya National Archives 6 October 2014).

⁴⁵ Constitution of Kenya Review Commission 'Verbatim report of Kamukunji Constituency public hearings in Bahati social hall on 29 May 2002 ' HAC/5/3/4; Constitution of Kenya Review Commission 'Verbatim report of Makadara constituency public hearings in Kaloleni social hall on 29 February 2002 ' HAC/5/1/1; Constitution of Kenya Review Commission 'Verbatim report of Starehe Constituency public hearings in Kariokor social hall on 28 May 2002 ' HAC/5/2/2 (accessed from the Kenya National Archives 9 October 2014).

⁴⁶ As above.

⁴⁷ As above.

⁴⁸ As above.

⁴⁹ As above.

⁵⁰ As above.

⁵¹ Constitution of Kenya Review Commission draft Bill, 2002 clause 107 (1) (c).

two grounds.⁵² First, the submissions indicated that the affirmative action clause negated the principle of equal treatment of all persons.⁵³ Second, that the reservation of the special seats contradicted the exercise of political rights also enshrined in the draft Bill.⁵⁴ On the death penalty the draft Bill expressly provided for abolition of the death penalty.⁵⁵ Members of the public suggested that given the high rate of crime in Kenya, the death penalty ought to be retained in the draft Bill.⁵⁶ On equality of the sexes, there was a proposal to include a provision on harmonisation of marriage and divorce laws and recognition of one system of marriage to give effect to equal rights in marriage.⁵⁷ This proposal by the Federation of Women Lawyers Kenya made direct reference to the 1993 concluding observation of the Committee on Elimination of all Forms of Discrimination Against Women which recommended harmonisation of marriage law to promote equal treatment between men and women.⁵⁸ However, there is no indication that the proposal was taken up by the Review Commission,⁵⁹ which perhaps is attributed to the fact that harmonisation of marriage and divorce laws was already provided for in a subsequent clause relating to the right to family.⁶⁰

Therefore, while issues which had been the subject of recommendations of monitoring mechanisms were raised in public memoranda, the influence of the recommendations was only observed in one instance in which a civil society organisation sought to use the recommendations to inform the constitutional provisions on harmonisation of marriage and divorce laws.

The draft Bill was presented to the National Constitutional Conference between 28 April and 6 June 2003. This involved presentation of the draft Bill and general debate on the draft Bill without taking any decisions or voting. The issues raised were to be considered, debated and adopted at the technical committee level. Analysis of the verbatim proceedings of the National Constitutional Conference during the presentation of the draft Bill indicates that while there was broad agreement on issues raised in the findings, some were put to debate while others were never considered. On elimination of gender disparity in citizenship, there was broad consensus on gender equality in citizenship rights. However, the three year time period provided for foreign spouses to be eligible to apply for citizenship was viewed as too short and the delegates made proposals to enhance it to seven years.⁶¹ The debate on the clauses on affirmative action for women, the one third gender principle, was mixed. Three concerns were raised during the general debate. First, some delegates opined that there was no need for affirmative action for women. Second, proposals were made that affirmative

⁵² Constitution of Kenya Review Commission 'Working document II: compendium of public comments on the draft Bill to alter the constitution' 17 April 2003, 46 (accessed from the Kenya National Archives 30 September 2014) [Compendium of public comments on the draft Bill].

⁵³ As above.

⁵⁴ As above.

⁵⁵ Constitution of Kenya Review Commission draft Bill, 2002 clause 32(2).

⁵⁶ Compendium of public comments on the draft Bill (n 52 above) 76.

⁵⁷ Compendium of public comments on the draft Bill (n 52 above) 84.

⁵⁸ As above.

⁵⁹ As above.

⁶⁰ Constitution of Kenya Review Commission draft Bill, clause 38 (5).

⁶¹ Constitution of Kenya Review Commission, National Constitutional Conference, 'Verbatim report of the proceedings, presentation of the draft Bill, chapter one – supremacy of the Constitution; two- republic; three – national goals, values and principles and four – citizenship at Bomas of Kenya' 7 May 2003, HAC/7/7, 90 (accessed 3 October 2014 from the Kenya National Archives).

action should extend beyond women to other groups such as pastoralist communities and persons with disability. Third, the delegates suggested that there was need to put a sunset clause on the affirmative action for women provisions.⁶² On abolition of the death penalty, the delegates took the view that the death penalty was necessary in Kenya.⁶³ No reference was made to the recommendations of monitoring mechanisms during the general debate and discussions.

At the technical committee level, the committees were required to examine clause by clause of the draft Bill, debate and amend the provisions and by separate voting adopt each clauses.⁶⁴ The technical committees' discussions were guided on the rationale behind particular provisions by members of the Review Commission who had no voting rights.⁶⁵ A review of the verbatim record of the proceedings technical committee on citizenship and the bill of rights points to the following. On the death penalty, although there was marginal support for its retention, the technical committee took the view that the death penalty ought to be abolished as it was un-African and not deterrent.⁶⁶ The technical committee thus adopted the provisions of the draft Bill abolishing the death penalty.⁶⁷ In relation to elimination of gender disparity in citizenship, the draft Bill provided that women could automatically confer citizenship to children born outside Kenya and to foreign spouses upon application after three years of marriage. There was general consensus that there should not be gender disparity in conferment of citizenship. However, amendments were proposed to enhance the number of years of marriage after which a foreign spouse would be eligible to apply for citizenship.⁶⁸ The technical committees voted to enhance the years to seven.⁶⁹ On constitutionalisation of children rights, the draft Bill enumerated a long list of children rights derived from the Children Act.⁷⁰ While it was agreed that children were a special group requiring constitutional protection, debate focused on the scope of rights included in the draft Bill which were argued to be too lengthy for a constitution.⁷¹ On the one hand it was suggested that the Children Act had domesticated the Convention of the Rights of the Child, hence these rights needed not to be outlined in the draft Bill. Proponents of constitutional

⁶²As above.

⁶³Constitution of Kenya Review Commission, National Constitutional Conference, 'verbatim report of the proceedings, presentation of the draft Bill, chapter five – bill of rights ' 8 May 2003, HAC/7/9, 39 (accessed from the Kenya National Archives 3 October 2014).

⁶⁴ Constitution of Kenya Review Act, 2001, The Constitution of Kenya Review, (National Constitutional Conference) (Procedure) Regulations, 2003.

⁶⁵ As above.

⁶⁶ Constitution of Kenya Review Commission, National Constitutional Conference, 'verbatim record of the technical working committee B (TWC B) chapter 4 and 5 citizenship and bill of rights held in tent no. 2 at Bomas of Kenya on 18 September 2003', HAC/6/B/11, 71 (accessed from the Kenya National Archives 2 October 2014).

⁶⁷ As above.

⁶⁸ Constitution of Kenya Review Commission, National Constitutional Conference, 'verbatim report of the technical working committee group B (TWC B), chapter 4 & 5 citizenship and the bill of rights held at committee tent no. 2 , Bomas of Kenya on 11 September 2003' HAC/B/6/4, 35 – 39 (accessed from the Kenya National Archives 2 October 2014).

⁶⁹ As above.

⁷⁰ Constitutions of Kenya Review Commission draft Bill, clause 37.

⁷¹ Constitution of Kenya Review Commission, National Constitutional Conference, 'verbatim report of the technical working committee B (TWC B) Chapter 4 & 5 citizenship and Bill of Rights held in tent no. 2 at Bomas of Kenya on 23 September 2003' HAC/6/B/17, 59 (accessed from the Kenya National Archives 2 October 2014). [Verbatim report of the technical working committee B of 23 September 2003].

protection argued that it was necessary to put the rights of children in the draft constitution as the Children Act was open to amendment by the National Assembly.⁷² In the end, an amendment was adopted that the provisions be re-drafted to reduce the length.⁷³ There was no reference to the 2001 concluding observations of the Committee on the Rights of the Child which had recommended domestication of the Convention on the Rights of the Child in the constitution or in national legislation.

In regard to affirmative action for women, the draft Bill contained a specific provision titled 'women' enumerating rights specific to women,⁷⁴ which in principle sought to remedy past injustices against women. The technical committee debated the provision on equal opportunities for women in the political, social and economic activities, which were argued to negate the exercise of political rights in the context of equal opportunities in political activities.⁷⁵ However, it was clarified the Review Act expressly required the constitution-making process to address the apparent historical injustices in relation to women, hence the provision was mandatory.⁷⁶ Nonetheless, an amendment was adopted in the provision to add the word 'men' whose purported import was to disabuse the notion that men and women were in competition.⁷⁷ No reference was made to the 1993 recommendations of the Committee on Elimination of Discrimination Against Women on equality of the sexes. In the context of marriage, the draft Bill expressly provided for equal rights in marriage, during the marriage and at the dissolution of the marriage. The provision was generally agreed to with an amendment to include equal rights before marriage which was referenced to the formulation of marriage rights in Article 16 of the Convention on Elimination of All Forms of Discrimination Against Women.⁷⁸

On constitutionalisation of economic, social and cultural rights, the draft Bill contained stand-alone clauses on the rights to social security, health, education, water, sanitation, housing and food.⁷⁹ Review of the proceedings of the technical committee indicates that these rights were adopted without debate as to their constitutional protection.⁸⁰ Further, no reference was made to the 1993 recommendations of Committee on Economic Social and Cultural Rights on constitutional entrenchment of socio-economic rights.

In regard to protection of the rights of detained persons, the draft Bill included an array of provisions which according to the Review Commission was informed by memoranda

⁷² Verbatim report of the technical working committee B of 23 September 2003 (n 71 above) 59.

⁷³ Verbatim report of the technical working committee B of 23 September 2003 (n 71 above) 62.

⁷⁴ Constitution of Kenya Review Commission draft Bill clause 35.

⁷⁵ Constitution of Kenya Review Commission, National Constitutional Conference, 'verbatim report of the technical working committee B (TWC B) Chapter 4 & 5 citizenship and Bill of Rights held in tent no. 2 at Bomas of Kenya on 22 September 2003' HAC/6/B/15, 32 (accessed from the Kenya National Archives 2 October 2014) [verbatim report of the technical committee B of 22 September 2003].

⁷⁶ Verbatim report of the technical committee B of 22 September 2003 (n 75 above) 34.

⁷⁷ Verbatim report of the technical committee B of 22 September 2003 (n 75 above) 41.

⁷⁸ Constitution of Kenya Review Commission, National Constitutional Conference 'verbatim report of the technical working committee B (TWC B) Chapter 4 & 5 citizenship and Bill of Rights held in tent no. 2 at Bomas of Kenya on 24 September 2003' HAC/6/B/20, 62, (accessed from the Kenya National Archives 3 October 2014).

⁷⁹ Constitution of Kenya Review Commission draft Bill clauses 55-62.

⁸⁰ Constitution of Kenya Review Commission, National Constitutional Commission 'verbatim report of the technical working committee B (TWC B) Chapter 4 & 5 citizenship and Bill of Rights held in tent no. 2 at Bomas of Kenya on 21 January 2004', HAC/6/B/34, 16-71 (accessed from the Kenya National Archives 8 October 2014).

submitted by prisoners. Records of the technical committee proceedings indicate that the provision was adopted without any debate or amendments.⁸¹

In March 2004, the National Constitutional Conference reconvened sitting as a plenary of the whole for presentation of the decisions of the technical committees and final clause by clause review and adoption. An assessment of the minutes of the proceedings of the whole plenary of National Constitutional Conference indicates that the provisions of the draft Bill relating to the bill of rights and citizenship were adopted without debate, except the clause on abolition of the death penalty.⁸² The draft Bill as presented to the plenary of the Conference provided that 'there shall be no death penalty'.⁸³ An amendment was moved providing for retention of the death penalty.⁸⁴ The plenary unanimously voted in favour of the amendment. A further amendment was proposed to restrict the death penalty to murder, child defilement and any other matter provided by legislation.⁸⁵ However the amendment failed to secure the requisite two third majority for its adoption.⁸⁶ This final debate did not reference recommendations of monitoring mechanisms on the death penalty.

From the foregoing, in the constitution making process between 1997 and 2005 influence of the recommendations of monitoring mechanisms is observed in one instance, discussed previously involving a submission by a civil society organisation on women rights. This is despite the fact that issues that had been subject of recommendations were extensively debated during the process. According to a member of the Review Commission, the recommendations of monitoring mechanisms did not influence the provisions of the draft Bill.⁸⁷ He indicated that the provisions were mainly informed by the experiences of the Kenyan people in enjoyment of human rights.⁸⁸ Notably, there was broad reference to international human rights conventions such the Convention on the Rights of the Child, the African Charter on the Rights and Welfare of the Child, International Covenant on Economic, Social and Cultural Rights, Convention on the Elimination of all Forms of Discrimination Against Women and the Convention Relating to the Status of Stateless Persons.⁸⁹

⁸¹ Constitution of Kenya Review Commission, National Constitutional Conference, 'verbatim report of the technical working committee B (TWC B) Chapter 4 & 5 citizenship and Bill of Rights held in tent no. 2 at Bomas of Kenya on 21 January 2004' HAC/6/B/35, 12 (accessed Kenya National Archives 8 October 2014).

⁸² Constitution of Kenya Review Commission, 'The votes and proceedings of the plenary sessions of the National Constitutional Conference' 9 March 2004, 155-163 (accessed from the Kenya National Archives 8 October 2014) (The votes and proceedings of the plenary sessions of the National Constitutional Conference March 2004).

⁸³ Constitution of Kenya Review Commission draft Bill, clause 41 (2).

⁸⁴ The votes and proceedings of the plenary sessions of the National Constitutional Conference March 2004 (n 82 above) 160.

⁸⁵ The votes and proceedings of the plenary sessions of the National Constitutional Conference March 2004 (n 82 above) 162-163.

⁸⁶ As above.

⁸⁷ Email correspondence with Prof. YP Ghai, Chairperson, Constitution of Kenya Review Commission, 1997-2004, 16 February 2015.

⁸⁸ As above.

⁸⁹ See *generally* Constitution of Kenya Review Commission, National Constitutional Conference, verbatim reports of technical working committee B (TWC B) HAC/6/B/ 4-35 & HAC/7/7/ 7-9; Report on the votes and proceedings on the plenary sessions of the National Constitutional Conference January - March 2004.

1.2.3 3rd phase – Finalisation of the constitution making process by the Committee of Experts

The 3rd phase of the constitution making process constitutes the final phase leading to the promulgation of the Constitution of Kenya, 2010. The bill of rights in the various drafts of the constitution was non-contentious. Comparatively, the bill of rights in the Proposed New Constitution, rejected in the 2005 referendum, greatly mirrored the Bomas draft constitution but for a few alterations. The specific alterations included: exclusion of provisions protecting the rights of minorities and marginalized groups, exclusion of the right not to obey unlawful instructions, introduction of new limitations to the bill of rights and in regard to enforcement of economic, social and cultural rights granting flexibility for the state to decide which rights it can afford to implement.⁹⁰ Either way, the Committee of Experts, which was mandated to finalise the constitution review process by resolving the areas of contention, did not identify the bill of rights as an area of contention.⁹¹

The assessment in this phase is based on review of all documentation relating to the bill of rights. This is informed by the fact that the bill of rights was not contentious and a large number of the findings and recommendations of monitoring mechanisms had been made at the time (2009-10) relating to almost each right, hence it is difficult to isolate specific findings and recommendations. Accordingly, the assessment will be limited to analysis of public memoranda submitted to the Committee of Experts and drafting sessions of Committee of Experts.

The Constitution of Kenya Review Act, 2008 required the Committee of Experts to ensure that the public participated in generating and debating proposals to complete the constitution review process.⁹² In view of this, the Committee of Experts received 26,541 public memoranda and presentations on issues that the public considered contentious and recommendations for their resolution.⁹³ In relation to the bill of rights, the public submissions included: the right to life in particular abortion, the character of marriage, property rights particularly land ownership and limitation of the equality clause in regard to persons of Islamic faith.⁹⁴ On the right to life, although the Proposed New Constitution of Kenya, 2005 expressly provided that abortion was not allowed subject to legislation, the public nonetheless made submissions proposing constitutional prohibition of abortion.⁹⁵ There were no submissions on the death penalty which had been retained in the Proposed New Constitution, 2005. In regard to character of marriage, despite the express outlawing of same sex marriages in the Proposed New Constitution,⁹⁶ public submissions proposed that same sex marriages should be outlawed.⁹⁷ In relation to property rights, the provisions of the land chapter were similar in all the draft constitutions, thus non-contentious. Nonetheless,

⁹⁰ See Bomas draft constitution, 2004 chapter six and Proposed New Constitution of Kenya, 2005 chapter six.

⁹¹ Committee of Experts preliminary report 17 November 2009 (n 25 above) 44.

⁹² Constitution of Kenya Review Act, 2008 6 (d) (i)

⁹³ Committee of Experts final report 11 October 2010 (n 26 above) 46.

⁹⁴ Committee of Experts 'public memoranda received by the Committee of Experts on the constitutional review process April – July 2009' HAC/3/1/22 – 31 (accessed Kenya National Archives 8 October 2014) (Committee of Experts public memoranda April – July 2009).

⁹⁵ As above.

⁹⁶ Proposed New Constitution of Kenya clause 42 (3).

⁹⁷ Committee of Experts public memoranda April - July 2009 (n 94 above).

public proposals recommended limiting the maximum acreage in private land ownership.⁹⁸ On the exclusion of the equality clause for persons professing Muslim faith, public submissions recommended removal of the provision on the ground that equality rights could not be qualified at the instance of religion.⁹⁹ An assessment of the public memoranda reveals no submissions on the findings and recommendations of monitoring mechanisms.

Following the publication of the harmonised draft constitution in November 2009, the public was once again invited to review the draft and make comments. In addition, the Committee of Experts held consultative meetings with government agencies and civil society organisations in January 2010 on the harmonised draft constitution. These public submissions and recommendations from the consultative meetings were considered and debated by the Committee of Experts in their drafting sessions of January 2010. The issues raised in the consultative meetings with civil society organisations on the bill of rights included: provision for non-derogable rights, rights of arrested persons primarily the length of time prior to production in court, expanding the protected statuses of non-discrimination, rights of internally displaced persons, rights of minorities and remedies for victims of human rights violations.

In regard to the recommendations of monitoring mechanisms, the Kenya Coalition on Socio-Economic Rights in its submission to expand the protected statuses under the non-discrimination clause, referred to the 2008 recommendations of the Committee on Economic, Social and Cultural Rights.¹⁰⁰ Further, the Kenya National Commission on Human Rights recommended removal of the clause limiting the application of the equality clause to persons professing the Muslims faith.¹⁰¹

A review of archival documents of the Committee of Experts indicates that there were at least four drafting sessions of the Committee of Experts organised as follows: (i) the April 2009 drafting session which considered the variations in the three drafts of the constitution to identify the areas of contention; (ii) the September and October 2009 drafting sessions which examined provisions of existing draft constitutions and public memoranda with a view to producing a harmonised draft constitution; (iii) the January 2010 drafting sessions which considered submissions from individuals and organisations following the publication of the harmonised draft constitution; and (iv) the February 2010 drafting session which considered the alterations made by the Parliamentary Select Committee. This assessment accords greater scrutiny to the review of the discussions of the drafting sessions of the Committee of Experts as these sessions examined and considered submissions on various provisions of the draft constitution and articulated the merits and demerits of each submission.

⁹⁸ As above.

⁹⁹ As above.

¹⁰⁰ Committee of Experts, 'verbatim record of the proceedings of the consultative meeting with civil society organisations on the bill of rights, 17 December 2009', HAC/1/1/95, 124 (accessed Kenya National Archives 9 October 2014).

¹⁰¹ Committee of Experts, 'verbatim record of the proceedings of consultative meetings with the Truth Justice and Reconciliation Commission, Interim Independent Boundaries Review Commission, Kenya Anti-Corruption Commission Board, NARC-Kenya, Kenya Parliamentary Caucus, Independent Electoral and Boundaries Commission and the Kenya National Commission on Human Rights, 16 December 2009' HAC/1/1/94, 97 (accessed Kenya National Archives 9 October 2014).

The first drafting session in April 2009 primarily identified the differences in various provisions of the three existing draft constitutions and developed an operation plan for the review process. In the context of the bill of rights, records of the verbatim proceedings of the Committee of the Experts indicate that it was agreed that in light of the mandatory national referendum to approve the constitution, certain rights would be lost.¹⁰² These rights were identified as: abolition of the death penalty, right to marry, protection of the rights of prisoners, freedom of the media and property rights of spouses.¹⁰³ In regard to the death penalty it was suggested that the Committee of Experts should revert to the Bomas draft provision which expressly provided for the death penalty.¹⁰⁴ On the character of marriage, it was recommended that the Committee of Experts should not consider same sex marriages under the provision on the right to marry.¹⁰⁵ On protection of the rights of persons in custody, the Bomas draft of the constitution had provided a wide range of rights including right to vote and fair hearing in disciplinary proceedings.¹⁰⁶ However, the Proposed New Constitution, 2005 removed the constitutional protections and relegated the rights to national legislation.¹⁰⁷ The Committee of Experts opted for the formulation of the Proposed New Constitution.¹⁰⁸ In relation to freedom of the media, the Proposed New Constitution, 2005 introduced a specific limitation of the freedom couched as duties and responsibilities.¹⁰⁹ The Committee of Experts suggested reverting to the provision in the Bomas draft.¹¹⁰ The Bomas draft expressly provided for property rights for spouses, which was not provided for in the Proposed New Constitution. The Committee of Experts suggested that the provision should be removed in view of the fact that the provision could be read in the equality and freedom from discrimination provisions.¹¹¹ These discussions of the Committee of Experts did not make any reference to the findings and recommendations of monitoring mechanism notwithstanding that findings had been made on abolition of the death penalty, decriminalization of homosexual conduct, protection of the rights of persons in custody and equal property rights for spouses.

Interviews with a member of the Committee of Experts indicate that the Committee was aware of the findings and recommendations of monitoring mechanisms relating to the above mentioned issues.¹¹² However, the conscious decision not to adhere to the findings and recommendations of monitoring mechanisms was in order to guarantee adoption of the draft constitution in the national referendum.¹¹³ Accordingly, provisions that would attract public

¹⁰² Committee of Experts, 'verbatim record of the proceedings of the Committee of Experts on the Constitutional Review during the Mombasa retreat at the Voyager (operational plan) 16 April 2009' HAC/3/3/, 38 (accessed Kenya National Archives 13 October 2014) (Committee of Experts verbatim record of proceedings of the Mombasa retreat 16 April 2009).

¹⁰³As above.

¹⁰⁴ As above.

¹⁰⁵ As above.

¹⁰⁶ Bomas draft constitution, 2004 clause 75.

¹⁰⁷ Proposed New Constitution of Kenya, 2005, clause 74.

¹⁰⁸Committee of Experts verbatim record of proceedings of the Mombasa retreat 16 April 2009 (n 101 above) 38.

¹⁰⁹ Proposed New Constitution of Kenya, 2005 clause 50 (6).

¹¹⁰ Committee of Experts verbatim record of proceedings of the Mombasa retreat 16 April 2009 (n 101 above) 40.

¹¹¹ As above.

¹¹² Interview with O Amollo, Member Committee of Experts on the Constitutional Review 2009/10, Kenya, Nairobi, 1 April 2015.

¹¹³ As above.

criticism and rejection of the draft constitution were avoided notwithstanding the recommendations of monitoring mechanisms.

The second drafting sessions in September and October 2009 reviewed the existing draft constitutions and public memoranda to generate the November 2009 harmonised draft constitution. Review of the records indicate that the Committee of Experts discussed the rights of minorities, the right to social security, rights of refugees and asylum seekers and non-derogation of rights such as freedom from torture.¹¹⁴ On the rights of minorities, a recommendation was made to list minorities in the constitution.¹¹⁵ Discussions of the Committee of Experts made reference to the 2007 report of the Special Rapporteur on human rights situation and freedoms of indigenous people which recommended constitutional recognition of indigenous persons.¹¹⁶ However, the Committee of Experts was unsympathetic to the recommendation citing the need for flexibility since minority status was not permanent, hence such listing would pose challenges.¹¹⁷ On the rights of refugees and asylum seekers, the Committee of Experts expunged the provisions from the constitution on the premise that refugees would demand socio-economic rights entrenched in the draft constitution.¹¹⁸ In regard to the right to social security, the Committee of Experts proposed a narrow formulation of the right to make it progressively achievable by the state.¹¹⁹ In relation to non-derogable rights such as the right to freedom from torture, none of the existing draft constitutions provided for non-derogable rights. The Committee of Experts in its discussions suggested inclusion of a provision on non-derogable rights to cover freedom from torture, freedom from slavery, right to a fair trial and right to an order of habeas corpus.¹²⁰

The third drafting session in January 2010 examined public submissions and recommendations of consultative stakeholder meetings with the Committee of Experts following publication harmonised draft constitution in November 2009. A review of the verbatim record of the proceedings of the Committee of Experts discussions and negotiations reveals the following. On elimination of gender disparity in citizenship, public submissions recommended increase of the number of years after which a foreign spouse would be eligible to apply for citizenship from seven years to ten years.¹²¹ This

¹¹⁴ Committee of Experts 'verbatim record of the proceedings of drafting retreat on the chapters on bill of rights and held on 18 September 2009' HAC/1/2/10 (accessed from the Kenya National Archives 10 October 2014); Committee of Experts 'verbatim record of the proceedings of drafting retreat on the chapters on land and bill of rights held on 19 September 2009' HAC/1/2/11 (accessed from the Kenya National Archives 10 October 2014); Committee of Experts 'verbatim record of the proceedings of drafting retreat on the chapters on bill of rights, environment, land and leadership and integrity held on 29 October 2009' HAC/1/2/20 (accessed from the Kenya National Archives 13 October 2014).

¹¹⁵ Committee of Experts 'verbatim record of the proceedings of drafting retreat on the chapters on bill of rights and land held on 19 September 2009' HAC/1/2/11, 21-22 (accessed from the Kenya National Archives 13 October 2014).

¹¹⁶ As above.

¹¹⁷ Verbatim proceedings of the drafting retreat on the bill of rights and land 18 September 2009 (n 114 above) 38.

¹¹⁸ Verbatim proceedings of the drafting retreat on the bill of rights and land 18 September 2009 (n 114 above) 33.

¹¹⁹ Verbatim proceedings of the drafting retreat on the bill of rights and land 18 September 2009 (n 114 above) 38.

¹²⁰ Verbatim proceedings of the drafting retreat on the bill of rights and land 18 September 2009 (n 114 above) 94.

¹²¹ Committee of Experts 'verbatim record of proceedings of plenary meeting of the Committee of Experts on Constitutional Review held on 2nd January 2010 in Delta House, Westlands, Nairobi on bill of rights and the

recommendation was nonetheless rejected on the basis that elimination of gender disparity in acquisition of citizenship was extensively debated in the Bomas draft constitution.¹²² In relation to the death penalty, public submissions proposed its abolition.¹²³ In rejecting the proposals, the Committee referred to its conscious election of April 2009 not to provide for abolition of the death penalty in order to secure adoption of the draft constitution in the national referendum.¹²⁴ On protection of homosexuality rights under the non-discrimination clause, the Committee of Experts indicated that it received overwhelming public memoranda against protection of these rights.¹²⁵ Accordingly, the Committee of Experts opted not to protect the rights similar to the Bomas draft constitution.¹²⁶ Instructively, in the making of the Bomas draft constitution, the technical committee proceedings on the bill of rights debated and unanimously agreed not to include sexual orientation as a protected status under the non-discrimination clause.¹²⁷ In relation to the qualification of the equality clause to persons professing Muslim faith, public submissions recommended removal of the clause as it negated the provision on equal treatment of all religions.¹²⁸ The Committee of Experts took the position that the clause was necessary as it provided the foundation for the Kadhi Courts in the draft constitution.¹²⁹ In addition, it was argued that removal of the clause would lead to challenge of the constitutionalisation of Kadhi Courts.¹³⁰ On this basis the Committee of Experts voted to retain the clause.¹³¹

In regard to constitutional protection of the rights of children, public submissions recommended removal of the rights from the constitution on the basis that the rights were already domesticated in the Children Act.¹³² The discussions of the Committee of Experts made reference to the 2001 recommendations of the Committee on the Rights of the Child recommending protection of children's rights either in the constitution or domestic law.

executive HAC/1/1/97, 35 (accessed from the Kenya National Archives 15 October 2014). [Verbatim record of proceedings of plenary meeting of the Committee of Experts on constitutional review 2nd January 2010].

¹²²As above.

¹²³Verbatim record of proceedings of plenary meeting of the Committee of Experts on constitutional review 2nd January 2010 (n 121 above) 159.

¹²⁴Verbatim record of proceedings of plenary meeting of the Committee of Experts on constitutional review 2nd January 2010 (n 121 above) 160.

¹²⁵Verbatim record of proceedings of plenary meeting of the Committee of Experts on constitutional review 2nd January 2010 (n 121 above) 165.

¹²⁶ As above.

¹²⁷ Constitution of Kenya Review Commission 'Verbatim record of the proceedings of the technical committee B citizenship and the bill of rights held in tent no. 2 at the Bomas of Kenya' 19 September 2003, HAC/6/B/13, 39-40 (accessed on 8 October 2014 Kenya National Archives).

¹²⁸ Verbatim record of proceedings of plenary meeting of the Committee of Experts on constitutional review 2nd January 2010 (n 121 above) 176 -177.

¹²⁹ Verbatim record of proceedings of plenary meeting of the Committee of Experts on constitutional review 2nd January 2010 (n 121 above) 178-180.

¹³⁰ As above.

¹³¹ As above.

¹³² Committee of Experts 'verbatim record of proceedings of plenary meeting of the Committee of Experts on constitutional review held on 3rd January 2010 in Delta House Westlands, Nairobi on bill of rights and the executive' HAC/1/1/98, 5 (accessed Kenya National Archives 15 October 2014). [Verbatim record of proceedings of plenary meetings of the Committee of Experts on constitutional review 3rd January 2010].

On the right to marry, the Committee of Experts received submissions to delete the provision on the right of every adult to found a family as it would allow same sex marriages.¹³³ The Committee of Experts however argued that marriage was distinct from family and voted to retain the provision to allow single parents the right to found families.¹³⁴

On minority rights, public submissions recommended definition of minorities in the constitution and provision of a sunset clause.¹³⁵ The Committee of Experts made reference to international human rights instruments for a definition of minorities.¹³⁶ It appears that in the absence of an international definition of minorities, these proposals were dropped.

In relation to socio-economic rights, on the right to health, public submissions challenged the express mention of the right to reproductive health on the basis that it would allow for abortion.¹³⁷ The Committee of Experts, which was equally divided, voted to adopt the formulation of the right to health as provided in the International Covenant on Economic, Social and Cultural Rights.¹³⁸ However, specific deliberations on the merits and demerits of right to reproductive health were discouraged by a section of the Committee.¹³⁹ On the right to education, discussions of the Committee of Experts centred on the level of education, whether primary, secondary or post-secondary, which the state was obligated to provide.¹⁴⁰ The Committee of Experts made reference to the International Covenant on Economic, Social and Cultural Rights to define the level of state obligation.¹⁴¹

In relation to the rights of arrested persons, the harmonised draft constitution provided that arrested persons ought to be brought before courts within 48 hours.¹⁴² The consultative meetings between the Committee of Experts and civil society organisations proposed reverting to 24 hours as provided in the old Constitution. An analysis of the verbatim proceedings indicates that the Committee of Experts had extensive discussions on whether to maintain the 48 hours or alter to 24 hours.¹⁴³ The gist of the debate was the balance between upholding the rights of suspects while allowing law practitioners sufficient time to conduct preliminary investigations and arraign a suspect in court.¹⁴⁴ This was in light of proposals made by law practitioners on the inadequacy of 24 hours in collecting sufficient

¹³³ Verbatim record of proceedings of plenary meetings of the Committee of Experts on constitutional review 3rd January 2010 (n 132 above) 15.

¹³⁴ Verbatim record of proceedings of plenary meetings of the Committee of Experts on constitutional review 3rd January 2010 (n 132 above) 16.

¹³⁵ Verbatim record of proceedings of plenary meetings of the Committee of Experts on constitutional review 3rd January 2010 (n 132 above) 16-17.

¹³⁶ As above.

¹³⁷ Verbatim record of proceedings of plenary meetings of the Committee of Experts on constitutional review 3rd January 2010 (n 132 above) 66.

¹³⁸ As above.

¹³⁹ Verbatim record of proceedings of plenary meetings of the Committee of Experts on constitutional review 3rd January 2010 (n 132 above) 67.

¹⁴⁰ As above.

¹⁴¹ Verbatim record of proceedings of plenary meetings of the Committee of Experts on constitutional review 3rd January 2010 (n 132 above) 70.

¹⁴² Harmonised draft constitution, 17 November 2009, clause 72(1) (f).

¹⁴³ Verbatim record of proceedings of plenary meetings of the Committee of Experts on constitutional review 3rd January 2010 (n 132 above) 78.

¹⁴⁴ As above.

evidence to frame charges.¹⁴⁵ In the end, the Committee of Experts adopted the 24 hours on the basis that the public should not be deprived of their rights because of the incapacities of the law enforcement system in Kenya.¹⁴⁶

On the rights of prisoners, a member of the Committee of Experts raised the apparent absence of provisions protecting prisoners in the harmonised draft constitution published in November 2009. Records of the proceedings of the Committee of Experts do not indicate any discussions on the rights of prisoners, perhaps in line with the conscious election of April 2009 to remove rights of prisoners from the draft constitution. Notably, the Constitution, 2010 contains no express provisions on the protection of the rights of prisoners.

The fourth drafting session of the Committee of Experts was in February 2010 after the review of the harmonised draft constitution by the Parliamentary Select Committee. In the context of the bill of rights, the Parliamentary Select Committee made a number of alterations. First, on the right to life, while the Parliamentary Select Committee retained the provision allowing for the death penalty,¹⁴⁷ it introduced provisions on abortion by defining when life starts and outlawing abortion.¹⁴⁸ The Hansard record of a meeting between the Parliamentary Select Committee and the Committee of Experts indicates the justification for retention of the death penalty and outlawing abortion was that it was a political settlement to ensure adoption of the draft constitution at the referendum.¹⁴⁹ Indeed, the Minister of Justice directed the Committee of Experts not to interfere with the provision on the right to life as drafted by the Parliamentary Service Committee.¹⁵⁰ The right to life in the Constitution, 2010 stands as drafted in the revised harmonised draft constitution by the Parliamentary Select Committee.¹⁵¹ Second, on the right to family, the character of marriage, the Parliamentary Select Committee removed the provision on the right of every adult to found a family,¹⁵² arguing that the provision would open room for same sex marriages.¹⁵³ The Committee of Experts in its discussions voted not to reinstate the provision to seal any loophole that would lead to inclusion of same sex marriages.¹⁵⁴

¹⁴⁵ Verbatim record of proceedings of plenary meetings of the Committee of Experts on constitutional review 3rd January 2010 (n 132 above) 79-80.

¹⁴⁶ As above.

¹⁴⁷ Revised harmonised draft constitution of Kenya from the Parliamentary Select Committee 29 January 2010, clause 25 (3).

¹⁴⁸ Revised harmonised draft constitution of Kenya from the Parliamentary Select Committee 29 January 2010, clause 25 (2) & (4).

¹⁴⁹ Committee of Experts 'verbatim record of the Committee of Experts on the constitutional review meeting with the Parliamentary Select Committee held on 16 February 2010 at the Cooperative Bank management centre, Karen, Nairobi', HAC/1/1/120, 34-35 (accessed from the Kenya National Archives 16 October 2014) [Verbatim record of the Committee of Experts meeting with the Parliamentary Select Committee 16 February 2010].

¹⁵⁰ As above.

¹⁵¹ See the Constitution, 2010 article 26 and Revised draft constitution of Kenya from the Parliamentary Select Committee 29 January 2010, clause 25.

¹⁵² See Harmonised draft constitution of Kenya, 17 November 2009 clause 42 (3) and Revised harmonised draft constitution of Kenya from the Parliamentary Select Committee 29 January 2010, clause 48.

¹⁵³ Verbatim record of the Committee of Experts meeting with the Parliamentary Select Committee 16 February 2010 (n 149 above) 36.

¹⁵⁴ Committee of Experts 'verbatim record of proceedings of plenary meeting of the Committee of Experts on Constitutional Review held on 10th February 2010 in Delta House, Westlands Nairobi on the bill of rights, land and environment', HAC/1/1/118, 88-89 (accessed Kenya National Archives 17 October 2014). [Verbatim record of plenary proceedings of the Committee of Experts, 10 February 2010].

Third, in regard to equal rights in marriage, the Parliamentary Select Committee removed the express constitutional guarantee of equal rights at the time of marriage, during and at the dissolution of the marriage.¹⁵⁵ It instead provided for enactment of national legislation to secure the rights.¹⁵⁶ The Committee of Experts however reinstated the provision making direct reference to the Convention on Elimination of All Forms of Discrimination against Women.¹⁵⁷ Fourth, the Parliamentary Select Committee also removed the special recognition of the rights of children, minorities and marginalized groups, persons with disability, youth and older members of society, and in the alternative introduced an omnibus provision to cater for all the groups.¹⁵⁸ The Committee of Experts nonetheless reinstated the recognition of the rights of special groups citing the Convention of the Rights of the Child and the Review Act which mandated adherence to the principles of human rights, equality and affirmative action in the review process.¹⁵⁹ Fifth, on socio-economic rights, the Parliamentary Select Committee collapsed all the stand-alone provisions into one provision with a view to reducing verbosity.¹⁶⁰ Although the Committee of Experts adopted the Parliamentary Select Committee formulation of the rights into a single provision, it opted to include brief particulars of the rights as outlined in the International Covenant on Economic, Social and Cultural Rights.¹⁶¹

Sixth, on right of access to information, the Parliamentary Select Committee removed the express constitutional guarantee and instead provided for enactment of national legislation on access to information under the freedom of expression.¹⁶² However, the Committee of Experts reinstated the express right to access to information arguing that the amendment by the Parliamentary Select Committee restricted enjoyment of the right to parliamentary approval which was not in line with international human rights conventions.¹⁶³

Seven, and of significance to this study, the Parliamentary Select Committee removed all provisions relating to state adherence to its obligations to international human rights bodies. Pointedly, all the draft constitutions published in 2002, 2004, 2005 and 2009 had express and elaborate provisions on compliance with international human rights monitoring,¹⁶⁴ thus these provisions were non-contentious. There is no record of the history of this provision from the September 2002 draft constitution. Nonetheless, it is arguable that since the provisions of the September 2002 draft were mainly informed by public submissions, it is likely that the provisions were influenced by members of civil society, some of whom were delegates to the National Constitutional Conference and had participated in the state reporting process. The provisions required timely submission of state reports, public

¹⁵⁵ See Harmonised draft constitution, 17 November 2009, clause 42 (4) and Revised harmonised draft constitution from the Parliamentary Select Committee, 29 January 2010, clause 42 (3) (b).

¹⁵⁶ As above.

¹⁵⁷ Verbatim record of plenary proceedings of the Committee of Experts 10 February 2010 (n 154 above) 91.

¹⁵⁸ Revised harmonised draft constitution from the Parliamentary Select Committee 29 January 2010, clause 49.

¹⁵⁹ Verbatim record of plenary proceedings of the Committee of Experts, 10 February 2010 (n 154 above) 22.

¹⁶⁰ Revised harmonised draft constitution from the Parliamentary Select Committee 29 January 2010 clause 40.

¹⁶¹ Verbatim record of plenary proceedings of the Committee of Experts, 10 February 2010 (n 154 above) 68.

¹⁶² Revised harmonised draft constitution from the Parliamentary Select Committee 29 January 2010, clause 32 (4).

¹⁶³ Verbatim record of plenary proceedings of the Committee of Experts, 10 February 2010 (n 154 above) 42.

¹⁶⁴ See Constitution of Kenya Review Commission draft Bill, clause 30 (6); Bomas draft constitution, 2004 clause 30 (6), (7) and (8); Proposed New Constitution of Kenya, 2005 clause 31 (5) & (6); and harmonised draft constitution, 2009 clause 30 (6), (7) & (8).

participation in preparation of state reports and dissemination of recommendations arising from the state reporting and other monitoring bodies including a statement in Parliament on whether and how the government intends to implement the findings.¹⁶⁵ Review of the records of the Committee of Experts meeting with the Parliamentary Select Committee indicates that the justification for the removal of the provisions was strong opposition by the Parliamentary Committee to reference to international law in the entire draft constitution.¹⁶⁶ Nonetheless, this must be viewed against the prevailing political circumstances at the time, the opening up of investigations by the International Criminal Court on the Kenya's post election violence cases.¹⁶⁷

The Committee of Experts in its drafting session in October 2009 deliberated on implementation of international state obligations on human rights.¹⁶⁸ It correctly noted that while the existing draft constitutions provided for state obligations in relation to findings of monitoring mechanisms, these provisions did not guarantee domestication of international human rights treaties that Kenya had ratified.¹⁶⁹ It was pointed out that the state had not domesticated the Convention on Elimination of All Forms of Discrimination Against Women, despite having ratified it in 1984 and that the Statute of the International Criminal Court was domesticated in 2009, five years after ratification.¹⁷⁰ The Committee of Experts introduced express provisions requiring the state to enact and implement legislation to fulfill its international human rights obligations.¹⁷¹ Instructively, although the Parliamentary Select Committee removed all provisions relating to state obligations to international bodies, the Committee of Experts elected to retain the provisions on enactment and implementation of legislation to fulfill international obligations.¹⁷² The question then is whether following the removal of the express provisions on recommendations of monitoring mechanisms, the Constitution, 2010 in any way obligates the state to implement such recommendations? According to a member of the Committee of Experts, notwithstanding the removal of the express provisions, the Constitution, 2010 envisages both legal and political avenues for the implementation of findings and recommendations of monitoring mechanisms.¹⁷³ Legally, the Constitution, 2010 incorporates international law hence the findings and recommendations of monitoring mechanisms flow from treaties that are Kenyan law, thus implementation can be enforced through the courts.¹⁷⁴ This view is however debatable. Politically, the Constitution,

¹⁶⁵ As above.

¹⁶⁶ Verbatim record of the Committee of Experts meeting with the Parliamentary Select Committee 16 February 2010 (n 148 above) 36-37.

¹⁶⁷ On 26 November 2009, the prosecutor of the International Criminal Court requested authorization from the Court to use its powers to initiate investigations into the post-election cases *proprio motu* based on information handed over to it in July 2009 on the persons who bore the greatest responsibility in the violence.

¹⁶⁸ Committee of Experts on the constitutional review 'Verbatim record of proceedings of the drafting retreat by the Committee of Experts on the chapters on land, environment, bill of rights, leadership and integrity held on 29 October 2009', HAC/1/2/20, 63-66 (accessed from the Kenya National Archives 13 October 2014).

¹⁶⁹ As above.

¹⁷⁰ As above.

¹⁷¹ Harmonised draft constitution of Kenya 17 November 2009, clause 30 (6) which includes the words 'The State shall 'enact and implement' legislation to facilitate the fulfilment of its international obligations in respect of human rights and fundamental freedoms...'. The phrase 'enact and implement' was not contained in the Bomas draft constitution, 2004 and the Proposed New Constitution, 2005.

¹⁷² Verbatim record of plenary proceedings of the Committee of Experts, 10 February 2010 (n 154 above) 127.

¹⁷³ Interview with O Amollo, Member Committee of Experts on the Constitutional Review 2009/10, Kenya, Nairobi, 1 April 2015.

¹⁷⁴ As above.

2010 requires the President to update Parliament on the progress in the implementation of international obligations which reflects the monist approach to international law and reinforces the argument that findings and recommendations of monitoring mechanisms constitute interpretation of treaties considered as Kenyan law.¹⁷⁵

Summing up the impact of the recommendations of monitoring mechanisms in the 3rd phase of constitution-making, the assessment finds the influence of the recommendations in at least three instances in submissions of civil society organisations and in expert discussions during the drafting sessions. Further, there is also extensive reference to international human rights treaties to inform the formulation of particular rights and provisions of the draft constitution.

1.3 Overall analysis of the impact of findings and recommendations of monitoring mechanisms in the constitution-making process

The previous sections have assessed the impact of the findings and recommendations of monitoring mechanisms in the three phases of Kenya's constitution making. The observations of the assessment are threefold. First, that there was marginal influence of the findings and recommendations of monitoring mechanisms in the constitution making process, despite its long span and the presence of state, non-state actors, civil society organisations, the academia and international experts. As discussed earlier, experts in the constitution making process point out that the findings and recommendations of monitoring mechanisms did not inform the constitution making process. Notably, the influence of the findings and recommendations was observed in submissions of civil society organisations and in expert discussions during the drafting sessions. Even then, one must take cognisance of the fact that a number of non-state actors were members of key organs of the constitution making process – the Review Commission, the National Constitutional Conference and the Committee of Experts. Most of these actors had also engaged in the international human rights monitoring mainly through preparation of shadow reports. Is it then possible that their awareness of the gaps in Kenya's human rights practices informed the review process without direct reference to the findings and recommendations of monitoring mechanisms?

Second, that there was broad reference to international law in the constitution making process. The reference to international law was made by both individuals and organisations in their submissions to the Review Commission and the Committee of Experts and also by the persons mandated to consider and adopt the constitution, the delegates in the Constitution of Kenya Review process and members of the Committee of Experts. The international law provisions were mainly to explain and validate proposals for inclusion or exclusion of given rights or principles and to frame particular rights during the drafting process. A closer examination reveals that the international human rights instruments referred to were mainly the UN human rights treaties to the exclusion of African human rights instruments. Pointedly, in some instances such as on the abortion provisions the Committee of Experts referred to the Covenant on Economic, Social and Cultural Rights and jurisprudence from American Courts, to the exclusion of the Protocol on Rights of Women in Africa which is more progressive and reflective of African realities.

¹⁷⁵ As above.

Third, the question posed would be if the recommendations of monitoring mechanisms in the four instances in which they were deployed influenced the constitution-making process? A closer scrutiny of the recommendations deployed indicate that they related to: harmonisation of divorce and marriage laws, constitutional recognition of indigenous peoples, constitutional protection of children rights and expanding the list of protected statuses in the non-discrimination provisions to cover sexual minorities. Notably, the recommendation on constitutional protection of the rights of children influenced the Committee of Experts to retain the provisions of children's rights in the draft constitution. The recommendations of marriage and divorce laws as pointed out earlier were already provided for in the draft constitution. The other two recommendations related to issues that were contested. The constitutional recognition of indigenous people was contested on the grounds of the criterion for indigeneity, while it was argued that expanding the list of protected statuses would have opened an avenue for protection of sexual minorities. Therefore, it is plausible to argue that the recommendations failed to exert influence the constitution making process in relation to contested issues. This proposition is supported by a member of the Committee of Experts who indicated that the Committee was aware of the recommendations but had to secure passage of the draft constitution in the national referendum.¹⁷⁶

2 Conclusion

The question then is whether the findings and recommendations of monitoring mechanisms had an impact in Kenya's constitution making process. Two issues stand out: first the limited deployment of the findings and recommendations of monitoring mechanisms in the constitution making process; and second the failure of the findings and recommendations to influence the thinking and decisions of key actors in the constitution making process on contested issue areas.

On the first issue of limited deployment of the findings and recommendations of monitoring mechanisms in the constitution-making process, it is instructive that the first draft constitution published in September 2002 contained a comprehensive bill of rights including procedures on state engagement with monitoring mechanisms. It is then arguable that a number of the issues raised in the findings and recommendations of monitoring mechanisms were already incorporated in the draft constitutions at the various stages. The second, which is the focus of concern, is the failure of the findings and recommendations of monitoring mechanisms to influence the thinking and actions of key decision makers in the constitution-making process on contested rights. Drawing from this, the chapter concludes that the findings and recommendations had limited impact on the constitution making process.

¹⁷⁶ Interview with O Amollo, Member Committee of Experts on Constitutional Review, Kenya, Nairobi, 1 April 2015.

Chapter 7

Analysis of relevant international law state compliance theories and their application to Kenya

1 Introduction

Although international scholars have debated the question of when and why states obey international law for hundreds of years, one will look in vain to scholarship for a concrete answer to the question. To legal scholars, it is an article of faith that law matters by which they mean that law impacts state behaviour.¹ Typified by Louis Henkin's assertion that 'almost all nations observe almost all principles of international law and almost all their obligations almost all of the time',² international legal scholarship has been reluctant to assess the actual impact of international law on state behaviour. Legal scholars have tended to point to isolated cases of state adherence to treaty commitments, expansion of treaty regimes and institutions and the incorporation of international law in national law to demonstrate the efficacy of international law while avoiding the causal question and predictive analysis.³ Contrastingly, political scientists have through empirically tested hypotheses sought to disprove that international law impacts state behaviour, often obtaining results that are at variance with the beliefs of legal scholars.⁴ Equally international relations scholarship, though skeptical of international law, often viewing it as insignificant in the international system, has developed theories on the different variables that influence state behaviour.⁵

At the heart of the debate is the question of the impact of international law on state behaviour, often expressed as compliance. With particular reference to human rights, this debate on the compliance question is manifest in the recent increase of scholarship on the causal mechanisms of compliance, particularly second order compliance with decisions of international human rights monitoring bodies.⁶

Instructively, a number of scholarly works have previously focused on the impact of treaty ratification on state behavior,⁷ a reflection of the traditional law making approach which

¹ LR Helfer, 'Overlegalizing human rights: international relations theory and the Commonwealth Caribbean backlash against human rights regimes' (2002) 102 *Columbia Law Review* 1834; A Guzman 'A compliance based theory of international law' (2002) 90 *Cal. L. Rev.* 1826.

² L Henkin *How nations behave* (1979) 47.

³ Helfer (n 1 above) 1834-1835.

⁴ Helfer (n 1 above) 1835; See LC Keith 'The United Nations International Covenant on Civil and Political Rights: does it make a difference in human rights behaviour?' (1999) 36 *Journal of Peace Research* 95 -118; EM Hafner-Burton & K Tsutsui 'Human rights in a globalizing world: the paradox of empty promises' (2005) 110 *AJS* 1373-1411; E Neumayer 'Do human rights treaties improve respect for human rights?' (2005) 49 *Journal of Conflict Resolution* 926-953.

⁵ Guzman (n1 above) 1827.

⁶ DC Baluarte 'Strategizing for compliance: the evolution of a compliance phase of Inter-American Court litigation and the strategic imperative for victims' representatives' (2013) 27 *AM. Int'l L Rev.* 264-265; See F Viljoen & L Louw 'State compliance with the decisions of the African Commission on Human and Peoples' Rights 1994 - 2004' (2007) 101 *AM. J. Int'l L.* 1-34; Open Society Justice Initiative 'From judgement to justice: implementing international and regional human rights decisions' (2010).

⁷ OA Hathaway 'Do human rights treaties make a difference?' (2002) 111 *Yale L.J.* 1934 -2034; Neumayer (n 4 above) 926-953; DW Hill 'Estimating the effects of human rights treaties on state behaviour' (2010) 72 *Journal of Politics* 1161 - 1174.

views ratification as the defining moment of legal obligation and assesses state behaviour with reference to that point in time. The international human rights regime creates institutions to monitor compliance with treaty obligations. These institutions interpret treaty provisions, elaborate norms and identify violations as a pathway through which state behaviour is influenced by human rights norms. This research is concerned with second order compliance, which is compliance with the findings and recommendations of international human rights monitoring mechanisms. The research is concerned with impact of the findings and recommendations of monitoring mechanisms, which is defined as the influence of the judgments, concluding observations and recommendations of international monitoring mechanisms on the actions of key domestic actors. The focus of the research is thus on implementation rather than compliance. International law literature defines 'compliance' as the conformity of a state's behaviour with a given rule, while implementation is defined as 'putting international commitments into practice' for instance by passing legislation or establishing institutions.⁸ While these terms are inter-related, implementation is measurable and observable since it connotes response to an identified commitment, as often articulated in findings and recommendations of monitoring mechanisms. This chapter will however use the term 'compliance' as it is the term employed in contextual literature on international relations and international law theories, which the chapter now turns to.

The first part of the chapter conducts a survey of compliance theories in international relations and international legal literature. However, the survey is not exhaustive in coverage of compliance theories, rather it focuses on theories that are important in framing the debate. Building upon this theoretical survey, the second part of the chapter examines the application of the compliance theories in relation to Kenya.

Compliance literature offers five distinct approaches to answer the question why states obey international law. These are power, self interest or rational choice, liberal explanations premised on rule-legitimacy of identity, communitarian explanations and legal processes explanations both horizontal and vertical.⁹ This section analyzes these approaches from the general perspective of international relations and international legal literature.

1.1 International relations theories

The international relations literature on compliance with international law follows three typical explanatory pathways each traceable in one of the historical roots of compliance theory. These are: the rationalist, the liberal and the constructivist strands.¹⁰ Under the rationalist strand the section discusses the neo-realist and institutionalist theories while under the liberal strand, the liberal theory is discussed and under the constructivist strand, the ideational theory- spiral model of change is discussed.

⁸ K Raustiala & AM Slaughter 'International law, international relations and compliance' in W Carlsneas, T Risse & B Simmons (eds) *The handbook of international relations* (2002) 539.

⁹ H Koh 'Why do nations obey international law?' (1997) 106 *The Yale Law Journal* 2632 - 2634.

¹⁰ As above.

1.1.1 Neo-realist theory

The neo-realist theory starts from the observation that the international system has no central authority and no structure exists to order relations between states. The theory posits that the system is defined by anarchy with state power as the central and only variable of interest in an international system where states are unitary actors.¹¹ The theory is premised on four basic assumptions: (i) that survival is the principal goal of every state hence in an anarchic international system, states must maximize on their power to advance their material interests that are necessary for survival; (ii) that states are rational actors interested in guaranteeing self preservation; (iii) that all states possess some power hence no state is safe relative to the others; and (iv) powerful states determine the world order.¹² The theory suggests that international law and international institutions are insignificant in influencing state behaviour.¹³ Accordingly, compliance with international law is coincidental and occurs when it serves the material interests of states but not out of an independent legal obligation pull.¹⁴

In the context of international human rights law, it is argued that human rights norms will be enforced to the extent that it is in the strategic interests of powerful states to enforce them.¹⁵ Therefore compliance with human rights norms occurs because the powerful states that determine the world order coerce relatively weak states into complying.¹⁶ Additionally, the international monitoring mechanisms have little influence on state human rights practices, but are merely a reflection of state power and interests.¹⁷ Based on this theory international human rights monitoring mechanisms have no influence on state behaviour.¹⁸

There are a number of difficulties associated with the neo-realist explanation of state compliance. First, viewed from the perspective of treaty formulation and establishment of treaty regimes, the theory fails to provide a convincing answer why states would participate in such activities if international law has no impact on their behaviour.¹⁹ Second commentators point to the existence of international dispute resolution mechanisms which they argue would not exist if international law is insignificant and of no influence to state behaviour.²⁰ Third, like most unitary theories, the neo-realist theory does not explain how states formulate their interests.²¹ Equally, in the human rights regime the theory leaves unanswered the questions of why states are willing to expend costs to design a regime for human rights protection, allow the regime to monitor the states' treatment of their own citizens through monitoring human rights mechanisms, commit to bring their internal affairs

¹¹ AM Slaughter 'International relations, principal theories' (2011) 4 *Max Planck Encyclopaedia of Public International Law* 1.

¹² As above.

¹³ Slaughter (n 11 above) 2.

¹⁴ Guzman (n1 above) 1837; Slaughter (n10 above) 2.

¹⁵ SP Baumgartner 'Does access to justice improve countries' compliance with human rights norms? - an empirical study' (2011) 44 *Cornell Int'l L.J* 447.

¹⁶ Hathaway (n 7 above) 1946.

¹⁷ Helfer (n1 above) 1842.

¹⁸ As above.

¹⁹ Guzman (n1 above) 1837.

²⁰ Guzman (n1 above) 1838.

²¹ N Rao 'Public choice and international law compliance: the executive branch is a "they" not an "it" ' (2011) 96 *Minnesota Law Review* 211.

in accordance to treaty requirements and continually engage in compliance monitoring activities.²²

1.1.2 Institutional theory

The institutionalist theory similarly views states as unitary rational actors in an international system governed by anarchy but in a significant departure from the realist theory posits that international cooperation is possible and there exists reasons why states choose to join and comply with international institutions.²³ The institutionalist theory defines institutions as 'established rules, norms and conventions around which actor expectations converge in a given issue area'.²⁴ The theory suggests that institutions remedy the uncertainty that impedes cooperation by providing spaces for continued interaction. This enhances the utility of reputation for countries and also makes penalty for non-compliance probable.²⁵ Institutions also facilitate information sharing and make compliance and non-compliance with norms and rules more discernible hence states know that failure to comply with a given rule will attract reprimand or penalties.²⁶ In addition, institutions provide a centralized forum for states to meet and agree on a given course of action.²⁷ Institutional theory thus argues reputational benefits, reciprocity and information sharing are the inducements that make states comply with international law.²⁸

In explaining compliance with human rights norms, commentators argue that there are relatively few reciprocal benefits that would accrue from compliance.²⁹ This is because unlike other regimes in which compliance attracts cooperative benefits, in human rights it is the state's own population that benefits from compliance hence the benefits of reputation are negligible.³⁰ The thrust of the argument is that reputation is more likely to be an incentive for compliance in regimes in which states offer reputation as collateral for international commitments. Compliance with the human rights regime would occur if the threat of direct sanctions or harm of reputation is far greater than the cost of noncompliance. In practice however, it is argued that sanctions for human rights violations are not common hence this is unlikely to be the single and perhaps most important determining factor for compliance.³¹ Further, other views hold that even if international human rights treaties were to be viewed as cooperation mechanisms for mutual benefits of all states, it is doubtful that meaningful cooperation would be achieved.³² In the specific context of international human rights monitoring mechanisms, it is suggested that information sharing inducement may lead to increased compliance as it enables other treaty partners to monitor noncompliance with treaties hence putting reputational pressure on violating states.³³ However, it remains to be

²² Hathaway (n 7 above) 1946.

²³ Slaughter (n 11 above) 2; Baumgartner (n 15 above) 447.

²⁴ Baumgartner (n 15 above) 447 citing R Keohane *International institutions and state power* (1989).

²⁵ Slaughter (n 11 above) 2-3.

²⁶ As above

²⁷ As above.

²⁸ Baumgartner (n 15 above) 448.

²⁹ Hathaway (n 7 above) 1951; Baumgartner (n 15 above) 448; Neumayer (n 4 above) 927.

³⁰ Baumgartner (n 15 above) 448.

³¹ Hathaway (n 7 above) 1951.

³² Neumayer (n 4 above) 927.

³³ Baumgartner (n 15 above) 448.

tested if such pressure will lead to increased compliance since no reciprocal benefits accrue from compliance.

Generally, the rationalist theories take the position that norms are not internalized by states, but rather the norms constrain state behavior.³⁴ A salient feature of the above discussed rationalist theories is that they are state centric in outlook. These theories tend to ignore the role of domestic politics and actors, yet international human rights norms are implemented at the national level. Applying the rationalist theories to the Kenyan case study, the assessment identifies one instance that is consistent with the institutionalist theory. As already noted in chapter three, section 2.10, the implementation of the recommendation on enactment of legislation on terrorism, the Prevention of Terrorism Act, 2012, was as a result of sustained pressure from Financial Action Task Force, a global standard setting body on anti-terrorism and combating the financing of terrorism.³⁵ The Financial Action Task Force had threatened to blacklist Kenya if the Act was not enacted by end of September 2012 which would have affected Kenya's import and export business and also blotted its reputation as an investment destination.³⁶ Even then, the Act as enacted did not fully comply with international human rights standards, as there were no reciprocal benefits accruing to Kenya from other states in regard to the human rights provisions. Further, the assessment on implementation in chapters three, four and five largely point to the role of domestic processes and actors hence these theories have little explanatory power in Kenya's case study.

1.1.3 Liberal theory

Unlike the realist and institutionalist theories, the liberal theory does not regard states as unitary actors in the international system. The theory's basic premise is that individual characteristics of the state influence international relations.³⁷ According to Moravcsik the theory is premised on the assumptions that: (i) individuals and private groups, not states, are the key actors in the international system; (ii) states serve and represent the interests and behaviour of a dominant sub-set of society; and (iii) the configuration of these interests determines state behaviour.³⁸ The theory is thus concerned with the study of domestic politics and institutions such as courts, legislatures and administrative agencies to explain state behaviour.³⁹ Accordingly, for compliance to occur, the domestic interests of the sub-state actors must be involved.⁴⁰

Liberal theory scholars writing on compliance with human rights treaties point to two interrelated variables that account for compliance. These are: incorporation of agreements into national law and use of transnational judicial review to interpret agreements and monitor violations.⁴¹ Incorporation of treaty provisions into national law enables individuals and private groups to press for compliance through the national courts while direct access to

³⁴ A Alkoby 'Theories of compliance with international law and the challenge of cultural differences' (2008) 4 *Journal of International law and International Relations* 155.

³⁵ F Oluoch 'Kenya under pressure to pass anti-terrorism law' *The East African* 29 September 2012, <http://www.theeastafrican.co.ke/news/Kenya-under-pressure-to-pass-anti-terrorism-law-/2558/1521092/-/5t6ugjz/-/index.html> (2 September 2014)

³⁶ As above.

³⁷ Slaughter (n 11 above) 3.

³⁸ Slaughter (n 14 above) 3-4.

³⁹ Guzman (n 1 above) 1837-1838.

⁴⁰ Hathaway (n 7 above) 1954.

⁴¹ Helfer (n 1 above) 1848 -1849.

supranational tribunals allow individuals to challenge state compliance with its obligations.⁴² The theory argues that individual and group standing before international and domestic courts is an essential requirement for compliance with international human rights law.⁴³ In addition, democratic states are more likely to comply with human rights obligations as democratic states offer private individuals and groups more avenues to seek redress as compared to less democratic states.⁴⁴

The liberal theory has however been criticized that although it explains state behaviour once a violation has occurred, it fails to explain state compliance before violation.⁴⁵ Its assertion that compliance is dependent on the democracy levels has also been criticized as national identities fluctuate and are neither permanently liberal nor non-liberal.⁴⁶ A further critique of the theory is that its overreliance on domestic politics runs into complexity since domestic interest groups are unpredictable hence this makes it difficult to generate a credible theory on how nations behave.⁴⁷

Applying the liberal theory to Kenya's human rights practices, the theory holds some explanatory power. On the first variable on incorporation of agreements into national law, as discussed in chapter two, section 6.2, the Constitution, 2010 incorporates international human rights standards as part of Kenyan law. The question then presents: has incorporation of international human rights standards in the Constitution, 2010 led to compliance with or implementation of findings and recommendations of monitoring mechanisms? The record is mixed as demonstrated in chapters three, four and five. On the overall, there are numerous instances in which Kenya has deviated from the Constitutional provisions and thus avoided complying with the findings and recommendations of monitoring mechanisms. The examples that stand out include police accountability on the use of firearms and women's rights. On the second variable which favours individual and group standing before international and domestic courts and tribunals to enforce human rights norms, some difficulties arise. First, review of Kenya's ratification record indicates that the state has not ratified any of the optional protocols or made a declaration, as the case may be, allowing individuals and groups to file complaints before the UN treaty monitoring committees.⁴⁸ Further the state has not made a declaration under the Protocol on the African Court allowing individuals and groups direct access to the African Court.⁴⁹ Notwithstanding the restrictions at the international level, the Constitution, 2010 adopts an inclusive approach to individual and group standing before domestic courts and tribunals.⁵⁰ However, although domestic courts and tribunals have inclusive rules of standing, Kenya's record of compliance with court decisions is poor. For instance, as discussed previously in chapter four, while the courts have since 2011 issued a number of decisions requiring the government to put in

⁴² Helfer (n 1 above) 1849 -1850.

⁴³ Baumgartner (n 15 above) 450.

⁴⁴ As above.

⁴⁵ Hathaway (n 7 above) 1953.

⁴⁶ H Koh 'How is international human rights law enforced?' (1999) 74 *Indiana Law Journal* 1404-1405.

⁴⁷ Guzman (n 1 above) 1839.

⁴⁸ Office of the High Commissioner for Human Rights, Human rights bodies, <http://www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx> (accessed 13 September 2013).

⁴⁹ African Court on Human and Peoples' Rights, Basic Documents, http://www.african-court.org/en/images/documents/New/Statuts_of_the_Ratification_Process_of_the_Protocol_Establishing_the_African_Court.pdf (accessed 13 September 2013).

⁵⁰ Article 22.

place legislation on evictions and directed timelines for enactment of the legislation, these decisions remain unimplemented. Third, on democratic states, although Kenya's Constitution, 2010 sets it on a clear path to democracy, assessment of transition indicates that Kenya is yet to consolidate the democratic gains and that the transition is laboured.⁵¹ Therefore applying the theory's proposition that democratic states are likely to comply with human rights norms one would expect poor compliance. Taken together, these issues make the liberal theory less suited for Kenya's case study.

1.1.4 Ideational theory

The constructivist strand argues that states and their interests are socially constructed in shared identities, beliefs and norms which determine state behaviour.⁵² For the constructivists, it is not the states and interests that create rules and norms, rather it is the rules and norms that constitute how states interact by determining who are the actors and what rules are to be followed and shape national identities.⁵³ The theory also emphasizes the role of non-state actors particularly in influencing state beliefs.⁵⁴ Based on the theory, states comply with international law as a result of constructed attitudes which shape their beliefs into compliance with given rules.⁵⁵

With regard to human rights, ideational scholars focus on the five step 'spiral model' to explain socialisation of states to human rights norms compliance.⁵⁶ At the initial stage states are repressive and engage in human rights violations.⁵⁷ The second phase is characterised by denial following pressure by transnational advocacy groups on repressive states to recognise international human rights norms.⁵⁸ This leads to the third phase, tactical concessions in which repressive states try to shift international focus from their human rights practices for instance by ratifying international treaties.⁵⁹ The fourth phase, prescriptive status is characterised by state actions and practices consistent with recognition of human rights norms such as changing domestic laws and establishing domestic human rights institutions.⁶⁰ The fifth phase is characterised by rule conformity and sustained compliance with international human rights norms.⁶¹

Assessing application of the five step spiral model after a decade, Risse *et al* find that while the theory has explanatory power for the first three phases of repression, denial and tactical

⁵¹K Kanyiga 'Kenya: democracy and political participation' (2014) 7. This study assessed Kenya against standards adopted by African states on democracy, elections and popular participation. The obstacles to Kenya's democratic transition are identified as ethnicity, a dominant executive that abuses the rule of law and the electoral system to the extent that it intermingles with ethnicity to defeat democratic transition.

⁵² Slaughter (n 11 above) 4; Koh (n 9 above) 2633-2634.

⁵³ Koh (n 9 above) 2634.

⁵⁴ Slaughter (n 11 above) 4.

⁵⁵ Koh (n 9 above) 2634.

⁵⁶ T Risse *et al* *The persistent power of human rights: from commitment to compliance* (2013) 5.

⁵⁷ Risse *et al* (n 56 above) 6.

⁵⁸ As above.

⁵⁹ As above.

⁶⁰ As above

⁶¹ Risse *et al* (n 56 above) 8.

concession, many states do not proceed to the fourth state of prescriptive status and the eventual phase of habitual compliance.⁶²

The application of the five step spiral model to Kenya's human rights compliance has been the subject of past scholarly research. Using the five stage spiral model of human rights change, past research explains embedding of human rights norms in the 1980s and 1990s.⁶³ The research illustrates the first stage as the deteriorating human rights situation in Kenya during the 80's which was characterized by arbitrary detention and political trials, state perpetrated torture and curtailing of the fundamental freedoms.⁶⁴ Domestic opposition within Kenya mobilized and linked up with transnational networks which jointly applied pressure on the government to fulfill its human rights commitments. The second and third stages were marked by government denial of the allegations of human rights violations and attempts to deflect the criticism through limiting flow of information.⁶⁵ At the fourth stage the human rights norms acquired prescriptive status in Kenya, for instance evinced by the ratification of the Convention against Torture and other Cruel, Inhuman or Degrading Punishment or Treatment in 1997 and establishment of a standing committee to monitor human rights violations in 1996.⁶⁶ However, the government adopted the path of institutional adaptation, where it fulfilled its human rights commitments only to avert domestic and external criticism.⁶⁷ The spiral change model envisions that at the final and fifth stage, states will have internalized human rights norms so that external pressure is no longer required for compliance. However, this fifth stage seems not to have occurred in the Kenyan case study, as human rights norms were not fully institutionalized in the political, legal and social structures. Therefore for sustainable human rights compliance in Kenya the process of norm internalization must occur.

1.2 International legal theories

International law literature also has a number of theories that attempt to explain compliance. International law compliance theories start from the basis that rationalist, constructivist and liberal theories fail to appreciate the persuasive power of legitimate legal obligations.⁶⁸ International law theorists argue that an understanding of state behaviour in the international realm requires an appreciation of the influence and importance of ideas and concerns of fairness and legitimacy.⁶⁹ However, it remains contested how and why the ideas matter.⁷⁰ This section discusses the managerial, legitimacy and transnational legal process theories.

⁶² Risse *et al* (n 56 above) 27-33.

⁶³ HP Schmitz 'Transnational activism and political change in Kenya and Uganda' in T Risse-Kappen *et al* *The power of human rights: international norms and domestic change* (1999) 39-77.

⁶⁴ Schmitz (n 63 above) 42-44.

⁶⁵ Schmitz (n 63 above) 53-54.

⁶⁶ Schmitz (n 63 above) 55 - 63.

⁶⁷ Schmitz (n 63 above) 67.

⁶⁸ Hathaway (n 7 above) 1955.

⁶⁹ As above.

⁷⁰ As above.

1.2.1 Managerial theory

The managerial theory was propounded by Chayes and Chayes and presumes that state compliance with international law is generally good and enforcement mechanisms have had little effect in attaining or maintaining compliance.⁷¹ The propensity to comply is based on: (i) states join treaties and regimes that they have an interest to comply with; (ii) compliance is achieved as a result of an internal decisional process; and (iii) existing norms create obligations for states to comply with legal undertakings.⁷² Non-compliance, it is argued, is not a result of a deliberate or intentional act, but as a result of lack of state capacity or resources to comply, lack of clarity or ambiguity in treaty interpretation and unavoidable or unforeseen time lag between commitment and actual implementation.⁷³ Compliance, the theory argues, is achieved through a 'cooperative problem solving approach' as opposed to application of formal or informal enforcement measures.⁷⁴ Non-compliance is thus addressed by reducing ambiguity through increased transparency, technical and financial assistance to states with limited capacity and resources and improvement of dispute resolution procedures.⁷⁵ These managerial efforts are further applied to persuade a non-complying state to compliance.⁷⁶ Generally compliance is achieved through non-confrontational, facilitative and forward looking management which includes persuasive dialogue rather than employment of sanctions or enforcement.⁷⁷

In the context of compliance with international human rights law, the theory suggests that norms have a causal influence and international cooperation is attained because of the persuasive power of human rights norms.⁷⁸ Accordingly, norm persuasion is achieved through dissemination and socialization of the norm by non-governmental organizations activism. This activism initiates dialogue on human rights, creates networks of people and institutions to monitor violations, lobby for creation of human rights regime and persuade states to join.⁷⁹

The theory has however been criticized as only suited for international agreements that address coordination problems with no plausible explanation on compliance in non-coordination related agreements.⁸⁰ Coordination problems relate to instances in which states are required to coordinate behaviour or to cooperate to achieve a desired outcome in international regulation for example, in arms control or in environmental fields.⁸¹

The application of the managerial theory to Kenya's compliance with findings and recommendations of monitoring mechanisms is fraught with one major challenge. The theory suggests that treaty regimes, in this instance international human rights monitoring mechanisms, assume a managerial role in regard to implementation of the findings and

⁷¹ GW Downs et al 'Is the good news about compliance good news about cooperation?' (1996) 3 *International organization* 50 380.

⁷² Raustiala & Slaughter (n 8 above) 542-543; Guzman (n1 above) 1830-1831.

⁷³ Raustiala & Slaughter (n 8 above) 543; Downs *et al* (n 71 above) 380-381.

⁷⁴ Guzman (n 1 above) 1830.

⁷⁵ Raustiala & Slaughter (n 8 above) 543; Downs *et al* (n 71 above) 381.

⁷⁶ Hathaway (n 7 above) 1957.

⁷⁷ Raustiala & Slaughter (n 8 above) 543; Hathaway (n 7 above) 1957.

⁷⁸ Hathaway (n 7 above) 1957.

⁷⁹ As above.

⁸⁰ Guzman (n 1 above) 1831.

⁸¹ Guzman (n 1 above) 1830-1833.

recommendations. Yet, as demonstrated in the assessment of implementation of the findings and recommendations in chapters three, four and five, the processes that drive implementation are mainly centered at the national level and driven by a broad range of actors besides the monitoring mechanisms. Stemming from this observation, the managerial theory is incomplete in analysing Kenya's implementation of the findings and recommendations of monitoring mechanisms.

1.2.2 Legitimacy theory

The legitimacy theory was propounded by Thomas Franck and has as its central thesis the proposition that states comply with rules addressed to them when they are convinced that the rule is legitimate, meaning 'the rule came into being in accordance to the right process'.⁸² Legitimacy is determined by four elements: (i) textual determinacy which refers to clarity on the permitted and prohibited behaviour; (ii) symbolic validation meaning that a rule communicates authority through rituals or regularized practice; (iii) coherence in the text and application of the rules suggesting that rules should be consistent; and (iv) adherence of the rule to a normative hierarchy meaning the rule must fit within the procedural institutional framework of an organized community.⁸³ Where the four elements are met, the rule is perceived as legitimate and this exerts a compliance pull on states, while there is little impetus to comply if the four elements are absent.⁸⁴ The causal pathway for compliance is thus the legitimacy of the rules which persuades states to comply.⁸⁵

In relation to the human rights regime, Franck posits that human rights norms have achieved symbolic validation as violation is perceived as 'trespass against a major public policy of the community'.⁸⁶ Further he points out that the adherence element is met as human rights rules are supported by the procedural and institutional framework of the international system.⁸⁷ With reference to the other two elements of determinacy and coherence, he posits that the monitoring process of the International Covenant for Civil and Political in which alleged violations are reviewed on a case by case basis by a quasi judicial mechanism, the Human Rights Committee, creates determinacy and coherence in the application of human rights norms.⁸⁸

The theory has a number of shortcomings which include its failure to offer an explanation on why states do or should be concerned about legitimacy, it fails to explain why legitimacy exerts a compliance pull and why states fail to comply with rules that they have earlier on complied with.⁸⁹ Other critics also argue that the theory is circular based on its claim that legitimacy determines compliance pull which is also the measure for legitimacy.⁹⁰

⁸² Raustiala & Slaughter (n 8 above) 541; Guzman (n 1 above) 1834.

⁸³ As above; J Stein 'International law: understanding compliance and enforcement' (2010) *The international studies encyclopaedia*.

⁸⁴ As above.

⁸⁵ Raustiala & Slaughter (n 8 above) 541; Hathaway (n 7 above) 1958.

⁸⁶ T Franck *Fairness in international law and institutions* (1995) 124.

⁸⁷ As above.

⁸⁸ Franck (n 86 above) 104-105.

⁸⁹ Guzman (n 1 above) 1834- 1835.

⁹⁰ Raustiala & Slaughter (n 8 above) 543; Stein (n 83 above) citing R Keohane 'International relations and international law: two optics' (1997) 38 *Harvard Journal of International Law* 487-502.

Applying the legitimacy theory to Kenya's human rights practices, arguably the theory holds some explanatory power. In regard to the findings and recommendations of monitoring mechanisms, the assessment in chapters three, four and five reveal that the government took deliberate steps to implement recommendations from the APRM, particularly in relation to women rights, whose process of formulation is viewed as legitimate. Contrastingly, the government in 2009 rejected and declined to implement the recommendations of the Special Rapporteur on extrajudicial killings and summary execution on the grounds that the recommendations and the process they were reached was not substantively and procedurally fair. To this extent the legitimacy theory explains Kenya's implementation of recommendations of monitoring mechanisms. However, the theory does not tell the whole story since it fails to explain implementation of other findings and recommendations not associated with the APRM and further not all the recommendations of the APRM have been implemented.

1.2.3 Transnational legal process theory

The transnational legal process theory is the most recent of the international legal theories on state compliance discussed above. Put forward by Koh, the theory's central proposition is that norm-internalization is the definitive reason why states comply with /obey international law.⁹¹ Koh defines transnational legal process as the theory and practice of the repeated interaction of both public and private actors in domestic and international as well as public and private fora to make, interpret, enforce and ultimately internalize rules of international law.⁹² The transnational legal process is distinguished from the ideational theory spiral model in that the transnational legal process is characterised by institutional interaction and interpretation of a norm leading to norm internalisation. On the other hand, the spiral model is characterised by top and bottom pressure on governments through which norms are cascaded into the domestic systems. The transnational legal process theory is a vertical process in which state and non-state actors interact in domestic and international fora to persuade non-complying states to accept certain norms in their domestic value set so that the norms are obeyed as part of national law.⁹³ The features of transnational legal process are: (i) non-traditional in that it saddles domestic and international as well as private and public law divisions; (ii) not state centric as it considers both states and non-state actors; (iii) dynamic as transnational actors engage in repeated interaction; and (iv) normative in that from the process new rules emerge which are interpreted, internalized and enforced.⁹⁴ The primary elements in this theory are the chronological phases of interaction, interpretation, internalization and obedience.⁹⁵ The process of norm internalization begins with transnational actors triggering interactions with a norm violating state, the interactions which occur in public or private, international or domestic fora result in legal interpretations of the norm which is then internalized in the violating state and other states.⁹⁶ Internalization at the national level occurs through incorporation of the international legal norms in the national

⁹¹ H Koh 'Transnational legal process after September 11' (2004) 22 *Berkeley J. Inter'l L.* 339.

⁹² H Koh 'Transnational legal process' (1997) 75 *Neb. L. Rev.* 183-184.

⁹³ Koh 'Transnational legal process after September 11' (n 91 above) 339. Koh differentiates compliance from obedience as follows: compliance is adherence to a rule because one is aware of the rule which is motivated by reward or avoidance of punishment while obedience is adherence to a rule because one has internalized the rule and made it part of their value system.

⁹⁴ Koh 'Transnational legal process' (n 91 above) 184.

⁹⁵ H Koh 'Bringing international law home' (1998) 35 *Hous L. Rev.* 644.

⁹⁶ As above.

legal and political systems through executive action, legislation and judicial interpretation.⁹⁷ The theory argues that the repeated participation of states in law-creating and interpreting fora results in vertical internalization or domestication of norms which is a powerful way of international law compliance.⁹⁸ Koh further identifies three forms of norm internalization: social, political and legal internalization.⁹⁹ Social internalization is achieved when a norm has attained so much public legitimacy that there is general adherence to it; while political internalization occurs when political elites are convinced of a norm and champion for its adoption as government policy.¹⁰⁰ Legal internalization occurs 'when an international norm is incorporated in the domestic legal system and becomes domestic law through executive action, legislative action or judicial interpretation or some combination of the three'.¹⁰¹ Legislative internalization occurs when international norms are legislated into domestic legislation or incorporated in national constitutions thus binding states. Judicial internalization on the other hand occurs when domestic litigation leads to judicial incorporation of international norms in national law and constitutional norms.¹⁰² These forms of internalization are not sequential and may vary.¹⁰³ The theory identifies the agents of internalization as: transnational norm entrepreneurs, government norm sponsors, transnational issue networks, interpretive communities and law declaring fora, bureaucratic compliance procedures and issue linkages.¹⁰⁴ Transnational norm entrepreneurs are non-governmental transnational actors and individuals, who mobilize and lobby for political and public support for norm creation and internalization.¹⁰⁵ Government norm sponsors are government actors who support and promote the norms in question while transnational issue networks are 'epistemic communities' that debate and formulate political solutions among concerned individuals on the same issues at global and regional levels.¹⁰⁶ Interpretive communities and law declaring fora include treaty regimes, domestic, regional and international courts, *ad hoc* tribunals, domestic and regional legislatures and non-governmental organizations.¹⁰⁷

In the context of human rights law compliance, Koh argues that compliance is achieved as a result of repeated interaction, interpretation and internalization through which international human rights norms acquire 'stickiness' and are obeyed (complied with) out of perceived self-interest which transforms to institutional habit.¹⁰⁸ Norm-internalization in human rights law begins when transnational norm entrepreneurs lobby and mobilize political and public support for the creation of a universal human rights norm.¹⁰⁹ The transnational norm entrepreneurs further seek to develop transnational issue networks that debate the issue

⁹⁷ Koh 'Transnational legal process' (n 91 above) 204.

⁹⁸ As above.

⁹⁹ Koh 'Bringing international law home' (n 95 above) 642.

¹⁰⁰ As above.

¹⁰¹ As above.

¹⁰² Koh 'Bringing international law home' (n 95 above) 643.

¹⁰³ As above.

¹⁰⁴ Koh 'Bringing international law home' (n 95 above) 647.

¹⁰⁵ As above.

¹⁰⁶ As above. Political scientists define epistemic communities as 'network of professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge within that domain or issue area.'

¹⁰⁷ Koh 'Bringing international law home' (n 95 above) 649- 650.

¹⁰⁸ Koh 'Why do nations obey international law?' (n 45 above) 1411.

¹⁰⁹ Koh (n 45 above) 1409- 1410.

and formulate political solutions at domestic, regional and international levels.¹¹⁰ In addition, the transnational norm entrepreneurs seek government actors to champion the norm while law declaring fora akin the monitoring mechanisms (treaty regimes, domestic, regional and international courts) form an interpretive community which defines, elaborates and clarifies the definition of particular norms and their violation.¹¹¹ The norms interpretations issued by the law declaring fora are internalized into the domestic political structures leading to reconstitution of identities and interests of states hence compliance.¹¹²

Criticism on the transnational legal process theory points to a number of issues. Critics argue that the theory lacks predictive analysis as one cannot predict which norms will be internalized through the sequential processes of interaction, interpretation, internalization and obedience.¹¹³ The theory has also been criticized for failing to explain why or how certain legal norms are internalized and why internalization leads to compliance.¹¹⁴ Further criticisms point out that the vertical internalization process remains incomplete as the theory does not explain why states internalize certain norms, instead the theory uses internalization as both the definition and cause of compliance.¹¹⁵ The critics argue that the theory describes an empirical pathway to compliance rather than explaining why compliance occurs.¹¹⁶

Applying the transnational legal process theory to the Kenyan case study, the theory holds explanatory power. The assessment on implementation in chapters three, four and five alludes to the three phases of state compliance espoused by the theory. The first and the second phases are illustrated by repeated interaction between the state and non-state actors including transnational actors before interpretive such as treaty monitoring bodies or before national and international adjudicative bodies. This interaction is triggered by non-state actors in an attempt to compel the state to implement findings and recommendations of monitoring mechanisms. At the third phase of internalisation, the assessment reveals different forms of internalisation for instance, legal internalisation through the Constitution, 2010 and attempted legal internalisation demonstrated by the various draft bills initiated by non-state actors. However, majority of the norms are not internalised which explains the low level of implementation of the findings and recommendations as established in the preceding chapters. The theory's proposition that for compliance to occur, there must be social, political and legal internalization is exemplified by the fact that despite occurrence of legal internalisation through constitutionalisation of human rights norms, compliance is largely lacking due to lack of social and political internalisation. The transnational process theory suggests a suitable framework for Kenya's case study.

1.3 Analysis of the applicable theory in relation to Kenya

This research theorises that implementation of/ compliance with the findings and recommendations of monitoring mechanisms is essentially a domestic affair and thus reflects on state and non-state actors and examines domestic institutions and politics within the state. The assessment on implementation in chapters three, four and five reveal, first, a

¹¹⁰ Koh (n 45 above) 1410.

¹¹¹ As above.

¹¹² As above.

¹¹³ Hathaway (n 7 above) 1962.

¹¹⁴ Guzman (n1 above) 1835-1836.

¹¹⁵ Raustiala & Slaughter (n 8 above) 544.

¹¹⁶ As above.

broad range and mix of actors relevant to implementation of the findings and recommendations, second, interaction among the actors, and third interaction of norms, institutions and political processes.

Drawing from the above, the focus of implementation is on domestic processes. Therefore, theories that are state centric are not appropriate for application to Kenya's implementation. The approach to implementation is norm-based, so that the focus is on the norm being implemented rather than the monitoring mechanism. It follows then that implementation is achieved as a result of the state accepting a norm as part of internal law.

Deductively, the transnational legal process theory offers the best theoretical framework for analysing Kenya's implementation of the findings and recommendations of international human rights monitoring mechanisms.

2 Conclusion

This chapter has examined international law state compliance theories and their application to Kenya based on the observed implementation processes discussed in chapters three, four and five. The chapter concludes that the transnational legal process theory is best suited to analyse Kenya's implementation of the findings and recommendations of monitoring mechanisms. The theory therefore forms the theoretical basis for analysis of the findings of monitoring mechanisms discussed in the next chapter.

Chapter 8

Overall analysis of implementation and impact of the findings and recommendations of monitoring mechanisms in Kenya

1 Introduction

This analysis is embedded in the theoretical framework of the transnational legal process as alluded to in the previous chapter. The theory posits that compliance with international law occurs as a result of vertical strategies of interaction, interpretation and internalisation between state and non-state actors.¹ Other than focussing on horizontal strategies at the state-to-state level, the transnational legal process theory focuses on a different set of actors, fora and transactions.² Accordingly, these repeated interactions by non-state actors, state actors, transnational actors in interpretive communities such as national executives, parliaments and national and international courts lead to compliance.³ The transnational legal process theory thus permits a functional analysis of a wide range of actors including state and non-state actors and interactional analysis of actors, norms, domestic processes and institutions in national level compliance with international norms.

Pointedly, modern scholarship on domestic compliance with international law, particularly in international human rights, has tended to cast aside state level explanations and instead has focussed on sub-state and transnational non-state actors. Simmons in her analysis on compliance with international human rights treaties establishes a strong relationship between domestic actors and treaty compliance.⁴ Simmons thus argues that the real potential for securing compliance lies at the domestic level.⁵ Hillebrecht in exploring domestic compliance with the rulings and recommendations of the Inter-American human rights system focuses on national executives.⁶ Similarly, Krommendijk in his study on compliance with the concluding observations of the UN treaty bodies focuses on Parliaments, Ombudsman institutions and civil society organisations.⁷

In an attempt to clarify the analysis, the chapter isolates five fundamental questions that guide the analysis. These are: (i) what is the level of implementation of the findings and recommendations of monitoring mechanisms? (ii) how have the findings and recommendations been implemented? (iii) what factors account for implementation? (iv) what shapes impact of the findings and recommendations of monitoring mechanisms? (v) what are the analytical and theoretical implications? By identifying the factors that account for varying implementation, the research attempts to isolate the causal mechanisms that lead to implementation. The chapter wraps up by conducting an analytical and theoretical discussion of the results. The findings and recommendations are categorised in the following

¹ HH Koh 'How is international human rights law enforced?' (1999) 74 *Indiana Law Journal* 1406-1409.

² As above.

³ As above.

⁴ B Simmons *Mobilising for human rights: international law in domestic politics* (2009).

⁵ As above.

⁶ C Hillebrecht 'The domestic mechanisms of compliance with international law: case studies from the Inter-American human rights system' (2012) 34 *Human Rights Quarterly* 959-985.

⁷ J Krommendijk *The domestic impact and effectiveness of the process of state reporting under UN human rights treaties in the Netherlands, New Zealand and Finland: paper pushing or policy promoting* (2014) 372-395.

five thematic areas: women’s rights; personal liberty and physical integrity and political rights; children’s rights; economic, social and cultural rights; and rights of collective groups.

2 Thematic analysis of implementation and impact

This section answers the first two questions: on the level of implementation of the findings and recommendations and the processes involved in their implementation. The section therefore analyses the extent of implementation, the process of implementation and identifies instances in which the findings and recommendations influenced judicial decisions, executive action and deliberations, legislative action and the activities of non-state actors.

In analysing the extent of implementation, the categories of partial implementation, discussed in chapter 1, section 5.2 are applied. Accordingly, partial implementation is explained as split implementation, state substitution or slow motion implementation. Further, time lapse refers to ‘time to implementation’ that is the number of years between when the finding or recommendation was first made, to the point at which it was either fully or partially implemented. For partial and non-implementation, the assessment year is 2014. The analysis does not qualify full implementation to the extent that there was considerable delay in the implementation process. Similarly, the analysis does not measure the number of times a finding or recommendation was repeatedly made by the monitoring mechanisms before implementation occurred.

2.1 Personal liberty and physical integrity rights and political rights

The recommendations on personal liberty and integrity and political rights, discussed in chapter three, relate to: the death penalty, police reforms, accountability for extrajudicial killings and torture by state agents, accountability for the 2007/08 post election violence, reform of the criminal justice system and the right to peaceful assembly and access to information. One finding by the African Commission relating to individual exercise of political rights was also considered. The implementation measures required include: legislative action, systemic and institutional reform within the police and the judiciary; prosecutorial action for accountability for human rights violations; and ratification of international human rights treaties. In relation to the finding by the African Commission, a specific measure to ensure safe return of the complainant to Kenya was required.

2.1.1 Level of implementation

Fully implemented recommendations

	Recommendations	Monitoring mechanism	Implementation pathway	Time lapse (in years)
1.	Establish a credible and independent police oversight authority	SR TOT, CCPR, UPR	constitution review process	13
2.	Create an autonomous internal affairs unit within the police	SR EJK	constitution review process	3
3.	Conduct vetting of all police officers	SR EJK	constitution review process	3
4.	Take measures to ensure independence of the Judiciary	SR TOT, CAT, UPR	constitution review process	10

5.	Make judicial appointments transparent and merit based	SR EJK	constitution review process	1
6.	Reform the Judicial Service Commission to make its membership more representative	SR EJK	constitution review process	1
7.	Undertake vetting of existing judges	SR EJK	constitution review process	1
8.	Enact the Victim of Offences Bill	CAT	non-state actors	1
9.	De-link control of public prosecutions from the Executive	SR EJK	constitution review process	1
10.	Guarantee the right to peaceful assembly	HRC	constitution review process	5
11.	Establish independent witness protection unit	SR EJK, UPR	executive action	2

Pointedly, most of the recommendations that are fully implemented relate to institutional reforms which were mandated by the constitution review process. Accordingly, in view of measures taken as a result of the constitutional provisions on independence of the Judiciary, composition of the Judicial Service Commission, independence of the directorate of public prosecutions the recommendations are classified as fully implemented.

Further, recommendations on police reform are fully implemented as a result of measures taken in regard to the constitutionally driven institutional reforms in the police leading to establishment of civilian oversight and an autonomous internal affairs unit and the vetting of police officers.

The only recommendation implemented through executive action is in relation to the establishment of an independent witness protection unit. As discussed in chapter 3, section 2.7, the implementation was influenced by the government's self interests in the context of the International Criminal Court's intervention in the 2007/08 post election violence cases.

Partially implemented recommendations

	Recommendations	Monitoring Mechanism/s	Implementation pathway	Time lapse (in years)
1.	Introduce national legislation on torture	CAT, SR TOT	non-state actors	5
2.	Facilitate access to the medical assessment form – P3	SR TOT, CAT	executive action	14
3.	Address the problem of arbitrary and unlawful police arrests and corruption	CAT	constitution review process	
4.	Take reform measures to address corruption in the Judiciary	HRC, CAT, UPR	constitution review process	9
5.	Ensure the Persons Deprived of Liberty Bill contains all legal safeguards for	CAT	constitution review process	1

	detained persons			
6.	Allow inspection of detention facilities by the Kenya National Commission on Human Rights	SR TOT, HRC, CAT	executive action	15
7.	Reform the current bail system to make it reasonable and affordable	CAT	constitution review process	5
8.	Establish the National Legal Aid scheme	SR TOT, HRC, UPR	constitution review process	15
9.	Reduce delay in payment of civil compensation cases	CAT	executive action	1
10.	Ensure post-election victims obtain redress and compensation	CAT, CEDAW, CERD, UPR	non-state actors	5
11.	Enact the Freedom Information law	UPR	non-state actors	4
12.	Publish, submit to Parliament and implement the TJRC report	CAT	executive action	1

Split implementation:

The recommendations on facilitating access to P3 Forms and allowing Kenya National Commission on Human Rights to inspect places of detention are categorised as split implementation. In regard to facilitating access to P3 Forms, the government in 2000 issued circulars to the police requiring them to issue P3 Forms to all persons as a matter of right.⁸ This circular was in response to recommendations of the Special Rapporteur on Torture, but no further action has been taken to facilitate access.⁹ Similarly, on allowing inspection of detention places by the Kenya National Commission on Human Rights, while the law empowers and mandates the Commission to conduct the inspection, there is no budgetary provision. These represent instances in which parts of the recommendations have been implemented but there is no indication by the state on any further measures.

Slow motion implementation:

The recommendations classified as slow motion implementation are: enactment of the anti-torture legislation, enactment of the persons deprived of liberty bill, establishment of a legal aid scheme, enactment of freedom of information law, reform of the bail system, reduction of delays in payment of civil compensation, payment of compensation to victims of the post election violence and implementation of the TJRC report.

On the recommendations relating to enactment of anti-torture legislation and freedom of information law and reform of bail system, the government has in some instances expressly stated that it will table the bills in Parliament while in other instances the bills have been

⁸ Amnesty International 'Kenya: ending the cycle of impunity' June 2001, 4, <http://www.amnesty.org/en/library/info/AFR32/011/2001> (3 May 2015).

⁹ As above.

published for parliamentary debate.¹⁰ Even then, the reluctance of the state to implement the recommendations on anti-torture legislation and the freedom of information which is evinced by continued delays to table the bills in Parliament is highlighted.

The recommendation on delay in payment of civil compensation is categorised as slow motion implementation since the government has as of April 2015 paid compensation to some of the victims.¹¹ Similarly, recommendations on compensation of post election violence victims and implementation of the TJRC report are categorised as slow motion implementation as the government in March 2015 expressed willingness to implement the recommendations. Specifically, the President in the state of the nation address directed the creation of KES 10 billion Fund to compensate victims among others those of the post election violence.¹² Further, the President also directed speedy tabling in Parliament and consideration of the TJRC report.¹³

Non-implemented findings and recommendations

	Findings and recommendations	Monitoring Mechanism/s	Time lapse (in years)
1.	Abolish the death penalty	HRC, CAT, UPR	34
2.	Decriminalise homosexuality	HRC, CESCR, UPR	9
3.	Prosecute and punish public officials responsible for torture	HRC, SR TOT, CAT, UPR	9
4.	Investigate, prosecute and punish perpetrators of torture and excessive use of force in Mt. Elgon	SR EJK, CAT, UPR	5
5.	Independently investigate the perpetrators of use of lethal and excessive force in Tana River	CAT	1
6.	Impartially investigate allegations of torture by ethnic Somalis	CAT	1
7.	Compensate victims of the Mt. Elgon torture	SR EJK, CAT	5
8.	Investigate and prosecute police perpetrators of extrajudicial killings	SR EJK, UPR, CAT	5
9.	Undertake credible and effective investigations into the Mungiki killings	SR EJK, UPR	5
10.	Investigate, punish and abolish all police death squads	SR EJK	5

¹⁰ For instance in regard to the anti-torture legislation, the government has on two occasions: during the May 2013 e review of the second periodic report to the Committee Against Torture and in March 2015 during the UPR process indicated that the bill would be tabled in Parliament. Similarly, Access to Information bill and the Persons Deprived of Liberty bill have been published though not tabled for debate.

¹¹ Interview with O Amollo, Ombudsman, Office of the Ombudsman, Kenya, Nairobi, 1 April 2015.

¹² Republic of Kenya 'State of the nation address, 2015' 19, 26 March 2015, Parliament of Kenya, news and events, <http://www.parliament.go.ke/2013-09-04-10-36-55> (accessed 3 May 2015).

¹³ As above.

11.	Publicise the results of the investigations of extra-judicial killings by the police	CAT	1
12.	Regulate use of firearms in line with the UN Basic Principles	SR EJK, UPR, CAT	5
13.	Enact the National Coroner's Bill	CAT	1
14.	Publish Kenya National Commission on Human Rights reports on places of detention	SR TOT, CAT	14
15.	Increase the number of medical personnel in all prisons	CAT	5
16.	Adopt the draft correctional policy	CAT	1
17.	Repeal the one year limitation on claims of tort against Government officials	CAT	1
18.	Establish the office of the public defender	SR TOT, HRC, CAT	15
19.	Establish an independent investigative authority for the 2007/08 post-election violence	CESR, CAT, SR EJK, CEDAW, CERD, UPR	6
20.	Make public the report of the multi-agency task force on post-election violence	CAT	1
21.	Fully cooperate with the International Criminal Court	UPR, CERD, CAT	4
22.	Revise the Anti-Terrorism Bill in line with international human rights law	SR Terrorism	8
23.	Ratify the optional protocol against torture	ST TOT, CAT, UPR, APRM	8
24.	Ratify the optional protocols on the ICCPR	CCPR, APRM, UPR	9
25.	Ratify the Convention for the Protection of Persons from Enforced Disappearances	UPR, CAT	4
26.	Ratify the Convention on the Prevention and Punishment of the Crime of Genocide	UPR	4
27.	Make the Declaration under article 34(6) of the Protocol for the Establishment of the African Court	ACHPR	7
28.	Facilitate the safe return of John D. Ouko to Kenya	ACHPR	15

The findings and recommendations classified as non-implemented include those which no action has been taken and those which contrary action has been taken indicating unwillingness to implement the finding or recommendation. The recommendations which no action has been taken are: prosecution of police officers for torture and extra-judicial killings, investigation of various incidences of human rights violations and ratification of international instruments. The only finding in this thematic group – facilitating the safe return of John D. Ouko is also not implemented since no action was taken.

The recommendations which contrary action has been taken are discussed below.

On abolition of the death penalty, the Constitution 2010 contains a death penalty saving clause thus making the death penalty constitutionally permissible. Although it is argued by experts in the review process that this constitutional provision is couched in such a way that the court may interpret it as disallowing the death penalty,¹⁴ national courts have since declared it constitutional.

Similarly, in relation to de-criminalisation of homosexuality, the Constitution expressly disallows same sex unions, which impliedly is an indication of unwillingness to de-criminalise consensual same sex relations. Moreover, recent measures undertaken by the government are expressive of unwillingness to de-criminalise homosexuality.¹⁵

On establishment of the office of the public defender, the provision in former draft constitutions that enshrined the office of the public defender was removed during the finalisation of the constitution review process in January 2010.¹⁶ This action negates any measures towards implementation of the recommendations.

In regard to the recommendations on review law on firearms and regulating use of firearms in line with UN Basic Principles, Parliament in December 2014 amended the National Police Service Act to broaden the grounds for lawful use of force,¹⁷ hence indicating unwillingness to implement the recommendations.

On full cooperation with the International Criminal Court, political and legal measures taken by the government in the African Union and at the International Criminal Court demonstrate unwillingness to implement the recommendation. For instance, in October 2013 the Kenyan government called for an extra-ordinary AU summit to push for an AU resolution obliging the President and the Deputy President not to attend their cases at the ICC.¹⁸ Further, the government has filed a number of petitions at the ICC challenging the admissibility of the Kenyan cases at the ICC.¹⁹

In relation to recommendations relating to investigation and prosecution of the perpetrators of 2007/08 post election violence, the establishment of an investigative agency for investigation and prosecution and publication of the report of the multi-agency task force on the 2007/08 violence, the state has expressly indicated that no measures will be taken. The President in the State of the Nation address in March 2015 indicated that there was

¹⁴ Interview with O Amollo, Ombudsman and Member Committee of Experts, Office of the Ombudsman, Kenya, Nairobi, 1 April 2015.

¹⁵ The Attorney General in April 2015 lodged an appeal against a High Court decision that allowed registration of a non-governmental organisation to represent the interests of gay and lesbian persons in Kenya. The main contention in the appeal is that homosexuality and same sex relations remain criminalised in Kenya. See *Eric Gitari v Non-Governmental Organisations Coordinating Board & 4 others* [2015] eKLR.

¹⁶ See the Harmonised draft constitution of Kenya, 17 November 2009, article 195 which provided for the office of the public defender. This provision was expunged by the Parliamentary select committee charged with overseeing the constitution review process. See Revised harmonised draft constitution of Kenya with recommendations from the Parliamentary Select Committee on the Constitution Review, 29 January 2010.

¹⁷ National Police Service (Amendment) Act, 2014, section 54. This amendment introduces new grounds in lawful use of force and firearms which include protection of property and escape from lawful custody for persons charged with committing a felony.

¹⁸ See African Union, Summits, para 10 at page 4,

<http://summits.au.int/en/sites/default/files/Ext%20Assembly%20AU%20Dec%20&%20Decl%20 E 0.pdf> (accessed 30, November 2014);

¹⁹ See also International Criminal Court, <http://icc-cpi.int/iccdocs/doc/doc1078823.pdf> (18 November 2014).

insufficient evidence to prosecute the alleged perpetrators hence no prosecutions would be conducted, instead the government would resort to restorative justice approaches.²⁰

Notably, most of the non-implemented recommendations relate to individual accountability and ratification of international instruments. This fact was alluded to in interviews with the Office of the Attorney General and Department of Justice. The explanation was that recommendations requiring systemic reforms particularly individual accountability are difficult to implement due to lack of political will.²¹ On the other hand, in regard to ratification of international instruments, the explanation was that ratification is expression of state sovereignty for which the state exercises its own free will.²² This discussion is more fully taken up in section 4.2.

2.1.2 Pathways of implementation

Full or partial implementation has mainly occurred through the constitution review process which resulted in legal and institutional reforms. As pointed out, most of the recommendations that are fully implemented relate to institutional reforms while most of those that are partially implemented relate to enactment of laws.

Non-state actors have mainly taken measures in implementation of recommendations relating to enactment of laws such as the anti-torture legislation, the access to information law and the law on rights and welfare of victims. The strategies used by non-state actors to facilitate enactment of laws are initiating draft bills, in the case of torture and access to information laws, and also introducing the draft laws to Parliament as in the case of the Victim of Offences Act. In addition, non-state actors have also used litigation before domestic and regional courts to facilitate implementation of the recommendations on accountability for human rights violations and justice for victims. This is illustrated by the recommendations on investigation and prosecution of perpetrators of human rights violations in Mt. Elgon and compensation for victims of the post election violence. In relation to the recommendation on Mt. Elgon, non-state actors in 2010 filed a reference at the East African Court of Justice and subsequently, a communication on the same issue has been filed with the African Commission on Human and Peoples' Rights.²³ Similarly, non-state actors in 2013 filed a petition in the High Court to compel the state to investigate and prosecute human rights violations in the 2007/08 post election violence.²⁴

In addition, the Office of the Ombudsman has also had an indirect effect in the partial implementation of the recommendations relating to delay payment of compensation in civil

²⁰ President Uhuru Kenyatta 'State of the nation address 26 March 2015' para 80, <http://m.news24.com/kenya/MyNews24/Full-State-of-the-Nation-address-by-president-Uhuru-Kenyatta-20150326> (accessed 10 June 2015).

²¹ Interview with M Njau-Kimani, Legal Secretary Justice and Constitutional Affairs, Department of Justice, Kenya, Nairobi, 4 March 2015.

²² As above.

²³ Interview with A Kamau, Programme Officer, Independent Medico-Legal Unit, Kenya, Nairobi, 17 January 2015. See also *Independent Medical Legal Unit v Attorney General of the Republic of Kenya and 4 others*, reference no. 3 of 2010 East African Court of Justice; African Commission on Human and Peoples' Rights, Communication 385 of 2010.

²⁴ *COVAW and others v the Attorney General, the Director of Public Prosecutions, the Inspector General of the National Police Service, the Chairperson of the Independent Policing Oversight Authority and the Minister of Health* petition 122 of 2013 (unreported).

cases involving human rights violations. The Office of the Ombudsman in 2014 lodged a petition for payment of compensation to a victim of police torture and inhuman and degrading treatment following a complaint by the victim to the Office.²⁵ The Office of the Ombudsman was however unaware that the delayed compensation was a subject of the May 2013 findings of the Committee Against Torture.²⁶ As of April 2015, the executive had made full payment to the victim although the petition is yet to be determined by the court.²⁷

2.1.3 Assessment of impact

In view of the widespread non-implementation of the findings and recommendations discussed above, the question is if these findings and recommendations have influenced executive action, judicial decisions, the constitution-review process, legislative reform and initiatives of non-state actors.

On the impact on executive action, one instance is identified. This is in relation to facilitating access to P3 Forms, in which the government issued a circular requiring all police stations to make the Form accessible following recommendations made in 2000 by the Special Rapporteur on Torture. The Attorney General had prior to that indicated that the government would implement the findings of the Special Rapporteur hence implying influence of the recommendation on subsequent executive action.

On the impact on legislative action, the recommendations have influenced legislative direction. This is particularly in regard to the anti-torture legislation. As already discussed, the government position in relation to legislation on prohibition of torture was that the existing legal framework was sufficient and all that was required was to amend the penal statute to stiffen the penalties. The recommendations in this sense have served to influence legislative direction.

On the impact on judicial action, the recommendations have to a limited extent influenced national courts actions. One illustration is the petitions filed by civil society actors including transnational actors in relation to the 2007/08 post-election violence. These petitions have been filed in response to the recommendations of monitoring mechanisms urging the state to investigate and prosecute the perpetrators of the violence and pay compensation to the victims. Although the one of the petitions was dismissed, (see discussion in chapter 3, section 2.9), it is instructive that the court in that petition pronounced itself on the state duty to investigate, prosecute and make reparations.

On the impact on the initiatives of non-state actors, two instances stand out. First, the drafting of the anti-torture legislation was initiated by civil society organisations and the Kenya National Commission on human rights in 2009 following recommendations made by the Committee on Torture in 2009. Second, although not implemented, measures taken by the Independent Medico-Legal Unit in regard to investigations and prosecution of

²⁵ *Republic v Principal Secretary Ministry of Interior and Coordination of National Government ex parte Lisa Catherine Wanjiru*, 2014.

²⁶ Interview with O Amollo, Ombudsman, Office of the Ombudsman, Kenya, Nairobi, 1 April 2015.

²⁷ As above.

perpetrators of the Mt. Elgon human rights violations were in response to the recommendations made by the SR EJK in 2009.²⁸

A number of issues are highlighted under this thematic area. One is the near complete absence of impact of the findings and recommendations of monitoring mechanisms on executive action. Second, is that in instances in which the recommendations have influenced the initiatives of non-state actors, this has not resulted in implementation of the recommendations as evinced in the cases of enactment of legislation and litigation on individual accountability for human rights violations. Third, many recommendations have been implemented through the constitution review process which is situational implementation, hence does not connote impact. Fourth, is failure of the recommendations on the death penalty and de-criminalisation of homosexuality to influence the decisions of key actors in the constitution review process. These issues are tackled in subsequent discussions in this chapter.

2.2 Economic, social and cultural rights

The recommendations on economic, social and cultural rights, assessed in chapter four, relate to: incorporation of socio-economic rights in domestic law, social security, water, housing and evictions and land. The recommendations required: domestic protection of economic, social and cultural rights, policy adoption, enactment of legislation and taking of programmatic measures.

2.2.1 Level of implementation

Fully implemented recommendations

	Recommendations	Monitoring Mechanism/s	Implementation pathway	Time lapse (in years)
1.	Incorporate economic, social and cultural rights in domestic law	CESCR, APRM	constitution review process	29
2.	Set a day for the entry into force of the HIV/AIDs Act	CESCR, APRM	non-state actors	3
3.	Adopt the national land policy	CESCR	non-state actors	1

The recommendation on incorporation of socio-economic rights in domestic law is fully implemented as the Bill of Rights incorporates a set of justiciable socio-economic rights. Similarly, the recommendation on setting a day for entry into force of HIV/AIDs Act, is fully implemented as the Act commenced operation in March 2009. In addition, the recommendation on national land policy is fully implemented as the policy was adopted in July 2009.

²⁸ Interview with A Kamau, Programme Officer, Independent Medico-Legal Unit, Nairobi, 17 January 2015.

Partially implemented recommendations

	Recommendations	Monitoring mechanism/s	Implementation pathway	Time lapse (in years)
1.	Regularise the situation of informal workers by including them in social security	CESCR	executive action	6
2.	Extend the scope of NSSF	CESCR	executive action	6
3.	Control prices charged by private water services and water kiosks	CESCR	executive action	6
4.	Address historical land ownership	APRM, CERD	constitution review process	8
5.	Implement the Ndung'u report on public land grabbing	CESCR	constitution review process	6
6.	Adopt legislation or guidelines on evictions	SR, ESCR, HRC, SR Housing	non-state actors	10
7.	Prioritise construction of social housing that is affordable in the slum upgrading programme	CESCR	executive action	6

Slow-motion implementation:

The partially implemented recommendations are all categorised as slow motion implementation because in all the cases, measures have been initiated towards implementation. On social security, the government has issued directives and amended the relevant law to bring informal workers under the ambit of social security.²⁹ In regard to controlling water prices by private vendors and water kiosks, the government in the National Water Policy, 2012 undertakes to control the water prices charged by private kiosks and vendors through introduction of formal and controlled water vendors.³⁰ On addressing historical land injustices and implementation of the Ndung'u report, the National Land Commission has initiated the drafting of legislation to put in place mechanisms to resolve the injustices and reclaim grabbed public land.³¹ On the recommendations on adoption of guidelines or legislation on evictions, a draft law, the Evictions and Resettlement Bill, 2011 is awaiting publication for parliamentary debated.³²

²⁹ Kenya Gazette Notice 159 of 30 October 2009.

³⁰ Republic of Kenya, draft National Water Policy, 2012, 12.

³¹ Kenya Gazette Notice no. 3139, 20 February 2014, 'Taskforce on the formulation of legislation on investigation and adjudication of complains arising out of historical land injustices.'

³² Commission on the Implementation of the Constitution, legislation, <http://www.cickenya.org/index.php/legislation> (3 May 2015).

Non-implemented recommendations

	Recommendations	Monitoring Mechanism/s	Time lapse (in years)
1.	Remove penalties associated with NHIF	CESCR	6
2.	Extend NHIF to cover all workers and reimburse all medical costs	CESCR	6
3.	Connect Kibera to the Nairobi water and sewerage services	CESCR	6
4.	Legalise informal settlements	CESCR	6
5.	Establish a quasi-judicial body on informal settlements	SR ESCR, SR Housing	6
6.	Include a provision in the Constitution on evictions only as a last resort	CESCR	6
7.	Prosecute cases of corruption and review the sentencing policy in light of corruption	APRM, ACHPR, CESCR	8
8.	Allocate sufficient funds for the implementation of the National Poverty Eradication Plan	CESCR, UPR	6

Non-implemented recommendations are those which no action has been taken. These are: removal of the NHIF penalties, connection of Kibera to Nairobi sewerage services, legalisation of informal settlements, establishment of a quasi-judicial body on informal settlements and review of the corruption sentencing policy.

In addition, to the above are recommendations which contrary action has been taken demonstrating unwillingness to implement the recommendations. For instance, the Constitution 2010 was passed without enshrining any provisions designating evictions as a measure of last resort. Similarly, on allocation of more funds for the National Poverty Eradication plan, Parliament in 2013 reduced funding and instead recommended that the Poverty Eradication Commission should be wound up.³³

2.2.2 Pathways of implementation

The recommendations have been implemented through the constitution review process, non-state actors' initiatives including transnational actors and executive action.

One of the stated objectives of the constitution review process was the incorporation of economic, social and cultural rights in the Kenyan constitution. Resultantly, the Constitution, 2010 incorporated economic, social and cultural rights in the Bill of Rights. Further, the recommendations relating to historical land injustices and public land have also been partially implemented through the legal and institutional reforms instituted in the constitutional review process.

³³ Parliament of Kenya, Report of the Budget and Appropriations Committee, 13 June 2013, http://www.parliament.go.ke/plone/senate/news/report-of-the-budget-and-appropriations-committee-on-the-estimates-of-revenue-and-expenditure-for-financial-year-2013-2014/at_download/file (15 March 2014).

On the other hand, non-state actors have acted as a catalyst for the implementation of a number of recommendations. The strategies used by non-state actors to facilitate implementation include litigation, public mobilisation and initiating the drafting of recommended laws and guidelines. In regard to litigation, the recommendation on commencement of the HIV/AIDs Act was implemented as a result of a petition filed by an individual in July 2008 seeking court orders to compel the relevant government minister to set a day for the entry into force of the Act. The government commenced the operation of the Act before the hearing of the petition. On public mobilisation, civil society organisations working on land reforms in July 2009 organised a public launch of the National Land Policy following delays by the government in adopting the policy. Similarly, and as discussed under previous themes, non-state actors have facilitated implementation of recommendations relating to enactment of laws through initiation of draft bills as in the case of the guidelines and draft bill on evictions.

Equally, a number of recommendations implemented have been through executive action and these recommendations relate to reduction of water prices, provision of social security and provision of low-cost housing. The recommendations on water and housing have been implemented since they coincided with on-going government initiatives particularly the social development agenda in Kenya's development blue-print, the Kenya Vision 2030.³⁴

2.2.3 Assessment of impact

This section traces the influence of the recommendations on executive action, judicial decisions, legislative action, constitution review process and initiatives of non-state actors.

On the impact on executive action, a number of instances are identified. First, recommendations on controlling water prices charged by private water kiosks and vendors influenced the provisions in the National Water Policy to regularise and control the pricing by private water kiosks and vendors. Second, the prioritisation of low housing in slum upgrading under the Kenya Vision 2030 was influenced by the 2008 recommendations. Interviews with the Office of the Attorney General and Department of Justice indicated that the provisions in the water policy and the slum upgrading programme was in response to the 2008 concluding observations of the CESC.³⁵ According to the Department of Justice, the 2008 recommendations were submitted to cabinet through a cabinet memo and consequently a cabinet directive was issued to the relevant Ministries requiring them to implement the recommendations.³⁶ Subsequent to this, the then Ministry of Housing prioritised the construction of 900 in the slum-upgrading programme.³⁷ Equally, the Ministry of Water incorporated in its National Water Policy a provision relating to controlling prices charged by private water vendors.³⁸ In practice, the Ministry of Justice often submitted concluding observations of monitoring mechanisms to cabinet, through a cabinet memo.³⁹ However, the concluding observations were often put aside at cabinet level on the understanding that the

³⁴ Interview with M Njau-Kimani, Legal Secretary Justice and Constitutional Affairs, Department of Justice, Kenya, Nairobi, 4 March 2015.

³⁵ As above.

³⁶ As above.

³⁷ Kenya Vision 2030 progress report, February 2013, 13.

³⁸ Republic of Kenya, draft National Water Policy, 2012, 12.

³⁹ Follow-up interview with M Njau-Kimani, Legal Secretary Justice and Constitutional Affairs, Office of the Attorney General and Department of Justice, Kenya, Nairobi, 29 July 2015.

concerns raised would be addressed in the constitution-making process.⁴⁰ The plausible explanation for the specific cabinet directive on implementation of the 2008 concluding observations of the Committee on Economic, Social and Cultural Rights is that the concluding observations coincided with government priorities at the time and mirrored government undertakings under the Vision 2030, which had just been launched.

On the impact on judicial decisions, in the specific context of litigation on evictions the recommendations have been pleaded by counsel and transnational actors thus influencing court decisions. Two cases are highlighted. First, in the case of *Ibrahim Sangor Osman*, 2005 recommendations of the Human Rights Committee were invoked by transnational and non-state actors in their submissions and ultimately influenced by the court's judgment.⁴¹ Second, in the case of *Satrose Ayuma*, the 2004 recommendations of the SR Housing were invoked by transnational actors which influenced the court's judgment directing the state to legalise informal settlements.⁴²

On the impact on legislative action, the recommendations have influenced legislative direction and content. This is illustrated by the Evictions and Resettlement Bill which was initiated by civil society, including transnational actors, in response to the 2005 Human Rights Committee concluding observations.⁴³ Therefore, the recommendations served to provide legislative direction. On influencing legislative content, the recommendations of the Human Rights Committee and the Special Rapporteur on Housing advised that the legislation or guidelines developed should be in line with the UN Basic Principles and Guidelines on Development based Evictions. The Evictions and Resettlement Bill mirrors these principles and guidelines.

On the impact on the initiatives of civil society and transnational actors, as already alluded to above, the recommendations influenced their litigation activities and also the initiation of draft legislation in particular the Evictions and Resettlement Bill.

2.3 Women's rights

The recommendations on women's rights assessed in chapter five relate to: equality and freedom from discrimination, increased participation of women in public life, violence against women, enjoyment of socio-economic rights and property ownership. Broadly the recommendations required: constitutional protection of women rights, enactment of legislation, initiation of policy and other measures, amendment of existing statutory provisions and implementation of laws.

2.3.1 Level of implementation

Fully implemented recommendations

⁴⁰ As above.

⁴¹ [2011] eKLR.

⁴² Petition 65 of 2010.

⁴³ Economic and Social Rights Centre (Hakijamii), Draft eviction and resettlement guidelines, 2012, 4, <http://www.escr-net.org/sites/default/files/Final%20evictions%20booklet.pdf> (13 March 2015).

	Recommendations	Monitoring mechanism/s	Implementation pathway	Time lapse (in years)
1.	Constitutional protection of the rights of women & gender rights	HRC, CEDAW	constitution review process	29
2.	Include a definition of discrimination against women in Constitution	HRC, CEDAW	constitution review process	29
3.	Repeal of the Constitution to guarantee equal rights for the sexes - citizenship & personal matters	CEDAW, ICESCR	constitution review process	17
4.	Domesticate CEDAW	CEDAW	constitution review process	17
5.	Enact the FGM Act	HRC,APRM,CEDAW, UPR,	non-state actors	6
6.	Repeal Section 38 of the Sexual Offences Act	CESCR, CEDAW, CAT	executive action	4
7.	Enact the Anti-Trafficking Act	CEDAW, CESCR, CAT UPR	non-state actors	3
8.	Operationalise the Anti-Trafficking Act	UPR, CEDAW	non-state actors	2
9.	Enact the Family Protection Act	CEDAW, APRM, ACHPR, CAT, CESCR	constitution review process	21
10.	Enactment of the Employment Bill		executive action	1
11.	Eliminate discrimination in land ownership	CEDAW	constitution review process	3
12.	Develop and adopt measures on affirmative action policy to address structural challenges of women in the economic sphere.	APRM	executive action	1
13.	Ratify the Protocol on the Rights of Women in Africa	ACHPR, APRM	executive action	4

The recommendations are classified as fully implemented for the following reasons: the new constitutional framework promulgated in 2010 accords protection of the rights of women; the Constitution defines discrimination, repealed of citizenship provisions granting women equal rights and eliminated discrimination in land ownership.

In addition, legislation on employment, anti-trafficking, prohibition of female genital mutilation has been enacted as well as repeal of section 38 of the Sexual Offences Act. Further the government in 2007 adopted the Women Enterprise Fund to address the structural

challenges of women in the economic sphere. The government also ratified the Protocol to the African Charter on the Rights of Women in Africa in October 2010.

Partially implemented recommendations

These are recommendations which although action has been taken, it falls in any of these categories: action taken is only part of the response required; a substitute response has been undertaken by the state; or the state has initiated or indicated it will take action.

	Recommendations	Monitoring mechanism/s	Implementation pathway	Time lapse (in years)
1.	Enact the Matrimonial Property Bill	CEDAW, APRM, ACHPR, CAT, CESCR	constitution review process	21
2.	Enact the Marriage Bill	CEDAW, APRM, ACHPR, CAT, CESCR	constitution review process	21
3.	Adopt measures to increase participation of women in public service	APRM, CEDAW,	constitution review process, presidential decree (2006)	13
4.	Adopt measures to increase participation of women in political office	APRM, CEDAW	constitution review process	17
5.	School re-entry policies for girls after giving birth	CEDAW, CESCR	executive action	1
6.	Criminalise marital rape	CESCR, CEDAW	constitution review process	9
7.	Prohibit polygamy	HRC, CEDAW	constitution review process	9
8.	Prohibit payment of bride price	HRC, CEDAW	constitution review process	9
9.	Enact the Reproductive Health Bill	CEDAW	non-state actors	3
10.	Review the law to ensure safe access to abortion	HRC, CEDAW, CESCR	constitution review process	9

Split implementation:

The recommendation on enactment of the Matrimonial Property Act is categorised as split implementation since the state enacted the Act which does not fully conform to the constitutional and international standards on equality in marriage. This appears as a stable end point in the implementation since the state has not indicated any measures to review the Act despite calls by various actors.

State substituted implementation:

These include the recommendations on enactment of the Marriage Act, prohibition of polygamy and bride price and criminalisation of marital rape. The enactment of the Marriage

Act is categorised as such in light of its provisions relating to polygamy and bride price. While monitoring mechanisms recommended that the state should prohibit polygamy and bride price, the state implemented an alternative response by legalising and regulating polygamy and payment of bride price through the Marriage Act. In regard to criminalisation of marital rape, the Protection Against Domestic Violence Act, 2015 defines marital rape as a form of domestic violence and entitles victims to obtain protective court orders without imposing any criminal penalties. Arguably, in these instances the state has taken measures to protect the rights of women which mirror the spirit of the recommendations but are however not the precise and specific terms of the recommendations.

Slow motion implementation:

The recommendations on adoption of measures to increase participation of women in political office and the public service and the Reproductive Health Bill, 2014 are categorised as slow motion implementation. While the Constitution, 2010 provides for one third gender principle for appointive and elective positions, the state has as of October 2015 not put in place mechanisms for implementation. However, the state has initiated action to put in place mechanisms for its implementation.

Non-implemented recommendations

	Recommendations	Monitoring mechanism/s	Time lapse (in years)
1.	Bring Kadhi's courts under the equality provisions of the Constitution.	CEDAW	3
2.	Put in place legal and institutional mechanisms to implement the 2006 Presidential decree & 30% constitutional principle on women in the public service.	CEDAW	3
3.	Revise the Political Parties Bill to re-introduce provision to ensure a quota for female candidates	CEDAW	3
4.	Decriminalise prostitution and develop exit programmes	CEDAW	7
5.	Enact legislation to sanction the demand side of prostitution	CEDAW	7
6.	Review abortion laws to grant victims of rape and incest access to abortion services independent of medical opinion	CEDAW	3

The recommendations categorised as not implemented are: those which no action has been taken by the state; and those which the state has taken contrary action indicative of its unwillingness to implement the recommendations.

The recommendations which the state has taken no action are: enactment of legislation to implement the 30% Presidential decree on women participation in the public service, decriminalisation of prostitution and bringing the Kadhi's courts under the ambit of the constitutional provisions on equality.

On the other hand recommendations which contrary actions have been taken are: review of abortion laws to allow access to abortion for victims of rape and incest since Kenya while

ratifying the Protocol to the African Charter on the Rights of Women in Africa in October 2010 entered a reservation on Article 14 which calls upon states to permit medical abortion in cases of rape and incest. Similarly, in relation to the Political Parties Bill, the Act was passed in 2012 without any provision for quotas for female candidates.

2.3.2 Pathways of implementation

The recommendations on women's rights have been implemented through executive action, constitution review process and civil society initiatives. Most of the recommendations have been implemented through the constitution review process that led to broader constitutional protections for example on equality and non-discrimination and legislative reforms to accord existing laws with the Constitution, 2010. The recommendations have least been implemented through executive action. It is nonetheless notable that implementation through the constitution review process has been protracted averaging more than 15 years between the first time the finding was made and when full or partial implementation occurred. This can be attributed to Kenya's lengthy constitution-making process. The question however would be if it was possible to implement the recommendations in the course of the constitution review process. Instructively, in August 2007 the government introduced a constitutional amendment to create 50 special seats for women to be effected in the December 2007 elections following recommendations by the ARPM on women representation in Parliament.⁴⁴ This suggests that implementation of recommendations during the period of constitution review process was possible if there was political will. However, it is suggested that during the period the government was not keen to implement the recommendations and always stated that it was reviewing the constitution which enshrined a comprehensive Bill of Rights.⁴⁵ Further, in relation to most of the recommendations implemented through the constitution review process, the issue of state obstructionism. Pointedly, the enactment of the bills relation to marriage, family protection and matrimonial property was initiated by non-state actors in 2000. However, their enactment remained obstructed by the Executive and Parliament for instance through failure to table the bills and lack of Parliamentary support specifically in voting.

Revisiting the implementation timelines, implementation through executive action has occurred within the shortest time span, which is indicative that political will is the most important factor in implementation of recommendations of monitoring mechanisms.

Further, non-state actors have facilitated implementation of recommendations particularly those relating to enactment of laws and specifically laws that were not designated as required to operationalise the Constitution, 2010 such as the Prohibition of Female Genital Mutilation Act and the Anti-Trafficking Act. Notably, a distinction is made in regard to enactment of laws designated to operationalise the Constitution, 2010 since for such laws there was a constitutional obligation and a mandated deadline for enactment. In the case of the other laws, there was no such constitutional obligation. The strategies applied by non-state actors to implement recommendations relating to enactment of legislation are: initiating the draft legislation, sponsoring the draft bill in Parliament and litigation to pressure the state

⁴⁴ Constitution of Kenya Amendment Bill 32 of 2007; Parliament of Kenya National Assembly official report, 15 August 2007, 18-34, <http://www.parliament.go.ke/plone/archive/archive-9th-parliament/hansard/official-report-15.08.07p/view> (19 February 2015).

⁴⁵ E-mail from Prof. Yash Pal Ghai, Chairperson, Constitution of Kenya Review Commission 2000-2004, on 17 February 2015.

to operationalise the legislation. This is particularly illustrated in regard to the recommendation on operationalisation of the anti-trafficking in persons law, discussed in detail in section 5.4.

2.3.3 Assessment of impact

In assessing impact, the analysis addresses the question of how the recommendations have influenced domestic processes and actions of key state actors. It thus connotes the influence of the recommendations on drafting of legislation, executive action and deliberations, the constitution review process and civil society initiatives.

On the impact on executive action and deliberations, four instances stand out. It is instructive that three instances relate to recommendations by the APRM. First, the recommendations influenced the 2006 presidential directive on 30% affirmative action for women in the public service. Second, the recommendations influenced the executive decision to set up Women Enterprise Fund in 2007 to address structural challenges of women in the economic sphere. Third, although not successful, it is notable that the government in August 2007 sought to introduce a constitutional amendment to create 30 special seats for women to increase their representation in Parliament. These measures were taken in response to recommendations by the APRM in 2006 which recommended adoption of an affirmative action policy to address the women rights in the political, social and economic spheres in Kenya. The President in his 2012 speech to the AU Heads of State and Government indicated that he had taken these initiatives in response to the 2006 APRM recommendations on the rights of women in Kenya.⁴⁶ Notably, the APRM is a states' led peer review process, which the recommendations are arrived at as a result of a deliberative process involving the state thus pointing to questions of legitimacy of the recommendations and the decision maker on implementation at the national level. This issue is more fully taken up in section 4.1. The fourth instance relates to ratification of the Protocol on the Rights of Women in Africa, as discussed in chapter 5, section 3.6, the ratification was brokered through the launch of the AU African Women Decade in Nairobi in 2010. Notably, the call to ratify had been bolstered by recommendations made by monitoring mechanisms urging the state to ratify the Protocol.

On the impact on legislative action, two instances in which the recommendations have provided legislative direction and content are identified. First, in relation to repeal of section 38 of the Sexual Offences Act, which was influenced by pressure exerted on the government by civil society organisations and transnational actors. As a result, recommendations influenced the content of legislation by calling for repeal of offending provisions. Second, the recommendations have provided legislative direction for instance in the enactment of the Prohibition of Female Genital Mutilation Act. The Act was enacted as an initiative of non-state actors in response to recommendations advising the state to criminalise female genital mutilation among adult women.

On the impact on the non-state actors' initiatives, a number of instances stand out. The recommendations were deployed by civil society organisations to initiate enactment of legislation for instance the drafting of the Prohibition of Female genital Mutilation Act and to

⁴⁶ Statement by H.E Hon. Mwai Kibaki President of the Republic of Kenya on Kenya during the 18th Ordinary African Union Summit 29-30 January 2012 in Addis Ababa, Ethiopia, 7 (accessed from NEPAD Kenya 10 November 2014).

exert pressure on the government to operationalise the anti-trafficking law.⁴⁷ In regard to the constitution review process, review of documents on the constitution making process, as discussed in chapter 6, civil society organisations deployed the recommendations of the CEDAW Committee in their submissions on incorporation of provisions in the draft constitution to harmonise marriage and divorce laws.

2.4 Children's rights

The findings and recommendations on children's rights, as discussed in chapter five, relate to: harmonisation of laws on the definition of a child, protection of children against violence, enjoyment of socio-economic rights, juvenile justice and enjoyment of civil and participation rights by children. Findings by the African Committee on the Child relating to nationality of children of Nubian descent in Kenya are also considered. Implementation of the findings and recommendations entails: review of legislation, enactment of legislation, ratification of treaties and programmatic measures.

2.4.1 Level of implementation

Fully implemented recommendations

	Recommendations	Monitoring Mechanism/s	Implementation pathway	Time lapse (in years)
1.	Harmonise the definition of a child in the national context	CRC, ACERWC	constitution review process	9
2.	Prohibit child marriages	CRC, HRC, CEDAW, UPR, ACERWC	constitution review process	9
3.	Take legislative measures to prohibit corporal punishment	CRC	constitution review process	9
4.	Revise penalties for rape and defilement	ST STC	executive action	5
4.	Expressly prohibit corporal punishment and torture against children	CRC	constitution review process	9
5.	Legislative prohibition of commercial sex exploitation in the Children Act	CRC, SR STC	executive action	3
6.	Formulate laws on extraterritoriality to deter child sex tourism and commercial sex exploitation	SR STC	non-state actors	3
7.	Ensure all children complete eight years of compulsory free education	CRC	constitution review process	3
8.	Review maternity legislation to provide 14 weeks paid maternity	CRC	non-state actors	3
9.	Strengthen measures of child	CRC	constitution review process	3

⁴⁷ Interview with P Mutiso, Programme Officer, The CRADLE, Nairobi, 27 March 2015.

	maintenance		process	
10.	Ensure separation of children in custody from adults	CRC	constitution review process	3
11.	Inclusion of children with disabilities in the regular education system and society	CRC, ACERWC	constitution review process	9
12.	Ratify the Hague Convention on Inter-Country Adoption	CRC	executive action	6
13.	Facilitate and promote the principle of child participation	CRC	executive action	7
14.	Ratify the African Charter on the Rights of the Child	SR STC	executive action	2

The recommendations that are fully implemented generally relate to enactment of laws and amendment of existing laws as well as ratification of treaties.

The constitutional protection of the rights of children resulted in enactment and amendment of laws leading to the implementation of the recommendations on: harmonisation of the definition of a child, prohibition of child marriages, strengthening measures on child maintenance, express prohibition of torture and corporal punishment against children, provision of free primary education and inclusion of children with disabilities in society. These recommendations are therefore fully implemented.

Further, the recommendation on review of maternity legislation was fully implemented through the review of the Employment Act in 2007 which increased maternity leave to three paid months excluding annual leave. Equally, the recommendation on revision of the penalties on rape and defilement was implemented through the Criminal Law Amendment Act, 2003 which was a government initiative and resulted in stiffer penalties for rape and defilement. On the recommendations requiring ratification, the government has also ratified the African Charter on the Rights of the Child and the Hague Convention on Adoption.

Partially implemented recommendations

	Recommendations	Monitoring mechanism/s	Implementation pathway	Time lapse (in years)
1.	Adopt the draft National Child Labour Policy, 2002	CESCR, ACERWC, UPR, CEDAW	executive action	6
2.	Extend free education to secondary level	CRC, CEDAW, ACERWC	executive action	7
3.	Increase public expenditure in education	CRC	executive action	7
4.	Raise the minimum age of criminal	CRC, ACERWC,	non-state actors	13

	liability to 12 years	CCPR, UPR, CAT		
5.	Implement alternative measures for children in conflict with the law	CRC	non-state actors	7
6.	Ensure access to free legal aid for children in conflict with the law	CRC	constitution review process	7
7.	Increase financial allocation to schools with children with disabilities	CRC	constitution review process	7
8.	Ensure free of charge registration at all stages of birth registration	CRC	executive action	7
9.	Establish a children's rights unit	CRC	executive action	7

The partially implemented recommendations are classified as slow motion implementation in instances in which action or measures towards implementation have been initiated or the government has indicated that it will take action. Split implementation represents instances in which the action taken is not fully responsive to the recommendations but represents an end point that is no further measures are envisaged.

Slow motion implementation:

The recommendation on adoption of the Child Labour Policy is categorised as slow motion implementation as the government has indicated that the policy will be adopted by 2017.⁴⁸ Similarly, in regard to the recommendation on establishment of a children's unit in the Kenya National Commission on Human Rights, the government has indicated that the office of a child ombudsman will be established by 2017.⁴⁹

The recommendation on free secondary education is partially implemented as the government in 2008 introduced partial government paid secondary education which only extends to tuition fees. Equally, the recommendations on increasing public expenditure in education and financial allocation to schools with children with disabilities are classified as slow motion implementation since the budgetary allocation per child including those with disabilities was increased in 2014.

Further, in relation to recommendations on raising the minimum age of criminal liability and alternative measures for children in conflict with the law are classified as slow motion implementation as the draft Child Justice Bill, 2014 which as of October 2015 is awaiting publication for parliamentary debate.

Split implementation:

The recommendation on access to free legal aid for children in conflict with the law is classified as split implementation since the provision in draft constitution that expressly

⁴⁸ Ministry of Labour, Social Security and Services, strategic plan 2013-2017, 5, <http://www.labour.go.ke/downloads/Ministry%20of%20Labour%20Strategic%20Plan%20201-2014.pdf> (3 May 2015).

⁴⁹ Ministry of Labour, Social Security and Services, strategic plan 2013-2017, 8.

guaranteed free legal aid to children in conflict with the law was removed from the final draft. The import is that although the Constitution guarantees legal aid for all persons, children are not specifically provided for and thus are not entitled to automatic legal aid. This position is further reinforced in the Legal Aid Bill, 2013 which does not entitle children in conflict with the law to automatic legal aid but accords them the same treatment as any accused person.⁵⁰ The measures taken are therefore only responsive to the recommendation in part.

In addition, the recommendation on guaranteeing free of charge birth registration at all stages is classified as split implementation. This is premised on the fact that the government through the National Registration and Identification of Persons Bill, 2014 grants free birth registration within three months but imposes penalties for registration after three months.⁵¹ The recommendation is thus partially implemented although the measures proposed represent an end point.

Non-implemented findings and recommendations

	Findings and recommendations	Monitoring mechanism/s	Time lapse (in years)
1.	Enact legislation on child labour	UPR	4
2.	Strengthen institutional capacity of institutions responsible for control of and protection from child labour	CRC, HRC	7
3.	Ratify the Optional Protocol on Sale of Children, Prostitution and Child Pornography	SR STC	16
4.	Review the age of children who benefit from free education	ACERWC	5
5.	Enforce law on exposure of children to drug abuse	ACERWC	5
6.	Remove reservation to Article 10 of the ICESCR	CRC	7
7.	Implement the Refugee Act in relation to unaccompanied children	CRC	13
8.	Develop a comprehensive strategy to address street children	CRC	13
9.	Take legislative and administrative measures to ensure Nubian children can acquire Kenyan nationality and proof of such nationality	ACERWC, CERD	3
10.	Ensure children of Nubian descent are registered immediately after birth	ACERWC	3
11.	Adopt a national plan of action	CRC	7

The non-implemented findings and recommendations above represent instances in which no action has been taken.

⁵⁰ See generally, Legal Aid Bill, 2015.

⁵¹ National Identification and Registration of Persons Bill, 2014, clause 8-10.

In relation to legislation on child labour, government has taken no action to initiate legislation on child labour and relatedly, no action has been taken to strengthen the child labour protection agencies. On ratification of the Optional Protocol on Sale of Children, Pornography and Prostitution, no action has been taken. Similarly, the reservation on maternity rights under Article 10 of the Covenant on Economic, Social and Cultural Rights similarly remains in force. On street children, although the government has put in place measures to address broadly street families, no particular action has been taken in the specific context of street children.

Turning to the findings of the African Committee on the Child in relation to nationality rights for children of Nubian descent in Kenya, the government has also not implemented the findings. There is no evidence of any action taken by government in the context of these findings.

Pointedly, in this section on children's rights, the government has not expressly taken actions that are contrary to the findings and recommendations as discussed in the foregoing thematic areas.

2.4.2 Pathways of implementation

The recommendations have mainly been implemented through the constitution review process which led to incorporation of specific rights relating to children in the Bill of Rights. This obligated the government to enact new laws, amend existing legal provisions and undertake certain programmatic measures in relation to education, children with disabilities and the institutional framework for the protection of the rights of the children.

A number of recommendations have also been implemented through executive action, mainly those relating to review of laws such as the Employment Act, the Criminal Law Amendment Act 2003 and legislating against commercial sex exploitation of children in the Children Act.

Civil society organisations have also facilitated the implementation of recommendations particularly those relating to enactment of legislation such as the Child Justice Bill and the Sexual Offences Act. Further, in relation to review of maternity leave provisions, although the enactment of the Employment Act was government initiated, the specific provision on increased maternity leave was a civil society initiative. The strategies applied by non-state actors to facilitate implementation include: enactment of legislation such as in relation to the recommendations on the minimum age of criminal responsibility and children in conflict with the law and advocacy to initiate amendment of laws as illustrated by the recommendation on increasing maternity leave provisions.

2.4.3 Assessment of impact

This section answers the question of how the above discussed findings and recommendations have influenced executive action, legislative action, judicial decisions and non-state actors' initiatives.

On the impact on executive action, the 2007 recommendations of the CRC have influenced the government undertaking to establish a children ombudsman by 2017.⁵²

On the impact on legislative action, the recommendations have at least in one instance influenced both legislative direction and content. This is in relation to the Child Justice Bill which has been drafted in response to the recommendations of the CRC Committee. In regard to influencing legislative content, the Bill contains provisions relating to recommendations made by the CRC Committee and the African Committee on the Child such as raising the minimum age of age of criminality.

On the impact on civil society initiatives, the discussion is already alluded to in the foregoing section on impact on legislative action. Nonetheless, civil society organisations', under the Juvenile Justice Network, initiative to draft the Child Justice Bill was influenced by the CRC recommendations in 2002.⁵³

2.5 Rights of collective groups

These findings and recommendations, discussed in chapter five relate to: indigenous people, persons with disabilities, internally displaced persons, refugees and ethnic discrimination. In addition, findings by the African Court on the Ogiek, and the African Commission on the Endorois were considered. The findings and recommendations required: enactment of legislation, constitutional protection of the rights of collective groups, adoption of policy and ratification of international human rights treaties.

2.5.1 Level of implementation

Fully implemented recommendations

	Recommendations	Monitoring Mechanism/s	Implementation pathway	Time lapse (in years)
1.	Recognise hunter and gatherer communities as indigenous	SR IP	constitution review process	3
2.	Enact the Internally Displaced Persons Act	SR IDPs	non-state actors	3
3.	Take special measures to increase employment opportunities for persons with disabilities	CESCR	constitution review process	2
4.	Address ethnic and regional disparities in allocation of resources in addition to the Equalisation Fund	CERD	executive action	1

The recommendation on recognition of gatherer and hunter communities as indigenous is categorised as fully implemented as the Constitution, 2010 recognises and accords these communities constitutional protection as marginalised communities. Similarly, the Internally Displaced Persons Act is categorised as fully implemented since it was enacted in October

⁵² Interview with M Njau-Kimani, Legal Secretary Justice and Constitutional Affairs, Department of Justice, Kenya, Nairobi on 4 March 2015.

⁵³ Interview with P Mutiso, Programme Officer, The CRADLE, Nairobi, on 27 March 2015.

2012 and entered into force in January 2013. On increasing employment opportunities for persons with disabilities, the Constitution sets a numerical quota of all public employment opportunities that should be reserved for disabled persons, thus the recommendation is fully implemented.⁵⁴ Finally, the Constitution sets out a revenue sharing criteria which obligates the government to factor in affirmative action for disadvantaged groups and areas in allocation of resources. Consequently, the government has since 2013 adopted a formula that allocates 20% of the revenue based on the poverty index. The recommendation is thus categorised as fully implemented.⁵⁵

Partially implemented findings and recommendations

	Findings and recommendations	Monitoring mechanism/s	Implementation pathway	Time lapse (in years)
1.	Reform the electoral system to facilitate the representation of indigenous people	ACHPR SM	constitution review process	3
2.	Review issuance of Identify cards to prevent discrimination against indigenous people	SR IDP, ACHPR SM	constitution review process	7
3.	Compensate and pay reparations to indigenous people for loss of their land	ACHPR SM	constitution review process	3
4.	Consult indigenous people prior to exploring for exploitation of natural resources in their ancestral land	ACHPR SM	constitution review process	3
5.	Adopt constitutional provisions on minority and community land	CERD	constitution review process	3
6.	Address land tenure along the LAPSET project	SR IP	executive action	1
7.	Extend legal aid scheme to indigenous people	ACHPR SM, CERD	constitution review process	3
8.	Recognise the rights and ownership of the Endorois and restitute their ancestral land	ACHPR	executive action	5
9.	Ensure unrestricted access of the Endorois to Lake Bogoria	ACHPR	executive action	5
10.	Pay adequate compensation to the Endorois for the loss suffered	ACHPR	executive action	5
11.	Pay royalties to the Endorois from the existing economic activities	ACHPR	executive action	5
12.	Engage in dialogue with the Endorois for effective implementation of the decision	ACHPR, UPR, CERD	executive action	5

⁵⁴ Constitution, 2010 article 54 (2).

⁵⁵ Commission on Revenue Allocation, 'Basis for revenue sharing among counties from 2013- 2015' National Assembly resolution 22 November 2012, <http://www.crakenya.org/> (3 May 2015).

13.	Ensure return of internally displaced persons to their land or resettle them through compensation	CESCR, SR IDPs, UPR	executive action	6
14.	Issue work permits to refugees	CESCR	executive action	6
15.	Address ethnic discrimination in employment	CERD	constitution review process	3

The categories of partial implementation of the above findings and recommendations are slow motion and split implementation.

Slow motion implementation:

The recommendation on reform of the electoral system to protect the political rights of indigenous peoples is categorised as slow motion implementation since measures put in place are inadequate and the specific legislation mandated by the Constitution to be enacted by August 2015 is yet to be enacted as of October 2015. The recommendations on payment of compensation to indigenous people for loss of their land and adoption of constitutional provisions on minority and community land are categorised as slow motion implementation since a draft law, Community Land Bill, which has provisions recognising ancestral land and mechanisms for compensation for loss of ancestral land is as of October 2015 undergoing parliamentary debate.⁵⁶ The recommendation on issuance of work permits to refugees is classified as slow motion as the government in 2012 began issuing work permits to refugees although the numbers issued are low.⁵⁷ Similarly, the recommendations on addressing ethnic discrimination in employment is also classified as slow motion implementation since although, the Public Service (Values and Principles) Act, 2015, was enacted in April 2015,⁵⁸ there are no mechanisms in place to address ethnic discrimination in public employment as required by the Act.

Turning to the African Commission's findings on the Endorois case, the findings are classified as slow motion implementation as the President in September 2014 appointed an executive task force with a one year mandate to review the modalities of implementation of the findings.⁵⁹ This indicates willingness to implement the findings. It is however, notable that the interim recommendations of the task force expected in April 2015 and the final recommendations expected in September 2015 have not been made public.

Split implementation:

⁵⁶ Parliament of Kenya, National Assembly, bill tracker as at 23 October 2015, <http://parliament.go.ke/the-national-assembly/house-business/bills-tracker/item/1979-bills-tracker-as-at-october-23rd-2015> (28 October 2015).

⁵⁷ Parliament of Kenya, National Assembly Hansard 30 October 2013, <http://www.parliament.go.ke/plone/national-assembly/business/hansard/wednesday-30th-october-2013-at-2.30pm/view> (3 May 2015).

⁵⁸ Parliament of Kenya, National Assembly, bill tracker, bill tracker as at 1 May 2015, <http://www.parliament.go.ke/the-national-assembly/house-business/bills-tracker/item/1362-bills-tracker-as-at-may-1st-2015> (3 May 2015).

⁵⁹ Kenya Gazette notice 6708 of 26 September 2014 Task force on the implementation of the African Commission on Human and Peoples' Rights decision contained in Communication 276/03.

The recommendations on review of laws on issuance of identity cards to prevent discrimination against indigenous people is categorised as split implementation. The laws relating to issuance of identity cards have been reviewed resulting in the Registration and Identification of Persons Bill, 2014. While the proposed law provides for the right to issuance of identity cards for all persons without discrimination,⁶⁰ the Bill does not contain safeguards against discrimination for indigenous people. Similarly, on the recommendations on consultation of indigenous people prior to exploitation of natural resources in their ancestral land, the Community Land Bill contains obscure provisions on formulation of agreements before ancestral land is to be exploited. However, these provisions do not meet the envisaged requirement of express consultation.

On ensuring return of all internally displaced persons to their land or payment of compensation, the government only resettled and/or compensated some of the displaced persons. This recommendation is thus categorised as split implementation since the official government position has been that all internally displaced persons have been resettled and/or compensated thus suggesting no further action will be undertaken.

Further, the recommendation on extending free legal aid to indigenous persons, the Legal Aid Bill, 2013 specifically requires the National Legal Aid Service to undertake research on legal aid, awareness and access to services for marginalised groups. While the indigenous persons can be read in the constitutional definition of marginalised groups, this category includes a broad range of groups including women so as to obscure indigenous people. Drawing from the lack of express provisions on indigenous people, the recommendation is classified as split implementation since there is no indication that further specific measures will be put in place for indigenous persons.

Non-implemented recommendations

	Findings	Monitoring mechanism/s	Time lapse (in years)
1.	Undertake a comprehensive study of the rights of indigenous people potentially affected by LAPSSET	SR IPs	1
2.	Reinstate restrictions on land transactions in the Mau Complex	African Court	1
3.	Establish a comprehensive mechanisms to provide reparations to the Ogiek	African Court	1
4.	Adopt the IDP policy	APRM, SR IDPs	8
5.	Enact and implement a clear refugee policy	APRM	8
6.	Relax the encampment policy requiring refugees to live in the camps for prolonged periods	CESCR	6
7.	Address ethnic discrimination in housing	CERD	3
8.	Ratify the ILO Convention 169	SR IP, UPR, ACHPR SM	7

⁶⁰ Registration and Identification of Persons bill, 2014 clauses 28-30.

9.	Adopt the UN Declaration on the Rights of Indigenous Persons and to ensure its incorporation to domestic law	SR IP, ACHPR, UPR	7
10.	Ratify the African Union Convention on Protection and Assistance of Displaced Persons in Africa (Kampala Convention)	SR IDPs	2

The above non-implemented recommendations relate to those which no action has been taken and those which contrary action has been taken signifying the government's unwillingness to implement the recommendations.

The recommendations which not action has been taken include adoption of the IDP policy which, although finalised in 2013 has not been adopted. Similarly, a refugee policy has not been adopted. In regard to the recommendation on a comprehensive study on the effect of the LAPSSET project on indigenous communities, no action has been taken. Finally, no action has similarly been taken on recommendations to adopt the UN Declaration on the Rights of Indigenous Persons or to ratify the ILO Convention 169 and the AU Convention on Internally Displaced Persons.

In the remaining non-implemented recommendations the government has taken contrary measures indicative of its unwillingness to implement. In relation to the findings on the Ogiek, in September 2013 the President directed the Minister of Lands to lift all restrictions on land transactions in the Mau Forest Complex contrary to the ruling by the African Court. Second, the government in April 2014 lodged an appeal against a national court decision which, similar to the African Court, required the government to resettle the Ogiek. These government actions are indicative of lack of willingness to implement the findings.

On relaxing the refugee encampment policy, the government in December 2012 and March 2014 issued directives requiring all refugees to relocate from urban areas to the camps. Additionally, in December 2014, the government enacted the Security Law Amendment Act, 2014 which compels all refugees to stay in the camps.⁶¹ These actions signify the government's unwillingness to implement recommendations relaxing the encampment policy.

2.5.2 Pathways of implementation

The findings and recommendations on collective rights have mainly been implemented through the constitution review process, executive action and in limited instances through non-state actors. Notably, even in relation to findings and recommendations implemented through the constitution review process and executive actions, non-state actors have catalysed the urgency in the implementation process. For instance, in relation to recommendations implemented through the constitution review process, non-state actors lobbied for constitutional recognition and protection of indigenous groups.⁶² In addition, on land tenure along the LAPSSET project, non-state actors petitioned the High Court to pressure government involve the local people in the land tenure adjudication.⁶³ Similar to

⁶¹ Security Law Amendment Act, 2014 section 46.

⁶² KS Abraham 'Kenya at 50: unrealized rights of minorities and indigenous peoples' 2012, 16-19.

⁶³ *Mohammed Ali Baadi & 9 others v Attorney General* [2012] eKLR.

other thematic areas, non-state actors have directly influenced the enactment of legislation, specifically the Internally Displaced Persons Act. Additionally, non-state actors facilitated the implementation of the findings on the Endorois through lobbying and exerting pressure.

In regard to the strategies used to facilitate implementation, non-state actors in these thematic area leveraged on new actors such as the Special Rapporteur, an *ad hoc* Parliamentary Committee and the Office of the Ombudsman. The office of the Special Rapporteur offered technical assistance to non-state actors in initiating the draft bill on internally displaced persons.⁶⁴ The bill was later handed over to a Parliamentary committee investigating state response to the 2007/08 internal displacement and enacted as part of the committee's recommendations.⁶⁵ Similarly, non-state actors worked alongside the Office of the Ombudsman to exert pressure on government for implementation of the findings relating to the Endorois.⁶⁶

2.5.3 Assessment of impact

This section traces the influence of the above findings and recommendations on executive action, judicial decisions, legislative action, the constitutional review process and initiatives of non-state actors.

On the impact on executive action, the establishment of a government task force on implementation of the Endorois decision is an illustrative example. First, the findings have influenced the executive thinking and actions towards decisions of the African Commission, at least in this instance. Second, the establishment of the task force also demonstrates an influence on government thinking, and perhaps political recognition, of the land rights of indigenous peoples.

On the impact on legislative action, the recommendations have influenced both legislative direction and content. In regard to legislative direction, the enactment of the IDP Act was influenced by the 2009 recommendations of the Special Rapporteur on internally displaced persons. It is pursuant to this recommendation that non-state actors with technical assistance from the office of the Special Rapporteur initiated a draft. Later the draft was taken up by an *ad hoc* Parliamentary Committee and enactment. Notably, the drafting of the IDP Act was initiated by non-state actors in response to the 2009 recommendations of the Special Rapporteur. On legislative content, the recommendations of the Special Rapporteur advised that the national legislation on internally displaced persons should be in line with the AU Convention for the Protection and Assistance of Internally Displaced Persons in Africa and the UN Guidelines on Internal Displacement. The IDP Act reflects both the Convention and the Guidelines.

On the impact on non-state actors initiatives, as already discussed the recommendations influenced non-state actors in initiating the IDP Act. Besides the drafting of the IDP Act, non-state actors in 2007 also initiated the formulation of the IDP policy in conjunction with the

⁶⁴ Interview with Dr. C Beyani UN Special Rapporteur on the human rights of internally displaced persons, Nairobi, Kenya, 2 May 2014.

⁶⁵ Parliament of Kenya, National Assembly Hansard 13 June 2012, <http://www.parliament.go.ke/plone/archive/archive-10th-Parliament/hansards/official-report-13-june-2012-pm/view> (7 June 2014).

⁶⁶ Interview with O Amollo, Ombudsman, Office of the Ombudsman Kenya, Nairobi, 1 April 2015.

Ministry of Justice. The impetus to develop the IDP policy was influenced by the 2006 recommendations on the APRM which urged Kenya to develop a comprehensive policy to address internal displacement.

On the constitutional review process, recommendations of the Special Rapporteur on indigenous peoples influenced discussions in the drafting of constitutional provisions on the recognition of indigenous peoples.

One issue that stands out in relation to the IDP policy, which, as discussed in chapter 5, section 3.2, has not been adopted is why the findings and recommendations influence actions of non-state actors but fail to bring out the desired kind of action in government institutions, particularly the executive. This question is applicable to the other thematic areas discussed in the foregoing. For instance, it has already been pointed out in relation to legislative action that a number of recommendations have influenced drafting of national legislation, although most of this legislation has not been enacted due to delays by the executive or has not been operationalised. Similarly, in relation to Judiciary, the courts have directed the government to put in place the necessary legal framework on evictions but this has not influenced government action. A discussion on this issue is undertaken in the subsequent sections of this chapter.

3 Overall implementation record

	Thematic rights	Full implementation	Partial implementation	Non-implementation
1.	Personal integrity and liberty and political rights	11	12	28
2.	Economic, social and cultural rights	3	7	8
3.	Women's rights	12	10	6
4.	Children's rights	15	9	12
5.	Rights of collective groups	4	15	10

In summary the above analysis reveals low level of full implementation of the findings and recommendations of monitoring mechanisms. Of the 162 findings and recommendations assessed, majority have not been implemented while only 45 are fully implemented. Partial implementation is the most prevalent outcome of the findings and is notably marked by state obstructionism. Even then, non-implementation remains widespread. Women's and children's rights have the highest number of findings and recommendations that have been fully implemented, while personal liberty and physical integrity rights and rights of collective groups have the lowest number of findings and recommendations that are fully implemented.

Additionally, more than half of the findings and recommendations are fully or partially implemented through the constitution review process. Impliedly, most of implementation is situational implementation, which does not connote impact. Moreover, the analysis reveals that only in few instances have the findings and recommendations influenced domestic processes and the actions of key government actors. It would then be reasonable to

conclude that the findings and recommendations have minimal impact on human rights practices in Kenya. The role of non-state actors in brokering the minimal influence, whatever the site of influence (whether on executive action, judicial decisions and legislative action) is also highlighted.

4 Factors indicative of implementation and impact

The thematic analysis displays on the overall low level of implementation of the findings and recommendations of monitoring mechanism and differences in the form and degrees of implementation raising significant questions. These questions are: what factors account for the variation in the degree of implementation? Why have some findings and recommendations been fully implemented while in others the response has been reluctant resulting in partial implementation, and in yet others contrary action has been taken? Why has the state taken deliberate efforts to implement some findings and recommendations while reluctantly implementing others, obstructing implementation or taking contrary action all together? In relation to impact the question that presents is: why the findings and recommendations have influenced other actors such as non-state actors or the Judiciary, but yet have failed to influence the desired kind of action in government institutions, particularly the executive.

Studies on compliance with recommendations of international human rights monitoring bodies isolate a number of factors as predictive of state compliance or non-compliance. Viljoen and Louw in their study on compliance with the recommendations of the African Commission propose factors that are predictive of compliance or non-compliance. The factors are categorised as: factors specific to the African Commission, to the communication, to the complainant, to the respondent state, to civil society actors and international pressure.⁶⁷ The factors specific to the African Commission are further sub-categorised as: maturity of the commission when the recommendation was made; length of time the Commission took to make a finding; state participation in the processing and determination of the communication; clarity and specificity of the remedy; degree of reasoning of a given remedy; and initiatives for follow-up by the Commission.⁶⁸ Similarly, under factors specific to the communication the classifications are: the nature of the right violated; the duty of the state implied in the right violated; scale of the violations; and whether the remedy required has a bearing on compliance.⁶⁹

Equally, Krommendijk in his study on effectiveness and domestic impact of concluding observations of UN human rights treaty bodies posits the factors predictive of implementation of the recommendations are: factors specific to the treaty body; the nature of the right and specificity of the recommendations; and domestic factors.⁷⁰

Writing on the domestic impact of the African human rights system on Nigeria, Okafor identifies the following factors as facilitative of impact: the role of civil society activists, the independence and dynamism of the judiciary, the cleavages in the Nigerian political culture,

⁶⁷ F Viljoen & L Louw 'State compliance with the recommendations of the African Commission on Human and Peoples' Rights 1994-2004' (2007) 101 *Am. J. Int'l.L* 12.

⁶⁸ Viljoen & Louw (n 67 above) 13.

⁶⁹ Viljoen & Louw (n 67 above) 17-18.

⁷⁰ Krommendijk (n 7 above) 376.

domestication of the African Charter in Nigeria and the negative international perception of the Nigeria.⁷¹

On the other hand, the transnational legal process hypothesizes that states obey international law as a result of repeated processes of interaction between state and non-state actors in fora where norms are interpreted ultimately resulting in acceptance of the norms as part of internal law, hence habitual obedience.⁷² The focus of the theory is thus on interactional processes involving both state and non-state actors, domestic and international institutions and the norms being interpreted.

Borrowing from these studies and tying together with the transnational legal process theoretical framework, the factors adopted for this analysis are: factors relating to the monitoring mechanism; factors relating to the findings and recommendations; and factors specific to the domestic context such as involvement of domestic state actors such as the Judiciary, Parliament and non-state actors such as civil society, individuals and media; involvement of transnational actors; and cultural, legal and political factors.

4.1 Factors relating to the monitoring mechanisms

The key issue examined is implementation across different monitoring mechanisms highlighting variables such as degree of legalisation of the mechanism, perceived legitimacy of a mechanism, whether the mechanisms involves adversarial or non-adversarial proceedings and regionalism.

On the degree of legalisation, the question posed is whether the nature of obligation imposed by a monitoring mechanism - primarily whether binding or non-binding facilitated implementation.⁷³ As discussed in chapter one, the monitoring mechanisms considered in this study are the UN human rights system, the African human rights system including the APRM and the sub-regional human rights system. The obligation imposed by these monitoring mechanisms is therefore decidedly mixed. While the findings from the African Court and the EACJ are binding, findings and recommendations from all the other monitoring mechanisms are non-binding. The EACJ has however not issued any merit decision against Kenya,⁷⁴ while the African Court issued orders for provisional measures against Kenya in

⁷¹ OC Okafor *The African human rights system, activist forces and international institutions* (2007) 148-151.

⁷² HH Koh 'Bringing international law home' (1998) 35 *Hous. L. Rev.* 626-627.

⁷³ See LR Helfer 'Overlegalizing human rights: international relations theory and the Commonwealth Caribbean backlash against human rights regimes' (2002) 102 *Columbia Law Review* 1839 -1841. Helfer identifies three components of legalization in human rights treaties: obligation, precision and delegation. Obligation implies the binding nature of an institution's or regime's rules, while precision connotes the level of specificity of the rules and delegation the grant of authority to neutral their parties to implement, interpret and create new rules. The focus of the analysis is on obligation.

⁷⁴ See cases decided by the EACJ against Kenya: *Prof Peter Anyang' Nyong'o and others v The Attorney General of the Republic of Kenya and others*, reference no. 1 of 2006 East African Court of Justice; *East African Law Society of Kenya and others v The Attorney General of the Republic of Kenya and others*, reference no. 3 of 2007 East African Court of Justice; *Emmanuel Mwakisha Mjawasi and 748 others v The Attorney General of the Republic of Kenya*, reference no. 2 of 2010 East African Court of Justice, *Mary Ariviza and Okotch Mondo v The Attorney General of the Republic of Kenya and the Secretary General of the East African Community*, reference no. 7 of 2010 East African Court of Justice; *Independent Medico Legal Unit v The Attorney General of the Republic of Kenya*, reference no. 3 of 2010 East African Court of Justice; *Omar Awadh Omar and 6 others v The Attorney General of the Republic of Kenya and others*, reference no. 4 of 2011 East African Court of Justice;

one instance, the Ogiek case in March 2013. This finding has not been implemented. Moreover, the state has undertaken contrary action thus demonstrating its unwillingness to implement the finding. Predictively, one would accord equal status on decisions from the African Court as those of national courts, and thus expect the finding to be more readily implemented.⁷⁵ However, the binding character of a finding does not seem to lead to its implementation. Nonetheless, only one of the 162 findings and recommendations analysed in this chapter is binding in character. It would then be inconclusive to draw conclusions on the basis of this one finding. Pointedly, a number of recommendations have been implemented particularly through deliberate government action notwithstanding their non-binding character. It is therefore plausible to argue that the degree of legalisation of a monitoring mechanism is not a factor determining implementation.

The non-binding nature of most of findings and recommendations implies that their implementation is dependent on their perceived legitimacy.⁷⁶ The question then is to what extent the perceived legitimacy of a monitoring mechanism has facilitated implementation of its findings and recommendations. Writing on the legitimacy of UN treaty bodies, Keller isolates factors that may inspire legitimacy on the UN treaty bodies.⁷⁷ These include the independence and expertise of members and procedural aspects such as involvement of stakeholders in a transparent process, involvement of state parties and adherence to the safeguards of due process.⁷⁸ Although, the implementation record in Kenya is low, absolute and express rejection of the findings and recommendations of monitoring mechanisms has been the exception. This is however contrasted against the numerous instances, discussed earlier in section 2 of this chapter, when the state has taken actions that are contrary to the findings and recommendations. Notwithstanding, in 2009 the government expressly rejected the recommendations of the Special Rapporteur on extrajudicial killings and summary execution.⁷⁹ Additionally, earlier on in 2006 Kenya spearheaded a backlash against the EACJ following an unfavourable ruling against Kenya, resulting in limitation of the jurisdiction of the Court.⁸⁰ Leaving that aside, the analysis reveals that the Executive has been more willing to implement the recommendations of the APRM. For instance, in relation to the recommendations on participation and representation of women in public life, although these recommendations had been made by other monitoring mechanisms since 1993, the Executive took deliberate action to implement these recommendations when they were made by the APRM.⁸¹ The question then turns on what accounts for this variation. Revisiting

Mbugua Mureithi wa Nyambura v The Attorney General of the Republic of Uganda and the Attorney General of the Republic Kenya, reference no. 11 of 2011.

⁷⁵ The Constitution, 2010 at Article 2 (6) incorporates any treaties ratified by Kenya as part of the national legal order so that any treaty ratified by Kenya possesses status in the national legal order and is directly enforceable in national courts. Therefore, binding decisions from international courts have equal status as decisions of national courts and should be implemented.

⁷⁶ Krommendijk (n 7 above) 376-378.

⁷⁷ H Keller & G Ulfstein 'Introduction' in H Keller & G Ulfstein (eds) *UN human rights treaty bodies: law and legitimacy* (2012) 6-9.

⁷⁸ As above.

⁷⁹ Office of the High Commissioner for Human Rights, human rights bodies, UPR, <http://www.ohchr.org/EN/HRBodies/UPR/Pages/KESession8.aspx> (6 May 2015).

⁸⁰ See East African Community, the Summit, Joint Communiqué of the 8th Summit of the EAC Heads of State, Arusha, 30 November 2006.

⁸¹ In October 2006 following the APRM recommendations in June 2006, the President issued a directive on 30% representation of women in the public office. Further in 2007, the President established the Women Enterprise

Keller's discussion on legitimacy, the APRM, when viewed against the other mechanisms, stands out in relation to the procedural aspects, for instance, the level of persuasion on the recommendations generated in the deliberations, state involvement in the review and transparency in making of the recommendations. Comparatively, government officials pointed out lack of independence of and questionable expertise in some of the monitoring mechanisms. For instance, the over-reliance of UN treaty monitoring bodies on shadow reports of non-state actors was highlighted, so that it was argued that the recommendations are often a replica of the shadow reports.⁸² More specifically, it was observed that the UPR process lacked focus and its recommendations displayed a singular lack of knowledge on and appreciation of Kenya.⁸³ Based on the above, some of the recommendations have no resonance with the domestic legal, political and cultural context.⁸⁴ This lack of impartiality, questionable authority and expertise in the eyes of decision makers within government militated against the implementation of the recommendations. Illustratively, the Executive in 2012 rejected the country review report of the 2nd APRM citing over-reliance by the Country Review Team on information from non-state actors leading to factual incorrectness.⁸⁵

Yet, even then, to explain the implementation of the recommendations of the first APRM review, another inference is possible. This is in relation to access of the monitoring mechanism to the relevant decision maker. In the APRM process the report is presented by the President and the recommendations are directed to the President who then bears responsibility for their implementation. In this case it is then possible to deduce why the Executive would take deliberate measures to implement the recommendations.

The next issue is whether the adjudicative or non-adjudicative nature or process of the monitoring mechanisms affects implementation. Of the monitoring mechanisms discussed in this research, the African Court, the EACJ and the African Commission and the African Committee on the Child in adjudication of individual complaints involve adversarial processes. Does the adversarial nature of a monitoring process facilitate or militate against implementation? Notably, in all the four findings involving adversarial monitoring processes, only the findings on the Endorois are partially implemented. Can an inference then be made that the adjudicative nature of the monitoring mechanism militates against implementation? Pointedly, the state never participated in the African Commission communication on the

Fund to facilitate access of loans to women. In addition, in August 2007, the government unsuccessfully sought to amend the Constitution to provide for 50 special seats reserved for women.

⁸² Interview with M Njau-Kimani, Legal Secretary Justice and Constitutional Affairs, Department of Justice and Office of the Attorney General, Kenya, Nairobi, 4 March 2015. It was stated that UN treaty monitoring committees often fail to ask government representatives to clarify the issues raised in the shadow reports, only to raise the same disagreeable issues as recommendations.

⁸³ Interview with M Njau-Kimani, Legal Secretary Justice and Constitutional Affairs, Office of the Attorney General and Department of Justice, Kenya, Nairobi, 4 March 2015. The main contention in relation to the UPR was that in 2015 rather than taking stock of the extent of implementation of the recommendations made in 2010, the 2015 process mainly raised new unrelated issues. Further, some UPR recommendations related to issues that are purely of a domestic nature such as budget allocation.

⁸⁴ Interview with M Njau-Kimani, Legal Secretary Justice and Constitutional Affairs, Office of the Attorney General and Department of Justice, Kenya, Nairobi, 4 March 2015.

⁸⁵ Interview with L Mbogo, Chief Executive Officer, NEPAD Secretariat Kenya, Nairobi, 10 November 2014. The Executive cited factual incorrectness of the findings of the Country Review Team in relation to the pace of implementation Constitutional reforms, resettlement of internally displaced persons and redressing of marginalisation in North Eastern and Coast regions, which it attributed to false information given by non-state actors.

Ouko case and similarly, in the African Committee on the Child communication on the children of Nubian descent. Conversely, the state readily participated in the Endorois communication. Viljoen and Louw in their study on the implementation of the recommendations of the African Commission find no correlation between the participation of the state and subsequent implementation of the decision.⁸⁶ Consequently, that inference linking state participation to implementation should be abandoned. The determining feature is perhaps the domestic structures of implementation, a discussion that is undertaken later in this section.

What about regional effect? Krommendijk finds that the recommendations of UN treaty bodies have had limited impact in the Netherlands due to the dominance of the European human rights regime.⁸⁷ Accordingly, government actors are not willing to change policy or enact legislation on the basis on non-binding recommendations if there is no authoritative binding judgment from the European Court of Human Rights.⁸⁸ Resultantly, regionalism is often used to justify non-compliance with the recommendations of UN treaty bodies.⁸⁹ Two questions are posed for purposes of analysis: (i) whether regional findings and recommendations have been more readily implemented; and (ii) whether there has been leveraging on regional effect to support implementation or non-implementation. In the first instance, there is no conclusive evidence that findings and recommendations from the African monitoring mechanisms are more readily implemented as compared to those of the UN monitoring mechanisms. Notably, the APRM is exempted from the consideration on regional effect because as discussed above, of its relative perceived legitimacy among government decision makers and its access to the decision-makers, hence it appears like an outlier. Further, there is also no evidence of leveraging on regional effect to justify implementation or non-implementation. Unsurprisingly, the African human rights system and particularly the African Court, due to its rather recent pedigree, has not pronounced itself on many issues which would then form the basis of regional jurisprudence. Therefore, unlike the European human rights regime the presence of the African human rights system in the implementation discourse is rare. While evidence of regionalism in implementation is absent, policy statements from government actors imply a shift towards regional mechanisms and less engagement with global mechanisms.⁹⁰

4.2 Factors specific to the findings and recommendations

The aspects assessed are: the thematic nature of the rights; the nature of remedy required and the nature of the state duty implied in the finding or recommendation.

On the thematic nature of the rights, the analysis examines the implementation of findings and recommendations across different thematic rights. The analysis indicates that women's and children's rights have higher levels of full implementation. In the case of women's rights, it is notable that most of the recommendations have been implemented through the constitutional review process thus implying situational implementation which does not

⁸⁶ Viljoen and Louw (n 67 above) 15.

⁸⁷ Krommendijk (n 7 above) 382.

⁸⁸ As above.

⁸⁹ As above.

⁹⁰ Interview with A Nyanjong, Programme Manager, International Commission of Jurists- Kenya Section, Nairobi, 22 April 2015; interview with A Kamau, Programme Officer, Independent-Medico Legal Unit, Kenya, Nairobi, 17 January 2015.

connote impact. Notably, a number of the recommendations implemented through the constitution review process had been the subject of measures undertaken by women's rights organisations, whose implementation was obstructed by state actors over the years. For instance, the process of enactment of the Marriage Act, Matrimonial Property Act and Protection Against Domestic Violence Act was initiated by women's rights groups between 2000 and 2007. However, the listing of the bills for parliamentary debate was delayed and only occurred because the constitutional implementation process set mandatory timelines for the enactment of these legislation. What accounts for this reluctance of the state or obstructionism in implementation of the recommendations relating to women's rights? Simmons in her study argues that the relative importance of a certain group of rights to policy makers determines the impact of the corresponding treaty at the domestic level.⁹¹ Contextualising Simmons argument in relation to Kenya, women's rights are both contested and do not rank high in the hierarchy of domestic priorities. Illustratively, on the contested nature of women's rights, a number of the constitutionally mandated provisions have either been delayed in implementation or there has been a reversal of the constitutional gains.⁹² Nonetheless, non-state actors have been instrumental in lobbying and pressuring government to implement the recommendations on women's rights. The high level of implementation is therefore linked to the initiatives of non-state actors.

Turning to the rights of children, the findings and recommendations have been implemented mainly through the constitution review process and executive action. Significantly, of the 24 implemented recommendations, 10 have been implemented through executive action and an equal number implemented as a result of the constitution review process. Moreover, it is only in the thematic group of children's rights that the government has implemented recommendations relating to ratification of treaties. Nonetheless, as with the findings and recommendations in other thematic areas, the government has been reluctant to implement certain findings such as harmonisation of the definition of the child and prohibition of child marriages, which were only implemented through the constitution review process. Comparatively, Krommendijk finds greater levels of implementation of the recommendations on children's rights in all the three study countries as compared to other rights.⁹³ Similarly, Simmons in her study finds that the Convention on the Rights of the Child has the greatest effect in the ratifying countries.⁹⁴ These studies posit that children's rights are less contested and enjoy greater importance in politics and society, hence more readily implemented. In the Kenyan context, this proposition also holds true. First, there are a number of non-state actors working on the rights of children who have actively engaged government actors on implementation. Second, interviews with non-state actors indicated that state actors were more receptive to findings and recommendations relating to children issues. For instance, the non-state actors pointed out that the government had readily accepted to set up a children ombudsman and also to implement recommendations relating to child participation.⁹⁵ Further, it is observable that there have been fewer instances of state

⁹¹ Simmons (n 4 above).

⁹²For instance, the implementation of the two third gender principle in relation to the representation of women in the national Parliament was postponed during the 2013 general elections as Parliament failed to enact legislation on the implementation mechanisms. Similarly, a number of laws relating to the rights of women fail to meet the constitutional standards these include the Marriage Act, 2014 and the Matrimonial Property Act, 2013.

⁹³ Krommendijk (n 7 above) 369 -370.

⁹⁴ Simmons (n 4 above) 357-358.

⁹⁵ Interview with P Mutiso, Programme Officer, CRADLE, Nairobi, 23 March 2015.

obstructionism in relation to recommendations on children's rights as well as no instances in which government has taken contrary action signalling unwillingness to implement a finding or recommendation. Even then, when the findings and recommendations on children involve contested right issues, the government is reluctant to implement. This is illustrated by the findings of the African Committee on the Child on the children of Nubian descent.

The findings and recommendations on personal liberty and physical integrity rights are least implemented. In addition, most actions contrary to the requirement of the finding or recommendation, which signify lack of willingness to implement, have been undertaken in relation to personal liberty and physical integrity rights. Distilled further, most of the non-implemented findings and recommendations require accountability for human rights violations. Interviews with the Office of the Attorney General acknowledged the low level of implementation and attributed this to lack of political commitment to undertake systemic reforms in view of the political costs involved.⁹⁶ The reason for lack of political commitment is not hard to find: these findings and recommendations touch at the core of the executive's control over the governed. Illustratively, while government outright rejection of findings and recommendations of monitoring mechanisms has been the exception, yet state officials in 2009 openly rejected the recommendations on accountability for extra-judicial killings and summary execution. Similarly, non-state actors highlight lack of political commitment for instance illustrated by the state's attitude in litigation to enforce implementation of the recommendations.⁹⁷ In a petition before the EACJ on the recommendations relating to investigation and prosecution of the perpetrators of human rights abuses in Mt Elgon, the state argued that no violations were perpetrated by state agents.⁹⁸ Equally, in a petition filed before the High Court in Kenya seeking to compel the government to investigate and prosecute perpetrators of sexual and gender based violence in the 2007/08 post election violence, the government response has been reluctant and delayed.⁹⁹ This unwillingness to interact with non-state actors in law declaring fora manifests lack of political commitment to implement the findings and recommendations.

Moreover, the analysis also reveals that non-state actors have recorded the least success in pushing for implementation of the findings and recommendations on personal liberty and physical integrity rights. The strategies employed by non-state actors to compel implementation as discussed above are litigation and also initiation of draft laws in instances in which the recommendations require enactment of legislation. However, this has been marked by state obstructionism.

Even then, the government is more willing to implement recommendations relating to symbolic measures and to payment of compensation than those requiring investigation, prosecution and accountability. In March 2015, the President in the state of the nation address issued an apology for and to the victims of all past human rights violations and

⁹⁶ Interview with M Njau-Kimani, Legal Secretary Justice and Constitutional Affairs, Office of the Attorney General and Department of Justice, Kenya, Nairobi, 4 March 2015.

⁹⁷ Interview with A Kamau, Programme Officer, Independent Medico-Legal Unit, Kenya, Nairobi, 17 January 2015.

⁹⁸ *Independent Medico-Legal Unit v Attorney General of the Republic of Kenya & 4 others*, reference no. 3 of 2010.

⁹⁹ *Coalition of Violence Against Women & 4 others v Attorney General & 5 others*, petition 122 of 2013. The government for more than one year failed to file a response to the petition until the presiding judge threatened to enter summary judgment against the government.

directed a three year phased out establishment of a KES 10 billion fund to compensate victims of human rights violations.¹⁰⁰ This foreclosed any investigation and prosecution of the perpetrators, particularly those of the 2007/08 post election violence, since the government expressly indicated its preference for restorative justice approaches.¹⁰¹ Writing on partial compliance with the judgments of the Inter-American Court, Hawkins and Jacoby find higher state compliance in judgments that require payment of compensation and issuing a public apology and relatively lower rates of compliance in investigating and punishing perpetrators.¹⁰² The authors argue that findings requiring payment of compensation involve lower 'political capital expenses' hence easily implemented.¹⁰³ Although studies on the implementation of decisions of the African Commission find relatively higher levels of implementation in cases involving personal liberty and physical integrity rights,¹⁰⁴ a distinction is made. In this study, the cases related to fair trial rights and the remedies issued included retrial, right to appeal and annulment of orders,¹⁰⁵ and did not involve investigation and punishment of perpetrators as in the instant discussion.

Besides the findings and recommendations on personal liberty and physical integrity rights, findings and recommendations relating to the rights of collective groups also record comparatively low levels of implementation. Additionally, most of the findings and recommendations have been fully or partially implemented through the constitution review process. Based on the interviews with relevant actors, two reasons account for the low level of implementation. First, it is notable that a number of the non-implemented findings and recommendations relate to the rights of indigenous peoples. The contested issues in respect of indigenous peoples remain unsettled at the national level. The contestations pertain to the concept of indigeneity in Kenya and whether there should be special collective rights for groups identifying as such. Government actors cited the difficulty in isolating indigenous peoples in the Kenyan population as a contributing factor to the low level of implementation.¹⁰⁶ Similarly, even in the constitution review process, the rights of indigenous peoples were contested hence although specific recommendations were invoked in the internal discussions of the experts, a deliberate decision was made not to fully implement through constitution provisions.¹⁰⁷ Indeed an expert in the constitution review process stated, 'the fact that one community arrived in Kenya 50 years earlier or later should not be a basis for any special recognition.'¹⁰⁸ Second, there are fewer non-state actors working on the rights of collective groups as compared to women and children rights. Impliedly, there have thus been limited instances of interaction between the state and non-state actors on the findings and recommendations to lobby for implementation.

On the nature of remedial measures required, recommendations requiring enactment of legislation have the highest implementation rate. Viljoen and Louw in their study on

¹⁰⁰ State of the nation address, 2015 (n 12 above) 80.

¹⁰¹ As above.

¹⁰² D Hawkins & W Jacoby 'Partial compliance: a comparison of the European and Inter-American Courts of Human Rights' (2010) 6 *Journal of International Law and International Relations* 55-59.

¹⁰³ As above.

¹⁰⁴ Viljoen & Louw (n 67 above) 18.

¹⁰⁵ Viljoen & Louw (n 67 above) 8-11.

¹⁰⁶ Interview with M Njau-Kimani, Legal Secretary Justice and Constitutional Affairs, Office of the Attorney General and Department of Justice, Kenya, Nairobi, 4 March 2015.

¹⁰⁷ Interview with O Amollo, Ombudsman & Member Committee of Experts, Nairobi, Kenya 1 April 2015.

¹⁰⁸ As above.

implementation of the recommendations of the African Commission find low levels of implementation of decisions requiring change of laws.¹⁰⁹ The Open Justice Initiative in a similar study on implementation of recommendations of the African Commissions arrives at the same conclusion.¹¹⁰ Comparatively, Hawkins and Jacoby also find lowest rates of compliance in court orders requiring amendment, repeal or adoption of new laws.¹¹¹ What then explains this difference? Pointedly, most of these recommendations have been implemented through non-state actors mainly by the initiating draft bills and identifying government norm sponsors to introduce the bills to Parliament as private member bills and lobby for enactment. For instance, the Prohibition of Female Genital Mutilation Act, the Counter-Trafficking in Persons Act, Victim of Offences Act and the Internally Displaced Persons Act were enacted as a result of initiatives of non-state actors. Even then, there are numerous instances of state obstructionism. Illustratively, most of the partially implemented recommendations relating to enactment of legislation such as the Prevention of Torture Bill, Access to Information Bill and Evictions and Resettlement Bill were initiated by non-state actors but have been delayed by government. Moreover, a number of recommendations implemented through the constitution review process were subject of government delays with implementation only occurring due to the Constitution, 2010 mandated timelines.¹¹² From the foregoing it is thus clear that implementation occurred mainly as a result of initiatives of non-state actors. Further, non-states have used a number of strategies to counter state obstructionism in implementation of recommendations requiring enactment of legislation. These include litigation in national courts seeking to compel the government to enact, assent to or operationalise legislation and also seeking dialogue with the government in international fora during state reporting.¹¹³

On the other hand, the least implemented recommendations are those that require the state to ratify human rights instruments, most notably the acceptance of individual complaint procedures. This is in addition to recommendations requiring the state to investigate and prosecute human rights violations discussed above. In relation to ratification, the analysis finds only three instances of implementation of recommendations relating to ratification. These are: the 2010 ratification of the Protocol on the Rights of Women in Africa, the 2009 ratification of the Hague Convention on Inter-Country Adoptions and the 1990 African Charter on the Child. Contrastingly, approximately 14 recommendations relate to ratification and have been made repeatedly since 1993. Why the widespread disinclination towards ratification? According to the Executive, ratification is an artefact of state sovereignty so that recommendations requiring ratification are untenable.¹¹⁴ Further, in relation to ratification of optional protocols accepting individual complaint mechanisms, the argument is that there are sufficient domestic complaint mechanisms at the national level.¹¹⁵ According to the executive 'justice cannot only be obtained in the CEDAW Committee or the Human Rights Committee,

¹⁰⁹ Viljoen & Louw (n 67 above) 21-22.

¹¹⁰ Open Society Justice Initiative, 'From judgement to justice: implementing international and regional human rights decisions' (2010) 100-104.

¹¹¹ Hawkins & Jacoby (n 102 above) 55-59.

¹¹² These include the Marriage Act, Matrimonial Property Act and Protection Against Domestic Violence Act.

¹¹³ Interview with A Nyanjong, Programme Officer, International Commission of Jurists- Kenya Section, Nairobi, 22 April 2015.

¹¹⁴ Interview with M Njau-Kimani, Legal Secretary Justice and Constitutional Affairs, Office of the Attorney General & Department of Justice, Kenya, Nairobi, 4 March 2015.

¹¹⁵ As above.

even the High Court can dispense the same justice'.¹¹⁶ This view is contested. While acknowledging that ratification is a political issue, the UN Special Rapporteur on Xenophobia posits that recommendations requiring the state to ratify human rights instruments seek to encourage rather than dictate to the state, hence not entirely untenable.¹¹⁷ Nonetheless, non-state actors have continued to initiate more interaction with the state with a view to inducing implementation. Even then, this has been limited to raising the issue of ratification in shadow reports submitted to monitoring mechanisms. Notably, a moratorium on ratification of treaties set in October 2010 after the promulgation of the Constitution, 2010 is still in place as of October 2015 notwithstanding the enactment of Ratification and Treaty Making Act, 2012. The Act is yet to be operationalised since 2012, a matter that is taken up in the subsequent discussion. Undoubtedly, the attitude of the state towards ratification of treaties implies that the recommendations will not be implemented in the short term. This proposition finds support in the government rejection of all recommendations on ratification of human rights instruments during the 2nd Universal Periodic Review in January 2015.¹¹⁸

4.3 Domestic factors

The aspects assessed are: domestic context factors (prevailing political events), domestic institutional structures and institutions, civil society actors, transnational actors and media.

4.3.1 Domestic context factors

A number of studies presage a causal connection between liberal democracies and compliance with international obligations and in particular, decisions of international monitoring bodies.¹¹⁹ These studies isolate a strong rule of law tradition and democratic politics as predictors of compliance.¹²⁰ On a strong rule of law tradition, it is argued that states which domestically submit to an independent judiciary and constitutional constraints will analogously comply with decisions of an international tribunal.¹²¹ In regard to democratic politics, the focus shifts to the ability of domestic groups to leverage on international legal obligations to pressure governments to comply.¹²² Assessing Kenya against the democratic politics predictor, the 2003 democratic rule opened new spaces for participatory democracy and human rights in Kenya.¹²³ Illustratively, the government established the Kenya National Commission on Human Rights to enhance protection and promotion of human rights in Kenya.¹²⁴ More specifically and in the particular context of international human rights obligations, the government in 2003 also established an Inter-Ministerial Committee on International Human Rights Obligations whose mandate was to ensure timely state

¹¹⁶ As above.

¹¹⁷ Interview with Dr. M Ruteere, UN Special Rapporteur on Xenophobia, Racism and Contemporary forms of Intolerance, Nairobi, Kenya, 9 March 2015.

¹¹⁸ Office of the High Commissioner for Human Rights, Kenya home page 'Report of the working group on the Universal Periodic Review Kenya' 26 March 2015, A/HRC/29/10, http://ap.ohchr.org/documents/dpage_e.aspx?c=95&su=101 (27 June 2015).

¹¹⁹ Viljoen & Louw (n 67 above) 25-26; LR Helfer & AM Slaughter 'Towards a theory of effective supranational adjudication' (1997) 107 *Yale Law Journal* 331-333.

¹²⁰ Helfer & Slaughter (n 119 above) 331-332.

¹²¹ Helfer & Slaughter (n 119 above) 332.

¹²² Helfer & Slaughter (n 119 above) 333.

¹²³ See K Kanyiga 'Kenya: democracy and political participation' (2014) Discussion paper by Afirmap, Open Society Initiative for Eastern Africa and the Institute of Development Studies, University of Nairobi, 9.

¹²⁴ As above.

reporting, with no express role on implementation.¹²⁵ A review of the implementation analysis discussed above indicates that although state reporting improved after 2003, there is no evidence of enhanced implementation of the findings and recommendations of monitoring mechanisms.¹²⁶ Reviewing the then existing findings and recommendations relating to women, children and personal liberty and physical integrity rights, there is no evidence of measures taken to implement the findings and recommendations. Notably, during this period which also coincided with the constitution review process, findings and recommendations of monitoring mechanisms were not implemented as the government's position was that the review process would address the issues identified in the findings and recommendations.¹²⁷

Turning to strong adherence to the rule of law, the Constitution, 2010 established an independent Judiciary and introduced constitutional constraints on the Executive. While the Constitution, 2010 sets Kenya on a path of strong adherence to the rule to law, in practice the Executive remains dominant and often disregards the rule of law.¹²⁸ For instance, on a number of occasions the Executive has disregarded national court decisions, while the overall record of implementation of national court decisions is wanting.¹²⁹ The question then, would be whether this has influenced implementation of the findings and recommendations. Looking at the post 2010 record of the implementation, most implementation falls within the category of situational implementation, in which implementation was necessitated by constitutional and legal reforms. Further, despite constitutional constraints on the Executive, there are cases in which the Executive has undertaken actions that are contrary to binding court decisions. For instance and in the context of findings of monitoring mechanisms, the African Court orders for provisional measures in the Ogiek case. Similarly, Parliament has enacted laws that are contrary to the requirements of the recommendations and ultimately negate international law standards. Illustratively, in December 2014, Parliament amended the National Police Service Act to widen the scope of grounds on lawful use of force to include protection of property, contrary to the recommendations. This demonstrates that although the Constitution 2010 envisages a strong rule of law culture, the domestic political culture has not changed. This then explains the low implementation of the findings and recommendations of monitoring mechanisms post 2010.

¹²⁵ Interview with M Njau-Kimani, Legal Secretary Justice and Constitutional Affairs, Office of the Attorney General & Department of Justice, Kenya, Nairobi, 4 March 2015; See also Kenya Gazette Notice 1143 of 2003. The Inter-Ministerial Committee on International Human Rights Obligations consisted of ministries dealing with various human rights issues and non-governmental organizations.

¹²⁶ For instance the state submitted the following overdue reports: the 2nd state report to the Human Rights Committee due in April 1986 was submitted in September 2004; 1st state report due to the Committee Against Torture in March 1998 was submitted in June 2007; and the combined 2nd, 3rd & 4th report due to the Committee on Economic, Social and Cultural Rights was submitted in September 2006; initial report to the African Commission in June 2006. See Office of the High Commissioner for Human Rights, Kenya homepage, reporting status for Kenya, http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/countries.aspx?CountryCode=KEN&Lang=EN (accessed 1 May 2015); African Commission on Human and Peoples' Rights, states, Kenya: initial report 1992-2006, <http://www.achpr.org/states/kenya/reports/1st-1992-2006/> (accessed 1 May 2015).

¹²⁷ Email correspondence with Prof. YP Ghai, Chairperson, Constitution of Kenya Review Commission, 16 February 2015.

¹²⁸ Kanyiga (n 123 above) 7.

¹²⁹ See discussions in chapter 3, section 1.6 on judicial reforms.

Tied to the strong rule of law adhering state, is the Constitution, 2010. The Constitution, 2010 binds Kenya to comply with international law. Broadly, it is suggested that the Constitution, 2010 as a whole requires Kenya to adhere to international law, while those who take a narrow view point to specific clauses that require compliance with international law.¹³⁰ Nonetheless, in the particular context of implementation of findings and recommendations of monitoring mechanisms, it has been suggested that the Constitution, 2010 obliges implementation since the findings and recommendations are derived from interpretation of treaties that are binding on Kenya.¹³¹ Accordingly, the question of binding or non-binding character of the findings and recommendations is inconsequential.¹³² This position is however not uncontested. The constitutional thesis posits that countries that have express constitutional commitments on human rights will more strongly enforce those rights. The question then is whether incorporation of international law into the national order and express constitutional commitments on human rights enhanced implementation of the findings and recommendations. As discussed earlier, review of the post 2010 implementation record is inconclusive on increased implementation. Nonetheless, there are instances of non-state actors leveraging on the constitutional commitments and international law to pressure the government to implement the findings and recommendations. Two instances stand out. First, the economic, social and cultural rights which since 2010 enjoy constitutional protection. In the particular context of the recommendations on evictions, non-state actors leveraged on the constitutional protection of the right to housing to urge the government to enact legislation on evictions rather than guidelines.¹³³ Although, the recommendation is partially implemented, using the constitutional provisions courts have repeatedly directed the state to enact legislation on evictions thus clothing the recommendations with legal status in the national legal order.¹³⁴ Similarly, on implementation of the recommendations on the death penalty, non-state actors are leveraging on constitutional protections and international law in a petition to the Supreme Court seeking to annul national legislation which provides for the mandatory death penalty.¹³⁵

4.3.2 Domestic institutional structures and institutions

Leaving aside the unitary state facade, recent scholarship on domestic implementation of international human rights rulings has focussed on domestic actors and institutions with mixed results. Writing on domestic implementation of the judgments of the European Court of Human Rights, Anagnostou and Mungiu-Pippidi establish a correlation between legal infrastructure capacity and effectiveness of government institutions and full/partial implementation.¹³⁶ Distilled further, the study elaborates on legal infrastructure and

¹³⁰ Constitution, 2010, article 132 (1)(c) (iii): 'The President shall once every year submit a report for debate to the National Assembly on the progress made in fulfilling the international obligations of the Republic.'; Article 132 (5): 'The President shall ensure that the international obligations of the Republic are fulfilled through the actions of the relevant Cabinet Secretaries.'

¹³¹ Interview with O Amollo, member Committee of Experts & Ombudsman, Office of the Ombudsman, Kenya, Nairobi, 1 April 2015.

¹³² As above.

¹³³ Interview with P Vata, Executive Director, Hakijamii, Kenya, Nairobi, 10 March 2015.

¹³⁴ As above.

¹³⁵ Interview with A Nyanjong, Programme Manager, International Commission of Jurists- Kenya Section, Nairobi, 22 April 2015.

¹³⁶ D Anagnostou & A Mungiu-Pippidi 'Domestic implementation of human rights judgments of Europe: legal infrastructure and government effectiveness' (2014) 25 *EJIL* 205-227.

government effectiveness as domestic implementation structures that: (a) have legal capacity and political clout to influence law making and policy processes towards implementation; and (b) diffused human rights awareness and involvement of parliamentary and civil society actors in implementation.¹³⁷ Similarly, Hillebrecht in a cross-country study on compliance with the judgments of the Inter-American Commission on Human Rights examines the executive as a supplier of compliance, specifically in the context of political will and building pro-compliance coalitions with Parliament and the Judiciary.¹³⁸

Assessing Kenya in the context of legal infrastructure and government effectiveness, the starting point is the 2003 Inter-Ministerial Committee on International Human Rights Obligations. As pointed out earlier, this Inter-Ministerial Committee was mandated to ensure timely state reporting and coordination of all government agencies in fulfilment of international human rights obligations. At the time of establishment in 2003, the Inter-Ministerial Committee was under the Ministry of Justice and chaired by the Minister of Justice, who then enjoyed political clout and hierarchy in government.¹³⁹ From 2003 to 2009, the Inter-Ministerial Committee based on its political clout coordinated with different ministries, agencies and state branches to prepare and submit reports to a number of monitoring mechanisms.¹⁴⁰ In the context of implementation of recommendations, the Inter-Ministerial Committee facilitated tabling of recommendations of monitoring mechanisms in Cabinet and, in one instance approval for their implementation by different Ministries.¹⁴¹ For instance, the 2008 concluding observations of the CESR Committee were tabled in Cabinet and approval given for the Inter-Ministerial Committee to direct different ministries to implement the recommendations.¹⁴² This led to the partial implementation of the recommendations relating to water and housing, particularly in informal settlements.¹⁴³

Predictively, one would expect higher levels of implementation during this period. However, the analysis does not confirm this expectation. This can be attributed to two reasons. First, as already discussed that the constitution review process was on-going and the government position was that most of the findings and recommendations would be addressed in the resulting Constitution.¹⁴⁴ Second, while the Inter-Ministerial Committee had political weight and also was staffed with persons with expertise in human rights issues, there was lack of expertise in human rights in the ministries, agencies and other state branches that were supposed to implement the recommendations.¹⁴⁵ Notably, Anagnostou and Mungiu-Pippidi find that the best countries in implementation of the judgment of the European Court for Human Rights have domestic implementation structures staffed with persons with expertise

¹³⁷ Anagnostou & Mungiu-Pippidi (n 136 above) 224.

¹³⁸ Hillebrecht (n 6 above).

¹³⁹ Kenya Gazette notice 1143 of 2003.

¹⁴⁰ Interview with M Njau-Kimani, Legal Secretary Justice and Constitutional Affairs, Office of Attorney General and Department of Justice Kenya, Nairobi, 4 March 2015.

¹⁴¹ As above.

¹⁴² As above.

¹⁴³ As above.

¹⁴⁴ Email correspondence with Prof. YP Ghai, Chairperson Constitution of Kenya Review Commission, 16 February 2015.

¹⁴⁵ Interview with M Njau-Kimani, Legal Secretary Justice and Constitutional Affairs, Office of the Attorney General and Department of Justice Kenya, Nairobi, 4 March 2015.

in human rights.¹⁴⁶ This is not the case in Kenya, leading to lack of implementation within the implementing agencies.

Further, post 2010 at the end of the constitution review process, one would again expect higher levels of implementation. However, this is not so. A number of reasons stand out. First, the Ministry of Justice was abolished in 2013 and relegated to a department in the Office of the Attorney General.¹⁴⁷ Accordingly, although the Inter-Ministerial Committee is still in place, it has no political weight which has undermined its capacity to intervene in lawmaking and in policy processes to influence implementation.¹⁴⁸ Further, due to its lack of political clout, the Inter-Ministerial Committee is also unable to effectively coordinate implementation of the findings and recommendations across different ministries and state agencies.¹⁴⁹ This view is supported by the Kenya National Commission on Human Rights which observed that in the absence of a political clout the Department of Justice has no authority to coordinate, monitor or direct ministries and state agencies on implementation.¹⁵⁰ Similarly, the UN Special Rapporteur on Racism, Xenophobia observed that with the low level representation in the hierarchy of government of the Department of Justice, implementation of findings and recommendations of monitoring mechanisms is unlikely to occur.¹⁵¹ Second, with the diminished role of the Department of Justice, implementation arrangements seem to centre around the Ministry of Foreign Affairs which has direct engagement with monitoring mechanisms in terms of receiving 'note verbale' and also follow-up inquiries on implementation.¹⁵² Additionally, the Treaty Making and Ratification Act which makes provisions for state reporting to monitoring mechanisms, centres the responsibility for reporting around the Ministry of Foreign Affairs.¹⁵³ However, the Ministry of Foreign Affairs has no expertise or capacity to coordinate or monitor implementation of the findings and recommendations.¹⁵⁴

Third and perhaps linked to the abolition of the Ministry of Justice is lack of political will by the Executive branch. Indisputably, numerous studies privilege the centrality of political will

¹⁴⁶ Anagnostou & Mungiu-Pippidi (n 136 above) 220-224.

¹⁴⁷ See Republic of Kenya, Presidential Circular No. 2/2013 Organization of the Government of the Republic of Kenya, 20 May 2013.

¹⁴⁸ Interview with M Njau-Kimani, Legal Secretary Justice and Constitutional Affairs, Department of Justice, Nairobi, 4 March 2015.

¹⁴⁹ As above.

¹⁵⁰ Interview with D Rono, Programme Officer International Human Rights Monitoring, Kenya National Commission on Human Rights, Nairobi, 17 March 2015.

¹⁵¹ Interview with Dr. M Ruteere, UN Special Rapporteur Racism, Xenophobia and Contemporary forms of Intolerance, Nairobi, 9 March 2015.

¹⁵² As above. For instance the Special Rapporteur indicated that he had sent queries on Kenya to Geneva which were subsequently transmitted to the Ministry of Foreign Affairs but the Ministry had not coordinated Government response to them in more than one year.

¹⁵³ Treaty Making and Ratification Act, 2012, section 16: 'Where a treaty provides for submission of periodic reports as part of its monitoring mechanisms the Cabinet Secretary (Foreign Affairs) shall, in conjunction with the Attorney General and the relevant State Department facilitate the preparation and submission of such report within the prescribed time.'

¹⁵⁴ Interview with M Njau-Kimani, Legal Secretary Justice and Constitutional Affairs, Office of the Attorney General and Department of Justice, Kenya, Nairobi, 4 March 2015. Further this author was on numerous occasions in 2014 tasked (through the Cabinet Secretary in charge of women affairs) to responded to correspondence from the Office of the High Commissioner for Human Rights – CEDAW Committee, to the Ministry of Foreign Affairs on follow-up on implementation of 2011 concluding observations.

in national level implementation of decisions of monitoring mechanisms.¹⁵⁵ Although political will remains an ambiguous concept in both international law and international relations scholarship, simplistically it is the convergence of political interests and preferences with given international norms. In Kenya, this convergence of political interests with findings and recommendations of monitoring mechanisms is uncommon.

Besides political will, Hillebrecht also suggests that the executive branch acts a factor in implementation by 'building pro-compliance coalitions'.¹⁵⁶ Illustratively, Hillebrecht in her discussion on Argentina's implementation of decisions of the Inter-American human rights tribunals on amnesty highlights Parliament's role in annulling amnesty laws and the Supreme Court's role in rescinding previous amnesties.¹⁵⁷ In the Kenyan context, the analysis finds only one instance of the Executive branch building pro-compliance coalitions with Parliament. Following Kenya's 2010 UPR process, in October 2010 the Ministry of Justice held a workshop with Parliament on the UPR process and the resulting recommendations.¹⁵⁸ Parliament undertook to consider the implementation of recommendations relating to ratification of human rights treaties and protocols.¹⁵⁹ To this end, Parliament's role was to enact the necessary legal framework to initiate the process of ratification of the treaties and protocols in line with the Constitution, 2010.¹⁶⁰ Accordingly, the Treaty Making and Ratification Act, 2012 was drafted as a joint effort between a Member of Parliament and the Executive branch.¹⁶¹ Oddly, the Executive is yet to operationalise the Ratification and Treaty Making Act hence the 2010 UPR recommendations on ratification remain unimplemented as of October 2015. Moving forward, given the exceptionally divided nature of domestic institutions, pro-compliance coalitions are unlikely to be established. While Parliament and the Executive are less divided, human rights is not part of the Executive branch agenda. At a broader level, the question that remains unanswered is whether the power of pro-compliance coalitions can overcome political obstruction, particularly when the pro-compliance coalitions are outside the executive branch?

Turning to Parliament, recent scholarship highlights the role of national Parliaments in implementation of decisions of international human rights bodies.¹⁶² More specifically, Krommendijk in a cross-country study on implementation of the concluding observations of UN treaty bodies finds Parliaments as crucial actors in pushing governments to implement or implementing recommendations such as those requiring enactment of legislation.¹⁶³ In Kenya, Parliament lacks direct engagement with the findings and recommendations of monitoring mechanisms and also has limited influence over the Executive branch's interactions with monitoring mechanisms. Pointedly, earlier draft constitutions of Kenya

¹⁵⁵ Viljoen & Louw (n 67 above) 31-33; Open Society Justice Initiative Open Society Justice Initiative 'From rights to remedies: structures and strategies for implementing international human rights decisions' (2013)15-16.

¹⁵⁶ Hillebrecht (n 6 above).

¹⁵⁷ Hillebrecht (n 6 above) 17-22.

¹⁵⁸ Interview with M Njau-Kimani, Legal Secretary Justice and Constitutional Affairs, Office of the Attorney General and Department of Justice, Kenya, Nairobi, 4 March 2015.

¹⁵⁹ As above.

¹⁶⁰ As above.

¹⁶¹ As above.

¹⁶² Open Society Justice Initiative 'From rights to remedies' (n 155 above) 55-73. This study identifies the role of national parliaments to include: enacting national implementing legislation, establishing parliamentary human rights committees and reporting methods.

¹⁶³ Krommendijk (n 7 above) 381.

sought to delegate oversight on implementation of findings and recommendations of monitoring mechanisms to Parliament.¹⁶⁴ However, these provisions were removed in 2010 during the finalisation of the constitution review process. The reasons for removal of these provisions were indicated as strong opposition to too much reference to international law in the constitution.¹⁶⁵ Although, the Constitution, 2010 broadly obliges the President to annually submit a report to the National Assembly for debate on the progress in fulfilment of international obligations,¹⁶⁶ this has not facilitated implementation. Parliament's role in implementation thus appears peripheral.

Notwithstanding, there are a number of instances in which Parliament has facilitated implementation. In relation to its primary role of enacting legislation, an *ad hoc* Parliamentary committee on resettlement of internally displaced persons in 2011 and 2012 engaged with non-state actors to enact legislation on internally displaced persons. On pressuring the Executive to implement the findings and recommendations, an assessment of the use of Parliamentary questions to bring the Executive to account on implementation finds that this has been ineffective. Illustratively, the implementation of the Endorois findings was raised in Parliament twice without inducing implementation.¹⁶⁷ Conversely, Parliament has also undermined implementation. For instance, Parliament in 2007 obstructed implementation of the APRM recommendations on increasing representation of women in Parliament.¹⁶⁸ Quite apart from the above, there are instances of individual members of Parliament or informal Parliamentary committees forming 'pro-compliance coalitions' with non-state actors to facilitate implementation. For instance, on the implementation of the recommendations on abolition of the death penalty, an informal Parliamentary committee on human rights in conjunction with non-state actors drafted a bill which was in June 2015 tabled in Parliament with a view to amending national legislation providing for the mandatory death penalty.¹⁶⁹

Studies on national courts as implementers of findings and recommendations of human rights monitoring bodies point out that involvement of national courts is dependent on their status in the national legal order.¹⁷⁰ Accordingly, most studies have largely focused on Views of UN treaty monitoring bodies, although their status remains contested, and decisions and

¹⁶⁴ See Harmonised draft constitution of Kenya, 17 November 2009 article 30 (8): 'The national government shall make a statement to Parliament on whether and how it intends to implement those recommendations'.

¹⁶⁵ Committee of Experts on the Constitutional Review 'Verbatim record of the Committee of Experts on the Constitutional Review with the Parliamentary Select Committee held on 16 February 2010 at the Co-operative Bank Management Centre, Karen, Nairobi' 36-37 (accessed from the Kenya National Archives on 16 October 2014).

¹⁶⁶ Article 132 (1) (c) (iii): 'The President shall once every year submit a report for debate to the National Assembly on the progress made in fulfilling the international obligations of the Republic.'

¹⁶⁷ Parliament of Kenya, National Assembly official report, Hansard 18 January 2011, 17-22 <http://www.parliament.go.ke/plone/archive/archive-10th-Parliament/hansards/official-report-18.01.11p/view> (4 June 2014).

¹⁶⁸ Parliament of Kenya National Assembly official report, 15 August 2007, 18-34, <http://www.parliament.go.ke/plone/archive/archive-9th-parliament/hansard/official-report-15.08.07p/view> (25 January 2014).

¹⁶⁹ Interview with A Nyanjong, Programme Manager, International Commission of Jurists- Kenya Section, Nairobi, 22 April 2015.

¹⁷⁰ R Alebeek & A Nollkaemper 'The legal status of decisions of human rights treaty bodies in national law' in H Keller & G Ulfstein (eds) *UN human rights treaty bodies: law and legitimacy* (2012) 356-413; Open Society Justice Initiative (n 155 above) 74-94.

judgments of international tribunals.¹⁷¹ Kenya is nonetheless not subject to any of the UN individual complaint procedures. With the exception of the findings from the African Court all the other findings and recommendations are essentially non-binding. The role of national courts thus tilts towards pushing the state towards implementation. The primary method employed in urging the state towards implementation has been through strategic litigation. A number of examples stand out. First, focussing on litigation that has indirectly led to full implementation, civil society organisations in 2010 filed a petition in the High Court seeking to invalidate a provision of the Sexual Offences Act as recommended by three UN treaty monitoring mechanisms. Although, the High Court in 2012 dismissed the petition,¹⁷² in response to the petition the Attorney General in 2012 repealed the provision. Notably, the Attorney General had required the petitioner (FIDA-Kenya, a civil society organisation) to withdraw the petition as a pre-condition for the government initiating amendments of the Act.¹⁷³ Equally, the Office of the Ombudsman in July 2014 filed a petition seeking an order to compel the Executive to pay delayed compensation as recommended by the Committee against Torture. Although the petition is yet to be determined as of October 2015, the Executive paid full compensation in March 2015 as a result of the petition.¹⁷⁴

Second, there are instances in which litigation has been initiated but the state is yet to implement the recommendations. In regard to the 2007/08 post-election violence, two petitions have been filed by non-state actors together with transnational actors. One of the petitions seeks to compel the state to investigate, prosecute and to provide reparations to victims of sexual and gender based violence during the violence, while the other was seeking to compel the government to resettle and compensate internally displaced persons. Third, the analysis finds a different approach in which non-state actors have raised the recommendations of monitoring mechanisms in strategic litigation to infuse legal status on the recommendations.¹⁷⁵ This is exclusively observed in cases on evictions. Although the High Court has on two occasions expressly directed implementation of the recommendations as part of the orders to the government, these are yet to be implemented.¹⁷⁶ Oddly, the High Court has constantly adjudicated the underlying factors that led to the recommendations on evictions without addressing itself to the question of the state's non-implementation of the recommendations.

4.3.3 National human rights institutions

Studies on national human rights institutions as facilitators of implementation of decisions of international monitoring mechanisms identify three roles associated with these institutions.¹⁷⁷ First, as a framework for formal communication with monitoring mechanisms, second as shaping implementation processes at the national level and third as applying unique

¹⁷¹ As above.

¹⁷² *FIDA Kenya & another v Attorney General* Petition 10 of 2010 (unreported).

¹⁷³ Meeting between the Attorney General and civil society organisations, Sheria House, Nairobi, 28 May 2011 (author of this thesis in attendance).

¹⁷⁴ Interview with O Amollo, Ombudsman, Office of the Ombudsman, Kenya, Nairobi, 1 April 2015.

¹⁷⁵ Interview with P Vata, Executive Director, Economic, Social & Cultural Rights Centre -Hakijamii, Nairobi, Kenya, 10 March 2015.

¹⁷⁶ *Mitu-Belle Welfare Association v Kenya Airports Authority & others* Petition 164 of 2011; *Satrose Ayuma & 11 others versus the Registered Trustees of the Kenya Railway Staff Retirement Benefits Scheme & 3 others* Petition 65 of 2010

¹⁷⁷ Open Society Justice Initiative 'From rights to remedies' (n 155 above) 95.

pressure for implementation.¹⁷⁸ In Kenya the national human rights institutions are three quasi-governmental constitutional commissions with shared but distinct human rights mandates.¹⁷⁹ These are: the Kenya National Commission on Human Rights, the Office of the Ombudsman and the Gender and Equality Commission. Assessing the national human rights institutions in implementation of the findings and recommendations of monitoring mechanisms, their roles are more pronounced in applying unique pressure and shaping implementation process at the national level. These roles are intimately related so that discussion on one portends the other. On shaping implementation processes, the analysis reveals the Kenya National Commission on Human Rights' role in spearheading implementation. For example, in regard to the findings on the Endorois case, the Human Rights Commission in 2010 organised a festival to celebrate the findings, create public awareness on the findings and importantly to initiate engagement with government on implementation.¹⁸⁰ In addition the Human Rights Commission has formed networks with non-state actors and transnational actors to catalyse the implementation of a number of recommendations. Three illustrations are set out below. First, the Human Rights Commission is a member of the Internally Displaced Persons network which with technical assistance from the office of the Special Rapporteur initiated legislation on internally displaced persons.¹⁸¹ Second, the Human Rights Commission was also a member of the network that initiated drafting of the anti-torture legislation and also a member of the juvenile justice network which initiated legislation to implement the recommendations on juvenile justice.¹⁸² Third, the Human Rights Commission is part of the strategic litigation by the non-state actors before the Supreme Court on the death penalty.¹⁸³

Turning to the Office of the Ombudsman, as discussed earlier in this chapter, the Ombudsman has been influential in implementation in at least two instances. Perhaps the starting point should be on the role the Office of Ombudsman in national implementation of findings and recommendations of monitoring mechanisms. The mandate of the Office includes omissions by public officers and institutions in performance of public duty, accordingly any non-implementation constitutes an omission which the Ombudsman is mandated to remedy through the Executive or through the courts.¹⁸⁴ This view is demonstrated in regard to implementation of the Endorois findings in which the Ombudsman initiated communication with the Attorney General to push for implementation. In addition, the petition to enforce payment of delayed compensation for a victim of police torture and inhumane treatment also points to remedying omissions by public officers. The role of the Office of the Ombudsman thus tilts towards applying unique pressure for implementation.

¹⁷⁸ As above.

¹⁷⁹ See Constitution, 2010 article 59 & Kenya National Commission on Human Rights Act, 2011, the Commission on Administrative Justice Act, 2011 and the National Gender and Equality Commission Act, 2011.

¹⁸⁰ Kenya National Commission on Human Rights, our work, minorities and marginalised, indigenous peoples, <http://www.knchr.org/OurWork/Minoritiesandmarginalisedgroups/Indigenouspeople.aspx> (23 June 2015).

¹⁸¹ Interview with D Rono, Principal Human Rights Officer, Kenya National Commission on Human Rights, Nairobi, 23 March 2015.

¹⁸² As above.

¹⁸³ Interview with A Nyanjong, Programme Manager, International Commission of Jurists- Kenya Section, Nairobi, 22 April 2015.

¹⁸⁴ Interview with O Amollo, Ombudsman, Office of the Ombudsman, Kenya, Nairobi, 1 April 2015.

4.3.4 Civil society, transnational actors and media

As already pointed out, the facilitative role of civil society organisations in implementation, notwithstanding the pathway of implementation, stands out. The thematic analysis reveals that civil society directly catalysed the implementation of 16 of the partially and fully implemented findings and recommendations. A simple count is however beside the point and of limited explanatory power. The focus ought to be the level and nature of domestic and transnational mobilisation by civil society organisations to induce implementation of the findings and recommendations. Tied to this, is civil society ability to overcome government reluctance to implement the findings and recommendations and also state obstructionism when implementation was initiated by actors outside the Executive branch. The strategies employed by civil society organisations to induce implementation include: public mobilisation, litigation, initiation of draft legislation and exerting international pressure. On public mobilisation, one example stands out: the adoption of the National Land Policy. Following more than one year delay in adopting the National Land Policy, non-state actors working organised a public launch of the National Land Policy in June 2009 which was to occur without Cabinet approval of the Policy.¹⁸⁵ The government following the pressure approved the Policy a day to the proposed public launch.¹⁸⁶ In relation to litigation, in a number of instances civil society organisations have used litigation before national and regional courts to directly compel implementation of the recommendations and also to counter state obstructionism in implementation. On the first part of directly catalysing implementation two examples discussed earlier stand out. These are the petitions seeking to compel the government to investigate, prosecute and punish the perpetrators of sexual and gender based violence in the 2007/08 post election violence and the Mt Elgon human rights violations.¹⁸⁷ On the second part of using litigation to counter state obstructionism the examples include litigation to compel the government to operationalise the Counter-Trafficking in Persons Act.¹⁸⁸ Notably, on the use of litigation by civil society organisations to facilitate implementation, the aspect of structures and institutions that support transnational collaboration stand out. In this regard, the inclusive standing rules of the High Court have facilitated civil society organisations and transnational actors to file petitions and submissions on implementation of the recommendations.¹⁸⁹

On the third strategy, the initiation of draft bills, as discussed earlier majority of the recommendations requiring enactment of legislation have been implemented as a result of civil society initiatives. This has been achieved through initiation of draft bills and identification of government norm sponsors in Parliament to table the bill and lobby for its enactment or lobbying the executive branch to table the bill. The implication here is access of civil society organisations to key decision makers. In relation to enactment of legislation, Parliament is the key decision maker. Arguably, civil society access to Parliament has been

¹⁸⁵ Centre for Land Economy and Rights of Women, Launching the Kenyan National Land Policy, 26 June 2009, http://www.clearwomen.org/articles/launch_of_the_land_policy_26.6.09.pdf (accessed 6 May 2015).

¹⁸⁶ As above.

¹⁸⁷ *COVAW & 11 others v Attorney General & 5 others* Petition 122 of 2013; *Independent Medico-Legal Unit v Attorney General*, Reference 3 of 2010.

¹⁸⁸ *CRADLE v Ministry of Labour, Social Services and Security* Petition 68 of 2015.

¹⁸⁹ Constitution, 2010, Article 22. Notably in the petition seeking to compel the state to investigate, prosecute and punish the perpetrators of sexual and gender based violence, transnational actors have filed submissions in the case as *amicus curiae*. Similarly, in the eviction cases transnational actors have filed submissions and appeared before the courts as *amicus curiae*.

critical in their success in implementation of recommendations on enactment of legislation. Notably, some members of Parliament are former civil society actors. Finally, on the exerting international pressure, this is mainly through shadow reporting by continually highlighting non-implementation in the civil society shadow reports.

On transnational actors, the analysis indicates their role is largely subsumed in that of non-state actors, for example participation in strategic litigation, participation in drafting of shadow reports and national level mobilisation for implementation. From the theoretical perspective the question that presents is that of the character of the transnational actors. Dissecting the transnational actors, these include individuals such of renown experts on human rights, UN Special Rapporteurs and independent experts; law schools in foreign universities such as the Human Rights Centre at the University of California Berkeley; and transnational non-governmental organisations such as Minority Rights International; and global networks such as World Organisation Against Torture.

On media involvement, Krommendijk finds limited media coverage of implementation of the recommendations of UN treaty bodies in the three study countries except when the recommendations relate to politically controversial issues.¹⁹⁰ Similarly Viljoen and Louw find limited media involvement in compliance or non-compliance with the recommendations of the African Commission.¹⁹¹ This outlook also holds true for Kenya. Although there are instances of media highlighting state engagement with monitoring mechanisms such as during state reporting or mission visits by Special Rapporteurs, there is no evidence of media involvement in the subsequent processes of implementation.¹⁹²

In summary, this section sought to explain the variance in implementation across monitoring mechanisms, thematic rights and findings and recommendations and also to isolate the factors facilitative of implementation. It identified the factors predictive of implementation as: the nature of the remedy required, the thematic nature of the right, involvement of non-state actors including transnational actors and domestic infrastructure. The analytical discussions are more fully taken up in section 6.

5 Case specific impact

This section seeks to address the fourth question on what shapes impact. It discusses specific cases of impact and serves to illustrate the main thesis of this research. The main thesis is that findings and recommendations of monitoring mechanisms are implemented through processes of repeated interaction between state and non-state actors, in which a state is persuaded to accept the findings and recommendations and ultimately internalise them in its political, legal and social order. The section offers a chronological narration of events in relation to select findings and recommendations to demonstrate how impact occurs at the national level. The discussion also provides a factual foundation for testing the transnational legal process theory on implementation of international human rights norms. At

¹⁹⁰ Krommendijk (n 7 above) 370-372.

¹⁹¹ Viljoen & Louw (n 67 above) 29-30.

¹⁹² R Obala 'Kenya to table human rights report in Geneva' Standard Digital News, <http://www.standardmedia.co.ke/article/2000083614/kenya-to-table-human-rights-report-in-geneva> (accessed 25 June 2015); 'Kenya defends human rights record at United Nations' 23 January 2015, All Africa, <http://allafrica.com/stories/201501260680.html> (25 June 2015).

the outset, and to contextualise the discussion, this section recalls the transnational legal process theory.

The transnational legal process theory refers to the process by which an international law rule is interpreted through the interaction of transnational actors in a variety of interpretive forums, leading to internalisation of the rule in the domestic national legal system.¹⁹³ The process is thus a three step process involving: interaction, interpretation and internalisation. The theory posits that there are three forms internalisation are legal, political and social internalisation. Legal internalisation occurs when an international norm is incorporated in the domestic legal system and becomes part of national law through executive action, legislative action or judicial interpretation. Political internalisation occurs when a norm gains acceptance among the political elite who then advocate for its adoption as government policy. Social internalisation occurs as result of norms acquiring public legitimacy so that there is general adherence.¹⁹⁴ Further, the theory identifies six agents of internalisation. First are the transnational norm entrepreneurs such as non-governmental organisations or individuals who initiate the transnational legal process. Second are government norm entrepreneurs who work within government bureaucracies and structures to promote change. Third, the transnational issue networks or epistemic communities who have expertise in a given issue area and generate political solutions in contested issue areas. Fourth are interpretive communities and fora, which include treaty regimes, domestic, regional and international courts and domestic and regional legislatures. Fifth are bureaucratic compliance procedures which refer to standard operating procedures and internal mechanisms that ensure habitual compliance. Finally, are issue linkages which promote internalisation through process linkages.¹⁹⁵

5.1 Endorois case- status: partial implementation (slow motion)

The Endorois legal claim for return of their ancestral land began in 1997 when the Endorois filed a petition in the High Court in Kenya seeking to benefit from the Lake Bogoria Game Reserve situated in their ancestral land.¹⁹⁶ The High Court in 2002 issued judgment that following the nationalisation of the Game Reserve, the Endorois could not claim direct control of or benefit from the Reserve.¹⁹⁷ In 2003, transnational actors entered the scene illustrated by the filing of a communication at the African Commission on Human and Peoples' Rights, thus invoking a transnational legal process.¹⁹⁸ The African Commission created a forum within which the Endorois collective rights over ancestral land could be debated and interpreted by the state, non-state actors and transnational actors. Following years of repeated interactions, in November 2009, the African Commission issued a judicial interpretation declaring Kenya in violation of the global norms applicable to indigenous peoples land rights.¹⁹⁹ The process of internalisation began, thus shifting the issue from an international interpretive forum to the domestic arena and creating new agents of internalisation.

¹⁹³ Koh (n 72 above) 626.

¹⁹⁴ Koh (n 72 above) 642.

¹⁹⁵ Koh (n 72 above) 646-655.

¹⁹⁶ *William arap Ngasia et al v Baringo County Council* civil case 183 of 2000 Judgment 19 April 2002.

¹⁹⁷ As above.

¹⁹⁸ See Communication 276/03. The communication was filed by Centre for Minority Rights, a Kenyan based civil society organization and Minority Rights Group International on behalf of the Endorois community.

¹⁹⁹ Communication 276/03 decision on merit November 2009.

The Kenya National Commission on Human Rights in conjunction with the Endorois in March 2010 organised a festival, in which the Minister for Lands was the chief guest, to celebrate the African Commission decision. This interaction with the Lands Minister enabled the Endorois and the Kenya National Commission on Human Rights to advocate for their interpretation and persuade the state to implement the findings. Further, the agents of internalisation also used the Universal Peer Review in 2010 to further seek to internalise the Endorois findings within the state bureaucracy and push for implementation.²⁰⁰ Meanwhile, legal internalisation of community land rights and the recognition and protection of indigenous (minorities and marginalised) groups occurred through the promulgation of the Constitution, 2010.²⁰¹ In January 2011, a question was raised in Parliament to further urge the state to implement the Endorois findings.²⁰² However, the internalisation of the Endorois findings became contested with Kenya's 2010 nomination and successful declaration of Lake Bogoria as World Heritage Site in 2011.²⁰³ The reason for the contestation was that the government's lack of consultation and involvement of the Endorois in the determination of Lake Bogoria as a World Heritage Site further endorsed the view that the Endorois had no claim to the land. In February 2012, a tripartite committee was formed consisting of representatives of the Endorois community, government officials and the office of the Attorney General to examine modalities of implementing the Endorois findings.²⁰⁴ This however did not yield to implementation.

In April 2013, at the 53rd Ordinary Session of the African Commission, the Kenya Human Rights Commission, a civil society organisation, sought an implementation hearing with state representatives, the Endorois and members of the African Commission.²⁰⁵ At the hearing the state representative indicated that there were adequate internal state mechanisms in Kenya to oversee the implementation of the Endorois findings.²⁰⁶ In particular, the representative recognised the jurisdiction of the Office of the Ombudsman.²⁰⁷ In July 2013, the Kenya Human Rights Commission organised a meeting between the representatives of the Endorois and the Office of the Ombudsman in which the status of implementation, the challenges and the way forward were agreed upon.²⁰⁸ In September 2013, the Office of the

²⁰⁰ Office of the High Commission on Human Rights, Universal Periodic Review- Kenya, outcome of the review, <http://www.ohchr.org/EN/HRBodies/UPR/Pages/KESession8.aspx> (accessed 20 May 2015).

²⁰¹ Interview with M Njau-Kimani, Legal Secretary Office of the Attorney General and Department of Justice, Kenya, Nairobi on 4 March 2015. The Legal Secretary stated that since civil society organisations working on rights of indigenous communities were aware of the Government's position regarding indigeneity (informed by the state's arguments before the African Commission), they lobbied to have a provision in the Constitution recognizing minorities and marginalised groups. This position finds support in the fact that earlier draft constitutions of 2002, 2004 and 2005 did not contain any provision recognising and protecting indigeneity. See Constitution, 2010: Articles 56 on protection of minorities and marginalized groups as read together with Article 260 on definition of marginalised groups; and Article 63 on community land.

²⁰² Parliament of Kenya, National Assembly official report, Hansard 18 January 2011, 17-22 <http://www.parliament.go.ke/plone/archive/archive-10th-Parliament/hansards/official-report-18.01.11p/view> (4 June 2014).

²⁰³ UNESCO World Heritage 'Republic of Kenya nomination proposal: Kenya lakes in the Great Rift Valley (Elementaita, Nakuru and Bogoria)' 2010, <http://whc.unesco.org/uploads/nominations/1060rev.pdf> .

²⁰⁴ Interview with State Counsel, Office of the Attorney General, Sheria House, Nairobi, 3 July 2014.

²⁰⁵ Interview with the O Amollo, Ombudsman, Office of the Ombudsman, Kenya, Nairobi, 1 April 2015.

²⁰⁶ Correspondence between the Office of the Ombudsman and the Kenya Human Rights Commission dated 15 July 2013 (accessed from the Office of the Ombudsman).

²⁰⁷ As above.

²⁰⁸ As above.

Ombudsman acting as a government norm sponsor initiated correspondence with the Attorney General on implementation of the findings.²⁰⁹ The Attorney General in 2013 informed the Office of the Ombudsman that the issue of implementation under consideration in cabinet.²¹⁰ In September 2014, the President established a high level government task force to examine the practicability of the implementation of the findings.²¹¹ The task force was required to make interim recommendations on implementation in April 2015 and final recommendations in September 2015.²¹²

The formation of the presidential task force signifies internalisation of the Endorois findings, issued by the African Commission, in the bureaucratic and political state structures due to repeated interaction of state officials and non-state as well as transnational actors. Arguably this sets into motion the process of implementation of the Endorois findings. As of October 2015, the findings are not implemented as the interim recommendations of the task force have not been made public.

Contrasting the partial implementation and impact of the Endorois findings against other similarly situated findings - the African Court ruling relating to the Ogiek and the African Committee on the Child decision on Nubian children- which are non-implemented, a number of conclusions can be drawn. First, the two cases involved invocation of transnational legal processes by filing of a petition in the African Court and a communication before the African Committee on the Child. In the case of the Ogiek, the transnational actors included the African Commission, while in the Nubian children case it included the Open Society Justice Initiative and Institute for Human Rights and Development in Africa. Further, in both cases, a legal interpretation was sought in interpretive intergovernmental forums with the aim of triggering judicial interpretations that Kenya was in violation of the African Charter on Human and Peoples' Rights and the African Charter on the Child. However, following the judicial interpretations that Kenya was in violation of its international law obligations, the internalisation phase seems to have failed to shift to the domestic arena. Illustratively, in the Nubian Children case, the African Committee on the Child in November 2012 met the National Gender and Equality Commission seeking to enlist the Commission in implementation of the findings.²¹³ However, as of April 2015 the Open Society Justice Initiative had not contacted the Commission as agreed in the November 2012 meeting to enable the Commission initiate dialogue with government on implementation.²¹⁴ Similarly, in the Ogiek case there is no documented evidence of any interactions between the Ogieks or other agents of internalisation with the state to induce implementation.

²⁰⁹ Correspondence between the Office of the Ombudsman and the Attorney General dated 5 September 2013 (accessed from the Office of the Ombudsman).

²¹⁰ Correspondence between the Attorney General and Office of the Ombudsman dated 21 September 2013 (accessed from the Office of the Ombudsman).

²¹¹ Kenya Gazette notice 6708 of 26 September 2014 Task force on the implementation of the African Commission on Human and Peoples' Rights decision contained in Communication 276/03.

²¹² As above.

²¹³ Interview with D Anyona, Programme Officer and Personal Assistant to the Chairperson, National Gender and Equality Commission, Kenya, Nairobi, 23 April 2015.

²¹⁴ As above.

5.2 Enactment of national legislation on prevention of torture – status: partial implementation (slow motion)

In 2009, the Committee Against Torture in its consideration of Kenya's initial report recommended incorporation of the Convention Against Torture in the national legal framework and specifically, express definition of torture in penal statutes.²¹⁵ Following this interpretation, the next phase on internalisation moved to domestic forums. Initial interactions between the agents of internalisation and the Attorney General indicated that the government was not keen on drafting new legislation to sanction torture but rather preferred to amend the penal statute to incorporate a definition of torture.²¹⁶ In November 2009, non-state actors formed a tripartite partnership with the Kenya National Commission on Human Rights and the Ministry of Justice and initiated the process of drafting national legislation on prevention of torture.²¹⁷ In 2011, the draft bill was finalised and submitted to the Attorney General for prioritisation in line with the Constitution, 2010 mandated legislative schedule.

In 2013, the agents of internalisation aware of the reluctance of the state to enact the legislation and seeking to coerce the state to accept their interpretation again raised the issue of lack of national legislation on torture during the consideration of the state's second report to the Committee Against Torture.²¹⁸ The Committee on Torture in its June 2013 recommended, more specifically the tabling of the Prevention of Torture Bill before Parliament.²¹⁹ In addition, the World Organisation Against Torture in its October 2013 mission to Kenya further triggered interactions with the government urging the adoption of the bill.²²⁰ Although, the Attorney General on a number of occasions undertook to table the bill in Parliament, the bill was not tabled as government remained unconvinced on the need for stand-alone national legislation on torture. Additionally, in 2015 agents of internalisation reacting to the delay in enactment of the bill sought another favourable international interpretive forum, the Universal Periodic Review process.²²¹ Equally, the state was once more urged to prioritise tabling of the Bill in Parliament.²²² During the Universal Periodic Review process the Attorney General indicated that the government was convinced on the

²¹⁵ UN Committee Against Torture, concluding observations of the Committee Against Torture on Kenya, 19 January 2009, para 8.

²¹⁶ Interview with A Kamau, Programme Officer, Independent Medico-Legal Unit, Kenya, Nairobi, 17 January 2015.

²¹⁷ 'State of torture and related human rights violations' Alternative report to the Human Rights Committee to inform review of the Kenya State report, June 2012, 44, http://www.omct.org/files/2012/07/21869/state_of_torture_and_related_human_rights_violations_in_kenya_un_hrc.pdf (2 May 2015).

²¹⁸ 'State of torture and related human rights violations in Kenya: alternative report to the UN Committee against Torture informing its review of Kenya's second periodic state' May 2013, http://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/KEN/INT_CAT_NGO_KEN_12866_E.pdf (accessed 2 May 2015).

²¹⁹ UN Committee Against Torture, concluding recommendations on Kenya, 19 June 2013, para 6.

²²⁰ World Organisation Against Torture 'Kenya: torture reforms must tackle implementation gap and end impunity' 5 October 2013, http://www.omct.org/files/2013/10/22401/kenya_pr_final_mission.pdf (20 May 2015).

²²¹ Interview with A Nyanjong, Programme Manager, International Commission of Jurists- Kenya Section, Nairobi, 22 April 2015. This interviewee participated in the 2015 Kenya Universal Peer Review process and also in the 2013 Committee against Torture review of Kenya's 2nd state report and presented the alternative report prepared by non-state actors.

²²² As above.

need for the Bill.²²³ This signifies political internalisation of the recommendations which optimistically will lead to full implementation.

A number of issues arise from the foregoing analysis. First is the obvious question of why the internalisation agents have not sought a government norm sponsor in Parliament to introduce the Bill as a private member Bill and subsequently spearhead its enactment. This is particularly in view of similar recommendations requiring enactment of legislation in which non-state actors have initiated bills and engaged government norm sponsors in Parliament to push for their enactment. However, non-state actors indicated that a private member bill would be futile since even if passed, the state would obstruct implementation particularly in view of the fact that it has not been convinced on the need for stand-alone anti-torture legislation.²²⁴ Consequently, the non-state actors opined that it was more strategic to seek political internalisation of the recommendation within the government bureaucratic and political structures.²²⁵

Second, it is notable that legal internalisation occurred with the incorporation of the anti-torture norms in the national legal system through the Constitution, 2010. Further, judicial internalisation is also illustrated through domestic litigation on torture in which courts have repeatedly adjudicated cases of torture awarded compensation. The question then is why the delay in implementation of this recommendation. The answer lies in lack of political internalisation which explains government obstructionism of the Bill since its finalisation in 2009.

5.3 Adoption of legislation or guidelines to address evictions – status: partial implementation (slow motion)

The recommendation on adoption of legislation or guidelines to address evictions was first made by the Special Rapporteur on Economic, Social and Cultural Rights in 2004. Subsequently, in 2005 after consideration of Kenya's second periodic report, the Human Rights Committee recommended that the state should develop appropriate procedures for dealing with evictions.²²⁶ Following this interpretive declaration, the internalisation phase shifted to the national level. In 2006, the Centre for Housing Rights and Evictions and the Economic, Social and Cultural Rights Centre (Haki jamii) organised a workshop with the Ministry of Lands on implementation of the Human Rights Committee recommendation.²²⁷ A joint task force was formed to develop the guidelines on evictions which were finalised in 2010.²²⁸ Later consensus was reached to develop a legislative framework resulting in the Evictions and Resettlement Bill which was handed over to cabinet in 2011.²²⁹ In 2010, the agents of internalisation began to initiate a series of domestic litigation on forced evictions promoting interaction with state officials and judicial incorporation of the right against forced

²²³ As above.

²²⁴ As above.

²²⁵ As above.

²²⁶ UN Human Rights Committee concluding observations of the Human Rights Committee on Kenya, 29 April 2005, para 22.

²²⁷ Economic and Social Rights Centre (Hakijamii), Draft eviction and resettlement guidelines, 2012, 4, <http://www.es-cr-net.org/sites/default/files/Final%20evictions%20booklet.pdf> (3 May 2015).

²²⁸ As above.

²²⁹ Interview with P Vata, Executive Director, Economic, Social and Cultural Rights Centre (Haki jamii), Kenya, Nairobi, 10 March 2015.

evictions.²³⁰ Notably, although the Constitution, 2010 protects the right to adequate housing, it does not expressly prohibit forced evictions.²³¹ Transnational actors, who included individual norm entrepreneurs, actively participated in the domestic litigation by filing submissions as interested parties in which they cited the recommendations on evictions were debated and interpreted by national courts.²³² Resultantly, the national courts directed the government to implement the recommendation on adoption of legislation and guidelines on evictions in Kenya.

The agents of internalisation have thus used judicialisation to reinforce the legal internalisation of the international norm against forced evictions. In this instance, the Judiciary has acted as a government norm sponsor pushing the state's political structures to accept and implement the recommendation. Therefore, legal internalisation of the right against forced evictions has already occurred through judicial interpretation, and consequently the courts have adjudicated over the right against forced evictions as if it is national law. What then explains government reluctance to table the Bill in Parliament? It is probable that the international norm has not been internalised in the government political structures. However, in the face of legal internalisation of the norm, it is likely that the recommendation will be implemented through the enactment of the Bill.

5.4 Enactment of legislation on anti-trafficking in persons – status: fully implemented

The recommendation on enactment of national legislation on anti-trafficking in persons emanated from delay by the state to table in Parliament a bill drafted by non-state actors and handed over to the Attorney General in 2006. Following the delay, from 2007 non-state actors moved to various international fora seeking to interact with state officials and specific interpretation that delay in enacting legislation on trafficking in persons was a violation of the state's obligation to protect women and children.²³³ Resultantly, three monitoring mechanisms issued recommendations urging the state to prioritise the enactment of the legislation.²³⁴ The internalisation phase then shifted to the national level for implementation. In 2009, the non-state actors identified a government norm sponsor to introduce the Bill in Parliament as a private member bill.²³⁵ The Bill was enacted in July 2010.²³⁶ However, the

²³⁰ *Satrose Ayuma & 11 others v Registered trustees of Kenya Railways Staff Retirement Benefits Scheme & 3 others* [2013] eKLR; *Ibrahim Sangor Osman & others v The Minister for Provincial Administration and Internal Security* [2011] eKLR; *Mitu-belle Welfare Association v Attorney General & 2 others* [2012] eKLR; *Susan Waithera Kariuki v Town Clerk Nairobi City Council & 3 others* [2013] eKLR .

²³¹ Article 43 (1) (b).

²³² In the *Satrose Ayuma* case, the former UN Special Rapporteur on Economic, Social and Cultural Rights appeared as an interested party and submitted to the court his findings on the right to housing in Kenya during his 2004 mission in which he made the finding on development of guidelines on evictions. Similarly, in the *Ibrahim Sangor* case, the Economic, Social and Cultural Rights network and Malcom Langford filed submissions as interested parties and cited the Human Rights Committee finding requiring Kenya to develop guidelines on evictions.

²³³ Interview with P Mutiso, CRADLE, Programme Officer, Kenya, Nairobi, 22 March 2015. See also 'Situation of violence against women and children in Kenya: alternative report to the UN Committee Against Torture', 2008, 19.

²³⁴ Committee on Elimination of Discrimination against Women 2007; Committee on Economic, Social and Cultural Rights 2008; and Committee Against Torture 2009.

²³⁵ Parliament of Kenya National Assembly official report, 15 July 2010, 28-42, <http://www.parliament.go.ke/plone/archive/archive-10th-Parliament/hansards/official-records-06.07.10/view> (3

President did not assent to the Bill. This delay triggered domestic pressure from non-state actors on the Executive leading to the assenting on the Bill in October 2010.²³⁷ Despite assenting to the Bill, the government did not gazette the Act, which provided that its commencement would be determined by the relevant minister. Non-state actors in September 2012 moved to the domestic courts to compel the government to operationalise the Act.²³⁸ In October 2012 the Act was gazetted and commenced operation. Yet again, the government failed to set up the trust fund established in the Act to assist victims of trafficking.²³⁹ Consequently, non-state actors in 2015 moved to national courts to compel the government to set up the fund.²⁴⁰

From the foregoing, the delay in enactment of the counter-trafficking in persons legislation forced non-state actors to seek various fora within which to engage the state and compel the state to enact the legislation. Further, the non-state actors engaged a government norm sponsor to move the bill in Parliament. Even then, the process of internalisation remained contested forcing the non-state actors to move to national courts to compel the state to assent to the bill, to operationalise the Act and set up the required implementation mechanisms.

6 Review of impact in the specific context of findings of adjudicative monitoring processes

As already discussed, the research has considered four findings arising from the adjudicative processes of the African Court, the African Commission and the African Committee on the Child. Of the four findings only the findings relating to the Endorois communication are partially implemented, to the extent that the state has put in place a mechanism to advise on implementation. Accordingly, the research concluded that the findings in the Endorois communication had influenced executive action and civil society initiatives (chapter 8, section 2.5.3). This section considers two issues: (i) impact in the context of individualised findings; and (ii) whether adjudicative monitoring processes are a poor predictor of impact. On the first issue of impact in regard to individualised remedies, one finding from the African Commission in the Ouko case related to exercise of an individual's political rights, while the other three, on the Endorois community, the Ogiek community and children of Nubian descent are considered as individualised remedies as they related to rights of identified and specific group of persons. In relation to the Endorois case, although categorised as partially implemented, it is notable that the state has only initiated measures towards implementation. What does failure of the three findings to influence the desired action from government actors suggest about the impact of monitoring mechanisms? Thus far the research has alluded to the limited impact of the findings and recommendations of monitoring mechanisms on the overall. The further absence of impact

May 2015). Notably, the Member of Parliament who tabled the bill had been part of the civil society actors that initiated the drafting of the bill in 2006.

²³⁶ As above.

²³⁷ The Cradle 'Assent to and implementation of the law to combat human trafficking an urgent necessity' 24 September 2010, <http://www.thecradle.or.ke/news-events/40-assent-to-and-implementation-of-the-law-to-combat-human-trafficking-an-urgent-necessity> (2 May 2015).

²³⁸ Petition 28 of 2012,

²³⁹ Interview with P Mutiso, CRADLE, Programme Officer, Nairobi, 22 March 2015.

²⁴⁰ Interview with P Mutiso, CRADLE, Programme Officer, Nairobi, 22 March 2015. See also *CRADLE v Cabinet Secretary Labour, Social Security and Services & Attorney General*, Petition 68 of 2015.

in relation to individualised findings supports the assertion that monitoring mechanisms have had limited impact on national human rights practices. In addition, it brings to focus the question of actual enjoyment of rights. Although a detailed analysis of actual enjoyment of rights remains outside the focus of this research, looking at the assessment of impact under taken in sections 2.1.3, 2.2.3, 2.3.3, 2.4.3 and 2.5.3 of this chapter, most of the findings and recommendations that have had an impact on actions of key domestic actors are partially implemented. Pointedly, it is partial implementation in the category of measures having been initiated but are not fully implemented. In light of this, it is plausible to argue that the limited impact has largely not resulted into actual enjoyment of rights.

On the second issue on whether adjudicative processes are a poor predictor of impact, the discussion focuses on post-adjudicative analysis. The discussion on the Ouko case is limited since there is no information on it. However, the other three cases offer more informative analysis. In relation to the Endorois case, as discussed above (see comprehensive discussion in section 5.1), soon after the findings by the African Commission, non-state actors, the Endorois community and the Kenya National Commission on Human Rights in 2010 initiated interactions with the executive on implementation of the decision. Subsequent repeated institutional interactions with the executive by Parliament in 2011, the African Commission in 2013 and the Office of the Ombudsman in 2013 led to the setting up of mechanisms for implementation. On the children of Nubian descent findings, (see discussion in 5.1), the post-adjudicative analysis reveals that the African Committee on the Child engaged the National Gender and Equality Commission in November 2012 to discuss implementation. However, as of April 2015, no follow-up measures had been undertaken by the Open Society Justice Initiative in providing the requisite information to enable the National Gender and Equality Commission initiate interaction with the executive. Additionally, there is no evidence of any initiatives undertaken by non-state actors in relation to the findings in this case towards implementation. Equally, in relation to the Ogiek case, there is no evidence of any engagement with the executive on the findings. Notably as discussed in 2.5.1, the executive in September 2013 took measures contrary to the African Court's order. Further, in April 2014, in a similar case in the national courts, the executive appealed against the court's ruling in favour of the Ogiek. Drawing from the above analysis, it is reasonable to conclude that impact is determined by the post-adjudication measures undertaken.

A final issue in this section is that of contextualising the findings of the Endorois communication, the Ogiek case and the children of Nubian descent communication within the broader debate of the thematic rights in question. The findings in these cases touch on indigenous peoples and minority rights. As already discussed in 4.2, these indigenous peoples' rights have the lowest levels of implementation due to their contested status at national level and relatively small number of non-state actors working on these rights at the national level. However, as demonstrated by the Endorois case, the explanatory power for implementation and impact lies in the repeated engagement with the state.

7 Discussions on the theoretical implications of the analysis

This section addresses the fifth question on the theoretical implications of the analysis. What accounts for implementation or non-implementation? Based on the number and variety of state and non-state actors involved in implementation and the complexity of their interactions, it is difficult to isolate one factor to explain implementation or non-

implementation. It is nonetheless possible to achieve explanatory power by viewing implementation from at least three different perspectives: first, from the context of domestic infrastructure and institutions; second non-state actors; and third by emphasizing the transnational legal process theory.

7.1 Domestic infrastructure and institutions

From this perspective implementation and non-implementation can be explained through domestic infrastructure and domestic institutions. First on the domestic infrastructure, the thematic analysis and qualitative interviews suggest that implementation structures with political standing and human rights capacity facilitate implementation of findings and recommendations across government agencies. This can be explained in at least two ways. First, from the perspective of political prioritisation of the findings and recommendations acquired through submission to cabinet, subsequent approval and delegation of implementation to the relevant government ministries. Second, from the perspective of coordination of implementation of the findings and recommendations across different government agencies, since the domestic implementation infrastructure has political standing in government.

Second on domestic institutions, findings and recommendations of monitoring mechanisms are ordinarily addressed to the Executive branch so that responsibility for implementation principally falls on the Executive. From the thematic analysis there is no evidence of any of the other two branches -Parliament and the Judiciary-independently initiating implementation. This is attributable to the fact that in the case of Parliament, its role in the implementation of the findings and recommendations is not expressly defined in the national legal order. Similarly, in relation to the Judiciary, the juridical status of findings of international monitoring mechanisms, particularly binding decisions, in national courts remains uncertain, the exception being decisions of East African Court of Justice which have legal effect in national courts. Contrastingly, the status of decisions of the African Court in national courts is unclear as illustrated by the order for provisional measures in the *Ogiek* case. The power of domestic institutions to facilitate implementation can be explained in terms of capacity and willingness to implement the findings and recommendations and the permeability of the domestic institutions to non-state and transnational actors.

In addition to these domestic institutions are national human rights institutions as earlier discussed. Unlike Parliament and the Judiciary the national human rights institutions have the added appeal of express human rights mandates. The question then is how these institutions can better facilitate implementation.

7.2 Non-state actors

The second perspective focuses on non-state actors to explain implementation and non-implementation. Non-state actors have had a catalytic effect on implementation particularly through mobilisation, domestic and international litigation, initiating draft national legislation and the yet to be tested formation of pro-compliance coalitions with government agencies.²⁴¹

²⁴¹ The pro-compliance coalition established by non-state actors and an informal parliamentary group (Kenya Parliamentary Human Rights Caucus) on a draft bill in the National Assembly on amendment of penal provisions that designate the death penalty as the only mandatory sentence which was tabled in the National Assembly in June 2015.

The analytical observations highlight the significance of non-state actors in pressuring government towards implementation beyond factors such as the thematic rights in question or the nature of the remedy required. Illustratively, although women's rights are politically contested, the thematic analysis indicates a high level of partial and full implementation almost equal to the less contested children's rights. This is attributed to the large number of non-state actors involved in women's rights. Contrastingly, thematic rights such as rights of marginalised and minority groups which have fewer non-state actors record lower levels of implementation. The findings relating to the Ogiek community and the Nubian children are illustrative examples. On the nature of the remedy required by the findings and recommendations, as already discussed under 4.2, similar studies on implementation suggest that recommendations requiring enactment of new legislation or amendment of legislation are least implemented. However, the analytical observations indicate high levels of recommendations requiring enactment of legislation, which is primarily attributed to initiatives of non-state actors in initiating draft bills and identifying government norm sponsors to spearhead tabling and enactment in Parliament. The explanatory power of non-state actors in facilitating implementation thus lies in their mobilisation, litigation, initiating draft legislation and establishment of pro-compliance coalitions.

7.3 Emphasizing on the transnational legal process theory

The third perspective, the transnational legal process theory, draws upon and develops on the insights of the previous two perspectives to explain implementation. The significance of domestic institutions and non-state actors suggests focussing on the domestic context as a framework for explaining implementation. The transnational legal process theory hypothesizes that international human rights law is enforced through 'institutional interaction, interpretation of legal norms and attempts to internalise those norms in domestic legal systems'.²⁴² Impliedly, implementation of the findings and recommendations of monitoring mechanisms occurs as a result of vertical norm-internalisation. Similarly, instances of partial or non-implementation result from lack of or ineffective processes of vertical norm internalisation. Accordingly in reviewing the theoretical implication, the norm-internalisation phase is then the unit of analysis. Koh defines norm-internalisation as the complex process of institutional interaction by which states incorporate international law concepts into their domestic legal and political processes.²⁴³ Further, Koh identifies three forms of internalisation: social, political and legal, (see comprehensive discussions in section 5). Notably, there is no definite order for which the three forms of internalisation occur and equally, the forms of legal internalisation do not fit any particular sequence.²⁴⁴ Additionally, beyond norm internalisation is the fourth phase, obedience.²⁴⁵ Obedience occurs as a result of full norm internalisation when a norm is accepted by society, policy makers and is legally recognised.

Transposing the above theoretical concepts to the analysis on implementation, findings and recommendations of monitoring mechanisms are definitive interpretations of international human rights treaties. The findings and recommendations thus represent treaty norms. The question then is to what extent can internalisation of the findings and recommendations be

²⁴² Koh (n 1 above) 1399.

²⁴³ H Koh 'Transnational legal process' (1996) 75 *Neb. L. Rev.* 205.

²⁴⁴ As above.

²⁴⁵ Koh (n 1 above) 1414.

observed in the Kenyan context? Undoubtedly, partial norm-internalisation is observable in a number of instances. Legal internalisation, through legislative internalisation and judicial internalisation, is the most prevalent form of internalisation. This is attributed largely to the constitution review process which entrenched many of the international norms expressed in the findings and recommendations as constitutional norms. Leaving aside the constitution review process, a number of the findings and recommendations have been internalised through domestic legislation, and particularly the recommendations that relate to enactment of national legislation. There are also instances of judicial incorporation as demonstrated in the recommendations on evictions and torture, in which domestic litigation has resulted in internalisation of the norms on evictions and torture. Predictively, there are also instances of judicial internalisation in politically and socially contested issues such as recognition of the rights of sexual minorities.²⁴⁶ Further, legal internalisation through executive policy can also be observed in the case of the APRM recommendations on women participation in the public service in which the President issued an executive directive. Notwithstanding, there is limited evidence of full norm internalisation.

The next question then turns on the relationship between the extent of internalisation and implementation. Internalisation, as defined previously, is incorporation of international human rights norms in the domestic political and legal structures. On the other hand, implementation is taking action that is responsive to an international obligation. Implementation therefore connotes pathways or processes to full internalisation. Impliedly, full implementation does not therefore signal full internalisation.

Revisiting the analytical observations, the most dominant mode of implementation is partial implementation while non-implementation remains widespread. In addition, implementation is characterised by state obstructionism, even in instances in which full implementation has otherwise been achieved. The partial implementation indicates that the processes of institutional interaction and interpretation have not resulted in incorporation of the norms in the domestic legal and political structures. Yet, as discussed above, legal internalisation has largely occurred particularly as a result of the constitution review process which explicitly incorporates international human rights norms in the domestic legal fabric. What accounts for widespread partial and non-implementation? Legal internalisation matters little if the Executive branch is determined to obstruct implementation. How then is the obstructionism explained? The transnational legal process theory offers two answers. First, from the political internalisation perspective; and second broadly based on norm-internalisation. On political internalisation, the theory posits that it occurs when political elite and structures accept a norm and advocate for its adoption as government policy. Drawing from this, reluctance of government bureaucracies to implement findings and recommendations, often demonstrated by obstruction of the implementation process, indicates lack of political internalisation. On the broader argument of norm-internalisation, the theory distinguishes between compliance and obedience. Compliance is defined as awareness of a norm and accepting its influence to gain certain incentives or avoid penalties. On the other hand, obedience is internalised compliance, in which an actor has incorporated a norm in its internal value set. Accordingly,

²⁴⁶ See *Eric Gitari v Non-Governmental Organisations Coordinating Board & 4 others* [2015] eKLR. Although the case did not directly relate to the recommendations, which recommend de-criminalisation of consensual same sex relations, the broader issue is that the recognition of sexual minorities as protected under the non-recommendations on discriminatory provisions has implications on the continued criminalisation of their sexual relations.

obstructionism can be explained as ‘grudging compliance’ signifying that the norm has not been incorporated in the domestic political structures. This is particularly evident in instances in which the government blocks full implementation or in instances of full implementation, fails to, for example to operationalise enacted legislation or regresses on constitutionally entrenched norms. Illustratively, failure to operationalise the Counter-trafficking in Persons Act and the Internally Displaced Persons Act and reversal of constitutional norms on the rights of women and police accountability indicate grudging compliance.

The transnational legal process theory suggests that one form of internalisation triggers the other forms of internalisation. What is the possibility that legal internalisation will trigger political and social internalisation leading to full norm-internalisation? Revisiting the analytical observations, there are illustrative instances in which legal internalisation has triggered political or social internalisation. First, as discussed in section 5.2 in relation to the enactment of anti-torture legislation. The Constitution, 2010 explicitly incorporated anti-torture norms in the national legal order, while litigation on torture cases in national courts has led to judicial incorporation of international law norms on torture in the domestic legal order. While political internalisation on anti-torture remained elusive, demonstrated by reluctance to implement the recommendation on enactment of national legislation on torture, the government in 2015 indicated it was convinced on the need for anti-torture legislation. Second, also as discussed on the Endorois case, the Constitution, 2010 incorporated the norms on rights of indigenous peoples and community land rights in the national legal order. Additionally, in March 2014 the High Court through the domestic case on the Ogiek community integrated international norms on community land rights in the national legal order. Flowing from the constitutional recognition and the judicial incorporation, the political elites seemingly have begun to adopt these norms as demonstrated by the September 2014 establishment of a high-level government task force on implementation of the Endorois findings. It is thus plausible to argue that the legal internalisation will lead to political and social internalisation.

Further on the analytical observations, the analysis in the previous sections of this chapter reveals that findings from adjudicative monitoring processes remain non-implemented with the exception of the partially implemented findings in the Endorois case. From the theoretical perspective what are the implications, if any? Leaving aside the Ouko case, the other three cases as pointed out in section 6 relate to indigenous persons and minority rights. Koh argues that the main determinant whether an international law rule will be obeyed is the degree to which the rule is internalised in the domestic legal system.²⁴⁷ As noted above, the rights of indigenous peoples and minorities have undergone legal internalisation through their entrenchment in the Constitution, 2010. The argument advanced above in relation to the Endorois case is that the establishment of the implementation mechanism signifies a move towards political internalisation. Therefore it can be presumed that in relation to the Ogiek and children of Nubian descent repeated interactions with the state could result in implementation. Drawing from this argument the explanatory power for implementation does not lie in adjudicative nature of the processes, rather in the level of internalisation of the rights in issue, which is to be achieved by triggering institutional interaction and interpretation.

²⁴⁷ Koh (n 72 above) 674-676.

Developing on the earlier two perspectives - domestic institutions and non-state actors- the transnational legal process theory is premised on institutional interaction, interpretation and norm-internalisation. In relation to domestic institutions, what institutions are available in the national arena for norm enunciation and elaboration? Further, how are the institutions adapted for that purpose? The analytical observations highlight the Judiciary and Parliament as key actors in norm enunciation and elaboration at the national level. Beyond the mere existence of these institutions is the question of capacity and willingness. For the Judiciary, most of the international norms enjoy constitutional protection, hence its role in judicial incorporation through domestic litigation is unquestionable. On the other hand for Parliament, outside its role in legislative internalisation through enactment of legislation, other roles are less explicit.²⁴⁸ The issue then narrows to how these institutions can be adapted to enhance their roles in implementation? In addition, what other domestic institutions can be created to increase institutional interaction with the findings and recommendations of monitoring mechanisms? What bureaucratic routines can be created to embed findings and recommendations of monitoring mechanisms into these domestic institutions?

On the issue of non-state actors, the analytical observations highlight the role of non-state actors in triggering institutional interaction. The transnational process theory suggests empowering more actors to participate in the norm-internalisation and expanding the roles of intergovernmental organisations, non-governmental organisations, private business entities and 'trans-national norm entrepreneurs'.²⁴⁹ Dissecting the actors involved in the transnational legal process in Kenya, non-governmental organisations and transnational norm entrepreneurs stand out. What other actors can be empowered to participate in norm-internalisation? The analysis indicates low levels of political and social internalisation leading to no or partial implementation. The question then is what actors can be empowered for political and social internalisation. What about epistemic communities?²⁵⁰ The transnational legal process theory suggests that the role of epistemic communities in norm-internalisation as debating and generating political solutions among individuals, government agencies, intergovernmental organisations and domestic non-governmental organisations.²⁵¹ The analysis points to participation of epistemic communities in norm-internalisation in Kenya in at least two instances: the economic, social and cultural rights global network that has participated in domestic litigation on evictions in Kenya and the World Organisation Against Torture (OMCT) which has participated in drafting of shadow reports. Drawing from this, the involvement of epistemic communities appears limited. In view of the limited political internalisation, undoubtedly policy-relevant discussions to generate political solutions particularly in contested norms such as the death penalty, indigenous peoples' rights and sexual minorities' rights would promote internalisation.

The final issue is that of impact, which is central to this research. The question raised in section 4, which so far remains unanswered, is why the findings and recommendations of

²⁴⁸ Earlier drafts of the Constitution published in 2002, 2004, 2005 and 2009 expressly vested Parliament with the power to oversee implementation of findings of monitoring mechanisms. See discussion under 4.3.2.

²⁴⁹ HH Koh 'Why do nations obey international law?' (1997) 106 *Yale L.J* 2656.

²⁵⁰ The transnational legal process theory defines epistemic communities as 'networks of professionals with recognised expertise and competence in a particular domain and an authoritative claim to policy- relevant knowledge within that domain or issue area.'

²⁵¹ Koh (n 72 above) 649.

monitoring mechanisms have influenced actions of non-state actors and, to some extent government actors such as the Judiciary, but yet failed to influence the desired actions from government institutions, particularly the Executive.

Linking impact to the theoretical framework, impact may be viewed as internalised compliance, thus obedience. Impact implies incorporation of norms into the domestic legal, political and social structures and bureaucracies hence deliberate implementation since the norms are part of the state's internal value set. Drawing from this, the findings and recommendations should influence the actions of key government actors towards implementation. The analysis indicates that the findings and recommendations have had little impact in Kenya, and only in a limited number of instances have they influenced actions of key government actors. Further, as already pointed out, full norm-internalisation has not occurred in many issues areas. While legal internalisation has largely occurred in relation to most norms expressed in the findings and recommendations, political and social internalisation remain elusive demonstrated by widespread partial implementation characterised by state obstructionism and non-implementation. Conclusively, the failure of the findings and recommendations of monitoring mechanisms to influence the actions of key government actors is largely due to lack of political and social internalisation.

8 Conclusion

This chapter has endeavoured to answer the first and second sub-questions of this research. On the first question relating to the impact of monitoring mechanisms in Kenya, the chapter has undertaken an analysis of the implementation and impact of the findings and recommendations of monitoring mechanisms assessed in chapters three, four, five and six. At the outset the assessment established that the level of implementation of findings of monitoring mechanisms is low with the most dominant mode of implementation being partial rather than full implementation. In addition, that the findings and recommendations have limited impact in Kenya since only in a handful of instances have deliberate and conscious efforts been undertaken by the state on implementation. The chapter has highlighted the factors that have facilitated implementation and the demonstrated the processes that shape impact.

On the second sub-question on assessment of compliance theories based on Kenya's case study, the chapter, based on the transnational legal process theory, has conducted an extensive discussion on the theoretical implications of the analysis. The observations in a large part support the transnational legal process theory. First, it is the significance of repeated interactions of non-state and transnational actors with the state in different fora leading to implementation of the findings and recommendations. It is this process of repeated interaction, interpretation that leads to internalisation thus influence the desired kind of action from key government actors. Second, the widespread partial and non implementation despite incorporation of human rights norms in the Constitution, 2010 conforms to the theory's proposition of incomplete internalisation. The chapter has thus demonstrated that the transnational legal process theory offers a suitable guide on the study of the impact of international human rights monitoring mechanisms in Kenya.

The chapter has also applied itself on the question of incomplete norm internalisation and highlighted issues that can be further explored to increase norm-internalisation through institutional interaction and norm interpretation. These issues are tackled in the next chapter

which seeks to answer the third sub-question on developing a blueprint to maximise the political, legal and social internalisation of the findings and recommendations in Kenya.

Chapter 9

Conclusion and recommendations

1 Introduction

The preceding chapters have assessed the extent of implementation of the findings and recommendations of monitoring mechanisms in Kenya. In addition, the chapters assessed the impact of the findings and recommendations on human rights practices in Kenya by reviewing their influence in: legislation, policy-making, constitution making process, court judgments and initiatives by non-state actors.

Three main conclusions are drawn. These are: (i) that the level of implementation of the findings and recommendations of monitoring mechanisms is low mainly characterized by non-implementation and partial implementation; (ii) that the findings and recommendations have had limited impact in influencing policy, legislation, constitution review process and court judgments; and (iii) that internalisation of the norms articulated in the findings and recommendations in the domestic political structures and bureaucracies is yet to occur, hence the limited impact.

These conclusions at first appear puzzling. Why would a state that actively engages with international human rights monitoring mechanisms fail to implement the findings and recommendations that result from these engagements? This research establishes that from the perspective of the transnational legal process theory the answer lies in lack of norm-internalisation which accounts for the limited impact of the findings and recommendations.

The conclusions also echo the broader debate alluded to in chapter one on treaty body reform and the legitimacy of the international human rights monitoring system. It is uninspiring that Kenya's participation in the system in the last 34 years has only resulted in low levels of influence on national human rights practices. This brings to sharp focus the very rationale of the international human rights monitoring system. The issue was however, not within the scope of this research. The conclusions of this research may nonetheless inform future research on the rationale of the international human rights monitoring system.

The focus of this chapter is the third sub-question of the research on what strategies can be applied to maximize internalisation of human rights norms at the national level to enhance the impact of the findings and recommendations of monitoring mechanisms in Kenya.

1.1 Developing a blue-print for internalisation

The analytical discussions in chapter 8 highlighted three forms of internalisation: political, legal and social internalisation, based on the transnational legal process theory. These discussions indicated that while legal internalisation has largely been achieved through entrenchment of international norms as constitutional norms. However, political and social internalisation remains far from achieved. This section therefore suggests strategies that may be applied to maximise political, legal and social internalisation. The recommendations discussed under political, legal or social internalisation are neither competing nor mutually exclusive.

1.1.1 Political internalisation

Develop a political culture more receptive to international human rights law and supranational authority

The focus is on the place of international human rights law and its regulation regimes in the political order, and specifically on the political processes that intervene in the implementation of the findings and recommendations of monitoring mechanisms. This research has demonstrated that the political elite use the state bureaucracy to impede the impact of the monitoring mechanisms by obstructing implementation. What opportunities exist to embed international human rights law in the daily practice of law and politics among the political elite and policy makers? The Constitution, 2010 incorporates international human rights in the bill of rights,²⁵² it also incorporates international law in the domestic legal order²⁵³ and implicitly expresses Kenya's willingness to be bound by international human rights regimes.²⁵⁴ Moreover to assure obedience to international obligations, the Constitution, 2010 binds the President to ensure Kenya fulfill its obligations,²⁵⁵ and to report to Parliament on the progress.²⁵⁶ Notwithstanding, a political culture that is receptive to international human rights and supranational adjudication remains elusive. The issue then narrows to how domestically embedded international norms and institutions can permeate domestic political structures and bureaucracies and influence the actions of key government actors. The following specific recommendations are made:

Enact national legislation on a framework and procedures for execution of international human rights judgments

While there is national level clarity on the procedures for the execution of the judgments and decisions of the East African Court of Justice,²⁵⁷ the procedures for the judgments of the African Court are unclear.²⁵⁸ However, notwithstanding the clarity on the procedures for execution of judgments in relation to the East African Court of Justice, there exist no procedures for accountability on the Executive's implementation of the judgments. The

²⁵² See generally Constitution, 2010, chapter four, the Bill of Rights.

²⁵³ Article 2 (5): 'The general rules of international law shall form part of the law of Kenya.' Article 2 (6): 'Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.'

²⁵⁴ Article 21 (4): 'The State shall enact and implement legislation to fulfil its international obligations in respect of human rights and fundamental freedoms.'

²⁵⁵ Article 132 (5): 'The President shall ensure that the international obligations of the Republic are fulfilled through the actions of the relevant Cabinet Secretaries.'

²⁵⁶ Article 132 (1)(c) (iii): 'The President shall once every year submit a report for debate to the National Assembly on the progress made in fulfilling the international obligations of the Republic.'

²⁵⁷ The Treaty for the Establishment of the East African Community provides for the execution of the judgments of the East African Court of the Justice requiring compensation. In practice also, the judgments of the Court are executable in the national courts without anything more. See Article 44: 'The execution of a judgment of the Court which imposes a pecuniary obligation on a person shall be governed by the rules of civil procedure in force in the Partner State in which the execution is to take place. The order for execution shall be appended to the judgment of the court which shall require only the verification of the authenticity of the judgment by the Registrar whereupon, the party in whose favour execution is to take place, may proceed to execute the judgment.'

²⁵⁸ The African Court Rule of Procedure, 2010 obligate states to cooperate in the course of proceedings before the Court. See 2010 Rules of Procedure of the African Court on Human and Peoples' Rights, Rule 32: (1) The State Parties to a case have the obligation to cooperate so as to ensure that all notices, communication and summonses addressed to persons residing within their territory or falling under their jurisdiction are duly executed.' (2) 'The same rule shall apply to any proceeding that the Court decides to conduct or to order in the territory of a State Party to a case.'

import of the lack of clarity and accountability framework is that international human rights judgments and decisions do not resonate with the political understandings of domestic obligations. Therefore, Kenya should firstly enact legislation that establishes a framework for the reception and execution of the decisions of the African Court. Secondly, the legislation should provide for an accountability framework in the execution of the judgments. The legislation should clearly define the roles of different actors such as: the Ministry of Foreign Affairs which is charged with receiving the judgment from the relevant international court and communicating the implementation status; the Judiciary which is responsible for execution of the judgment; the Attorney General who is responsible for implementation; and Parliament for accountability. In relation to accountability the legislation should set out timelines within which the Ministry of Foreign Affairs should transmit the judgment to the Judiciary and the timelines for execution by the Judiciary. In addition, the legislation should set timelines within which the Ministry of Foreign Affairs communicates back to the relevant court on the implementation of the judgment. Further, to ensure accountability of both the Executive and the Judiciary in the reception, execution and implementation of judgments of international courts, the President should annually report to Parliament on the status of the execution of the judgments. This resonates with the Constitutional provisions, previously discussed, which bind the President to annually report to Parliament on fulfilment of international obligations.

Establish domestic political structures for implementation of findings and recommendations of monitoring mechanisms

The rationale for the establishment of domestic political structures is to guarantee access to forums in which policy debates transpire. This research has revealed that at present the domestic mechanisms for the implementation of the findings and recommendations of monitoring mechanisms are weak and lack political standing. This is further illustrated by the bypassing of this Inter-Ministerial Committee by the President in September 2014 and appointment of a high level Inter-Ministerial Committee on the implementation of the Endorois decision. The main problem seems to stem from the diminished role of the former Ministry of Justice which was relegated to a Department in the Office of the Attorney General and the lack of clarity on the mandate of the Ministry of Foreign Affairs in relation to international human rights treaties.

At the outset, Cabinet should consider elevating the Department of Justice to a fully fledged Ministry. This recommendation is particularly functional for two reasons. First, the need to detach the role of the Office of the Attorney General's in defending government before international monitoring mechanisms, for instance in the case of communications before the African Commission, and that of coordinating implementation of adverse findings. Studies on implementation of international human rights decisions indicate that while these dual roles may appear intimately related, the arrangement is beset with structural challenges.²⁵⁹ Second, the Department of Justice is specifically responsible for national policies on administration of justice, rights and rule of law issues. The findings and recommendations of monitoring mechanisms mainly implicate reforms in the administration of justice, rights and rule of law issues. These issues are often peripheral in policy debates since the Attorney

²⁵⁹ Open Society Justice Initiative 'From rights to remedies: structures and strategies for implementing international human rights decisions' (2013) 32-34 (Open Society Justice Initiative).

General's other roles, as the government's legal advisor occupy a more privileged status. Similarly, the Ministry of Foreign Affairs is least suited for domestic implementation since as pointed out above, most findings and findings implicate the justice sector for which the Ministry has no competence or capacity.²⁶⁰ Indeed, commentators have argued that government's likelihood to implement findings and recommendations is determined by the proximity of the implementing ministry's functions and the adverse judgment.²⁶¹ The key recommendation is therefore to establish a Ministry of Justice which will privilege issues of the sector justice and by implication the findings of monitoring mechanisms in policy debates and in policy making fora, in particular the Cabinet.

On the legal infrastructure for implementation of findings and recommendations of monitoring mechanisms, the two essential features for this infrastructure are: (i) political standing; and (ii) ability to 'clothe' the findings and recommendations of monitoring mechanisms with an 'ought to status' in regard to domestic implementation obligations. Deductively, the infrastructure should take the form of a permanent inter-agency committee, anchored in national legislation and charged with implementation of the state's international human rights obligations. The agency should be situated in the Ministry of Justice and convened by the Minister of Justice to vest it with the required political standing. This inter-agency committee should have the following important characteristics. First, its powers and duties must be clearly defined. The rationale is that the inter-agency committee should coordinate all government agencies in implementation of findings and recommendations, hence it must be vested with authority to issue instructions and require compliance.

Second, its membership should include government agencies responsible for human rights issues. In addition the Ministry of Foreign Affairs, Finance, national human rights institutions and non-state actors. The Ministry of Finance is particularly important because implementation of findings and recommendations often has financial implications for example, setting up institutions and payment of compensation. The agency should also have power to co-opt members as may be necessary to allow for participation of petitioners, for example in the case findings on communications from the African Commission or the African Committee on the Child. The level of participation in the inter-agency committee should be defined at deputy secretary or higher to facilitate effective implementation at the respective government agency.²⁶² The point is that implementation of a finding in a particular government agency should not be designated to a junior officer without clout in the respective agency. Third, the inter-agency's procedures for implementation should include: submission of the findings to Cabinet, a Parliamentary statement on whether and how it intends to implement the findings and dissemination of the findings to the public. Fourth, there should be mechanisms for the inter-agency's accountability of implementation of the findings and recommendations to Parliament.

Most importantly, the inter-agency committee should also develop bureaucratic implementation procedures to embed the findings and recommendations into the

²⁶⁰ See Republic of Kenya 'Organization of the Government of the Republic of Kenya' Executive Order 2 /2013, May 2013, 6; Interview with M Njau-Kimani, Legal Secretary, Office of the Attorney General and Department of Justice, Kenya, Nairobi, 4 March 2015.

²⁶¹ Open Society Justice Initiative (n 9 above) 38.

²⁶² In public service administration in Kenya, a deputy secretary is the third ranking accounting officer in a Ministry.

bureaucratic routines of domestic institutions and political structures. For instance, implementation tools such as national action plans and standard operation procedures. Commendably, the government in October 2013 developed a national action plan on the implementation of the May 2013 concluding observations of the Committee Against Torture.²⁶³ However, this national action plan has not been implemented.

The case for setting up of an inter-agency committee by Presidential or Executive decree is arguable since it is faster and also guarantees political standing of the agency. However, this suggestion is fraught with two weaknesses. First, an inter-agency committee set up by Executive decree is subject to the preferences of the government in power hence it can be disbanded or fall into disuse as in the case of the existing Inter-Ministerial Committee. Studies demonstrate that this is not limited to the Kenyan setting.²⁶⁴ Second, an inter-agency committee set up by Executive decree is accountable solely to the Executive hence it is unlikely to be effective for implementation. Illustratively, the Task Force set up by the President in September 2014 on implementation of the Endorois decision is singularly accountable to him.²⁶⁵ This perhaps explains why nothing has been heard of the interim and final recommendations that were due in April and September 2015 respectively.

Formation of epistemic communities

This research has already demonstrated the absence of political will in the implementation of findings and recommendations of monitoring mechanisms. The issue then turns on how to harness political will by countering the strong ideological opposition to supranational authority. Epistemic communities act as agents of internalisation by generating debates and formulating political solutions.²⁶⁶ The rationale of epistemic communities would be to establish the legitimacy of findings and recommendations in the domestic political discourse. There is little evidence of the involvement of professionals and experts in the national discourse on implementation of findings and recommendations of monitoring mechanisms and supranational adjudication. The key recommendation is formation of networks of professionals and particularly from the academia with expertise in international law, international human rights law areas and international adjudication.

These epistemic communities will generate ideas that shape the political interests and policies. The role is twofold. First, to generate debates and interpretations on the legitimacy of the findings and recommendations of monitoring mechanisms particularly in view of the monist approach to international law under the Constitution, 2010 and thus shape actions of the political elite. Secondly, to generate debates, and formulate political solutions in relation to contested recommendations such as those on the death penalty, rights of indigenous persons, abortion rights and sexual minority rights. Moreover, these epistemic communities can be embedded in the domestic political structures on implementation of the findings and

²⁶³ National action plan on implementation of the May 2013 concluding observations of the Committee Against Torture (accessed from the Department of Justice, 4 March 2015).

²⁶⁴ Open Society Justice Initiative (n 9 above) 36. Discussing the case of the US in which an inter-agency working group on human rights obligations established under Presidential decree fell into disuse after the Clinton administration.

²⁶⁵ Kenya Gazette no. 6708 Task Force on the implementation of the decision of the African Commission on Human and Peoples' Rights contained in Communication 276/03 (Centre for Minority Rights Development on behalf of the Endorois Welfare Council v Republic of Kenya).

²⁶⁶ HH Koh 'Bringing international law home' (1998) 35 *Hou L. Rev.* 649.

recommendations of monitoring mechanisms. For instance, the epistemic communities can be incorporated as an advisory board to the proposed inter-agency committee discussed above.

1.1.2 Legal internalisation

Create more avenues for institutional interaction and interpretation

For full norm-internalisation, Koh suggests development of techniques to trigger legal internalisation as a pathway to political and social internalisation.²⁶⁷ The argument goes that with continued legal internalisation, through judicial and legislative internalisation, international norms begin to acquire a ‘familiar feel’ to political actors.²⁶⁸ This ‘familiarity’ eventually leads to political and social internalisation.²⁶⁹ This has been demonstrated in this research as with the cases of indigenous peoples’ rights and anti-torture. Further, this research has demonstrated that legal internalisation has occurred in a number of issue areas through incorporation of international human rights norms in the Constitution, 2010. However, implementation of the findings and recommendations of monitoring mechanisms remains low hence the need to trigger other forms of legal internalisation such as judicial incorporation, legislative internalisation or executive action. The techniques to trigger legal internalisation thus call for empowering more institutional actors and identifying new fora for interpretation. To this end, the following specific recommendations are made:

Enhance the role of Parliament in implementation of the findings of monitoring mechanisms

The current role of Parliament in implementation of the findings and recommendations is limited to its legislative mandate and formation of pro-compliance coalitions with different domestic actors. The issue then is on other avenues of engaging Parliament as an interpretive forum, in addition to the accountability roles discussed above under political internalisation. One major attraction in enhancing the role of Parliament is that it addresses the counter-majoritarian argument, particularly in the Kenyan political context in which the legitimacy of findings and recommendations of monitoring mechanisms is contested. Indeed, one of the criticisms of the transnational legal process theory is that it uses counter-majoritarian institutions such as courts to advance human rights.²⁷⁰ Moreover, counter-majoritarian arguments have also arisen in Kenya in relation to recommendations on death penalty, abortion rights and rights of sexual minorities.

First, is institutional interaction provoked by national human rights institutions through their annual reports. The Constitution, 2010 requires the national human rights institutions to submit annual reports to Parliament.²⁷¹ The reports are then committed for consideration and debate to the Parliamentary committees in charge of human rights leading to policy debate between the Executive and Parliament. A review of the annual reports of the Kenya National Commission on Human Rights to Parliament indicates that the reports do not specifically

²⁶⁷ Koh (n 16 above) 679.

²⁶⁸ As above.

²⁶⁹ As above.

²⁷⁰ M Waters ‘Normativity in the ‘new’ schools: assessing the legitimacy of international legal norms created by domestic courts’ (2007) 32 *Yale J. Int’l L.* 458.

²⁷¹ Article 254 (1) : ‘As soon as practicable after the end of each financial year, each commission, and each holder of an independent office, shall submit a report to the President and to Parliament.’

address the issue of non-implementation of findings of monitoring mechanisms.²⁷² The Kenya National Commission on Human Rights could contemplate raising the issue of non-implemented findings in its annual reports. This has the possibility of Parliament triggering policy dialogue with the Executive on the basis of the report which could positively result in executive action in relation to some of the findings and recommendations.

Second, is provoking institutional interaction with Parliament through public petitions. The Constitution, 2010 vests every person with the right 'to petition Parliament on any matter within its authority, including to enactment, amendment or repeal of any legislation.'²⁷³ This right is further operationalised by the Parliamentary standing orders which provide for the procedure of petition.²⁷⁴ A number of recommendations have required repeal of legislation, for instance the Committee Against Torture in May 2013 recommended repeal of the Public Authorities Limitations Act. Further, in 2008, 2009 and 2011 three UN treaty monitoring committees recommended repeal of a provision of the Sexual Offences Act. Notably, in the case of the Public Authorities Limitations Act the High Court had already indicated that it was up to Parliament to repeal the provision.²⁷⁵ The recommendation has not been implemented as of October 2015. Similarly, in relation to the Sexual Offences Act, the High Court declined to declare the provision unconstitutional.²⁷⁶ Notably, non-state actors during the interviews for this research expressed their dissatisfaction with the Judiciary particularly in regard to cases that required the courts to determine the constitutionality of statutory provisions.²⁷⁷ They indicated that the courts often abdicated their role by deferring to Parliament.²⁷⁸

In addition to the potential for repeal and amendment and enactment of laws, the petitions once committed to the relevant Parliamentary committee initiate systemic dialogue between the Executive and Parliament which could lead to executive action. For example, following a public petition on compensation and resettlement of 'integrated' internally displaced persons in July 2014, the relevant Cabinet Secretary appeared before the Parliamentary Committee on Administration and National Security.²⁷⁹ From the ensuing dialogue, the Cabinet Secretary undertook to develop a database and a system of registration of the 'integrated' internally displaced persons in Kenya.²⁸⁰ The process is on-going at the time of this writing. Of note is that issue of 'integrated' internally displaced persons was highlighted by the Special Rapporteur on Internally Displaced Persons during his May 2014 mission to Kenya. The key recommendation is that individuals, non-state actors and transnational actors

²⁷² Kenya National Commission on Human Rights, reports and publications, annual reports, <http://www.knchr.org/ReportsPublications/AnnualReports.aspx> (accessed 27 June 2015).

²⁷³ Article 119 (1).

²⁷⁴ Parliament of Kenya, National Assembly, Standing Orders, orders 219-230.

²⁷⁵ *Wachira Weheire v Attorney General* [eKLR] 2010.

²⁷⁶ *Federation of Women Lawyers- Kenya v Attorney General*, petition 22 of 2010.

²⁷⁷ Interview with A Nyanjong, Programme Manager, International Commission of Jurists-Kenya Section, Nairobi, 22 April 2015; Interview with A Kamau, Programme Officer, Independent Medico-Legal Unit, Kenya, Nairobi, 17 January 2015. The specific cases discussed included in regard to the death penalty, matrimonial property rights and child maintenance.

²⁷⁸ As above.

²⁷⁹ Meeting between the Cabinet Secretary Devolution and Planning and the Parliamentary Committee on Administration and National Security, Continental House, Nairobi, Kenya, 24 September 2014 (author in attendance).

²⁸⁰ As above.

should provoke interaction with Parliament through public petitions, particularly in regard to findings and recommendations that require legislative action.

Third, is adapting Parliament to play an enhanced role in the implementation. At present both Houses of Parliament have committees dealing with human rights.²⁸¹ While the Senate has a committee dedicated to human rights issues and chaired by the former Attorney General, in the National Assembly human rights issues are addressed by the committee on administration of justice.²⁸² There is also the practice of forming joint committees of both houses on issues important to both Houses such as national cohesion and equal opportunity.²⁸³ The recommendation is for Parliament to consider establishing a joint committee to deal with human rights including implementation of international human rights obligations.

Enhance the role of the Judiciary in implementing findings and recommendations of monitoring mechanisms

This research has established that the role of the Judiciary in implementation of findings and recommendations is primarily through domestic litigation. Notably, there are recommendations that are directed to the Judiciary such as those requiring training of judges and magistrates on torture and also judicial supervision of places of detention. Further, the Judiciary has on a number of times adjudicated on issues raised in the recommendations and findings of monitoring mechanisms without addressing itself to the question of non-implementation of the recommendations by the Executive, for instance in relation to enactment of access to information law. On the one hand there appears to be unawareness of the findings and recommendations of monitoring mechanisms. The focus then should be on mechanisms to ensure that the Judiciary is aware of the findings and recommendations of monitoring mechanisms. The recommendation is therefore establishment of a judicial unit to monitor findings and recommendations of monitoring mechanisms. This can be done through the National Council on the Administration of Justice, which is the policymaking unit of the Judiciary and brings together all actors in the justice sector including non-state actors. The Council could be mandated to monitor the findings and recommendations of monitoring mechanisms which are then circulated to all judicial officers. Further, the Council could develop policies and programmes for implementation of the findings that specifically address the Judiciary.

In addition, and linked to the question of the failure of the Judiciary to address itself to the non-implementation of the findings and recommendations of monitoring mechanisms by the Executive, is the lack of clarity on the place of international law in the national legal order. As discussed in chapter two, section 6 the Judiciary has issued inconsistent decisions that place international level at par with domestic legislation. This has resulted to the diminished role of international law in the national political and legal discourse. The recommendation is that the Judiciary should unequivocally clarify the place of international law in the national legal order.

²⁸¹ Parliament of Kenya, <http://www.parliament.go.ke/> (accessed 27 June 2015).

²⁸² As above.

²⁸³ As above.

Explore the role of regional parliaments as avenues for institutional interaction and interpretation.

Finally, on legal internalisation is the question of regional parliaments as avenues for institutional interaction and interpretation. Transnational actors should explore the extent to which regional parliaments such as the East African Legislative Assembly and the Pan African Parliament could be used to shape implementation of decisions from the East African Court and perhaps the African Court and the African Commission.

1.1.3 Social internalisation

Develop a social culture receptive to international human rights law

The main point is on promoting acceptance of international human rights standards by society. This research has demonstrated low public acceptance of international human rights norms. This is particularly illustrated by the constitution making process in which, as discussed earlier, a number of international human rights standards were expunged from the draft constitutions to guarantee public approval in the national referendum. The recommendation is public education, research and promotion of human rights by national human rights institutions. In addition borrowing from the earlier recommendations, generation of discussions by epistemic communities on contentious human rights norms could also promote public education on human rights.

In relation to the findings and recommendations of monitoring mechanisms, earlier draft constitutions of 2002, 2004, 2005 and 2009 envisaged the direct presence of the people in international human rights monitoring through participation in preparation of state reports and as recipients of the recommendations of monitoring mechanisms. These provisions were however expunged from the Constitution, 2010 as discussed elsewhere. The issue then is how to keep the public engaged on the implementation process. First, the state should disseminate the findings and recommendations of monitoring mechanisms. Second, the state should develop bureaucratic compliance procedures that incorporate elements of public education and awareness. For instance national actions plans on implementation should include components of public awareness and public briefings on the extent of implementation. Third, non-state actors and transnational actors should explore opportunities to engage the media in their norm-internalisation initiatives with a view to promoting public debate on findings and recommendations of monitoring mechanisms.

2 Generalisation of the research observations and conclusions

The final issue is to what extent the observations and conclusions of this research in relation to Kenya can be applied to other countries. The theoretical approach taken by this research allows the drawing of broad conclusions which may apply across many countries. It is therefore reasonable to assume that similarly situated countries like Kenya- with constitutional protection of human rights, weak rule of law and an active network of non-state actors would present the same observations and conclusions on implementation and impact of the findings of monitoring mechanisms. The observations and conclusions of this research can thus be replicated beyond Kenya.

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