



TOWARDS EQUALITY AND ANTI-DISCRIMINATION

*An Overview of International and Domestic
Law on Anti-Discrimination in Kenya*

KENYA HUMAN RIGHTS COMMISSION

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25th JANUARY 2010

INTERNATIONAL LAW

Core United Nations Human Rights Treaties

In general, Kenya has a strong record of ratifying major international and regional human rights instruments. It is a party to six of the seven core UN human rights treaties, with the exception being the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

United Nations Treaties

Treaty	Signed	Date
International Covenant on Civil and Political Rights (1966)	YES	1972
<i>Optional Protocol I to the International Covenant Civil and Political Rights (1976)</i>	YES	1972
International Covenant on Economic, Social and Cultural Rights (1966)	YES	1972
<i>Optional Protocol I to the International Covenant on Economic, Social and Cultural Rights (2008)</i>	NO	
Convention on the Elimination of all forms of Racial Discrimination (1965)	YES	2001
<i>Declaration under Article 14 allowing individual complaints</i>	YES	2001
Convention on the Elimination of all forms of Discrimination against Women (1979)	YES	1984
<i>Optional Protocol to the Convention on the Elimination of all forms of Discrimination against Women (1999)</i>	NO	
Convention on the Rights of persons with Disabilities (2006)	YES	2008
<i>Optional Protocol to the Convention on the Rights of persons with Disabilities (2006)</i>	YES	2008
Convention on the Rights of the Child (1989)	YES	1990
<i>Optional Protocol I to the Convention on the Rights of the Child (2000)</i>	YES	2002
<i>Optional Protocol II to the Convention on the Rights of the Child (2000)</i>	NO	
Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990)	NO	

Kenya has made two reservations limiting the effective application of these treaties. On signing the International Covenant on Economic, Social and Cultural Rights, Kenya placed a reservation against Article 10 (2) which requires that states make provision for paid maternity leave. The reservation states that “the present circumstances obtaining in Kenya do not render necessary or

expedient the imposition of those principles by legislation."¹ In 2009, the UN Treaty Body Monitor re-iterated the need for Kenya to withdraw the reservation to this text.

On signing Optional Protocol 1 to the Convention on the Rights of the Child Kenya made a declaration stating that "the minimum age for the recruitment of persons into the armed forces is by law set at eighteen years" and that recruitment is "entirely and genuinely voluntary", an interpretative declaration indicating that the government considers its obligation to "ensure" that those under the age of 18 are not recruited into the armed forces thereby discharged. The declaration goes on to state that the Government of Kenya reserves the right to "add, amend or strengthen the present declaration".

Kenya has not signed the Optional Protocols to either the Covenant on Economic, Social and Cultural Rights (CESCR), or the Convention on the Elimination of all forms of Discrimination against Women (CEDAW), which recognise the competence of the Committees governing these Conventions to hear individual complaints or institute investigations into breaches. It has signed but not ratified the Convention against Enforced Disappearance and Optional Protocol II of the Convention on the Rights of the Child, which provides additional rights of protection from child trafficking, pornography and prostitution². **Other Treaties related to Discrimination**

Kenya has adopted a number of key International Labour Organisation (ILO) Conventions governing discrimination in employment, including, the Equal Remuneration Convention, 1951 (C100) and the Discrimination (Employment and Occupation) Convention, 1958 (C111). It has not, however, signed the Indigenous and Tribal Peoples Convention, 1989 (C169), a matter of concern given the status of some indigenous groups in public life. Kenya has also not signed the 1960 UNESCO Convention against Discrimination in Education³.

Kenya has signed the 1951 Convention relating to the Status of Refugees and the Protocol to the Convention. However, given the lack of enjoyment of citizenship rights by certain minority groups in Kenya such as the Somali, Nubian and Ethiopian populations, the fact that it has not signed the 1954 Convention Relating to the Status of Stateless Persons⁴ is a matter of concern.

African Union Treaties

Kenya has adopted many of the conventions established by the African Union (AU) and the African Economic Community.

¹ Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such a period working mothers should be accorded paid leave or leave with adequate social security benefits.

² Bayefsky Human Rights Library, *Ratifications by State; Kenya*, 2009, available at: http://www.bayefsky.com/html/kenya_t1_ratifications.php

³ <http://portal.unesco.org/la/convention.asp?KO=12949&language=E&order=alpha>

⁴ Bayefsky Human Rights Library, *Ratifications by State; Kenya*, 2009, available at: http://www.bayefsky.com/html/kenya_t1_ratifications.php; Minnesota Human Rights Library, *Ratification of International Human Rights Treaties by Country; Kenya*, 2009, available: http://www1.umn.edu/humanrts/research/ratification_kenya.html

African Union Human Rights Treaties

Treaty	Signed
AU African Youth Charter (2006)	Ratified 2008
Protocol on the Rights of Women in Africa (2005)	Signature only (2003)
Protocol on the establishment of an African court on Human and People's Rights (1997)	Signature only (2003)
African Charter on the Rights and Welfare of the Child (1990)	Acceded 2000
African Charter on Human and Peoples' Rights (ACHPR, Banjul, 1981)	Ratified 1992
Convention on specific aspects of refugee problems in Africa (1969)	Ratified 1992
AU Cultural Charter for Africa (1976)	Ratified 1981

Status of Treaties in National Law

Kenya adheres to a dualist legal system and as such international treaties and obligations do not take immediate effect and require implementation through domestic legislation. The result is that the full implementation of a number of treaties providing protection from discrimination, through enactment of new laws and amendments to existing legislation, has been the subject of debate and disagreement. Many of the reforms required to bring Kenya's domestic law into line with its international obligations have been delayed.

CONSTITUTIONAL LAW ON DISCRIMINATION AND EQUALITY

The **Constitution of Kenya** was first introduced in December, 1963. A number of attempts to revise it have been made since then, the only successful attempt being in 2001; attempts to redraft the constitution less than a year later eventually failed to pass a public referendum in 2005. A new Harmonised Draft Constitution was published for consultation on 17 November 2009 and is currently under review by a Parliamentary Select Committee and the Committee of Experts before being presented to the National Assembly.

Chapter 5 of the 1963 Constitution, titled *'Protection of Fundamental Rights and Freedoms of the Individual'* contains a number of provisions related to non-discrimination and equality. **Section 70** provides that, "Every person in Kenya is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, tribe, place of origin or residence or other local connection, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest."⁵

⁵ Constitution of the Republic of Kenya, Section 70.

Section 82 provides the core protection from discrimination. It prohibits discrimination on grounds of race, tribe, place of origin or residence, political opinion, colour creed or sex. Notably, the list of protected grounds excludes sexual orientation, disability and age and is closed, denying the opportunity for challenge on other grounds deemed parallel to the protected list.

The first two subsections of the Article set the material scope for the protection. Sub-section **(1)** provides that laws should not discriminate directly or indirectly; sub-section **(2)** provides protection from discrimination from those “acting by virtue of any written law” or in the exercise of public functions. In addition, sub-section **(7)** provides protection from discrimination in respect of access to public buildings or spaces. It should be noted that despite the broad scope provided by these provisions, they are subject to exceptions under later parts of the Constitution.

Discrimination is defined as “affording different treatment to different persons attributable wholly or mainly to their respective descriptions [by a protected characteristic] whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.”⁶

The provision provides a number of significant exceptions to the protection from discrimination which substantially limit its scope, excluding both certain groups and specific areas of life from protection. Sub-section **(4)** excludes non-citizens from protection and exempts all matters of personal law including marriage, divorce, adoption and burial and customary tribal laws from the application of the Section 82. The sub-section also provides a broadly defined public interest exemption, where disadvantage is “reasonably justifiable in a democratic society”. Sub-section **(5)** provides that laws which make provision “with respect to standards and qualifications” for public office will not be inconsistent with subsection **(1)** provided such qualifications are not directly related to a protected characteristic. Sub-section **(6b)** excludes the matter of giving or withholding consent for agricultural transactions by relevant body.

The Constitution provides for derogation from the prohibition on discrimination on all protected grounds under the Constitution when Kenya is at war or when a declaration has been made by the President for the preservation of public security (**Sections 83 and 85**).

DISCRIMINATORY LAWS

Chapter 6 of the **Constitution**, which concerns citizenship, contains a number of provisions which discriminate against women. **Section 90** states that for those born outside of Kenya, citizenship may only be conferred through proof of Kenyan fatherhood. **Section 91** provides that non-Kenyan women may acquire Kenyan citizenship through marriage, but does not make the equivalent provision to allow Kenyan women to confer citizenship on their non-Kenyan spouse. These provisions unequivocally make Kenyan women second-class citizens without the right to automatically confer citizenship to their children and spouses.

The Kenyan **Penal Code** prohibits homosexual sex, which is criminalised as “carnal knowledge... against the order of nature”. The penalty for such action is punishment of between

⁶ Constitution of the Republic of Kenya, Section 82 (3).

14 and 21 years imprisonment⁷. **Section 165** of the Penal Code extends this prohibition to other homosexual acts defined as “acts of gross indecency” between men, stating that committing, attempting or encouraging such acts in public or private is a felony.

Provisions of the **Sexual Offences Act** governing rape and sexual violence do not provide adequate protection for married women. While most forms of sexual offenses are explicitly prohibited, **Section 43 (5)** of the Act states that all acts described as unlawful and intentional “shall not apply in respect of persons who are lawfully married to each other.” Concerns have been expressed over **Section 38** of the Act, which provides that anyone making a false accusation of sexual offences are liable to penalties ‘equal to that of the offence complained of’. The UN Committee on Economic, Social and Cultural Rights has said that the provision should be immediately relaxed as it discourages women who have been raped from taking their cases to court.⁸

The Law of Succession Act discriminates against women in respect of inheritance rights. The Act’s basic provisions guarantee equal inheritance rights for male and female children, and the equal right to produce a will by both male and female parents. However, **Sections 32 and 33** of the Act expressly exclude all agricultural land, cattle and crops from legislated inheritance and instead places their succession under the purview of customary law as specifically defined by the appropriate minister in Kenya’s official Gazette. For the aforementioned reasons, it is likely that decisions under these customary laws will discriminate against women and girls. In addition, rules governing ‘intestate’ succession create a hierarchy for inheritance which directly discriminates against women. Thus, under **section 39** of the Act, priority in the absence of children or spouse is given to the father of the deceased over the mother. Furthermore, a woman’s inheritance rights are made void should she remarry following the death of her husband.⁹

While the **Citizenship Act (1963)** does not contain directly discriminatory provisions it does fail to specifically address groups which could today be defined as stateless, namely Nubian Kenyans and Kenyan Somalis ‘absorbed’ upon independence. Under the law, these persons are entitled full citizenship as naturalised residents of Kenya¹⁰. Despite this, practical obstacles in obtaining land rights, proof of residence, permanent work and identity papers such as passports means that this right is often unrecognised. In addition, **Section 42** of the **Constitution**, which provides for the division of Kenya’s parliamentary constituencies, allows for the under-representation of certain vulnerable groups. Sub-section **(3)** provides that constituencies should provide for equal representation, taking into account differences in population size and density across regions. However, as the census process itself has yet to recognise either Nubian or Somali Kenyans who lack citizenship, the provisions perpetuate the underrepresentation of these groups.

⁷ Government of the Republic of Kenya, *Penal Code*, 1963 (revised 2009), available at: http://www.kenyalaw.org/kenyalaw/klr_app/frames.php

⁸ See UN Economic and Social Council, *KENYA Concluding Observations of the Committee on Economic, Social and Cultural Rights*, E/C.12/KEN/CO/1, para.22, 1st December 2008, available at: <http://sim.law.uu.nl/SIM/CaseLaw/uncom.nsf/804bb175b68baaf7c125667f004cb333/4105a1d93c2984cbc12575520048ef41?OpenD>

⁹ The Law of Succession Act, Section 35.

¹⁰ Government of the Republic of Kenya, *Kenya Citizenship Act*, 1963, available: http://www.kenyalaw.org/kenyalaw/klr_app/frames.php; see also Government of the Republic of Kenya, *Constitution of the Republic of Kenya*, 1963, available: http://www.kenyalaw.org/kenyalaw/klr_app/frames.php

SPECIFIC ANTI-DISCRIMINATION LAWS

Kenya lacks a single comprehensive anti-discrimination law or single equality enforcement body. However, a number of specific anti-discrimination laws are in force which address discrimination against particular groups in a range of areas of life.

The Persons with Disability Act

The Persons with Disability Act¹¹ does not contain a general prohibition on discrimination against persons with disabilities. Rather, it contains a series of separate provisions in relation to *employment, education, health, accessibility and mobility, public buildings, public service vehicles, sports and recreation, polling stations and voting*. The term 'discriminate' is defined in terms of direct discrimination and does not refer to indirect discrimination either explicitly or in the scope of the definition (**Section 2**).

The Act prohibits discrimination by both public and private employers in all areas of *employment* including advertisements, recruitment, the creation, classification or abolition of posts; the determination or allocation of wages, salaries, pensions, accommodation, leave or other such benefits, the choice of persons for posts, training, advancement, apprenticeships, transfer and promotion or retrenchment (**Section 15(1)**).

The Act contains a requirement for employers to make reasonable accommodation through the provision of facilities and modifications as may reasonably be required to accommodate persons with disabilities (**Section 15(5)**). In addition, it provides two key incentives for employing disabled persons, by exempting them from income tax (**Section 12(3)**) and providing that employers who employ persons with disabilities are eligible for tax incentives (**Section 16**).

Section 15(2) places three important restrictions on the prohibition of discrimination: in cases where when the act or omission alleged to constitute the discrimination was not wholly or mainly attributable to the disability of the person; in cases of genuine and determining occupational requirements; and in cases where special facilities or modifications are required which the employer cannot reasonably be expected to provide.

In respect of *education*, **Section 18(1)** prohibited all persons and learning institutions from denying admission to any course of study any person on the basis of their disability, if the person has the ability to acquire substantial learning in that course. In addition, learning institutions are obliged to take into account the special needs of persons with disabilities with respect to, *inter alia*, entry requirements, curriculum, use of school facilities (**Section 18(2)**).

With regards to *access to buildings open to the public and public services*, the Act provides that no person shall, on the ground of disability alone, deny a person with a disability admission into any premises to which members of the public are ordinarily admitted (**Section 25**). **Sections 22 and 23** set out specific time frames within which proprietors of public buildings and public service vehicles are required to comply with policies and measures issued by the National Council for Persons with Disabilities regarding modification of services to suit the needs of persons with disabilities. All premises to which members of the public are ordinarily admitted and all services or amenities ordinarily provided to members of the public may be subject to an adjustment order from the National Council for Persons with Disabilities regarding amendment

¹¹ The Persons with Disability Act, Act Number 14 of 2003, Laws of Kenya, adopted 2003, entered into force 16 June 2004.

of the premise, service or amenities concerned to secure reasonable access by persons with disabilities (**Section 24**). Adjustment orders against government institutions are subject to special regulations (**Section 27**).

The Act also contains a range of permissive and proscriptive positive action measures applicable to private and public actors and bodies. In *employment*, **Section 15(5)** requires employers to undertake reasonable accommodation for persons with disabilities. **Section 13** requires that the National Council for Persons with Disabilities endeavour to reserve five percent of all casual, emergency and contractual positions in employment in the public and private sectors for persons with disabilities. In *education*, learning institutions are obliged to take into account the special needs of persons with disabilities in a number of aspects of education including admission requirements and curriculum. In *sports and recreation*, all persons with disabilities are entitled, free of charge, to the use of recreational or sports facilities owned or operated by the Government during social, sporting or recreational activities (**Section 28(1)**). A range of obligations are in place with respect to the duty to provide reasonable accommodation in respect of access to *public buildings and public service vehicles* (**Section 22 and 23**).

The Act establishes the **National Council for Persons with Disabilities** which has a mandate to issue an adjustment order to the owner of any premise, or the provider of any service or amenity, that is usually provided or open to the public, if the council deems that premise, service or amenity inaccessible to persons with disabilities by reason of any structural, physical, administrative or other impediment (**Section 7(a) and 24**). Adjustment orders apply to public and private premises, amenities and services although some restrictions apply in relation to public services. In this regard, the Council cannot issue an adjustment order against any public health facility or education or training institution without the consent of the relevant Government Minister.¹²

It is an offence under the Persons with Disabilities Act for any person to fail to comply with an adjustment order; contravene the prohibition on discrimination in employment; deny entry to premises or use of services or amenities on grounds of disability alone and to discriminate against a person with disability on the ground of any ethnic, communal, cultural or religious custom or practice (**Section 26 (1)**). Subsection (**2**) establishes minimum fines and sentences for offences, while under subsection (**3**), any person found guilty of an offence may also be ordered to pay the injured person compensation. Any person denied entry to premises, or use of services or amenities on sole grounds of disability has the right to recover damages in any court of competent jurisdiction (**Section 25(3)**).

In addition to enforcement activities, the National Council for Persons with Disabilities is also charged with promotional, educational and policy responsibilities and has the mandate to formulate and develop “measures and policies designed to achieve equal opportunities for persons with disabilities” (**Section 7**).

¹² Specifically, the Council cannot issue an adjustment order to any hospital, nursing home or clinic controlled or managed by the Government or registered under the Public Health Act or to any school or educational or training institution controlled or managed by the Government or registered under the Education Act, except with the consent of the Government Minister responsible for the institution or Act concerned (Section 27).

The National Cohesion and Integration Act

The National Cohesion and Integration Act of 2008 outlaws direct and indirect discrimination on ethnic grounds including colour, race, religion, nationality or ethnic or national origins in both public and private spheres. While the Act does not expressly define direct and indirect discrimination, it defines discrimination to include less favourable treatment of other persons on ethnic grounds by segregation, harassment and victimisation 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.

Part II of the Act outlines the acts, conduct and circumstances deemed to be discriminatory. Section 7 prohibits discrimination and harassment in employment, both during recruitment and in the course of employment. It obligates all public establishments to ensure representation of Kenya's diversity by having no more than one third of staff from the same ethnic group. However, the scope of discrimination and harassment in the course of employment does not extend to private enterprises except in cases of discrimination by way of victimisation and on ethnic grounds. **Section 7**

The NCIA also outlaws discrimination of persons applying for membership and members of organisations except in cases where membership is limited to religious persuasion or profession (**Section 9**). Discrimination by agencies in the provision of services such as education, employment, training and licensing to prospective and current clients is prohibited in the Act. (**Section 10**).

With respect to public resources and property, the Act prohibits distribution of public resources in an ethnically inequitable manner and unequal treatment of persons in the acquisition, management or disposal of public property on ethnic grounds. The law stipulates that distribution of public resources should take into account Kenya's diverse population and poverty index. (**Section 11 and 12**)

Hate speech is criminalised in the Act, with a penalty of 1 million shillings or imprisonment of three years for the use of threatening, insulting or abusive words or behaviour, or display, publishing or distribution of any material intended or likely to stir up ethnic hatred (**Section 13**).

The NCIA permits certain actions which would otherwise be discriminatory where such action is justified to meet a legitimate goal and proportionate to the required objective. It provides an exception to discrimination in employment where being of a particular race, ethnic or national origin, or ethnic group is a genuine and determining occupational requirement or qualification. Discrimination on the basis of ethnic qualifications will however not be justified where an employer already has a sufficient number of employees of the required ethnic group who are capable of carrying out the specified duties. Discrimination by agencies may also be justified in cases where it is proven to be a necessary requirement in the nature of business transaction with no alternative means of achieving a required objective, or in the case of public authorities, where it is pursuant to a judicial act or action undertaken by the Minister for Immigration on matters of immigration and nationality.

Furthermore, the Act permits stipulates that any action to afford people of a particular ethnic group or non-citizens access to facilities or services to meet their special needs in education, training, welfare or other ancillary benefits does not constitute discrimination. This is in

accordance with principles of equal treatment which necessitate differential treatment of people according to their circumstances to enable them to assert their equal worth.¹³

The Act established the National Cohesion and Integration Commission which was inaugurated in September of 2009 with a key mandate to facilitate and promote equality of opportunity, good relations, harmony and peaceful co-existence between different ethnic and racial communities of Kenya. **Section 43** of the Act makes provision for any aggrieved person to lodge a complaint regarding contravention of the Act to the Commission which may refer the case for conciliation or issue a notice of compliance following the hearing of the case. The Commission also has powers 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. In addition to its enforcement role, the Commission is required to promote public awareness on ethnic and racial harmony and to monitor and report to the National assembly the status and success of implementation of its recommendations.¹⁴

NON-DISCRIMINATION PROVISIONS IN OTHER LEGISLATION

Protection from discrimination in other legal fields is patchy and inconsistent. While some Acts, including notably the 2007 Employment Act, the Universities Act and the Children Act contain provisions which prohibit discrimination based on the range of grounds provided in the Constitution, legislation governing other areas of life does not contain non-discrimination provisions.

Nationality, citizenship and immigration

The **Refugees Act (2006)** provides protection from discrimination to asylum seekers, refugees and the families of refugees upon entering Kenya. **Section 16** states that every recognised refugee and every member of their family in Kenya shall be entitled to all rights contained in international treaties to which Kenya is a party while they reside in the country. This provision therefore extends the protections against discrimination as contained in the various international instruments outlined in the first section of this report and more specifically, the **International Convention on the Elimination of Racial Discrimination**.

Section 18 (a) of the Act further provides that no person shall be refused entry into Kenya, expelled, extradited from Kenya or returned to any other country where he would be persecuted on account of race, religion, nationality, religion, membership of a particular association or political opinion.

Employment

The Employment Act prohibits both direct and indirect discrimination on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin,

¹³ Equal Rights Trust, *Declaration of Principles of Equality and Non-Discrimination*.

¹⁴ Part VI of the National Cohesion and Integration Act.

disability, pregnancy, mental status or HIV status¹⁵, though no definitions are provided for direct or indirect discrimination. Discrimination is prohibited in both public and private sector employment¹⁶ and applies to all aspects of employment including recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment. The scope of protection extends to employees and prospective employees.

The Act specifically provides for equal remuneration for work of equal value (**Section 5(5)**). Employers have a duty to promote equal opportunity in employment and strive to eliminate discrimination in any employment policy or practice.¹⁷ **Section 6** provides an additional prohibition of both direct *and* indirect forms of sexual harassment¹⁸.

The burden of proof in questions of discrimination at work or in respect of any work related activity lies with the employer or employment agency when accused of any breach of this promise. Any person found guilty of an offence under the Employment Act (including the prohibition on discrimination) for which no penalty is expressly provided, is liable to a fine and/or term of imprisonment not exceeding one year (**Section 48**).

The Act permits affirmative action measures consistent with the promotion of equality or the elimination of discrimination in the workplace (**Section 5(4) (a)**). It also places a duty upon the Minister of Education, labour officers and the Industrial Court to promote equality of opportunity in employment in order to eliminate discrimination in employment. Having said this, the Act does not require affirmative action to be taken.

The Act stipulates that it does not constitute discrimination under the Employment Act to: distinguish, exclude or prefer any person on the basis of an inherent requirement of a job; employ a citizen in accordance with the National employment policy; or restrict access to limited categories of employment where it is necessary in the interest of state security.

The Act does not apply to either the armed forces or police¹⁹. In addition, **section 3 (5)** specifically exempts the Export Processing Zone from the application of the Act, raising concerns that employees in this area may suffer discrimination in matters relating to pay, leave, equal right to a healthy working atmosphere and to suitable rest, where these are not addressed in the additional provision of the **Export Processing Zones Act of 1990**.

Criminal law

The **Penal Code** does not define prohibited discrimination. However, **Section 77 (1)** criminalises the commission of actions with a subversive intention including activities “intended

¹⁵ Employment Act, Section 5 (3) (a).

¹⁶ The Act shall apply to all employees employed by any employer under a contract of service (Section 3(1)). The Act does not apply to the armed forces or the reserve, the Kenya Police, the Kenya Prisons Service or the Administration Police Force, the National Youth Service or an employer and the employer's dependants where the dependants are the only employees in a family undertaking (Section 3(2)).

¹⁷ Employment Act, Section 5(1) and (2).

¹⁸ Specific provisions are made for sexual harassment: any employer who employs twenty or more employees shall issue a policy statement on sexual harassment, and guidelines for the contents of the statement are provided, Section 6: Sexual Harassment.

¹⁹ Employment Act, Section 3 (1).

or calculated to promote feelings of hatred or enmity between different races or communities in Kenya” (**Section 77(3)**).

The **Sexual Offences Act** introduced a number of new offences which broaden the protection of women from sexual abuse and harassment. New offences created under the act include gang rape and trafficking for sexual exploitation. The Act also introduces mandatory minimum sentences for rape, sexual assault and sexual harassment. Having said this, the Act does not create an offence of abduction of women which had previously been explicitly prohibited under the Penal Code. Both the Sexual Offences Act and the **Public Officer Ethics Act** criminalise sexual harassment by any person in a position of authority, or holding a public office.

Health

The **Public Health Act** does not contain any non-discrimination provisions²⁰.

However, the **HIV and AIDs Prevention and Control Act of 2006** established to *inter alia* for the appropriate treatment, counselling, support and care of persons infected or at risk of being infected with HIV and AIDs, dedicates Part VIII to the prohibition of discrimination on the ground of ones actual, perceived or suspected HIV status. The Act expressly prohibits discriminatory acts and policies in employment, in schools, when travelling or in the choice of abode, in seeking elective or other public office, in accessing credit facilities or insurance, health care services and burial services (**Sections 31 - Section 37**). **Section 38** provides that any person who commits these prohibited acts would be liable to a penalty.

Section 25 of the Act establishes an HIV and AIDs Tribunal with the jurisdiction to hear and determine complaints, appeals and any matters arising out of the contravention of the Act and to make orders for payment of damages in respect of proven financial loss or direction on steps that should be taken to address the discriminatory practice among other orders. The Tribunal issues a certificate of the orders granted, which upon being filed in the High Court shall be deemed as a decree of the High Court.

Family Law

The family law regime in Kenya covers marriage, divorce and matrimonial property governed under various pieces of legislation including the African customary laws of different ethnic groups, the Hindu Marriage and Divorce Act based on Hindu law, Mohammedan Marriage and Divorce Act based on Islamic law, the Marriage Act and the African Marriage and Divorce Act for those who chose to marry under formal law regardless of the cultural or religious affiliations. In the similar fashion, there is no single law governing matrimonial property and it is addressed within various laws including the Constitution, the Matrimonial Causes Act, the Married Women’s Property Act and the Law of Succession Act. Discrimination against women is most evident upon dissolution of a marriage when the women are kicked out of their matrimonial home with nothing to their name. This discriminative effect has been reinforced by the Kenyan Court of Appeal in the case of *Peter Mburu Echaria Vs Priscilla Njeri Echaria*²¹ where the court held that neither the status of marriage nor the performance of domestic duties would entitle a

²⁰ Public Health Act, 1961, available at: http://www.kenyalaw.org/kenyalaw/klr_app/frames.php

²¹ Nairobi Civil Appeal No. 75 of 2001

woman to a beneficial interest in matrimonial property upon dissolution of marriage. This is a departure from previous case law from the same court which was to the effect that matrimonial property ought to be divided equally between the spouses upon dissolution of the marriage.

The multiplicity of legal regimes and continued application of discriminatory customary norms have made it difficult to apply a common standard for assessing gender justice including the standards of non-discrimination such as those enshrined under CEDAW.²²

Education

The Education Act,²³ which governs primary and secondary educational institutions, contains no non-discrimination provisions and does not expressly prohibit discrimination. Having said this, the **Children Act (2001)** contains a single broad provision prohibiting discrimination on ground of origin, sex, religion, creed, custom, language, opinion, conscience, colour, birth, social, political, economic or other status, race, disability, tribe, residence or local connection²⁴. The Children Act also provides additional protections in relation to abuse, parental care, right to education, protection from armed conflict, forced labour, harmful cultural practises and religious discrimination (**sections 6-15**).

Protection from discrimination does exist in respect of higher education institutions. Under the provisions of the **Universities Act of 1985**, universities must be established by a specific Act of Parliament²⁵. Each constituting Act contains an identical prohibition on discrimination on grounds of ethnic origin, sect or creed in relation to admissions and appointment of academic staff at the University.²⁶ For example, **section 7(2)** of the **University of Nairobi Act**, states that admissions and appointments should be made “without distinction of ethnic origin, sect or creed and no barrier based on any such distinction shall be imposed...”²⁷. It should be noted that the Universities Act and the Universities Rules (1989)²⁸ contain no protection from discrimination in respect of private universities.

²² Family Law Reforms in Kenya: an overview; Nancy Baraza, Commissioner Kenya Law Reform Commission, presented at Heinrich Boll Foundation's Gender Forum, Nairobi, 30th April, 2009.

²³ Education Act, Cap 211, Laws of Kenya, (1968).

²⁴ Government of the Republic of Kenya, *Children Act no.08/2001*, 2001, available at: http://www.kenyalaw.org/kenyalaw/klr_app/frames.php, Section 5.

²⁵ Universities Act, Cap 210B, Laws of Kenya (1985).

²⁶ See, for example, the Egerton University Act, Cap 214, Laws of Kenya (1987), Section 4(2): Admission to the University as candidates for degrees, diplomas, certificates or other awards of the University shall be open to all persons accepted as being qualified by the Senate, without distinction of ethnic origin, sect or creed and no barrier based on any such distinction shall be imposed upon any person as a condition of his becoming, or continuing to be, a professor, lecturer, graduate or student of the University, or of his holding any office therein, nor shall any preference be given to, or advantage be withheld from, any person on the grounds of ethnic origin, sect or creed.

²⁷ Government of the Republic of Kenya, *The University of Nairobi Act*, 1985, available at: http://www.kenyalaw.org/kenyalaw/klr_app/frames.php

²⁸ United States International Grant Making (USIG), Country Profile: Kenya, 2008, available online: <http://www.usig.org/countryinfo/kenya.asp>, last accessed 28 March 2008.

IMPLEMENTATION AND ENFORCEMENT

In addition to the National Cohesion and Integration and the National Council for Persons with Disabilities, the Kenya National Commission on Human Rights and the National Commission on Gender and Development are also mandated to monitor the implementation of equality legislation.

The **National Commission on Human Rights**, established under the **Kenya National Commission on Human Rights Act**²⁹, has both a promotional and enforcement role. It has the mandate to, *inter alia*, investigate, on its own initiative or upon a complaint made by any person or group of persons, the violation of any human rights (**Section 16(1) (a)**), meaning the fundamental rights and freedoms of any individual protected under the Constitution and any human rights provided for in any international instrument to which Kenya is a signatory (**Section 2**).

The Commission operates a Hearing Panel (Tribunal) and an Alternative Dispute Resolution mechanism; it also undertakes Public Inquiries. Under **Section 19**, the Commission has the power of a court to, (a) issue summonses or other orders requiring the attendance of any person before the Commission and the production of any document or record relevant to any investigation by the Commission; (b) question any person in respect of any subject matter under investigation before the Commission; (c) require any person to disclose any information within such person's knowledge relevant to any investigation by the Commission. It can order either (a) the release of any unlawfully detained or restricted person; (b) the payment of compensation; or (c) any other lawful remedy or redress.

The National Gender and Development Act established the **National Commission on Gender and Development** to overallly co-ordinate, implement and facilitate gender mainstreaming in national development. The Commission which is established as a parastatal within the Ministry for Gender, Children and Social Services plays a strategic role through the formulation of laws, practices and policies which eliminate discrimination against women and the institution of mechanisms that promote gender equity and equality in all spheres of life and in particular, access to and benefits in education, healthcare, nutrition, shelter, employment and control of economic and national resources. It also plays an educational role through the co-ordination of programmes to create awareness and support for gender issues. Although the Commission is mandated to carry out investigations on gender-based rights and violations and make recommendations to relevant authorities, it does not have an enforcement role nor the power to hear complaints.

Section 84 of the Constitution on the enforcement of the Bill of Rights including protection from non-discrimination permits any aggrieved person to lodge a case before the High Court for remedy. This provision has been the basis upon which individuals and organisations alike have instituted cases on human rights violations before the Court. However, there has been almost negligible case law on anti-discrimination emanating from specific anti-discrimination law and as such the Courts have not established clear standards for the determination of such cases. One of the outstanding cases brought under Section 84 of the Constitution is *Rangal Lemeiguran & Others v Attorney General and Others*³⁰, commonly known as the *Ilchamus* case where the Ilchamus, a minority group in Kenya, sought for a declaration from the Court to have a special

²⁹ Kenya National Commission on Human Rights Act, Act No. 9 of 2002, Laws of Kenya, entered into force 12 March 2003.

³⁰ Miscellaneous Civil Application No. 305 of 2004 eKLR [2006] Delivered 18th December, 2006

nomination seat in the National Assembly. The applicants argued that their rights as enshrined in the Bill of Rights, including the right to equal treatment, would continue to be violated if they did not have representation in Parliament. In giving an affirmative decision, the Court echoed the principles in a previous ruling by Ringera J, in *Njoya & Others Vs AG & Others* 2004, which stated that “the concepts of equality before the law, citizens rights in a democratic state and of the fundamental norm of non-discrimination all call for equal weight of equal votes and dictates that minorities should not be turned into majorities in decision making bodies of the State. However, that cannot be the only consideration; it must be remembered that minorities of whatever shade and colour are entitled to protection and that in the context of the Constitution which is for all, majorities and minorities alike, the voices of all should be heard.”

Another case in point, is *J.A.O Vs Homepark Caterers Ltd, Dr. Primus Ochieng and Metropolitan Hospita*³¹ where the plaintiff alleged violation of her rights through unlawful termination on the basis of her HIV/AIDS status. In determining an application brought by the defendants to strike out the suit, the Judge found that it was not suitable to strike out the suit in recognition of its probable value towards moulding attitudes and public policy in the treatment of persons with HIV and AIDS by hospitals, employers and others that the same may be free of discriminatory tendencies. This case was eventually determined through an out of court settlement.

There is need for increased strategic litigation and judicial activism to enhance anti-discrimination case law in Kenya. The National Cohesion and Integration Act, the Persons with Disabilities Act, the HIV/AIDS and Prevention Act and the Employment Act as well as other anti-discrimination provisions in other laws provide a pedestal upon which such precedents may be laid and within which clear standards and burden of proof can be developed.

³¹ Civil Case 38 of 2003 eKLR (2004).