

Kenya National Commission on Human Rights

**Submission to the Committee on the Elimination of Racial
Discrimination in Response to the Periodic Report of Kenya**

June 2011

Introduction

1. This submission has been prepared by Kenya National Commission on Human Rights. This submission provides information in relation to the Kenyan Government's combined initial to fourth reports under the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).
2. The Kenya National Commission on Human Rights (KNCHR) is an independent Human Rights Institution with 'A status' accreditation. The National Commission was established in 2003 by statute with the mandates of protecting, promoting and monitoring the exercise of human rights in Kenya.
3. In furtherance of its statutory mandate to act as the chief agent in ensuring government's compliance with its obligations under international law, the Kenya National Commission on Human Rights in 2007 provided capacity building for state officers involved in the preparation of the state report to the CERD committee. Furthermore, the Commission also participated in a meeting called by the government to validate its report.
4. This submission demonstrates through various situations and incidences that there are significant areas where the Kenyan government could take steps to tremendously improve implementation of its obligations under ICERD. The submission therefore includes recommendations, where appropriate.

The Normative Context

The Kenyan report to the ICERD Committee was submitted at a time when Kenya was still operating under the constitution adopted in 1963, hence does not take into account the changes introduced by the adoption on a new constitution in August 2010. The new constitution, other than containing a very progressive bill of rights, has also transformed Kenya from a dualist to a monist state, by providing that any treaty ratified by Kenya shall form part of the law of Kenya. The significance of this is that all obligations arising under ICERD should now be effectively and

immediately implemented as its provisions have the same direct effect as domestic law even without action by the legislature. However, for this direct application to be effective, there are still numerous actions required on the part of the government, which have not been taken as demonstrated in the following submission.

Definition of discrimination-(*ICERD Articles 1*)

Since ratifying the convention in 2001, Kenya has never adopted a single law or policy for the specific purpose of implementing CERD obligations. Further, there is also no single institution with the mandate to monitor discrimination in the country.

Article 27 of the newly enacted constitution guarantees the right to equality and freedom from discrimination. It provides and for equality of every person before the law; the right of every person to equal protection and equal benefit of the law, prohibits the state or any person from discriminating 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 10(2)(b) of the Constitution further lists the national values and principles of governance which include human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized.

However, the constitution does not contain a definition of discrimination. Provisions on anti-discrimination are scattered in various pieces of legislation¹ which aim to prohibit certain types of discrimination. Key of these is the National Cohesion and Integration Act², which was enacted to

¹ For Example the Kenya Employment Act Section 5; The Persons with Disabilities Act; The Kenya National Cohesion and Integration Act; The HIV and AIDS Prevention and Control Act 2006, the Children's Act, and the Refugee Act all contain various provisions on anti-discrimination.

² Act No. 12 of 2008, available at http://www.kenyalaw.org/kenyalaw/klr_app/frames.php

facilitate and promote equality of opportunity, harmony and peaceful coexistence between persons of different ethnic and racial backgrounds in Kenya. This Act defines discrimination to include *'less favourable treatment of other persons on ethnic grounds by segregation, harassment and victimization by reason of action taken against the discriminator in relation to violations under the Act; and the application of requirements, conditions, provisions, criterion or practices which while also applied to persons of other ethnic groups or race, are detrimental to persons from specific ethnic groups, unjustified and/or an unproportionate means of achieving a legitimate goal.'*

The Act establishes the National Cohesion and Integration Commission. The Commission was formed as one of the instruments to respond to the post-election crisis and not with the aim of enforcing the provisions of ICERD. The conceptualization of discrimination under the Act is extremely narrow and the mandate of the Commission in addressing discrimination is limited with the effect that it cannot oversee or even monitor implementation of ICERD in the domestic sphere.

The scattered and piecemeal legislation on anti-discrimination and the lack of comprehensive law or definition of the same has made implementation of the ICERD elusive. However, the Constitution of Kenya 2010 offers a great opportunity for remedying of the situation. The constitution in Article 27 (4) expands the prohibited grounds of discrimination and the use of the phrase 'including' leaves room for further developments. Moreover, the Constitution in Article 59 envisages the establishment of the Kenya National Human Rights and Equality Commission whose functions among others are to promote respect for human rights and develop a culture of human rights in the country and to receive and investigate complaints about alleged abuses of human rights. The implementation of Article 59 Kenya presents an opportunity to institutionalize all human rights issues-not only those enumerated in the bill of rights but all those in international conventions or treaties to which Kenya is a party.

Our recommendations are for the state to;

- In implementing Article 59, the state should ensure that the legislation establishing the successor institution/s is comprehensive enough in both content and form. This means that the legislation should seek to expound without attempting to interpret on the rights under the bill of rights and other international treaties ratified by Kenya including CERD, as well as provide a mechanism for their enforcement. Further that the implementation should provide

for a holistic approach to issues relating to equality and non-discrimination and in so doing care should be taken not to have a proliferation of institutions with duplicating functions.

Obligation to eliminate discrimination including requirement to review and amend/eliminate discriminatory policies and to implement affirmative measures to ensure adequate development and protection in economic, social and cultural rights – ICERD Article 2

Article 27 (6) of the constitution requires the State to take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination. This is indeed an affirmation that various individuals and groups have consistently suffered systemic discrimination in various instances. Discrimination has continued to be manifest in various practices, such as in the acquisition of Kenyan citizenship. Some communities are also marginalized and suffer discrimination in access to economic, social and cultural rights, particularly the communities living in Northern Kenya, who have been relegated to second class citizens.

Citizenship

The Kenyan National identity card is a crucial link to citizenship and nationality and is at the core in determining the extent to which one can enjoy their fundamental rights and freedoms. Without a Kenyan national ID card, access to basic social services becomes impossible. One requires an Identity card to vote or participate in any political process, access admission to colleges or universities, acquire a driving license, access banking services or obtain services from government offices. Accessing employment opportunities or transacting in property also becomes impossible without a national identity card.

Various minority groups ,³ most notably Nubians, Kenyan Somalis, Coastal Arabs, Kenyans of

³ Various reports and studies have documented instances of discrimination in access to citizenship. For example KNCHR, 'An Identity Crisis? A study on the issuance of National Identity Cards' , 2007 available at www.knchr.org/dmdocuments/Final%20IDsReport.pdf

Asian descent and persons of Somali ethnicity have suffered decades of discriminatory laws, regulations, practice and procedures that apply to them only and not to the other Kenyans, in access to nationality and citizenship. Typically, individuals obtaining citizenship by birth only need to demonstrate one parent is a Kenyan citizen, usually by presenting a parent's national ID. However, for Nubians, persons of Somali ethnicity, Kenyans of Asian descent and coastal Arabs, the standard is higher and more arbitrary in practice. Unlike other Kenyans, these ethnic groups are required to go through a discriminatory and burdensome vetting process to be confirmed as nationals and issued with the necessary identity documents. This discriminatory practice against the Kenyan Somalis is often justified by state officials on the basis that it is difficult to differentiate Kenyan Somalis from Somali refugees or other nationals of Somalia and further that the process is necessary for security concerns as the this group of people normally live in the North-Eastern Province, at the highly porous Kenya - Somalia border.

The Nubians and Coastal Arabs are also subjected to a long and complex vetting process, even though they are not in the border districts. In many cases, they are simply denied identity cards even after the vetting, contributing to further marginalization. In fact, in March 2011, Kenya was found in violation of the rights of Nubian children to non-discrimination, nationality and protection against statelessness by the African Committee of Experts on the Rights and Welfare of the Child (Communication No. 002/2009 'Nubian Children in Kenya v Kenya'). Nubian children in Kenya had decried systematic denial of Kenyan nationality, affirming that this practice constituted discrimination, under Article 3 of the African Charter on the Rights and Welfare of the Child and a violation of their right to a nationality at birth as guaranteed by Article 6 (3). The High Court in Kenya has also declared the identity card process for the Coastal Arabs as discriminatory.⁴

The government in its report to the Committee acknowledges these practices and observes that they are being redressed. However, this is not the situation as the policies and practices which entrench

See also KNCHR, *Out of the Shadows: Towards ensuring the Rights of Stateless Persons and Persons at Risk of Statelessness in Kenya*, 2010; Adam H. Adam, *The Nubians and Statelessness: History in Defining Modern Lives* available at <http://dev.justiceinitiative.org/db/resource2/fs/?file id=17043>

⁴ In January 2011, a Mombasa human rights group, Muslim for Human Rights (MUHURI) and Khelef Khalifa successfully petitioned the High Court to declare unconstitutional an internal memo of the Ministry of Immigration which required Kenyan Muslims, Arabs and Kenyans of Asia origin to be subject to further vetting procedures as a prerequisite for the issuance of national identity cards.
http://www.loc.gov/lawweb/servlet/lloc_news?disp3_l205402477_text, last accessed on July 12, 2011

discrimination in acquisition of citizenship have not yet been eliminated. Our recommendation is that:

- The state should harmonize with the constitution laws that govern citizenship and nationality and ensure that all discriminatory provisions that exist with regard to acquisition of citizenship are repealed. It is noteworthy of mention that though the laws relating to citizenship and immigration are currently under review, and they recognize the right of to certain documents of identification including national identity cards, the proposed law is devoid of any provisions relating to the issuance of the same. Unless the proposed review includes a review of the Registration of Persons Act and the Registration of Persons Rules to eliminate any discriminatory practices and lapses relating to the issuance documents of identification, the state will continue to apply administrative action to racially profile certain category of Kenyans and inadequate coverage to deny other Kenyans especially those from marginalized regions registration as citizens.
- The state should remove administrative obstacles, to ensure that all Kenyans have access to nationality and all documents of registration beginning with birth certificates for all children, national identity cards and any others as these are directly related to access to and enjoyment of not only civil and political rights but also economic, social and cultural rights, such as employment, housing, health care, social security and education which are also enshrined under the Bill of Rights.
- The state respect the court ruling and quickly move to eliminate discriminatory vetting procedures imposed in respect of certain groups and ensure that these communities are registered and issued with the necessary identification documents.
- The state should also ensure that it deploys adequate resources to marginalized areas to ensure equal coverage of registration of person's right from birth.
- Lastly the state to ensure that all citizens enjoy the right to citizenship through timely registration for all. To do this effectively, the state department responsible for the registration of persons needs to plan and budget adequately to avoid shortfalls that leave citizens unregistered for indeterminable periods.

Under development in Northern Kenya

The Northern Kenya region is an expansive area, mainly consisting mainly of arid and semi-arid lands. Due to economic and political marginalization, the region lags behind other parts of the country and is characterized by chronic underdevelopment in all spheres of life, including poor infrastructure, scarcity of resources and acute poverty.

The inhabitants of Northern Kenya suffer untold misery in the face of appalling lack of the most basic needs, in terms of food, healthcare and shelter and are for the most part dependent on food aid given by Non -Governmental Organizations which is often irregular and inadequate. They face extreme starvation and there have been instances where people have died for lack of food, especially as the area also suffers periods of drought. Moreover, there exists an often forgotten category of other marginalized people, the urban poor who share in a lot of respects (and sometimes even more) with the marginalized groups the same deplorable circumstances in terms of economic and social rights.

These people have a right to a decent livelihood but have been denied an appropriate and effective development policy for decades. Biased government development policies have resulted in underdevelopment and marginalization, with very few institutions of learning, deplorable infrastructure and lack of basic services. Insecurity and the threat of insecurity are also rife and which are major inhibitors of the flow of investments to these areas. The government in its report refers to National Policy for the Sustainable Management of Arid and Semi Arid Lands of Kenya, which it says is an advanced stage. However, this policy has been developed since 2004 and has never been finalized. Likewise and in respect of the urban poor, in 2003 the government in partnership with UN-Habitat initiated the Kenya Slum Upgrading Programme (KENSUP) as a core element of poverty reduction.⁵ The programme is housed within the Ministry of Housing and has so far put up some 600 housing units in Kibera as part of the shelter improvement programme. While this achievement is laudable, the general pace is slow given that this initiative is to be replicated for the benefit of other slum dwellers throughout the country.

The constitution now establishes an Equalization Fund (Article 204) which can be used to provide basic services including water, roads, health facilities and electricity to marginalized areas to the extent necessary to bring the quality of those services in those areas to the level generally enjoyed

⁵ For more information please visit,
http://www.housing.go.ke/index.php?option=com_content&view=article&id=24&Itemid=15

by the rest of the nation. Our recommendations are that the Northern Kenya region and other marginalized sectors of society should be specific beneficiaries of this fund once set up so that they are assisted to recover from the past historical injustices, marginalization and underdevelopment . In the meantime:

- The state should put in place a long-term food security policy which ensures that the Northern Kenya region is catered for during food shortage.
- The state should provide basic services to inhabitants of this region and the urban poor, particularly access to water and health services.
- The state should beef up security in the aforementioned areas to enhance the dignity of the citizens of these areas and as an incentive to investments which in turn will spur economic growth.
- Given that Kenya is moving towards a devolved system of government, the devolution of resources to the country level should be guided by the principles of equality and non-discrimination and hence if the state should base the distribution of resources on the incidence of poverty and not just numbers to promote those that have been historically marginalized.

Condemnation of all propaganda and all organizations which promote racial hatred and discrimination- ICERD Article 4

As acknowledged in the state report to the Committee, Kenya is an ethnically diverse country. The state report has not comprehensively captured the rampant discrimination on the basis of ethnic origin. Tribalism, nepotism, social discrimination and inequitable distribution of resources have plagued the country for decades. Tensions often flare up upon instigation of members of certain communities against others and often escalate to fatal levels, particularly during the election period when politicians retreat to their ethnic groups and incite their communities against other ethnic groups, using inappropriate and often inflammatory language sometimes amounting to hate speech to draw a wedge between communities. The use of hate speech along ethnic lines and derogatory remarks about other tribes, races and communities has become the hallmark for Kenya's political rallies during the run-up to elections as demonstrated during the 2007 post-election violence where violence targeted individuals and communities on the basis of their ethnicity and their political leanings.

Despite the gravity of the consequences that the country has witnessed due to negative ethnicity⁶, the laws and policies in the country are severely inadequate as a basis for protecting against hate speech, ethnic intolerance and incitement to hatred.

Section 77(3) (e) of the Penal Code provides that:

‘(1) Any person who does or attempts to do, or makes any preparation to do, or conspires with any person to do, any act with a subversive intention, or utters any words with a subversive intention, is guilty of an offence and is liable to imprisonment for a term not exceeding three years... (3) For the purposes of this section, ‘subversive’ means... (e) intended or calculated to promote feelings of hatred or enmity between different races or communities in Kenya: Provided that the provisions of this paragraph do not extend to comments or criticisms made in good faith and with a view to the removal of any causes of hatred or enmity between races or communities.

Section 96 of the Penal Code criminalizes incitement and provides for an imprisonment term of a maximum of three years. The Election Code of Conduct also prohibits the use of inflammatory language which can be used to incite people to violence.

A more comprehensive provision is in Section 62 of the National Cohesion and Integration Act 2008, in which hate speech is described as follows;

‘Any person who utters words intended to incite 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 shillings, or to imprisonment for a term not exceeding five years, or both or a newspaper, radio station 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.

Section 13 of the Act finds liable any person who uses threatening, abusive or insulting words or behaviour, or displays any written material, which is threatening, abusive or insulting and that is intended or likely to stir up ethnic hatred. It 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.

⁶ Thousands of lives have been lost due to ethnic clashes. During the 2007-2008 post election violence, 1313 people lost their lives.

The problem with the definition of hate speech in this Act is that it falls short of the definition required to protect one from being a victim of hate speech. First, hate speech is only recognized as such only if it occurs on the basis of ‘*ethnicity or race*’. There are many other grounds upon which hate speech can be propagated, including religion, nationality, gender, sexual orientation and so on, all of which ought to be included in the definition of hate speech. The law as drafted does not send a strong state-sanctioned message that hate speech is unacceptable, harmful, and dangerous and shall not be tolerated. On the other hand the law and in absence of any legal precedents there is lack of clarity on what factors would be considered before one is accused of perpetrating hate speech e.g. the targets of the speech, the position of influence occupied by the perpetrator viz a viz the target group. Such clarity would be helpful in ensuring that hate speech is not misused especially by the political elite to silence their opponents.

Further, the Commission charged with monitoring the provisions on the National Integration and Cohesion Act has limited powers of enforcement and is only empowered to investigate complaints of ethnic or racial discrimination and make recommendations to the Attorney General, the Human Rights Commission or any other relevant authority on the remedial measures to be taken where such complaints are valid. It is noteworthy that those who have been recommended for prosecution by the Cohesion Commission are mostly the political elite including Cabinet Ministers; pointing to the need for concerted political efforts and actions to discourage the use of hate speech and other inflammatory language in addition to legal and criminal sanctions.

So far, there have been no successful prosecutions of politicians or any other person on account of their utterances. The patchy and scattered pieces of legislation have been ineffective in containing the vice and the problem has continued to manifest itself from time to time. In 2007, a comprehensive Prohibition of Hate Speech Bill (“Hate Speech Bill”) was drafted through the facilitation of Kenya National Commission on Human Rights. The bill aimed to fill the missing gap in legislation by providing an appropriate definition of hate speech and prescribing sanctions. The bill provided for criminal sanctions which were intended to provide the essential deterrent effect. The government acknowledges in its report (paragraph 73 (e)) that this legislation was drafted but does not mention that it was not passed into law and there are currently no efforts to pass it into law.

Our recommendations in this regard are:

- To Criminalize hate speech by enacting a single comprehensive legislation to protect against incitement to hatred or use of language which prejudices or engenders discrimination on an individual or group, on the other forms of discrimination, not just on the basis of ethnicity (as provided in Section 13 of the National Cohesion and Integration Act, 2008), but also on other grounds such as gender, religion, conscience, belief, culture, dress, language, birth, disability, sex, marital status, health status, social origin, and sexual orientation.
- Ensure effective prosecution of perpetrators of hate speech.

Equal enjoyment of political, civil, economic, social and cultural rights – ICERD Article 5

Various categories of people in Kenya suffer systematic discrimination and marginalization and are unable to enjoy the rights outlined in Article 5 of ICERD by reason of their peculiar status. These categories of people are often vulnerable in the face of blatant violations of their rights. Article 260 of the Constitution defines a marginalized group as 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); i.e. 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. Glaring instances of discrimination are have been suffered by the following groups:

Indigenous Communities

In the past, the state did not take any active measures to preserve and protect indigenous communities in Kenya. In fact, in the State's view, there were no indigenous communities in Kenya.⁷ Without any recognition or protection by the state, discriminatory practices against indigenous peoples were rampant. The constitution now recognizes indigenous communities and

⁷ See speech of the Minister for Constitutional Affairs, Mutula Kilonzo, to the Human Rights Council Working Group during the UPR review of Kenya on 6th May 2010, where he said 'the term "indigenous peoples" was not applicable, as all Kenyans of African descent were indigenous to Kenya.' available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/144/88/PDF/G1014488.pdf?OpenElement>, last accessed on 22nd July 2011.

makes various provisions which acknowledge them. However, the rights of indigenous people are far from being recognized in reality. The two main issues which have posed challenges have been land/ natural resources and participation in public life for this group of people.

These issues have been adjudicated both at the national courts and at the African Commission on Human and Peoples Rights, where positive decisions have been given recognizing the rights of indigenous communities. In the case of *Rangal Lemeiguran and others vs The Attorney General and Others*,⁸ the Il Chamus community in Kenya, a small and distinct community of about 25-0000-30,0000 persons, who regard themselves as an indigenous community, approached the High Court of Kenya to preserve their fundamental right of participation in public affairs. Since independence, no member of the community had been elected to the national assembly and none would be elected given the makeup of their constituency where they were the minority and the voting patterns. Without representation in Parliament, the Il Chamus suffered marginalization and continued to be prejudiced in political, social and economic matters.

The High Court found that the group qualified as indigenous people and affirmed the right to participation in public life for minority groups by declaring that the Il Chamus community in Kenya constitutes a special interest group in terms of Section 33 of the former Constitution, and nominations to Parliament under that section should involve them and other minority groups constituting special interests.

This decision was never implemented. The new constitution now recognizes the right to participation and makes provisions which would ensure nomination of indigenous communities to parliament. However, unless the constitutional provisions are fully implemented, the rights of indigenous communities will continue to be violated.

The Endorois community another indigenous group, on the other hand, raised the often thorny issue of land in Kenya. The Endorois (a community of about 60,000 persons) were displaced from their ancestral lands, denied access to natural resources, and cultural/spiritual sites. In 2003, they approached the African Commission on Human and Peoples' Rights (276 / 2003 – Centre for Minority Rights Development and Minority Rights Group International on behalf of Endorois

⁸ High Court of Kenya, Misc. Civ. Appl. 305 of 2004 (*The Il Chamus Constitution case*), available at http://www.kenyalaw.org/CaseSearch/view_preview.php?link=41614722442187857994712&words=Il+Chamus+&mode=2, last accessed on 22nd June 2011

Welfare Council v Kenya), which made a series of recommendations to the Government of Kenya. The African Commission found that Kenya was in violation of Articles 1, 8, 14, 17, 21 and 22 of the African Charter and made a series of recommendation, including that Kenya recognizes rights of ownership to the Endorois, restitute their ancestral land and pay adequate compensation to the community for all the loss suffered. The Commission also recommended that the State should ensure that the Endorois community has unrestricted access to Lake Bogoria and surrounding sites for religious and cultural rites and for grazing their cattle and pay royalties to the Endorois from existing economic activities and ensure that they benefit from employment possibilities within the Reserve.

Implementation of this decision remains outstanding with the result that the success of these communities in canvassing their cases before impartial tribunals has come to naught, thereby perpetuating further injustices against these groups. Our recommendations are therefore that:

- The state immediately implements the recommendation of the African Commission on Human and Peoples Rights concerning the Endorois Community and the decision of the High Court in the Il Chamus case.
- The state to conduct consultations with the indigenous communities in Kenya with the aim of ensuring that indigenous peoples are involved in the ownership, control and management of their traditional lands and resources.
- The state to ratify and implement ILO 169 in order to enhance the framework for protection of indigenous persons.
- The state to ensure that laws enacted under the constitution including those relating to participation in public life through holding elective and appointive offices make explicit and practical provisions that will lead to the realization of these rights.

Persons with Disabilities

Persons with disabilities in Kenya have also endured decades of discrimination due to attitudes, practices, laws and policies which engender discrimination and deny them full and effective participation in society on an equal basis with others. They face major challenges in exercising their

right to education, health, equal participation in public life, access to various facilities and opportunities in employment as a result of social, cultural, and economic prejudices and abuse.

Within the legal framework, Kenya enacted Persons with Disabilities Act in 2003. The Act prohibits discrimination of persons with disabilities in employment and establishes the National Council for Persons with Disabilities which is mandated to, among other things, ‘formulate and develop measures and policies designed to achieve equal opportunities for persons with disabilities by ensuring to the maximum extent possible that they obtain education and employment, and participate fully in sporting, recreational and cultural activities and are afforded full access to community and social services.’

In the context of employment, the Act requires the Council to endeavor to secure the reservation of five percent of all casual, emergency and contractual positions in employment in the public and private sectors for persons with disabilities. However, this provision, like most of the provisions of the Act, has never been implemented with the effect that access to employment for persons with disabilities remains a distant dream. On its part, the Constitution requires the State to 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. The state has not yet taken cogent measures to fulfill this obligation.

Section 22(1) of the Act further makes provisions with regard to public buildings requiring proprietors of public buildings to adopt them to suit persons with disabilities in a manner specified by the council. Despite this, access to buildings for persons with disabilities remains a nightmare as not even a handful of buildings have been adopted to make them accessible to persons with disabilities.

Access to justice remains particularly elusive for persons with disabilities. Persons with disabilities who find themselves in conflict with the law often suffer undignified treatment, first as even the courts of law have not been adapted to be accessible to persons with disabilities and secondly as the assistive devices necessary for certain types of disabilities are considered dangerous and nothing has been put in place in prisons to accommodate persons with disabilities.

Several provisions of the law are outdated and the act is yet to be amended to conform to the Convention of the Persons with Disabilities Act, which Kenya ratified in 2008. For example, the

Kenyan Penal Code at Articleprovides for the protection of “idiots” and “imbeciles” when referring to persons with mental disabilities, a highly derogatory language that should not exist in any statute.

- The state should review all the Laws on persons with disabilities to harmonize them and fully implement constitutional provisions relating to persons with disabilities.
- The state should fully implement the provisions of the Convention of the persons with disabilities
- The state should intervene with affirmative action programs to address the inequalities and prejudices suffered by persons with disabilities and enhance realization of their economic, social and cultural rights.

Sexual Minorities

The Kenyan Penal Code, Chapter 63 of the Laws of Kenya prohibits consensual sex between people of the same sex. The penalty is five to fourteen years’ imprisonment. The constitution forbids discrimination on a number of grounds, but omits to mention sexual orientation as one of the grounds. The constitution also specifically mentions that marriage has to be between a man and a woman. Homosexuality is legally outlawed with the effect that homosexual, gay and lesbian persons are not recognized in Kenya. Without such recognition, the LGBTIs continue to suffer various discriminatory practice, are prone to attacks by a very homophobic society thus they live in fear for their lives.

Of particular concern is discrimination of LGBT persons within the health sector. They are often denied access to healthcare, particularly HIV/AIDS testing, counseling and treatment, leading to consequences both as it has health consequences both for the individual and also in relation to HIV prevention.

Another minority group which has been and continues to be brutally stigmatized are the intersex persons. Due to their apparent invisibility, not much is known about intersexual persons in Kenya, yet they continue to suffer silently as the society maintains collective ignorance. Lack of public

discussion and acknowledgement of intersexuality has led to lack of their legal recognition as a distinct vulnerable group in need of protection of and by the law. There is lack of clarity on the facilities and advice available to parents of intersex infants; this has led to mismanagement and erroneous assignment of gender to such infants. Medical procedures for corrective surgery are on the whole in accessible and or unavailable to poor parents.

Our recommendations are therefore that:

- The state should ensure that there are effective laws and policies that protect sexual minorities from discrimination, particularly in access to healthcare facilities.
- The State should promote tolerance and understanding towards sexual minorities and condemn attacks against their lives by the public.
- The state should ensure that parents of intersex infants are provided with proper advice and appropriate medical interventions at the earliest opportunity.
- That those who have not benefitted from such facilities are accorded protection from harassment and assured of the enjoyment of the right to participate fully in public life.

CONCLUSION

There is no longer need for Kenya to domesticate the CERD convention as it is now a monist state. However, if people are to enjoy the provisions of the convention there is urgent need for Kenyan to ensure the provisions of the convention are implemented. The lack of a comprehensive legal framework to protect against anti-discrimination has particularly hindered implementation of the Convention. The Committee should therefore impress upon the state to enact legislation that will comprehensively address the twin issues of equality and non-discrimination and ensure an accessible enforcement mechanism is in place to guide the elimination of past and continuing discrimination while providing remedies for violations. However, even before the law is enacted, the state must eliminate all discriminatory laws, policies and practices which prevent sections of the population from enjoying fundamental rights and freedoms and ensure that fundamental human rights are uniformly enjoyed and apply to all citizens without discrimination. Further, the state must address the inequalities which currently exist in the economic and social rights, with particular attention to the rights of minorities in the society.

