

**JOINT CIVIL SOCIETY ORGANIZATIONS' ALTERNATIVE REPORT TO THE UN
COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS ON THE
OCCASION OF THE REVIEW OF THE REPUBLIC OF KENYA**

Economic and Social Rights Centre-Hakijamii, Amnesty International-Kenya, Kituo Cha Sheria, Umande Trust, Copa-Kenya, COT, African Platform for Social Protection, Muungano wa Wanavijiji, Article 19, Grassroots Trust, Kutoka Network, Health Rights Africa, UPR info, Minda Trust, Haki-Yetu Trust, Kisora, Wewasafo, EACH Rights, Kenya Land Alliance, The Youth Congress, Kamukunji Paralegal Trust, Nairobi Peoples Settlement Network (NPSN), Institute of Environment and Water Resources Management, Water Livelihood Network (Walinet), Migori Clan, Homabay Community, Youth Alive Kenya, Pamoja Trust, Edmund Rice advocacy Network, Kenya Human Rights Commission, Kelin Kenya, Kenya Hospice and Palliative Care Association (KEHPCA), HIVOS Kenya, Keeping Alive Society's Hope.

Table of Contents

ABBREVIATIONS AND ACRONYMS.....	4
Acknowledgement	5
1.0 Introduction	6
2.0 Article 1: The right to self-determination	7
2.1 Internal and external challenges of self-determination	7
3.0 Article2 Progressive realization	8
3.1 Disparities in the enjoyment of economic, social and cultural rights	9
3.1.1 Persons living with disabilities (PWDs).....	9
3.1.2 Refugees and Internally Displaced Persons.....	9
3.1.3 Internally Displaced Persons (IDPs)	10
4.0 Article 3: The equal right of men and women to the enjoyment of all economic, social and cultural rights.	11
5.0 Article 6 & 7: The right to work and just and favorable conditions of work	11
6.0 Article 8: The right to join trade unions	12
6.0 Article 9: The right to social security	12
6.1 Coverage of programmes	13
7.0 Article 10: Protection of the family	14
7.1 Discrimination against children.....	14
7.1.1 Legal Framework.....	14
7.1.2 Children living with disabilities	15
7.1.3 Children living with HIV/AIDS.....	17
8.2 Child abuse, neglect and child labor	19
7.2.1 Legal Framework.....	19
7.2.2 Situational Analysis	19
8.0 Article 11: Adequate standards of living.....	21

8.1 Forced evictions.....	21
8.2 No security of tenure.....	22
8.3 Legislative provision undermining the justiciability of socio-economic rights.....	23
8.5 Right to water and reasonable standards of sanitation	25
8.6 The Water Bill 2014.....	26
8.7 Under-investment in the water sector	27
8.8 Disparity in access to safe drinking water and sanitation especially for the unprivileged in urban and those in arid and semi arid areas	28
8.8.1 Water	28
8.8. 2 Sewerage coverage.....	28
9.0 Article 12: The right to health	29
9.1 Geographical disparities in accessing health care services	29
9.2 Increased out of pocket spending for health services for the marginalized.....	29
9.3 Maternal health care	30
10.0 Article 13 and 14: The right to education and free compulsory primary education.....	30
10.1 Access to education.....	30
10.2 Quality of education.....	31
10.3 Effects of low-cost private schools	31
10.4 Early Childhood Development Education neglected	33
11.0 Article 15: The right to participate in cultural life	34
11.1 Cultural Rights Issues in the Kenyan Context	35
11.2 A Classical Case of Impending Cultural Rights Violation of IPs in Lamu Archipelago (Adopted from Kenya at 50: Unrealized Rights of Minorities and IPs).....	35

ABBREVIATIONS AND ACRONYMS

ACHPR	African Commission on Human and Peoples
AIDS	Acquired Immunodeficiency Syndrome
CBO	Community Based Organizations
COK	Constitution of Kenya
CSOs	Civil Society Organizations
ECDE	Early Childhood Development and Education
FBOs	Faith Based Organizations
FDSE	Free Day Secondary Education
FPE	Free Primary Education
FY	Financial Year
HIV	Human-Immunodeficiency Virus
ICCPR	International Covenant on Civil and Political Right
ICESCR	International Covenant on Economic, Social and Cultural Rights
IPs	Indigenous Peoples
IDPs	Internally Displaced Persons
ILO	International Labour Organization
KHRC	Kenya Human Rights Commission
KLRC	Kenya Law Reform Commission
KNCHR	Kenya National Commission on Human Rights
LGBTI	Lesbian, Gay, Bisexual, Transgender and Intersex
MDG	Millennium Development Goals
NACC	National Aids Control Council
NGOs	Non-Governmental Organizations
NSSF	National Social Security Fund
NWSS	National Water Services Strategy
OOP	Out-of-Pocket
OPDP	Ogiek People Development Program
PMTCT	Prevention of Mother to Child Transmission
UDHR	Universal Declaration of Human Rights
UNCRC	United Nations Convention on the Rights of the Child
UNESCO	United Nations Educational, Scientific and Cultural Organization
WASH	Water, Sanitation and Hygiene
WSB	Water Services Board

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1.0 Introduction

This submission provides a synopsis of critical issues and recommendations of the civil society organizations in Kenya. Pursuant to Article 16 of the International Covenant on Economic, Social and Cultural Rights, the government must submit reports highlighting the extent to which they are fulfilling their human rights obligations. This report complements the information presented in Kenya's 2nd -5th Periodic Report of July 2013, highlighting concrete issues as it pertains to the State's compliance with its obligations under the International Covenant on Economic, Social and Cultural Rights (ICESCR). The report makes specific reference to issues unsatisfactorily addressed, omitted or absent from the State report. It seeks to respond to the questions put forth in the List of Issues adopted by the Committee's Pre-session Working Group on 16th October 2015. It relies primarily on government statistics, which, as outlined in the submission, is not always reliable in terms of its accuracy. Supplementary data from credible international agencies is also cited.

In the time since the submission of its state report, Kenya has been undergoing a constitutional transition. There have been a lot of changes in political leadership, governance and legal order. The Kenyan Constitution has been applauded and accredited as both progressive and ideal by the international community. However, the country still faces challenges in its effective implementation. The expectations of the citizens of Kenya at its inauguration have chiefly remained unmet. This is as a result of political, economic and social environment that is unfavorable for actualization of human rights. Article 43 of the Constitution recognizes economic and social rights. Article 21 mandates the State to take significant steps including policy, legislative and other measures together with the setting of standards and resource allocation towards the realization of these rights. The period under review has seen great efforts by the political class in absconding their constitutionally enshrined obligations, particularly those relating to international law. There was an increase in actions that violated human rights in anti-terrorism activities, determination of salaries and benefits of parliamentarians and former members of the executive and lack of accountability under the Rome Statute. Business entities have also undermined human rights in their pursuit of profit generation. An important illustration of this has especially been witnessed in the mining industry. Additionally, public appreciation and support of human rights has continued to erode, particularly with regards to efforts of curbing the rising cases of insecurity in the country. This is also true of the public's perception of human rights defenders work to ensure the respect of guaranteed rights.

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The participating civil society organizations express grave concerns that the previous and current government under the new constitution have failed to meet the requirements of Article 43. As detailed in this submission, in some instances, the different administrations have consciously taken steps to undermine the respect for and realization of economic, social and cultural rights which is a breach of the state's obligations. More broadly, in response to the country's worsening

education crisis, the different administrations have so far continued to prioritize short-term measures to attract foreign loan for instance in proposing regressive taxes on basic goods and cutting essential subsidies which fail to address the systemic dysfunctions in the country's economy and risk leading to significant retrogression in the realization of socio-economic rights.

2.0 Article 1: The right to self-determination

2.1 Internal and external challenges of self-determination

Kenya has witnessed a lot of aggressions from Alshabab ¹from the neighboring war torn country Somali and also clashes between communities particularly in the Arid and semi arid areas over natural resources like water, land and grazing fields. The September 21 2013 attack on Nairobi's Westgate mall killed at least 67 people and highlighted the security threat posed by the militant Islamist Somali group Al-Shabaab both within Somalia and in Kenya, which hosts an estimated 500,000 Somali refugees. The Somali refugee community has frequently been subjected to discrimination and reprisals in the wake of attacks in Kenya, including a brutal police operation from November 2012 to January 2013 in Nairobi's Eastleigh neighborhood. Another terror attack on Garissa University College claimed the lives of 147 Kenyans leaving others emotionally and physically impaired. Terrorism remains a major challenge to self determination in Kenya. The education system has been affected more so when teachers are forced to withdraw from conflict and terror stricken areas and the communities re-locate from their settlements for fear of being invaded. Conflict also acts as a disincentive to investment by the communities and development agencies, both in the long-term and short-term particularly in the tourism sector that forms 21% of the national GDP.

Recommendation

- The State should provide information on what measures it has taken to protect its citizens and those within its jurisdiction from external aggression such as those from Al-Shabaab militants and militia communities in Mandera, Wajir, Garissa, Lamu Nadome, Kapedo and other areas in North Rift of the country where conflicts affect development and provision of essential services in these areas through disruption of the communities' livelihood systems by restricting economic development.
- What steps is the government taking to protect citizens from frequent terror attacks that have directly affected peoples endeavours to self determination.

¹ Al-Shabaab is a Somali group that wants to turn Somalia into a fundamentalist Islamic state. Al-Shabab has staged numerous attacks in Kenya. The 2 April 2015 massacre at Garissa University, near the border with Somalia, is the bloodiest so far.

3.0 Article2 Progressive realization

3.1.1 The State should provide information on the mechanisms, if any, to ensure that there are adequate safeguards to guarantee the enjoyment of economic, social and cultural rights particularly in relation to most disadvantaged and marginalized groups. Specifically, what laws, policies and other measures have been put in place to guarantee the enjoyment of economic, social and cultural rights? The State should also provide information on the steps it has taken to comply with court orders in relation to cases below.

The Kenya National Commission on Human Rights is mandated under Section 8 of the KNCHR Act, 2011 (Revised 2012) to act as the principal state agency in the promotion and protection of human rights. In discharging this function, the Commission is required to ensure observance of human rights in all spheres of life in the Republic of Kenya. However, the Commission has not been able to do much due to political interference. Additionally the concept of economic and social rights is fairly new in Kenya. To a large extent the Commission needs capacity and technical support and benchmarks to properly understand and effectively execute their mandate. The Commission also requires sufficient budgetary allocations to run. We have to underscore the fact that the Commission has established an ECOSOC department with its office which is a big step going forward. However, the Commission needs to come out strongly and develop smart indicators against which the government can evaluate itself in realization of these rights.

The judiciary is one of the three co-equal arms of government. Its chief mission is to resolve disputes in a just manner with a view to protecting the rights and liberties of all, thereby facilitating the attainment of the rule of law. The recognition of economic and social rights in the Kenyan constitution was one major step in the history of these rights in Kenya. The judiciary in the recent past has made some progressive judgments on violation of economic and social rights. Although, several cases touching on violation of individuals' economic and social rights have been determined in Kenyan courts, the government has remained adamant in enforcing court decisions, a blatant disregard of Article 50. This has been propelled by the impugnable Government Proceedings Act that protects the government from having its assets attached and shield it from being forced to comply with court decisions. Some of the pending cases include: Satrose Ayuma and the Ibrahim Sangor Case.

Question

What is the amount of compensation that the State has been ordered by the courts to pay to victims of economic and social rights violations, and how much has the State paid so far?

What measures has the state taken to repeal retrogressive and unconstitutional laws such as the Government Proceedings Act?

3.1 Disparities in the enjoyment of economic, social and cultural rights

3.1.1 Persons living with disabilities (PWDs)

The Constitution of Kenya under Article 54 provides that persons with disabilities are entitled to the following:

- a. To be treated with dignity and respect and to be addressed and referred to in a manner that is not demeaning;
- b. To access educational institutions and facilities for persons with disabilities that are integrated into society to the extent compatible with the interests of the person;
- c. To reasonable access to all places, public transport and information;
- d. To use sign language, Braille or other appropriate means of communication; and
- e. To access materials and devices to overcome constraints arising from the person's disability.

Recommendations

- a) The State should elaborate on the policies and legislation put in place to ensure persons living with disabilities are recruited to the public service.
- b) The State should provide a monitoring framework on the measures taken 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 as per Article 54(2) of the Constitution of Kenya, 2010.

3.1.2 Refugees and Internally Displaced Persons

Since the Kenya Defense Forces entered Somalia in October 2011, the registration of refugees and asylum seekers in both urban and camp centers have been discontinued. More recently, the government has attempted to enforce encampment and in so doing, has induced *refoulement* in contravention of the signing of a Tripartite Agreement between the Office of the United Nations High Commissioner for Refugees (UNHCR), the Kenyan Government and the Government of Somalia in November 2013. In addition to the inability to access services as a result of non-registration and punitive measures against undocumented persons, recent terror attacks have compounded the already precarious protection environment of refugees with an increase in cases of harassment, extortion and discrimination.

Recommendation

- a. The government takes relevant steps to ensure timely and efficient issuing of work permits to refugees. This will also reduce illegal immigrants and terrorists.
- b. The government should develop procedures of repatriation in line with the 1951 Convention relating to the status of the refugees and the 1969 African Union Convention governing the Specific Aspects of Refugee Problems in Africa.

3.1.3 Internally Displaced Persons (IDPs)

The Kenyan government has made strides to prevent, resolve and control internal displacement. The government has also tried to address land issues from a legal and policy perspective. The enactment of the Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act No 56 of 2012 now makes provision for the assistance of internally displaced persons and also gives effect to the Great Lakes Protocol on the Protection and Assistance to Internally Displaced Persons, and the United Nations Guiding Principles on Internal Displacement. However, the government has failed to enact laws to comprehensively address the problem of land tenure, which is one of the main causes of displacement. In addition, while the Act recognizes that internal displacement can be caused by the government on account of development projects, there is no framework for evictions or resettlement procedures. Some of these issues would be addressed through enactment of the Evictions and Resettlement Procedures Bill. This is an area that needs to be remedied, alongside efforts to implement the laws already enacted. The challenges that have been witnessed include lack of adequate stakeholder awareness about the instruments in question, delays in the establishment of the bodies mandated to oversee their implementation, funding shortages and weak land governance at national and county levels²

Recommendations;

- i. Harmonization through organized communication and cooperation within government line ministries when dealing with IDPs
- ii. The government should compile an up-to-date data on internal displacement. As things stand, no organisation or authority consistently tracks IDPs's location and needs over time. Those outside camps are largely invisible, and any information that is available tends to be sparse and focus on new displacements.

² <http://www.knchr.org/Portals/0/EcosocReports/201407-af-kenya-unfinished-business-en-2.pdf>

4.0 Article 3: The equal right of men and women to the enjoyment of all economic, social and cultural rights.

Despite making substantial progress to ensure that women are equally able to enjoy economic, social and cultural rights, discrimination against women persists in Kenya in all its facets. In practice, opportunities for women as compared to their male counterparts in public and private spaces are limited, and the constitutional requirement for non-discrimination and affirmative action is implemented half-heartedly. Although Kenyan women are gradually joining the civil service and making significant strides to develop careers in the previously male-dominated professions, they are still grossly underrepresented in senior management and public decision positions. In job group P and above, they only form 0.5% compared to 24.3% of those in job group A-G ³.

Recommendation

The State should take decisive measures to implement the constitutional directive to effect the 2/3 gender rule representation in elective and appointive bodies as provided by Article 27(8) of the Constitution.

5.0 Article 6 & 7: The right to work and just and favorable conditions of work

Article 41 of the Constitution of Kenya talks about the labor relations in Kenya. It states that every person has the right to fair labour practices. This Article provides that every worker has the right:-

- (a) To fair remuneration;
- (b) To reasonable working conditions;
- (c) To form, join or participate in the activities and programmes of a trade union; and
- (d) To go on strike.

The country's unemployed population falls between the ages of 15-34 years old. 80% of the population in Kenya falls between ages 15-34⁴. Further, young people aged 25 and 30 years show unemployment rate of 25% and 15% respectively. Kenya's youth unemployment is a major issue that has led to a lot of social ills like the youth joining terrorist activities. The government has placed a lot of measures to increase the employment rate of the youth within the nation. This ranges from the start up of loan opportunities like Uwezo Fund, Youth Funds, Constituency Development Funds and Women Enterprise Development Fund. However the funds have been

³ UNIFEM, (2010). Women representation and participation in the public and private sectors in Kenya. A Baseline report. Strategic Research Limited.

⁴ UNDP (2013) Kenya's Youth Unemployment Challenge. UNDP New York.

marred by corruption and duplication beating its own essence⁵. Additionally, youth complain of stringent processes in application of these funds in terms of collateral as a requirement.

Recommendations

- a) The government needs to have in place proper and effective accountability mechanisms that checks on the expenditure and allocation of these funds. Statistics show that the funds have not adequately addressed youth unemployment.
- b) The government should revise the unfavourable application processes for these funds to allow young people to easily access the funds

The 2010 Constitution at Article 41(1)(c) is very clear on labour relations, thus any contravention by employers with regards to this right is already dealt with in law. This right is not only premised on workers' rights and collective bargaining but also on social development whereby trade unions are supposed to be drivers of social development of workers' rights and ensuring that employers obligations to their workers are adhered to especially with regards to workers' socio-economic interests. However, much has not been done in the informal sector where violations are rife. Labor officers are few and unable to deal effectively with labor issues particularly labor rights that are rife within the informal sector in the urban areas.

Recommendations

The government should increase the number of labour officers to ensure strict adherence to labour laws. This will ensure enforcement of labour standards. The state should further stop interfering in trade unions management structures through the ministry of labour.

6.0 Article 9: The right to social security

Article 9 of the ICESCR requires universal access of social security and social insurance. Kenya has made efforts towards implementing these rights through the provisions of Article 43 of the 2010 Constitution which guarantees the right to social security. In addition, the National Social Security Fund Act⁶ and the National Hospital Insurance Fund Act⁷ provide the basis for the realization of social security and social insurance rights. However the complementary nature and interrelated experience of realizing economic, social and cultural rights demands for an integrated approach which in Kenya, under the social protection banner covers social security,

⁵ <http://kenyalaw.org/caselaw/cases/view/105977/>

⁶ National Social Security Fund Act, No. 45 of 2013

⁷ National Hospital Insurance Fund Act 1998

social insurance and social assistance.⁸ These speak to the realization of Article 9 of the ICESCR but gaps still exist in common principles especially those concerned with universality and indivisibility.

6.1 Coverage of programmes

Social protection programmes under which social security and social insurance fall are faced with coverage challenges that undermine uptake of services among the citizenry. Both social security and social insurance remain open to all citizens. However the discrepancy is noticed in the formal and informal sector workers. Whereas in the formal sector payment of social security and social insurance are compulsory and are deducted at source (employer) by the government, the informal sector workers have this as a voluntary contribution. According to the World Bank's International Finance Corporation,⁹ health insurance in Kenya is offered by the National Hospital Insurance Fund (NHIF) accounting for 18%, private sector 2%, microfinance 2% and community based health insurance accounting for 2%; meaning that out of pocket expenditure accounts for the majority of health financing. According to the Kenya Institute for Public Policy Research and Analysis (KIPPRA),¹⁰ the informal sector accounts for about 80% of all workers which speaks to the disparity in the contributions and coverage of the scheme that target mostly formal sector workers rather than the majority in the informal sector. The dichotomy between contributors and workers is evident and points to great parallels in terms of access to both social security and social insurance. In the case of vulnerable groups i.e. older persons, persons with disabilities, orphans and vulnerable children, cash transfers which look to safeguard consumption irregularities (safety net measures) as well as enhance access to other basic amenities such as health and education targeting mechanisms are employed, which have high inclusion and exclusion errors. According to the Social Protection Sector Review¹¹ only 28% of OVCs are covered by the Orphans and Vulnerable Children Cash Transfer. This again points to poor coverage of both social security and social insurance from a systemic perspective in so far as the targeting for both the social insurance fund and the social security fund is concerned. Coverage of all the programmes remain low especially because the two funds favour contributions from those in the formal sector.¹² Social protection schemes continue to be dogged by questions as to

⁸ Government of Kenya. (2012). *Kenya National Social Protection Policy*. Nairobi: Government of Kenya.

⁹ International Finance Corporation (2015) *The Path to Universal Health Coverage in Kenya: Repositioning the Role of the NHIF*

¹⁰ KIPPRA (2013): Kenya Economic Report 2013; *Creating an Enabling Environment for Stimulating Investment for Competitive and Sustainable Counties*

¹¹ Ministry for State for Planning, National Development and Vision 2030. (2012). *Kenya Social Protection Sector Review*. Nairobi: Government of Kenya.

¹² KIPPRA (2013): Kenya Economic Report 2013; *Creating an Enabling Environment for Stimulating Investment for Competitive and Sustainable Counties*

their adequacy stemming from price inflation eroding the value of the shilling¹³ and therefore the purchasing power of households. The issue of a progressive contribution system for the funds is key in the sense that it has to build the funds (efficiency in financing) while ensuring that service provision and expansion of benefits remains core to its expenditure.

The Social Protection Sector Review of 2012¹⁴ identified duplication and lack of coordination as a key hindrance to the enjoyment of social protection benefits. The lack of a coordination mechanism rooted in law as spelt out in the National Social Protection Policy¹⁵ has meant that the Social Protection Council which among other tasks, is charged with setting up a Social Protection Fund does not exist. Under the Council, a secretariat charged with the function of coordination and with powers to act would also be set up. Although the secretariat exists, it is not founded in law nor does it have the power to coordinate functions of the NHIF, which is run under the Ministry of Health under the NHIF Act and the NSSF which is under a different department in the Ministry of Labour, Social Security and Services established under the NSSF Act.

Recommendations

The government should not hide under the guise of progressive realisation and instead set measurable targets to increase budgetary allocations to social protection programmes, increase uptake by informal sector workers for social protection and ensure universal access and coverage of all programmes. NSSF and NHIF should expand its portfolio of services to attract more informal sector workers and increase its funding base to ensure sustainability in the long run. Social assistance programmes need to take cognisance of the vulnerability of

7.0 Article 10: Protection of the family

7.1 Discrimination against children

7.1.1 Legal Framework

Article 53(1) (b) and (c) of the Constitution 2010¹⁶ states that every child has the right to free and compulsory basic education, and basic nutrition, shelter and health care. Section 7 (1) and (2) of the Children's Act 2001 states that every child shall be entitled to education the provision of which shall be the responsibility of the government and the parents. It further states that every child shall be entitled to free basic education which shall be compulsory in accordance with Article 28 of the United Nations Convention on the Rights of the Child¹⁷.

¹³ Ministry for State Planning, National Development and Vision 2030. (2012). *Kenya Social Protection Sector Review*. Nairobi: Government of Kenya

¹⁴ Ibid

¹⁵ Government of Kenya. (2012). *Kenya National Social Protection Policy*. Nairobi: Government of Kenya.

¹⁶ *Constitution of Kenya 2010*,

¹⁷ National Council for Law Reporting (2001) *Children's Act 2001*, Nairobi: National Council for Law Reporting

Article 19 of United Nations Convention on the Rights of the Child (UNCRC) obligates State Parties to 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.

Article 28 of the UNCRC¹⁸; Section 28, 29 and 32 of the Basic Education Act 2013¹⁹ provide for free and compulsory education for children. Article 2 of UNCRC echoed by Section 5 of the Children's Act 2001²⁰ provides that no child shall be discriminated against on grounds of origin, sex, religion, creed, custom, language, opinion, conscience, colour, birth, social, political, economic or other status, race, disability, tribe, residence or connection.

Article 54 (1) of the Constitution 2010 relates to the rights of persons with disabilities. Specifically, Article 54 (1) requires that people with disabilities be treated with dignity and respect; to access educational institutions and facilities for persons with disabilities that are integrated into society to the extent compatible with interests of the person; to reasonable access to all places; to use sign language, Braille or other appropriate means of communication; and to access materials and devices to overcome constraints arising from the person's disability.

Section 18 of the Persons with Disability Act 2003²¹ also states that no person with disability shall be denied admission to any course of study by reason only of such disability; and learning institutions shall take into account the special needs of persons with disabilities with respect to the entry requirements, pass marks, curriculum, examinations, auxiliary services, use of school facilities, class schedules, physical education requirements and other similar considerations.

Section 9 of the Children's Act 2001 provides for the right of a child to health and medical care while Section 12 states that a disabled child shall have the 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.

7.1.2 Children living with disabilities

A survey conducted by the National Coordinating Agency for Population and Development in 2008 revealed that the overall level of disability rates in Kenya is 4.6%. Among these, 1.6% have physical disabilities and 1.4% have visual disabilities. The report established that among children between 0-14 years, 0.5% suffer from hearing disabilities, 0.2% speech, 0.4% visual, 0.1% mental, 0.6% physical while 0.3% have self care challenges. Among teenagers between 15-24

¹⁸ United Nations (1989) United Nations Convention on the Rights of the Child

¹⁹ Basic Education Act, No 14 of 2013, Laws of Kenya

²⁰ Children's Act NO 8 of 2001 Laws of Kenya

²¹ Persons with Disabilities Act, No 14 of 2003, Laws of Kenya

years, 0.4% have hearing difficulties, 0.2% speech, 1.1% visual, 0.2% mental, 1.1% physical and 0.3% have challenges related to self care.²²

The survey also established that 32% of Persons with Disability (PWDs) use assistive devices or support service. Out of this proportion, one in every five uses an information device while 12% use a personal mobility device. Other devices such as communication aids (0.3%), household items (0.1%), personal care and protection (0.4%), handling products and goods (0.1%), and computer (0.1%) were rarely used. PWDs in urban areas (41%) were more likely to use an assistive device or support service than their rural counterparts (26%). Similarly they were more exposed to use of information devices (30% for urban versus 11% for rural).

Many children living with disabilities in Kenya continue to experience discrimination due to retrogressive cultural practices and dispositions. Many children with special needs are considered a bad omen by some families and are therefore denied opportunities for personal growth and development.

Many public schools in Kenya, both primary and secondary, have not prioritized and integrated special needs education into their learning curricula as is required by law. There is a significant shortage of teachers with special needs training and many of the schools do not have adequate equipments or facilities that support learning for children with disabilities. Schools that are specialized in providing special needs education are very few and sparsely distributed across the country, often making them inaccessible to many children. Subsequently, the costs associated with special needs education are also high, making it expensive for many parents with low income to afford such specialized schools. Due to inadequate facilities and equipments for children with special needs in many public and private schools, children with special needs often find it difficult to catch up with the rest of their colleagues. Some schools continue to discriminate against children with special needs by refusing them admission.

Treatment and medication for children with special needs is often very expensive considering that many of these children are frequently ill and in need of regular medical attention. Some necessary equipment such as wheelchairs for physically disabled children, sun screen, sun glasses and prescription lens for children with albinism are very expensive and unaffordable to many families.

Lastly, children with disabilities, particularly those who have undergone apprenticeship or vocational training programmes also find it increasingly difficult to find job placements where they can put their skills to gainful use.

²² National Coordinating Agency for Population and Development (2008) *Kenya national Survey for Persons with Disabilities: Preliminary Report*, Nairobi: National Coordinating Agency for Population and Development

Recommendations

- (a) Map out and create a database of the special needs requirements of all children living with disabilities, and through budgeting, fast-track the provision of assistive devices, materials, equipments and facilities to ensure their easy learning, mobility and personal development
- (b) Take measures to facilitate training and recruitment of teachers for special needs education to eliminate the current shortage.
- (c) Increase the number of units in public schools offering special needs education to increase access for children with special needs.
- (d) Speed up the process of integrating special needs children into mainstream education and facilitate availability of materials and equipments to ease their learning.
- (e) Fully implement the provisions of the Persons with Disabilities Act 2003 and other legislations to ensure all children with disabilities are able to access free treatment and medication in all public health facilities
- (f) Ensure non-discrimination of all children living with disabilities in all public and private institutions through enforcement of policies and legislations.
- (g) Continue with its effort to create awareness among citizens with the view of creating a positive and receptive attitude towards children living with disabilities and to counter retrogressive cultures that continue to discriminate against them
- (h) Set aside special places for apprenticeship of children with disabilities through the National Youth Service and thereafter facilitate their absorption into employment.

7.1.3 Children living with HIV/AIDS

A study conducted by the National AIDS Control Council of Kenya (2014) established that there were at least 190,131 children between 0-14 years living with HIV in Kenya in 2013, 95,743 male and 94, 388 female. Children between the age of 15 years and above living with HIV were estimated at 87, 291, of which 37, 514 are male and 49, 778 female.

The Government, other Non-Governmental Organizations (NGOs), Faith Based Organizations (FBOs) and Community Based Organizations (CBOs) have in the last decade scaled-up the fight against HIV/AIDS with a view to realizing the zero infection rates. A lot of public awareness has been created in this regard to combat the spread of HIV/AIDS including other policy interventions such as the Youth Communication Strategy, Condom Policy and Strategy, Male Circumcision Policy, HIV and AIDS policy at workplace, HIV and AIDS Prevention and

Control Act, National Aids Control Council and Stakeholder's Code of Conduct and guidelines *inter alia*.

Deliberate programme interventions such as the Prevention of Mother to Child Transmission (PMTCT), Early Infant Diagnosis, PMTCT ARV prophylaxis, HIV counseling and Testing, and Cash Transfer Programmes where Orphans and Vulnerable Children receive Ksh 2000 per month have also been established.

However, despite these interventions, HIV/AIDS stigma, particularly of children living with HIV and AIDS still remains a significant cause for concern. Many orphaned children living with HIV suffer neglect from caregivers and family members due to the unfounded fear and belief that they may pass on the HIV virus to their children. For this reason, children living with HIV/AIDS are often stigmatized through restricted play and interaction with other children and even forced to use separate utensils and beddings.

Many children living with HIV/AIDS are not facilitated to attend hospitals or clinics for treatment and medication or when the medication has been provided, they are not properly administered by the caregivers as prescribed. Many children living with HIV/AIDS are often considered a burden in the family and believed to have a shorter time to live hence less attention is given to them, including the necessary medical and educational needs.

There are a growing number of children living with HIV/AIDS who have been disowned by their families and or caregivers, thus ending up on streets or children homes. In some instances, children are dispossessed of their inheritance by greedy relatives while others suffer physical, sexual and emotional abuse.

There are also incidents where children living with HIV/AIDS experience discrimination in schools. Some schools either refuse to admit children living with HIV/AIDS or in other incidents, insensitive language or examples related to HIV pandemic are used in class by teachers that continue to stigmatize these children. Many orphaned children are also forced to drop out of school due to lack of school fees, particularly due to high fees charged in most secondary schools.

Recommendations

- (a) Provide adequate protection to orphaned children to ensure their rightful inheritance is guaranteed.
- (b) Facilitate the provision of child and youth friendly desks in all health care institutions to sensitize children and teenagers on HIV/AIDS and reproductive health for behavior change and character formation
- (c) Step-up efforts to demystify HIV/AIDS retrogressive myths through appropriate campaigns, and training and workshop particularly for teachers to avoid re-victimization of children living with HIV/AIDS within school set-ups

8.2 Child abuse, neglect and child labor

7.2.1 Legal Framework

Chapter four of the Constitution of Kenya, 2010 provides for the bill of rights and fundamental freedoms of all citizens; Article 53 of the same provides for special guarantees for children's rights

Drawing from Article 19 of UNCRC, Section 10 of the Children's Act (2001) provides for protection from economic exploitation and any work that is hazardous or likely to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development

The International Labour Organization (ILO) Convention 138²³ as domesticated in Section 56 the Employment Act 2007²⁴ and Section 4 of the Children's Act 2001 establishes the minimum age of work permissible for children.

ILO Convention 182²⁵ illustrates the worst forms of child labour. The Sexual Offences Act (2006) provides for different forms of sexual offenses and applicable penalties thereto, including defilement, attempted defilement, gang rape, indecent act with child or adult indecent act with adult, promotion of sexual offences with a child and child sex tourism

Section 13 of the Children's Act (2001) provides for the protection from physical and psychological abuse, neglect and any other form of exploitation including sale, trafficking or abduction by any person.

7.2.2 Situational Analysis

According to a national survey conducted in 2010 on violence against children in Kenya, three out of every ten females and nearly two out of every ten males aged 18 to 24 reported at least one experience of sexual violence prior to age 18.²⁶ Seven percent of females aged 18 to 24 reported experiencing physically forced sexual intercourse prior to age 18. Of females whose first sexual encounter occurred before age 18, 24% reported that it was unwilling, they were forced,

²³ International Labour Organization, Minimum Age Convention , 1973

²⁴ Employment Act, No 11 of 2007, Laws of Kenya

²⁵ International Labour Organization, Worst Forms of Child Labour Convention, 1999

²⁶ <http://www.unicef.org/esaro/Violence> Against Children _in_ Kenya.pdf

pressured, tricked or threatened to engage in sexual intercourse. In the 12 months prior to the survey, about 11% of females and 4% of males aged 13 to 17 experienced some type of sexual violence. Among 18 to 24 year olds, almost two-thirds of females and three-quarters of males reported experiencing physical violence prior to age 18. Approximately half of all females and males aged 13 to 17 experienced some type of physical violence. About one-quarter of females and one-third of males aged 18 to 24 years reported experiences of emotional violence prior to age 18.

The government of Kenya has put in place important measures to protect children from abuse and facilitate easy access to justice. Such measures include the establishment of institutions such as the Children's Courts, National Council for Children's Services, and the introduction of children's rights into school curriculum among other measures. Other Non-governmental Organizations also play a significant role in the promotion and protection of children's rights by establishing institutions of child care and learning and by promoting awareness of child rights and abuse to local citizens.

However, many children in Kenya are continuously subjected to the worst forms of child abuse in schools, child care institutions and even at home. There have been a growing number of cases reported by the media of child defilement, physical abuse, neglect and emotional abuse. Cases of children being defiled, abducted, strangled and/or badly mutilated and their bodies dumped have been on a steady rise with some of them going unresolved. The reluctance of law enforcers to expedite investigations, make arrests and charge perpetrators is worrying. There is also reluctance among the public to assist with investigation, including instances of alleged bribery, either of law enforcers or family members to compromise or withdraw cases.

There is also a growing concern of alleged criminal activities perpetrated by children in many informal settlements. In Mukuru informal settlements and Kayole areas in Nairobi for instance, there is an alleged criminal gang named GAZA that is recruiting children, both boys and girls, as young as 9 years and thereafter inducting them into criminal activities. The children are lured through sports such as football and later made to take illegal oaths which bind them as members of that gang. These children are then slowly introduced into crime, ranging from extortions, theft, robbery, prostitution and illicit drugs. The gang operates very secretly, making it difficult to know the whereabouts of its leaders, and it thrives through instilling fear through threats to local residents.

Child labour in Kenya is also rampant with a steady growth of street children, especially in Nairobi. In many informal settlements such as Mukuru, illicit brew, locally known as *chang'aa* also contributes to this problem. Many *chang'aa* dens are opened as early as 7.00 am and sometimes children are involved in selling, which is often their parents' occupation. This

happens despite the law requiring all pubs and bars selling alcohol to open not earlier than 5.00 pm on weekdays and 3.00 pm on weekends.²⁷

In addition, many children are involved in plastics and scrap metal collection, sometimes to supplement family income instead of going to school.

Recommendations

We therefore propose the following recommendations to the government of Kenya:

- (a) Consider establishing a child unit within the National Police Service to promote public awareness on children's rights and to fast-track investigations and prosecution of all cases related to child abuse.
- (b) Investigate the activities of GAZA gang and provide safeguards to protect children from being recruited into this gang, and where applicable, prosecute all those found culpable of exploiting children to promote criminal activities.
- (c) Promote community based initiatives that help children and teenagers to channel their energies through games, sports and the arts so as not to be victims of criminal gangs.
- (d) Strengthen legislations to stop business people and individuals from buying scrap metals and plastics from children and prosecute all those found culpable of exploiting children for their commercial gain.

8.0 Article 11: Adequate standards of living

8.1 Forced evictions

In May 2004, the government assured Special Rapporteur on adequate housing, Miloon Kothari, that it would stop all evictions to work on a more organized and systematic plan for evictions. The government also informed the Special Rapporteur that it intended to sensitize all citizens and stakeholders on procedures for evictions.²⁸ Both of these commitments are yet to be honored.

²⁷ Alcoholic Drinks Control Act, No. 4 of 2010, Laws of Kenya

²⁸ UN Commission on Human Rights, *Adequate housing as a component of the right to an adequate standard of living. Report by the Special Rapporteur, Miloon Kothari. Mission to Kenya*, 17 December 2004, at para.78,

Despite the Constitution of Kenya protecting the right to accessible and adequate housing under Article 43(1) (b), this right is still being violated, both by private persons and by the State itself. The Constitution goes a step further and also enshrines the right to property in Article 40. Under Article 40(3) the government is expressly prohibited from arbitrarily depriving a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with the provisions of the Constitution; or is for a public purpose or in the public interest and is carried out in accordance with the Constitution and any Act of Parliament that:

- (i) requires prompt payment in full, of just compensation to the person; and
- (ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.

Instances of forced displacement have been on the rise as a result of the increase in the number of mega developments being undertaken in the country, most notable the Lamu Port-South Sudan- Ethiopia Transport Corridor (LAPSSET Corridor). To pave way for these developments communities are being unprocedurally evicted from their homes and left homeless, vulnerable to further violations of their economic and social rights.

This situation is facilitated by the continued absence of a comprehensive eviction policy or law. In its State of Housing Report, 2013/2014, the Economic and Social Rights Centre (Hakijamii) reported that the lack of an enabling policy and legal framework on evictions and resettlement was identified by members of the public as contributing significantly to the vulnerability of communities to forced evictions.²⁹

8.2 No security of tenure

Another factor leaving Kenyans vulnerable to forced evictions is lack of security of tenure. Persons who do not hold title to land are protected in Article 40(4) of the Constitution of Kenya which states that "provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land." Therefore, lack of title to land is no justification for unprocedural arbitrary evictions. This has been witnessed in areas such as Isiolo where the land has been held under communal tenure with the adjudication and titling process yet to be undertaken. Irregular and illegal evictions have been carried out against some residents with the officers carrying out the evictions alleging that the residents have no right to be there and therefore cannot be protected. Such statements also reveal a need for the

E/CN.4/2005/48/Add.2, available at: <http://www.refworld.org/docid/42d66e380.html> at para. 78, [accessed 6 November 2015] .

²⁹ The Economic and Social Rights Centre-Hakijamii, *Annual State of Housing Rights in Kenya 2013 to 2014*, (September 2014) pg 18.

government to carry out trainings and awareness building on human rights for security forces who need to understand a human rights approach to law enforcement, including the carrying out of evictions.

The study undertaken by Hakijamii also found that security of tenure was identified by members of the public as the most important factor of adequate housing and in turn the lack of security of tenure left residents in informal settlements vulnerable to forced evictions.³⁰

8.3 Legislative provision undermining the justiciability of socio-economic rights

The current legal framework is currently acting as an impediment to realising the right to housing and is also frustrating efforts towards ensuring the justiciability of economic and social rights, particularly the right to a remedy. In the case of **Ibrahim Sangor Osman v Minister of State for Provincial Administration and Internal Security**³¹ 1,123 petitioners went to court after their homes were demolished without notice by armed administration police officers in riot gear, in blatant violation of their right to housing, property and dignity and blatant disregard for due process. The court found that this amounted to a violation of, inter alia, their right to dignity, accessible and adequate housing, reasonable standards of sanitation, health care services, water and freedom from hunger. The court issued a mandatory injunction compelling the State authorities to return the Petitioners back to their land, reconstruct reasonable residences and/or alternative housing with all the amenities, facilities and schools they agree on. A permanent injunction was also ordered against any evictions done apart from the law and due process and the 1,123 Petitioners were granted damages of two hundred thousand Kenya shillings each. However, the enforcement of the award of damages in the judgment has been frustrated by Section 21(4) of the Government Proceedings Act³² which states that:

“no execution or attachment shall be issued by any such court for enforcing payment by the Government of any such money or costs and no person shall be individually liable under any order for the payment by the Government, or any Government department, or any officer in the Government of any money or costs.

This provision essentially undercuts any monetary awards against the Government, rendering them unenforceable in the event that the Government fails to pay. This problem is compounded by the Government’s unwillingness to negotiate. Therefore, for the monetary awards granted to be effective, it is imperative to amend Section 21(4) of the Government Proceedings Act. The law should allow execution proceedings against the Government in order to stir an impetus to comply with judicial declarations. In addition, in order to spur political will to respect and fulfil

³⁰ Ibid, pg 17.

³¹ Embu Constitutional Petition No. 2 of 2011

³² Act No. 47 of 1956, Chapter 40, Laws of Kenya.

socio-economic rights, it is necessary to amend the law to hold individuals rather than institutions personally accountable for infringement of rights.

Recommendations

1. The Government should expedite the enactment of legislation on evictions and resettlement, and this legislation should be comprehensive enough to provide effective protection of human rights and dignity of the persons protected. The Evictions and Resettlement Bill developed by the Taskforce appointed by the Ministry of Lands in 2012 incorporated public opinions and international best practice and should be adopted as the law governing evictions and resettlement.
2. The government should also expedite the process of adjudication of land, to ensure security of tenure for more citizens who will no longer have to live in fear of being forcefully evicted at any time.
3. To secure the justiciability of the Bill of Rights and the right to a remedy, the government should amend the provisions of the Government Proceedings Act (No 47 of 1956) to allow monetary judgements against the government to be enforced.

8.4 Women and Land Rights

The right to property is protected under article 40 of the Constitution of Kenya which states that **every person** has the right, either individually or in association with others, to acquire and own property of any description and in any part of Kenya. Article 27(3) declares that women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres. Women are also expressly provided for in the principles of land policy as set out in article 60, which also provides for equitable access to land, security of land rights and importantly, the elimination of gender discrimination in law, customs and practices related to land and property in land.

Despite the constitutional emphasis on equity and equality, non-discrimination and affirmative action, women are still largely deprived of control of property and access to ownership and ownership documents. The Federation of Women Lawyers in Kenya reports that whereas 89% of subsistence farming is undertaken by women, only 5% of land title deeds in Kenya are held by

women jointly with men and a dismal 1% of land titles in Kenya are held by women alone.³³ This has been shown to leave them vulnerable to poverty, domestic violence and disease.³⁴ Research has also shown that secure rights to land and housing empower women both socially and economically, and in turn, insecure land tenure and property rights for women can contribute to the spread of HIV and to a weakened ability to cope with the consequences of AIDS.³⁵

Legislative provisions allowing the discriminatory customary practices are still in force, including the Trust Land Act, Land Adjudication Act and the Land Consolidation Act. The State has introduced the Community Land Bill 2015, which aims to repeal the Trust Land Act and the Land (Group Representatives) Act. This law should also repeal the Land Adjudication Act and Land Consolidation Act in order to ensure a more conducive legal environment for women to enjoy their right to land and property.

Women are still inadequately represented in the land administration institutions and both formal and traditional land decision making institutions.³⁶ There is need for the government to take steps to increase the number of women in these crucial institutions to ensure their interests are represented and protected.

8.5 Right to water and reasonable standards of sanitation

A survey conducted by UNDP in Nairobi's informal settlements revealed that access to water is most desired by residents to improve their living standards.³⁷ Although there exists pro-poor water management policies in the informal settlements, disparities still exist. Tariffs have been set by the national bodies to ensure greater access for the rural and urban poor at a more affordable cost, citizens should pay only shs.2 for 20 litres of water. However from the UN Special Rapporteur's report on the right to water and sanitation in Kenya 2014, citizens pay a minimum 5 shillings and up to 10 shillings, in the remote areas, for the same 20litres.³⁸ While those in poor urban areas pay a minimum of Ksh 5 and a maximum of Ksh 50 per 20 litre

³³ Federation of Women Lawyers, Kenya (FIDA-Kenya), 'Women's Land and Property Rights in Kenya', (2013) <http://fidakenya.org/wp-content/uploads/2013/08/Women-land-rights-brochure.pdf>

³⁴ Joanne Monene, 'Towards the Realisation of Land Rights for Women in Kenya', https://ke.boell.org/sites/default/files/uploads/2014/02/toward_the_realisation_of_land_rights_for_women_in_kenya.pdf

³⁵ Renee Giovarelli, Amanda Richardson, Aisha Davis; USAID Issue Brief, *Land Tenure, Property Rights, and HIV/AIDS – Approaches for enhancing women's economic security and reducing HIV infection*, (May 2013).

³⁶ Professor Patricia Kimeri-Mbote, *From rhetoric to action: Reaping gains through enhanced women's land and property rights*, (September 2013) <https://www.devex.com/news/from-rhetoric-to-action-reaping-gains-through-enhanced-women-s-land-and-property-rights-81750>

³⁷ United Nations Development Programme (UNDP) "Small Scale Water Providers in Kenya: Pioneers or Predators?" (2011) pg. 26

³⁸ Report of the Special Rapporteur on the human right to safe drinking water and sanitation, "Common violations of the human rights to water and sanitation" Catarina de Albuquerque, (2014)

jerrican depending on the supply and availability of the commodity. This is partly due to the lack of both financial and human capacities to ensure compliance by small scale vendors and also due to the unregistered small vendors³⁹ who are not subject to these regulations. The poor actually end up paying more than those who are connected to piped water.⁴⁰

The state report presents numerous projects that have been undertaken by the government to improve water supply and access. There is a 62% coverage of water access and a corresponding 30% for sanitation. However 82% is in the urban areas while rural areas water access coverage is only at 55%.⁴¹ This is a large disparity between the two areas. The disparity is also big between formal and informal settlements. These disparities should be addressed considering Kenya's commitment to put in place affirmative action programs that will ensure marginalized and disadvantaged groups have reasonable access to water and also in accordance with the principle of equality and non-discrimination in the execution of its mandate.⁴² The State report also fails to indicate that there has been a significant decrease in water access in the urban areas and this due to population increase in these areas. The decrease was from 92% to 82% in the year 2012.

8.6 The Water Bill 2014

The water Bill 2014 which is yet to be passed is an Act of Parliament that provides for the regulation, management and development of water resources, water and sewerage services and for connected purposes in Kenya. The Bill has been aligned to the Constitution 2010 and the national water master Plan 2030. It has gone through the second reading and is still awaiting further discussion. The Bill articulates that water resources in Kenya are vested and held by the national government on behalf of the people of Kenya. The Bill proposes the formation of Water Resources Regulatory Authority to replace the Water Resource Management Authority. The Bill articulates that every Kenyan has a right to safe and clean water in adequate quantities and to reasonable standards of sanitation⁴³.

The State report to the committee on ECOSOC rights fails to mention the existence of the Water Bill 2014 that is currently before parliament and that will repeal the Water Act of 2002 once enacted. The report also does not mention the existence of the Water Policy 2012. Both of these

³⁹ United nations development Programme (UNDP) "small scale water providers in Kenya: pioneers or predators?" (2011)

⁴⁰ Water for urban poor: water markets, household demand and service preference in Kenya(2005) Gulyani Sumila, Kariuki Mukami

⁴¹Report of the Special Rapporteur on the human right to safe drinking water and sanitation, "Common violations of the human rights to water and sanitation" Catarina de Albuquerque, (2014)

⁴² Articles 56 (e) and 27(6), Constitution of Kenya, 2010.

⁴³ Water Bill 2015

documents will be instrumental in the management of water resources and services in the country and will bring alignment of the water sector with the new constitution⁴⁴.

The report also leaves out the important structure of devolved governance in the water sector. With the new constitution being in force, and the anticipated Water Bill of 2014, some of the responsibilities and functions related to water and sanitation services have been devolved to the County Governments.

It has also not mentioned the transitional strategies in place that will ensure that during the devolution of some of the water services to the counties there will be no disruption of water services to citizens. From the UN report by the Special Rapporteur on the right to water and sanitation, it was noted that County governments have better understanding and interactions with the citizens and are therefore able to identify and provide for the needs of the community.

8.7 Under-investment in the water sector

The government report shows an increase of resource allocation to the water sector since 2002. However, the amount allocated in the financial year 2013/2014 reduced to 29.3 billion from the previous year's 41.8 billion. The actual amount disbursed of the earmarked funds also reduced to Ksh. 29.1 billion in the year 2012/2013 to 21.4 in 2013/2014. The actual funds received from government as well as donors also reduced by 49% on the part of government and 16% by the donors. The loans received by the sector in the same financial year (2013/2014) were 10.3 billion a reduction of 10.5%. Grants amounted to 1.5 billion this is a 39% decrease.⁴⁵ These statistics reveal a general reduction of resource allocation to the water sector in the year 2013/2014; this is a departure from the increment trend in the last 5 years or so.

The report by UN Special Rapporteur showed that 4% of the budget is allocated to water and sewerage. This is a commendable effort. However, in a Water Sanitation and Hygiene (WASH) performance index released in 2015, Kenya ranked position 76 out of 117.⁴⁶ This shows that Kenya is not yet investing its maximum resources to realize the right to water and sanitation. The government should ensure that there are continued ample budgetary allocations and other means of funds solicitation to ensure that the right to water and sanitation is protected. They should also ensure that allocation to the counties is done in an equitable way to protect areas with water scarcity. The last measure is to ensure there is transparency and accountability of those funds, so as to ensure the continuous attainment and enjoyment of this right.

⁴⁴ <http://kenyalaw.org/kl/fileadmin/pdfdownloads/bills/2014/WaterBill2014.pdf>

⁴⁵ Annual water sector review, 2013-2014, (2015) Kenya Water and Sanitation Network

⁴⁶ <http://waterinstitute.unc.edu/wash-performance-index-report/> accessed on (21 September 2015)

8.8 Disparity in access to safe drinking water and sanitation especially for the unprivileged in urban and those in arid and semi arid areas

The Constitution, now, recognizes economic, social and cultural rights, such as the right to education, right to housing, right to water, right to health and the right to culture. Every person in Kenya must be able to enjoy these rights free from discrimination.

8.8.1 Water

The national coverage for water and sanitation is currently at 55.9% of the total population of 44.1 million people. Access to safe and clean water in urban centres in Kenya stands at 65.4% against the Millennium Development Goals (MDGs) requirement of 80%. Only 48% of people in rural areas had access to safe and clean drinking water in 2014.

All the Water Service Boards (WSB) in Kenya registered net increase in water supply coverage except the Northern Water Services Board. This covers the arid and semi arid areas of Laikipia, Samburu, Isiolo, Marsabit, Mandera, Wajir and Garissa Counties. Access to water in these areas remains a challenge. For example only 23.8% of residents in Garissa County have access to safe and clean drinking water.

8.8.2 Sewerage coverage

During the financial year (FY) 2013/2014, 431,729 people were connected to sewerage systems in urban areas. This raised the coverage by 1.6% from 20.6% to 22.1%. Note that the urban coverage for the financial year 2012/13 has been revised from 21.5% to 20.6% after Rift Valley WSB revised their coverage figures. This is still far below the National Water Services Strategy

Recommendations

- a. The government must pass the Water Bill 2014 to give effect to article 43 of the Constitution that guarantees the right to safe, clean drinking water in adequate quantities.
- b. Direct county governments especially in arid and semi arid areas to prioritize water and sanitation services in their budgets and development agenda.
- c. Entrench human rights principles and approaches in the development of County Integrated Development plans for easier planning and realization
- d. Invest more in sewer development to improve the standard of living especially for people living in urban informal settlements in major towns.
- e. As a way out of this, the government should ensure that it monitors and ensures compliance of the price controls. It should involve the public and CSOs as a way of getting information on any deterrence by water vendors.

(NWSS) and Vision 2030 targets on sewerage coverage of 40%

9.0 Article 12: The right to health

9.1 Geographical disparities in accessing health care services

Geographic disparities in access to health care in Kenya are unacceptably high. For instance, in Wajir County, only 12 percent of deliveries are assisted by a skilled health worker, compared to 94 percent in Nyeri, the best performing county. Likewise, only 47 percent of children were fully immunized in Wajir compared to 93 in the Nyeri in 2011⁴⁷.

Recommendation

The government should fast track the passing of the Health Bill 2014 into law to assist in addressing the disparities.

9.2 Increased out of pocket spending for health services for the marginalized

A significant share of health expenditure is in the form of out-of-pocket (OOPs) payments; households account for about one third of total health expenditure. The review shows that total private spending on health increased from US\$ 17.5 per capita in 2001/02 to US\$ 21 in 2011/12. The contribution by donors, on- and off-budget, has also increased from US\$ 5.3 per capita to about US\$ 15 during this period. OOP payments are inequitable, are a major barrier to access, and contribute towards household poverty and impoverishment.

Recommendation

The government needs to:

- a. Include palliative care in the National Health Bill 2014. Also make morphine available and allow nurses to prescribe to patients
- b. Reduce reliance on out-of-pocket payments and move towards pre-payment financing mechanisms. Out-of-pocket (OOP) payments account for over a third of total health expenditure. The OOPs are inefficient, inequitable and contribute to households' poverty and impoverishment. Increasing the share of tax funds allocated to the health sector and promoting health insurance can offer financial risk protection for the population.
- c. Undertake to address these inequalities through setting specific budgets for health care related infrastructural development in marginalized areas

⁴⁷ Kenya Public Expenditure Review: Laying the Foundation for a Robust Health Care System in Kenya, World Bank Group Volume II December 2014.

9.3 Maternal health care

Even with the government announcing free maternity care for women in Kenya in all public hospitals, maternal mortality remains high at 488 maternal deaths per 100,000 live births. Most maternal deaths are due to causes directly related to pregnancy and childbirth, such as unsafe abortion and obstetric complications such as severe bleeding, infection, hypertensive disorders, and obstructed labor. However in the recent past several other factors including ignorance from medical personnel, absenteeism and travelling long distances are common in Kenya.

Retention of expecting mothers in hospitals after delivery is the recent and most common violation of maternal health rights facing expecting women are facing in Kenya. The case at point is between Millicent Awuor Omuya (Petitioner 1) Vs the Attorney General, Minister for Health, City Council of Nairobi and Pumwani Maternity Hospital (Respondents). In the judgment, the court made the some critical observations that aim at protecting patient's rights. We ask the government to obey the court orders and immediate embark on the following⁴⁸:

- The government must take the necessary steps to protect all patients from arbitrary detention in health care facilities which include enacting laws and policies and taking affirmative steps to prevent future violations.
- The government should develop clear guidelines and procedures for implementing the waiver system in all public hospitals.
- That the government should take administrative, legal laws and policy measures that eradicate the detention of patients in hospitals due to lack of capacity to pay for their medical bills.

10.0 Article 13 and 14: The right to education and free compulsory primary education

10.1 Access to education

The right to education in Kenya is captured in Article 43(1) (f) of the Constitution of Kenya, 2010. The Constitution at Article 53 (1)(b) further guarantees the right to free and compulsory basic education for every child. In October 2012 a report by the United Nations Educational, Scientific and Cultural Organization (UNESCO)⁴⁹ on Kenya paints a picture of failure despite legislative and policy measures such as Free Primary Education (FPE) and Free Day Secondary Education (FDSE). According to the report, approximately one million children are still out of school in Kenya despite FPE and attempts at FDSE. While this is almost half the number reported in 1999, it is still the ninth highest of any country in the world. The survey also raised

⁴⁸ http://www.who.int/pmnch/media/membernews/2011/20121216_kenyaparliament.pdf

⁴⁹ UNESCO 'Education for All Global Monitoring Report'

http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/ED/pdf/EDUCATION_IN_KENYA_A_FACT_SHEET.pdf

concerns about the inaccessibility of free education and resulting benefits to poor and marginalized groups. It reports that 55 percent of poor girls and 43 percent of poor boys living in the North-Eastern regions have never been to school.

10.2 Quality of education

Education in Kenya has also been noted to be of poor quality in that it does not ensure that all children learn the basics. According to a 2011 report by Uwezo Kenya,⁵⁰ only three out of 10 children in Class Three can read a Class Two story [in English], while slightly more than half of them can read a paragraph. Four out of 100 children in Class Eight cannot read a Class Two story. Further, Uwezo Kenya reported that 30 percent of Class Three children are unable to complete Class Two division, and 10 percent of Class Eight children cannot do Class Two division. The 2012 survey by UNESCO also revealed that among young men aged 15-29 years who had left school after six years of schooling, six percent were illiterate and 26 percent were semi-literate. The figures are worse for girls, with nine percent illiterate and 30 percent semi-literate after being in school for six years.

10.3 Effects of low-cost private schools

The Basic Education Act, 2013 sets out guiding principles for the provision of basic education in Kenya which include the promotion of quality, transparency, accountability, promotion of integration and cohesion, non-discrimination, protection of the marginalized, appropriate human resource, funds, equipment and infrastructure that meet the needs of every child in basic education.⁵¹

A 2015 study by the Economic and Social Rights Centre (Hakijamii) and Global Initiative for Economic, Social and Cultural Rights (GI-ESCR) found that the number of private primary schools in Kenya increased from 385 in 1998 to 8917 in 2013.⁵² Further, the number of low-cost-for-profit private schools in Kenya has increased drastically, without a corresponding implementation of stringent regulations to ensure that the quality of education is not compromised and human rights standards are maintained. In Kibera and Mathare, the major informal settlements in Nairobi, 96 percent of schools in the area are private schools.⁵³ It is

⁵⁰ Uwezo, Kenya 'Are Our Children Learning? Annual Learning Assessment Report, 2011'

<http://www.pokot.org/wp-content/uploads/2012/05/Uwezo-20111.pdf>

⁵¹ Basic Education Act, No 14 of 2013, Laws of Kenya, Section 4

⁵² The Economic and Social Rights Centre – Hakijamii; Global Initiative for Economic, Social and Cultural Rights, 'Kenya's support to privatization in education and its impact on discrimination and segregation, May 2015', <http://globalinitiative-escr.org/wp-content/uploads/2015/06/150428-Kenya-Parallel-report-CRC-privatisation-right-to-education.pdf>, at 8 and 9.

⁵³ Ibid, at 7 and 8.

estimated that 52 percent of children in Kibera informal settlement attend low cost for-profit private schools.⁵⁴

Whereas these schools play an important role in making education physically accessible, the State has failed to adequately regulate these institutions to ensure that the quality and curriculum offered in these schools meets international and national standards and basic education remains free and compulsory to all. These low cost private schools are largely under resourced with barely trained, unqualified, underpaid teachers, and deliver poor quality education in the sense that the learning experiences for the average student deteriorate.⁵⁵ These institutions also deepen the discrimination and stratification in society by relegating the already marginalized children in informal settlements to poor quality education which in turn entrenches the cycle of poverty.⁵⁶ The Report of the Special Rapporteur on the right to education demonstrates that privatization adversely affects the right to education both as an entitlement and as empowerment. The report states that 'privatization in education cripples the universality of the right to education as well as the fundamental principles of human rights by aggravating marginalization and exclusion in education and creating inequalities in society.'⁵⁷ This is an exceptional tragedy considering education is supposed to be a tool of empowerment, giving disadvantaged children the means to ensure a better standard of living for themselves and their families.

The report of the Special Rapporteur also emphasized that the State has the primary responsibility to provide education, which includes protecting the right against violation by private entities. However, the Government has facilitated the proliferation of these low cost alternative private schools by failing to adequately invest in and regulate public schools especially in these informal settlements. The number of public primary schools in Kenya has only increased by 24.9 percent between 1998 and 2013.⁵⁸ A study done in 2015 found that for some of the poorest families in Kenya, public school is too expensive because of other costs for exams, uniforms and levies for special projects. Further, the classes are too overcrowded. These factors make basic education economically inaccessible for children from poor families, and

⁵⁴ Ibid at 9.

⁵⁵ Dr Brent Edwards, Steven Klees, Jante Wildish, 'Dynamics of Low-Fee Private Schools in Kenya: Government Legitimation, School-Community Dependence, and Resource Uncertainty', September 2015, at 34.

⁵⁶ The Economic and Social Rights Centre – Hakijamii; Global Initiative for Economic, Social and Cultural Rights, 'Kenya's support to privatization in education and its impact on discrimination and segregation, May 2015', <http://globalinitiative-esrc.org/wp-content/uploads/2015/06/150428-Kenya-Parallel-report-CRC-privatisation-right-to-education.pdf>

⁵⁷ Report of the Special Rapporteur on the right to education, Kishore Singh, September 2014, A/69/402, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N14/546/82/PDF/N1454682.pdf?OpenElement>

⁵⁸ Ibid.

have forced parents to move their children to low-cost private primary schools, where quality is undermined in favour of profits.⁵⁹

The legal framework governing the low-cost private schools is unclear. It appeared the Basic Education Act 2013 sought to eliminate them because it does not provide for them, yet there has been a Policy for Alternative Provision of Basic Education and Training (APBET) since 2009 and recently the State developed the Registration Guidelines For Alternative Provision Of Basic Education And Training, 2015.⁶⁰ The cumulative effect of this is a violation of the right to a quality free basic education for every child.

The current government, through its campaign manifesto acknowledged the inequalities and poor standards of education in Kenya. It therefore pledged that it would increase the number of schools in disadvantaged areas and restrict class sizes to a maximum of 40. The Government is yet to disclose any programs it has formulated to honor these pledges.

10.4 Early Childhood Development Education neglected

For a long time, Early Childhood Development and Education (ECDE) has been neglected in Kenya. Under the Sixth Schedule of the Constitution of Kenya 2010, responsibility for managing pre-primary education vests with the County Government. However, under the Basic Education Act, both National Government and County Governments have a role to play in the provision of this service.

Currently, efforts to provide ECDE are disjointed and uncoordinated and this is because the current 2006 ECD Policy is outdated.⁶¹ There is no standardization in the provision of ECDE and as a result learning outcomes in primary and secondary are compromised.

Recommendations

- a)** Adequate resources should be directed to the public education system to build its capacity to make quality education free and physically accessible, especially to children in poor families and those living in informal settlements.
- b)** The Government should effectively enforce regulations in the education sector to ensure that free basic education remains free and accessible to all the members of society, particularly the vulnerable persons.

⁵⁹ Dr Brent Edwards, Steven Klees, Jante Wildish, 'Dynamics of Low-Fee Private Schools in Kenya: Government Legitimation, School-Community Dependence, and Resource Uncertainty', September 2015, at 29.

⁶⁰ Ibid

⁶¹ <http://www.education.go.ke/Documents.aspx?docID=866>

- c) The State should urgently standardize and regularize provision of education in Kenya to ensure that quality, equity and development is maintained in both public and private schools at all levels of education. Low-cost private schools should be strictly regulated to maintain adequate standards of quality in education, specifically with regard to transparency and accountability, well trained and motivated teachers and availability of infrastructure for the holistic development of the child.
- d) The Government should amend the policy and legal framework governing Alternative Provision of Basic Education and Training (APBET) to provide clarity on the legal status of these institutions and to align it with the new constitutional dispensation.
- e) The National Government must fulfill its mandate to set education policy and standards related to Early Childhood Development and Education (ECDE) to ensure harmonized standards and delivery for ECDE across the country.
- f) The 2006 policy framework governing Early Childhood Development and Education should be amended to include the devolved system of government, the division of roles between the National and County Government, and a renewed focus on the importance of early childhood development and education.

11.0 Article 15: The right to participate in cultural life

Culture forms an integral part in the daily practices and knowledge of Indigenous Peoples. Through cultural practices including duties and obligations, culture becomes a foundation necessary for continuity of social life. It is fundamental to the collective identity and distinctiveness of a group. Cultural rights are therefore deemed to protect the very survival and continued development of Indigenous Peoples.

The Universal Declaration of Human Rights (UDHR) in the year 1948 strongly considered and proclaimed cultural rights as human rights.⁶² Moreover, cultural rights are recognized as collective rights. For instance, the ICESCR states that “all people have the right of self-determination.”⁶³ By virtue of that right, they can freely pursue their economic, social and cultural development. The free pursuit of cultural development strengthened by the right of self-determination, allow people to preserve their cultural identity.

International human rights jurisprudence under article 27 of the International Covenant on Civil and Political Rights (ICCPR) and article 15 of the ICESCR sets out an integrated content of the rights of indigenous peoples. They provide for economic and social rights which are part of their culture; protection from forcible relocation; land and resource rights; protection of cultural sites; and guarantee against severe environmental degradation.

⁶² The United Nations, Universal Declaration of Human Rights, 1948, Article 27

⁶³ International Convention on Economic Social Cultural Rights, 1966, Article 1

There are inter-linkages between right to culture and non-human rights instruments, for instance Convention on Biological Diversity which offers opportunities for implementation of cultural rights. It obligates states to address rights to traditional knowledge (article 8 (j)) and to promote and protect customary use of biological resources in accordance with traditional practices (article 10(c)).

11.1 Cultural Rights Issues in the Kenyan Context

Cultural recognition amounts to respect for human dignity and social justice. It also includes recognition of indigenous peoples' legitimate claims to redress long-standing political and economic inequities that stems from their cultural marginalization. It is therefore imperative to note that recognition of cultural rights is largely dependent on recognition as **Indigenous Peoples (IPs)**. However, the Kenyan government still denies such recognition and this alone amounts to violation of cultural rights. The obligation to respect and to protect cultural productions of IPs is bestowed upon the governments.

11.2 A Classical Case of Impending Cultural Rights Violation of IPs in Lamu Archipelago (Adopted from Kenya at 50: Unrealized Rights of Minorities and IPs)

Kenya's ambition is to become a newly industrialized, "middle-income country ... by the year 2030." To achieve this goal, the Kenyan state has designated series of flagship programmes (known as Vision 2030), a number of them for areas occupied by minority and marginalized groups. These mega-projects, while having the potential to engender growth, can have harmful impacts on the livelihoods and cultures of indigenous groups, threatening not only their identities but also their very survival.

The Kenyan state's approach to development, during the colonial and postcolonial period, is to pursue quick economic gains for the majority, at the expense of prior consultation and participation of communities. This approach has exacerbated inequalities between and within communities, displaced communities from land traditionally held by them, and often intensified the poverty and vulnerability of certain communities. Lamu is the largest town on Lamu Island, which is in turn part of the Lamu archipelago. Lamu old town became a UNESCO World Heritage Site in 2001. It is one of the oldest and best-preserved continuously occupied settlements among the Swahili towns on the East African coast, with origins dating back to the twelfth century AD. This area is home to several minority and indigenous groups – including the Bajuni, Boni, Sanye and Swahili – and will soon see the development of a US \$20 billion port

project called the Lamu Port–Southern Sudan–Ethiopia Transport (Lapsset) Corridor,⁶⁴ one of the flagship projects of Vision 2030. When complete, the project will comprise a port, an international airport and a refinery at Lamu, and a labyrinth of roads, railways and pipelines covering Kenya, Ethiopia and South Sudan.

Far from promoting the culture of the people of the Lamu region, the government will in fact destroy local culture as a result of the development and the influx of skilled workers with their own cultures from neighboring cities. Many people native to Lamu believe that ‘up-country’ people will come to Lamu, dominating all aspects of its institutions, causing them to become an oppressed minority.

In the past, local fishermen have hailed the Manda Creek, next to Lamu town, as a shrimp sanctuary vital to local subsistence fishermen. But now, construction of the port in this area would undoubtedly have a negative impact on their livelihood. Moreover, in order to begin the port construction, pristine mangrove forests in the Manda Bay area, from Mkanda Channel to Dodori Creek, would require extensive felling. Mangrove forests are the first line of defense against the rise in sea level associated with global warming, and destruction of these forests would endanger this fragile eco-system and reduce its capacity to mitigate the effects of climate change. Ironically, the government has for years denied the local communities rights to harvest the mangrove forests precisely on the ground that this would threaten the coastal eco-system. The Sanye, Boni and Bajuni watch these developments with consternation. Years of state neglect is now giving way to massive grabbing of their forest, fishing and farming lands in order to drive forward national and regional developmental plans. While the proposed projects may bring economic benefits for Kenya – in socio-cultural terms, they will spell the doom of the Lamu indigenous people’s distinct culture and creed. They will also adversely affect the environment in Lamu.

Recommendations

The state should ensure that cultural rights are emphasized and indigenous peoples’ consent is sought in relation to implementation of mega investment projects in their lands. Emphasis should also be placed on a human rights approach to development that allows participatory approaches that encourage the culture, and traditions knowledge of these communities.

⁶⁴ Kenya Institute for Public Policy Research and Analysis (2014) Remarginalising Kenyan Pastoralists: The Hidden Curse of National Growth and Development