

# FOREIGNERS AT HOME

*THE DILEMMA OF CITIZENSHIP IN NORTHERN KENYA*



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## Executive Summary

Once a neglected issue in political discourse, citizenship has now emerged as a central concern. It has become a highly contested conceptual territory as individuals are less defined as members of social class and more as citizens. As the prominence of dialogue on citizenship increases, so have its challenges. Decades of associating citizenship with human rights may have elevated its profile, but has not liberated citizenship from politics and violations.

Centuries of debate and practice have not clarified the definition of citizenship. While citizenship conjures the notion of civic duties, unwavering loyalty and a legal link to a polity, and equal access to state institutions, its limits span across a social and spatial divide. For centuries citizenship rights have been inflicted by exclusive tendencies. Ancient Greece for instance excluded slaves and women from participating in processes ordinarily reserved for citizens. Just as in the past, equality in accessing state institutions and public participation in decision making remain key challenges to citizenship and its discourse. Since 1990, different African countries have witnessed denationalisation resulting in intra-national conflicts. Kenya, however, only experienced tacit contest on citizenship. Discourse on citizenship in Kenya has been mostly confined to the affected groups and among the Civil Society Organizations (CSO) with minimal reference to mainstream society. This study explores Northern Kenya as a case study of the manner in which skewed allocation of resources and politics of exclusion together affect citizenship rights.

Formal citizenship in Kenya has its genesis in colonialism. In theory, colonial Kenya had equal citizens. However, in practice the State enforced a system of 'unequal citizenship'. White settlers enjoyed all citizenship rights while the natives were invariably considered 'subjects'. It is arguable that after independence, Kenya retained this 'dualism' in its definition and approach to its citizens.

The basis of citizenship acquisition in Kenya has remained limited to birth, marriage and residency. While birth may be considered a foundation for acquisition of citizenship all over the world, the interplay between two concepts - *jus sanguinis* (blood relationship) and *jus soli* (territorial relationships) - holds precedence in Kenya so that descent takes supremacy over birth as proof of citizenship. Rather than use lineage to determine the identity of Kenyans born out of Kenyan jurisdictions, lineage is used to determine the identity of those born within Kenyan borders leading to exclusion. This is further nuanced by ethnicity, regionalism and gender. For instance, women do not as a right confer citizenship to their foreign spouses and while members of certain ethnic groups are considered bonafide citizens, others have to qualify.

Furthermore, the concept of citizenship is reduced to possession of National Identity Cards (ID cards) without which one misses out on countless opportunities and freedoms. The acquisition of an ID card is viewed not as a right but a State prerogative. In practice however, the propagation of 'insider' and 'outsider' ideologies has led to the repudiation of these opportunities and freedoms for even those with ID cards. Moreover, Government procedures for the issuance of ID cards are not equal for all Kenyans.

Applicants for Kenya's citizenship in the Northern region often undergo stringent vetting - at least compared to other peoples in other parts of Kenya. Being female, Muslim or belonging to the Somali ethnic group further complicates the application procedures for obtaining a passport or ID card. Women from the region for instance are without automatic citizenship and must be linked to men (husbands or fathers). The result of this has been the chronic delay and outright denial of this valuable document to many people in the region.

This institutionalized discrimination has continued in violation of the Constitution of Kenya which expressly prohibits discrimination. Kenya is also a signatory to a number of international human rights instruments stipulating equality for all and prohibiting discrimination on all grounds.

Historical marginalisation has worsened the exclusion of Northern Kenya. The region has been neglected in resource allocation, infrastructural development, political voice and representation causing its residents to dangerously sit on the edge of statelessness. Thus, Northern Kenya residents may not count on their citizenship let alone their nationality.

While welcoming the National Registration Bureau's nationwide directive in 2006 given to administrative personnel to cease requesting for grandparents' documentation as proof of citizenship, addressing citizenship rights will need more careful consideration. This study calls for the elimination of arbitrary citizenship denials, citizenship-based discrimination and protection against statelessness. Calls have also been made for the restructuring of the ID cards management system and the creation of a centralized database of birth registration information to help limit the practice of discriminatory identification procedures in adulthood. The Kenya Government and international organisations such the United Nations High Commission for Refugees (UNHCR) are also urged to work towards protecting minorities from becoming stateless.

The reassessment of the relationship between the Central Government and the people in the provinces is more salient than ever in the wake of the xenophobic violence that followed the 2007 general elections. Promoting equal citizenship and equal access to citizenship as a basis for national integration is crucial if Kenya is to recover from decades of neglect, ethnicity, structural marginalization and other historical injustices. Redefining identity and cultural belonging in Northern Kenya and the country as a whole will call for honest national dialogue and constitutional reforms on, amongst others, citizenship. Policy makers must now consider new legislation to enhance citizenship rights of minority and vulnerable groups (for instance, women, children, and refugees). In addition, public knowledge on citizenship needs to be prioritised. This study therefore calls for legal, policy, institutional and administrative changes to address institutional discrimination, exclusion and marginalisation.

## List of Abbreviations

ACHPR	African Charter on Human and Peoples' Rights
ACoHPR	African Commission on Human and Peoples' Rights
APRM	African Peer Review Mechanism
ASAL	Arid and Semi Arid Lands
CEDAW	Convention on Elimination of all forms of Discrimination Against Women
CEMIRIDE	Centre for Minority Rights Development
CRC	Convention on the Rights of the Child
CSO	Civil Society Organizations
CDF	Constituency Development Funds
DRC	Democratic Republic of Congo
HRN	Human Rights Networks
ICCPR	International Covenant on Civil and Political Rights
ID	Identity Card
KHRC	Kenya Human Rights Commission
KNCHR	Kenya National Commission on Human Rights
KMC	Kenya Meat Commission
MDG	Millennium Development Goals
MUHURI	Muslims for Human Rights
MRG	Minority Rights Group International
NEP	North Eastern Province
NFD	Northern Frontier District
NRB	National Registration Board
OSIEA	Open Society Initiative for East Africa
OSISA	Open Society Initiative for South Africa
RI	Refugee International
SID	Society for International Development
UDHR	Universal Declaration of Human Rights
UNHCR	United Nations High Commission for Refugee
WMS	Welfare Monitoring Surveys



## Chapter 1

# CITIZENSHIP: A CONCEPTUAL ANALYSIS

### 1.1 Introduction

Debates on citizenship are never conclusive because citizenship is an evolving idea and practice. This study explores the dynamic relationship between effective citizenship and 'space' for three reasons:

- To explain the instrumentality of 'place' in structuring the inequitable patterns of citizenship in Kenya;
- To determine whether citizenship counts for citizens and descendants of Northern Kenya communities beside interrogating the challenges in accessing citizenship rights; and
- To propose ways to make citizenship a public discourse in Kenya's mainstream society.

While the study interrogates two citizenship functions - allocation and integration - this chapter examines the background of and reasons why citizenship issues matter, particularly in Northern Kenya.

### 1.2 Study background

The Kenya Human Rights Commission (KHCR) first commissioned this study in November 2006, with the aim of assessing citizenship-based discrimination in Northern Kenya. It commissioned the study a second time in December 2007, with an additional focus of addressing access to citizenship rights. The study's field work was conducted between 10<sup>th</sup> and 16<sup>th</sup> March 2008. The first study exposed the differences in acquisition of citizenship documents, particularly the national identity (ID) card and passport, amongst different ethnic groups residing in Northern Kenya. It found that the challenge is not limited to recognition but extends to a large corpus of other human rights.

Since 1990, denationalisation of some political leaders and expulsion of groups has been a dominant scene on citizenship challenges around Africa.<sup>1</sup> In some cases acts of denationalisation have been accompanied by legal tussles and sometimes, violent conflicts. Since the mid-1990s the African Commission on Human and Peoples' Rights (ACoHPR) has made several rulings on citizenship arising from communications instituted by politicians, activists and communities. For example, in three cases related to the issue of access to citizenship, *John K. Modise v. Botswana*<sup>2</sup>, *Amnesty International v. Zambia* and *the Mauritania cases*, the Commission has recognized that arbitrary denationalization is a violation of the African Charter on Human and Peoples' Rights (African Charter).<sup>3</sup> In the *Mauritania cases*, the African Commission ruled that the expelled Mauritians had been stripped of their citizenship in a discriminatory manner - and the expulsion was therefore illegal. The Commission has also condemned the deportation of non-citizens. In *Amnesty International v Zambia* and *John K Modise v Botswana* the treatment of the complainants repeated deportation and eventually confinement in a no man's land between Botswana and South Africa in Mr. Modise's case and deportation to Malawi in the *Zambia* case was considered to amount to a violation of the complainants' rights, including the right to dignity, protected by Article 5 of the African Charter.

Ethnic manipulations for political ends and the question of recognition have been at the centre of a number of conflicts in the Great Lakes Region. For instance, Banyarwanda (Rwandese speaking people in the Democratic Republic of Congo (DRC)) living in the North and South Kivu provinces of DRC were in September 1996 denied citizenship based on their ethnicity.<sup>4</sup> The Banyarwanda and Banyamulenge were accused of being foreigners who have acquired Congolese citizenship fraudulently. The result has been retaliation through militia groups which fight to regain their recognition.<sup>5</sup> The colonial administration (the Belgian Government) used a dual system of civic and customary rule to administer Burundi, DRC, and Rwanda. These systems gave rise, in the post-colonial State, to a notion of citizenship that drew distinctions between the indigenous and the stranger.<sup>6</sup> At DRC's independence in 1960, the Banyarwanda considered themselves citizens of the new State. In January 1972, DRC granted citizenship to all natives of Burundi and Rwanda who had settled in the country before 1950. In 1981, in response to significant pressure from the majority of the constituency in the Eastern provinces, President Mobutu enacted a citizenship legislation invalidating the 1972 decree. The new law recognised individuals with ancestral connection to the population that resided in Congo in 1885 only, thus stripping the Banyarwanda of their citizenship.

Kenya may have only experienced tacit dialogue on citizenship albeit confined to victims and a number of Civil Society Organizations (CSOs). This is due to the fact that the problems have been less dramatic and not well known by many. In addition, there has been an open association of ID cards to citizenship; and therefore, the majority of Kenyans who easily access the document automatically assume that those without do not belong. Such persons without ID cards, as such, cannot be defended or supported in their quest to obtain the document.

While ID cards and recognition are important, citizenship is more than these. For instance, in the year 2000, the KHRC in a study titled [the] *Forgotten people Revisited; Human rights abuses in Marsabit and Moyale Districts*, a sequel to an initial study by the same organization, pointed to increased violent conflicts and insecurity in the regions during the period between 1996 and 97. These studies attributed the violent conflicts and insecurity to banditry, ethnic animosity, highway robbery and international aggressions along the Ethiopian border. On 12<sup>th</sup> July, 2005, Marsabit District experienced massacres in Turbi and Bubisa that significantly involved people from Ethiopia in the planning and execution.<sup>7</sup> The same year, similar intra-clan conflicts visited Mandera and the entire Northern Kenya region. In October 2008, the military was deployed to Mandera to curb ethnic conflicts.<sup>8</sup> The main question in this regard has been why the Kenya Government did not intervene substantively to check the violence, yet it has a constitutional obligation to protect life and property of all citizens. The report by KHRC hypothesized the linkage between neglect and the perception of the region's inhabitants that they are not citizens of Kenya.<sup>9</sup> In addition, discrimination in accessing citizenship rights in the Northern region is factored on identities – ethnic, gender, religion among other social identities.

A study conducted by the Kenya National Commission on Human Rights (KNCHR)<sup>10</sup> established that both access and enjoyment of citizenship rights in Kenya is akin to attainment of an ID card which is not a right but a State prerogative. The study concluded that limiting the benefits of ID cards to capacity to be registered as a voter not only undermines the value of the document, but also the sanctity of citizenship itself. On its part Refugee International (RI), in a

policy brief on Kenya's citizenship registration process,<sup>11</sup> concluded that Kenya's national registration process leaves minorities at the edge of *statelessness*. These studies propose that Kenya must change its identification process into a form that enhances one's opportunities to enjoy human rights and freedoms.

While most citizenship discussions in Kenya have been geared towards Government policies, the National Civic Education Programme (*Uraia*) has been aimed at promoting and strengthening access to citizenship rights by members of the public. The *Uraia* programme seeks to strengthen public voice to demand accountability from the State. Whether the programme has or will achieve its goals, only time will tell.<sup>12</sup> Nonetheless the citizenship situation in Kenya, as in the world, is evolving but remains controversially state-centric. Citizenship remains the less understood practice and concept of belonging.

### 1.3 Significance of citizenship in Northern Kenya's context

Citizenship is critical in the quest for human rights. Notwithstanding the fact that human rights are enjoyed by both citizens and non-citizens, citizenship is the foundation right that obligates a state to respect, protect, promote and fulfil these rights. As indicated in the preceding sections unequal access to citizenship undermines national cohesion and development.

Kenya is in the midst of major legal and institutional reforms. A review of the citizenship concept and practice is an important element in the changes and countless reforms Kenya has earmarked for the next 2 to 5 years.<sup>13</sup> Whereas previous calls for these reforms went unheeded,<sup>14</sup> the present Grand Coalition Government is expected to put in place the required legal and policy reforms. In the year 2005, the country acceded to the African Peer Review Mechanism (APRM) and went through a process of internal audit. The outcome of this process indicted Kenya in several respects and called for urgent remedial measures such as managing its diversity in nation-building, securing constitutional reform and consensus-building, stemming out corruption, eradicating poverty and creating wealth for a large population, managing land resources, addressing gender inequality, minimizing youth unemployment and creating transformative leadership.<sup>15</sup>

This study addresses itself to challenges facing the status and practice of citizenship in Kenya today, taking the case of Northern Kenya.

Northern Kenya provides a classic case for analysing the intersection between citizenship-based discrimination and under-development. The region has been marginalised through laws, Government policies and other administrative practices. For instance, the Sessional Paper No. 10 of 1965 on *African socialism and its application to planning in Kenya* was designed to address seven objectives, three of which addressed poverty and inequalities in wealth and income.<sup>16</sup> Key concern to the Sessional paper was the amount of and purpose for expenditure and to help the less developed areas of the country taking cognizance of the productivity and output of the regions and potential for inequality.<sup>17</sup>

Forty years after independence, equal opportunity and high growing income per-capita that are equally distributed deliberately excluded pastoralism which is the mainstay of the region. According to Tom Mboya, the architect of the aforementioned policy paper, there was justification in investing in what he called 'high potential areas' because of the assurance of high returns. He argued thus:<sup>18</sup>

...Given our limited resources, and when we consider that these areas do not often have basic natural resources including water or land...they cannot compete for development money with other parts of Kenya.

Mboya, as the foremost Planning Minister in independent Kenya, went on to prescribe a type of apartheid - equal but separate development - predicated upon the notion that some areas were of higher potential, with reference to the well-watered Kenya highlands while others, such as the dry lands of the Northern Frontier District (NFD), were deemed to be wastelands of little economic potential, and hence not worthy of serious investment. It is on the warped and discriminatory premise of Sessional Paper No. 10 of 1965 that the superstructure for present-day limited public sector investment in Northern Kenya was laid.

Since 2004, the Government introduced free primary education, attempted social health insurance schemes; and decentralized the water sector, roads network and infrastructural development. In these various schemes, marginalized areas remained as peripheral beneficiaries. In response, CSOs have forwarded the constituency model of development to attempt citizen-driven development and address inequality, its effectiveness notwithstanding.<sup>19</sup>

Moreover, the recent establishment of the Ministry of Northern Kenya and other Arid Areas under the Grand Coalition, the improved Ministry of Livestock, and revival of the Kenya Meat Commission (KMC); and the impending opening of four satellite abattoirs in Isiolo, Wajir, Garisa and Turkana, represent attempts at addressing the economic downside experienced by pastoralists in Northern Kenya. The KNCHR has established two regional offices in both Wajir and Kapenguria to handle a plethora of past human rights violations to prevent their recurrence in North Eastern Kenya and the North Rift, respectively. The KNCHR is among the few national institutions that have taken such a bold step. Social integration of the people from this region into the larger Kenyan community remains an issue to be addressed. The Economic Recovery Strategy for Wealth and Employment Creation 2003 (ERS)<sup>20</sup> recognized that deliberate effort to develop marginalized areas was critical for national development and that this is only achievable through consolidating nationhood.

Despite this systemic marginalization and discrimination, which has led to serious human rights violations, there is paucity of research on the phenomenon, its economy and underlying causes. Moreover, there are inadequate policy and legal measures taken to address the same. During elections, the region has been the receptacle of a myriad of promises, ranging from economic 'Marshall Plans' to enlargement of freedoms and equal opportunities. Following elections however, successive governments and leadership have failed to take deliberate and sustained measures.

#### **1.4 Methodology**

This study utilises case studies, in-depth interviews and Focus Group Discussions (FGDs) as methodological approaches. The study also looks at the challenges the Government faces in meeting its obligations to the residents of Northern Kenya. The study asks the following key questions:

- What differences and reasons exist in accessing citizenship documents in Northern Kenya in comparison to other parts of the country?
- Is recognition a critical challenge limiting citizenship rights in Northern

- Kenya?
  - What do these differences and challenges imply for the current reform discourse?

#### **1.4.1 In-depth interviews**

KHRC constituted a research team which developed a concept framework including identification of key issues. A key informant guide was developed and administered to informants at the provincial levels, in the period between 10 and 15 March 2008. In-depth interviews were held with key Government officials in order to gain insight on the role and challenges the Government faces in ensuring citizenship rights. The Government officials interviewed were mainly from three departments: Registrar of Persons, Provincial Medical Officer, Provincial Education Officer, and UNHCR officials.

#### **1.4.2 Focus Group Discussions**

Three FGDs were conducted; one with participants drawn from NEP, and another with participants drawn from Upper Eastern. In November 2006, the study conducted a further FGD with the Galjeel community. The composition of the discussion groups included persons drawn from Faith-Based Organizations (FBOs), NGOs and human rights networks. The key thematic areas of focus during the discussions included:

- Importance of citizenship document(s);
- Access to citizenship document(s);
- The experiences with the vetting process;
- National security issues;
- Differentiating between Kenyan nationals and refugees; and
- The State's obligation to protect Kenyan nationals.

### **1.5 Geography and the study population**

Northern Kenya refers to the former Northern Frontier District (NFD)<sup>21</sup> and its people. The study addresses itself to the local residents, in particular, Somali and Oromo speaking descendants who share origin and occupy areas across international borders. The Somalis predominantly occupy North Eastern Province (NEP) while the Oromo speakers occupy Upper Eastern.

### **1.6 Data processing and analysis**

The research team used discussion guides to gather and analyze information and dicta-phones to record the discussions. The data collected was first typed and transcribed from the information from the dicta-phones before feeding it into Nudist (N6) software for qualitative data analysis. Using this software a thematic analysis of the field data was conducted.

In addition to field study, the research team conducted a literature review covering aspects of policy, legislation and impact in relation to issuance of ID cards and development history in general. The study used key human rights principles of equal treatment and non-discrimination, as well as the right to nationality and citizenship to analyze the collected data. In addressing citizenship-based exclusion, there are a number of key concepts that guide analysis of access to citizenship.

### 1.7 Scope and limitations of study

The fieldwork did not cover the entire NFD but was limited to NEP and Upper Eastern. However, the outcomes of the study could be said to be representative of the entire NFD region. The findings are therefore generalised for the entire North for historical and contemporary reasons. Historically, the region constituted the former NFD, while at present, in national development agenda, the region is treated as one.

The study attempts to link marginalization to citizenship rights. It addresses citizenship as a broad concept. The research does not pretend to be exhaustive but gives useful pointers to future research in this area.

There were a number of limitations encountered in this study during the fieldwork. Some of the target interviewees were not available for interviews at the time. For instance, in Embu, the research team was not able to obtain interviews with the Provincial Education Officer; in North Eastern Province, it was not possible to meet the Provincial Registrar of Persons. In other instances, officers declined to give any information due to lack of proper knowledge. Some of the interviewees were new and had limited experience in the geographical area away from the provincial headquarters. Such was the case in Embu. In discussing access to citizenship document(s), the study addresses itself to persons who have attained the age of eighteen years and above or where no proof of age exists, are of the apparent age of eighteen years and above, as provided under the Registration of Persons Act.<sup>22</sup>

### 1.8 Definition of citizenship

While there is no clear definition of citizenship<sup>23</sup>, what is evident is that its practice and understanding has been changing through history. Part of the challenge in modern states has been the individual's *right to* citizenship and the state's *recognition* of that citizenship. Despite being a contested idea and practice, citizenship has been defined as the 'status which people possess and.... practice which people engage in.'<sup>24</sup> Thus, citizenship is a concept about *being* and *doing*.

In practice, citizenship is a collection of interrelated entitlements and obligations which come to life in the connection between an individual in a territory and its sovereign.<sup>25</sup> It thus locates an individual within a body of reciprocal rights and obligations between members of the community and its collective institutions. These rights and obligations are not inherent in citizenship but are historical variables. According to Marshall,<sup>26</sup> through history, citizens in democratic capitalist states have had three broad categories of rights which states must guarantee and individuals enjoy: Civil rights which are expressed in law and exercised through institutions of legal systems; political rights which grant an individual the entitlement to participate in the political life of a community; and social and economic rights which allow participation in general, standard well being and extend to sharing to the full the social heritage.

As a bundle of entitlements, citizenship has both external and internal elements. The internal elements are rights and entitlements that accrue from individual relations to the state, such as voting, among other participation and security rights. These internal elements constitute the bundle of entitlements referred to as citizenship. Concurrently, the external elements reflect the consequence of these entitlements enabling the bearers, whenever their

citizenship rights are endangered, to claim protection from the state. This external aspect, better known as *nationality*, is most relevant when a citizen is outside his or her country. Theoretically therefore, citizenship and nationality are complementary and mutually interdependent concepts. In this study, the two are interchangeably used.

In addressing access to citizenship and citizenship-based discrimination, a number of the following key concepts have been used to guide the analysis. These include:

- ***Effective citizenship and nationality***: This is when the system works as it should and citizens have legal recognition by their states on one hand, and in practice have the associated rights and protections of citizenship.
- ***Statelessness (de facto statelessness and de jure statelessness)***: Legally, a stateless person is defined as an individual who 'is not considered as a national by any State under the operation of its law.'<sup>27</sup> Anyone who fits this description is *de jure* stateless. This legalistic definition is limiting. It does not include a large number of people who are entitled to citizenship but do not enjoy the rights or protection of citizenship. Even holders of documented proof of citizenship may suffer marginalization or exclusion to the extent that their citizenship is rendered ineffective. Such persons are *de facto* stateless.
- ***De facto statelessness***: Is a largely unrecognized and unexamined middle ground. This applies where an individual may possess documentary proof, (even imperfect) of their citizenship, yet does not have the attached rights and protections. Comparatively, *de jure* stateless (having neither legal nor state protection), at the far end of the continuum, is considerably fortunate, at least in the legal clarity of their position. There is sufficient support in law and duty on international agencies to step in and provide them with protection.
- ***Indirect discrimination***: Differential treatment sanctioned by law and practice constitutes institutionalized discrimination. Indirect discrimination refers to the enactment of a facially neutral measure that has a disparate impact upon a specific group or population.<sup>28</sup> These discriminatory practices may be described as 'fair in form but discriminatory in operation.'<sup>29</sup> Indirect discrimination differs from direct discrimination which is defined as showing less favourable treatment on the basis of impermissible grounds such as race or ethnicity. The Council of European Union defines indirect racial or ethnic discrimination as an occasion in which:<sup>30</sup>  
An apparently neutral provision, criteria, or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criteria, or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.
- ***Structural discrimination***: Structural discrimination entails a segregated locale for instance where specific neighbourhoods suffer worse conditions across several areas - education, health, roads, water, and housing stock. This could rise to the level of discrimination, even without proving the motive. The legal concept of structural discrimination evolved from the 'institutional discrimination' model, which became part of American legal terminology in the 1960s.<sup>31</sup> Adherents to the institutional discrimination model dismiss

the notion that discrimination is purely an intentional, individualist, or 'race-targeted' concept, and instead focus on the intra-institutional dynamics that perpetuate disparate outcomes within organizations or institutions. The structural discrimination framework builds upon these institutional theories, but rather than revert to *intra*-institutional forces to explain the perpetration of racial disparities in multiple sectors of society, structural discrimination provides an *inter*-institutional perspective.

### 1.9 Summary

While citizenship has evolved for centuries, in many states the dream of having civic citizens is far from realisation. In addition, equality between and among citizens in accessing state institutions and resources too has been unattainable. Citizenship thus remains less understood as a concept of belonging; contested in practice. A civic community is that which participates in decisions and is informed of its rights as citizens. Citizenship works for such a community and by extent, a state may become more accountable to such citizens.



## Chapter 2

# ACCESS TO CITIZENSHIP IN KENYA A SITUATION ANALYSIS

### 2.1 Introduction

Historically, socio-economic, legal and political issues have a way of affecting citizenship practices. While CSOs and development partners have extensively engaged in issues of economic violations, social and cultural rights, as well as civil and political rights, one issue that has escaped scrutiny is that of citizenship and identity-based discrimination in Northern Kenya. Little attempts (if any) have been made to link this region's economic exclusion, to problematic access to citizenship rights. This anomaly has its place in the turbulent history of Northern Kenya. During colonial times, the region was excluded and closed. According to a Central Depository Unity (CDU) 2003 report, like all pastoralists in the Kenyan territory, the colonialist confined NFD residents to dry land,<sup>32</sup> disregarded pastoralism<sup>33</sup> and enacted laws that pushed Africans to one side of the country.<sup>34</sup>

The ordinance effectively made NFD a closed area and movement in and out of the area was restricted to indigenous people only or holders of passes obtainable from the District Commissioner (DC).<sup>35</sup>

After independence, the residents were subjected to war (shifta War),<sup>36</sup> countless massacres and citizenship screening. Not only have these affected the region's integration into the rest of Kenya, but they have also affected its people's social inclusion. These issues constitute the subject matter of this study. This chapter traces effective citizenship (public participation, access to citizenship document(s) and attainment of human rights) in Kenya within the context of Northern Kenya.

### 2.2 Historical perspective on citizenship in Kenya

The rights to participate in public life and access to citizenship have a long history in Kenya. Over time, inequality has become a fact of life, not only to individuals from mainstream ethnic groups, but also to marginalised communities.<sup>37</sup> While members of mainstream communities realise that automatic access to citizenship documents only address their recognition by the state, the marginalised communities on their part complain of delays in getting ID cards and recognition affecting their sense of belonging. Commenting on citizenship problems in Kenya Ghai argues that:<sup>38</sup>

...as a nation Kenyans have to ensure the full rights of citizenship (including the obtaining of ID, voting cards and passports) of all people (for even the poor of so-called 'dominant' communities have difficulties obtaining these), while recognizing the special difficulties encountered by Somalis, Nubians, and Asians etc.'

Citizens of Northern Kenya region, for instance, continue to face difficulties in attaining recognition and accessing citizenship rights and their inherent freedoms, particularly ID cards. Equality of citizens before Government institutions has been the greatest challenge in Kenya.

Unequal access to citizenship has caused countless human rights violations. Since its inception, Kenya has had unequal citizens – 'citizens and subjects' by practice and law.<sup>39</sup> In colonial days, the settlers enjoyed all citizenship rights – they controlled power and resources, participated in decision-making while the natives existed at the periphery of society, yet paid taxes. Natives fought

for independence to establish equality and yet today the State maintains the same differentials based on ethnicity, region and gender.<sup>40</sup> Today, mainstreamed communities get automatic citizenship based on their lineage than birth or any other basis whilst the marginalised communities such as those in Northern Kenya must prove their belonging.<sup>41</sup> Although Kenya's Constitution and other relevant legislations allude to birth, lineage, marriage, and/or residency within the jurisdiction as the basis of citizenship in Kenya, at different times ethnicity has been dominant. All in all, there is nothing 'concrete that demonstrates what constitutes citizenship in Kenya.'<sup>42</sup> The aforementioned KNCHR report concluded that recognition rights are a sub-component of ethnic mainstreaming, gender and regional residency. Worse still, one cannot rely on his or her Kenyan nationality when it matters.

### 2.3 Kenya: The socio-economic context

Despite exhibiting many markers of civil strife seen elsewhere in Africa such as strong ethnic divisions, weak governance structures high socio economic disparities between regions, deepening levels of poverty and endemic corruption, violent conflicts in the country have been low key. Unlike many countries in the Horn of Africa<sup>43</sup> most ethnic conflicts in Kenya have been taking place in marginal areas with limited media coverage giving the world a notion of a peace-loving nation. Until the disputed general election of December 2007, the world had yet to witness violent outburst from Kenyans despite the simmering tensions. Kenya has posted mixed results in different international social, political and governance rankings; the State has maintained an impressive but very unequal economy coupled with poor democratic and governance records.



*Thousands of Kenyans were rendered homeless during the violence which followed the disputed 2007 general elections*

Kenya has the largest economy in Eastern Africa, but its growth had declined tremendously in the last two decades. The annual growth rate was over 7% during 1970s, but this fell to a mere 1% between 1997 and 2002.<sup>44</sup> Problems ranged from external shocks, deterioration of the terms of trade, corruption, deterioration in infrastructure, weak implementation capacity and declining foreign aid. The current regime has introduced economic reforms that have significantly improved growth and inflation rates and fiscal deficits have been kept within target. The implementation of strong and effective policies however remains a challenge.<sup>45</sup>

Since the year 2003, Kenya has experienced a measure of economic recovery. The country recorded an impressive economic growth rate of 5.8% in 2005/6 fiscal year, up from 4.9% in the previous year.<sup>46</sup> This has been partly attributed to 'improvements in transport and communication together with increased returns from tourism and manufacturing.'<sup>47</sup> Kenya's GDP growth has been positive (2.8%, 4.3% and 5.0% in 2003, 2004 and 2005 respectively) even though it barely surpassed population growth, which was greater than 2% per annum during the 2002 - 2005 period.<sup>48</sup> On the crest of its recent economic growth, and emboldened by the apparent optimism of its citizens,<sup>49</sup> Kenya has developed a vision to industrialize by 2030.

Although Kenya has had regular elections the State has fared poorly in various global governance rankings. Regular voting has yet to improve public participation in decision making and governance. For instance, the Failed States Index by the Fund for Peace<sup>50</sup> ranked the country 34th out of 146 countries in 2006. Similarly, the Freedom House Democratic Index ranked Kenya as the 29<sup>th</sup> most undemocratic state out of 150 countries in 2006;<sup>51</sup> and in the same year Transparency International ranked Kenya the 142<sup>nd</sup> most corrupt out of 163 states.<sup>52</sup> In addition, the country's human rights record, rife with unresolved ethnic cleansing, political assassinations, disproportionate development amongst regions and unresolved historical injustices, has all dovetailed to undermine the quest for a human rights state.<sup>53</sup> In its latest release, the Ibrahim Index of African Governance indicates that Kenya has been losing ground in its governance obligations to its citizens. Kenya was ranked number 17 in 2008; 15 in 2005; 15 in 2002 and 13 in 2000 out of 48 African countries under survey. On the contrary, the first five countries have maintained their ranking during the same period and have been improving in marks.<sup>54</sup>

## 2.4 Northern Kenya in context

As indicated above, Northern Kenya has traditionally been set and kept apart by law and administrative practices. It is a challenged section of the country (physically undeveloped and economically poor) and its people have a questioned belonging for historical and contemporary reasons. In addition to its complex social-political life, it is a region whose people lack civic voices. For instance, being border communities Kenyan Somalis are construed to be 'illegal migrants or refugees.'<sup>55</sup>

Pastoralists have remained on the margins of political power, in part because they lack a strong and effective lobby for their interests. Leaders from pastoral areas have not always acted in the best interests of their constituents.<sup>56</sup>



Northern Kenya citizens lack automatic recognition and it is a region with limited public investment. Descendants of the region are vetted wherever they reside in Kenya.<sup>57</sup> These have affected the quality of public participation from the region in particular delays in processing voter's cards for people in the region.

The marginalisation of the region could be said to have commenced with the curving off of the NFD, which constituted the bulk of Northern Kenya, followed by the establishment of separate laws for the region, the Shifta War (1963 –1967) after independence and the discriminatory development policies thereafter. The role of law shall be discussed in the next subsections. The Shifta War predominantly involved ethnic Somalis in the NFD who attempted to join with their fellow Somalis in a Greater Somalia.<sup>58</sup> Led by the Northern Province Peoples's Progressive Party (NPPPP), Somalis in the NFD vigorously sought union with the Somali Republic to the North.<sup>59</sup> At the start of the Lancaster House talk to discuss the independence Constitution for Kenya, a delegation of Somali leaders from NFD met with the British Secretary for Colonial Affairs in London stating their desire to have NFD secede to Somalia; they felt they would be welcomed and treated fairly unlike the situation in Kenya. They were equally encouraged by Somalia's independence Constitution which in Article 6(4) stated that one of its objectives was, 'the union of Somali territories by legal and peaceful means.'<sup>60</sup> This meant the consolidation of Somalis from Kenya, Ethiopia and Djibouti to form a Greater Somalia.<sup>61</sup> The Shifta War ended in 1968, with the re-establishment of diplomatic relations and pardoning of rebels who agreed to lay down their arms.<sup>62</sup> The war played a substantial role to influence post-independence Government policy towards the region.

Although the state of war between Kenya and Somalia formally ended two years after the Arusha ceasefire negotiated by the then Zambian President, Kenneth Kaunda, and then Somalia's Prime Minister Mohamed Egal, it was not replaced by a state of peace but a trail of chaos (inter and intra-ethnic conflicts) and attendant human rights violations.<sup>63</sup> The Shifta War claimed thousands of lives and occasioned massive economic losses to the Somali. No quantification of these losses has been undertaken by Government or independent bodies. However, it must be noted that the current poor economic status of the community may partly be a correlative of this brutal war. A number of human rights violations have been conducted in the region such the Wagala massacre as will be described later. Rhoda E. Howard in *Human Rights in Commonwealth Africa* states that:<sup>64</sup>

Somali leaders were routinely placed in preventive detention, where they remained well into the late 1970s. The North Eastern Province was closed to general access (along with other parts of Kenya) as a 'scheduled' area (ostensibly closed to all outsiders, including Members of Parliament, as a means of protecting the nomadic inhabitants), and news from it was very difficult to obtain. A number of reports, however, accused the Kenyans of mass slaughters of entire villages of Somali citizens and of setting up large 'protected villages' -- in effect concentration camps. The Government refused to acknowledge the ethnically based irredentist motives of the Somalis, making constant reference in official statements to the shifta (bandit) problem in the area.

The post-independent activity did not just close down the region; it may have led to the death of active political party leadership from the region. Indeed, after NPPPP, there has been no political organization that has emerged from the region.

This may explain why for a long time communities in the region, irrespective of mistreatment by governments, have aligned themselves to the leadership of the day. In 2002 67% of voters in NEP voted the incumbent Government's candidate for Presidency while voting 72% for the adoption of a proposed new Constitution through a referendum in 2005 that was considered to be a Government project.

Kenya's Governments, led by the then President Jomo Kenyatta, continued to rule NEP as an operations area<sup>65</sup> for fear of Somalia fanning dissent within Kenyan borders. Even today with its collapsing state and the massive military arsenal from the Soviet Union, Somalia continues to be accused of being a source of firearms finding their way into Kenya. Equally blamed is the Oromo Liberation Front (OLF) in Upper Eastern Kenya.<sup>66</sup> A joint military and police operation conducted in October 2008, and which resulted in the hospitalisation of more than 200 people, was explained by the police spokesperson as intended to curb illegal firearms from Somalia and Ethiopia.<sup>67</sup>



*The presence of illegal firearms within the region remains a persistent challenge, resulting in recurrent military and police operations*

The security of this area is further complicated by the fact that 'most pastoralist communities of Northern Kenya have virtual militia armies and an informal or clandestine but thriving arms trade is flourishing.'<sup>68</sup> Further still, groups in Northern Kenya live in ethnically defined Districts with buffer zones between them that often tend to be well-watered and foraged but are no-man's land.

The Northern Kenya's context is loaded with issues; nonetheless, the Government has the constant responsibility to ensure security and safety of the citizens within the region and protection of their human rights. Nothing denotes insecurity than vigilantism and the need for arms. This is symptomatic of neglected citizens defending lives and protecting their property in the only way known to them.

### 2.4.1 The birth of NFD

There is no clear historical account on the rationale for carving out the NFD. It is however, clear that the scramble for and partition of Africa was instrumental in creating NFD which altered the complex ethnic mobility that existed in the region. Claiming rulership over all the Oromo speakers and buoyed by his conquest of the Italians in the battle of Adowa in 1896, Emperor Menelik II wrote to the heads of states of Britain, Italy, France, Germany, and Russia, stating claim over the territory stretching from Juba River on Lake Turkana (formerly Rudolf) to Marsabit Mountain.<sup>69</sup> Not wanting to be a spectator, in 1899 Menelik sent troops to demonstrate his manifest interest.<sup>70</sup>

Although the colonial British Government then in Kenya was reluctant to venture beyond the railway line, the 'White Highlands' and the capital Nairobi, the fear of Menelik encroaching into British territory forced a rush to halt the invasion.<sup>71</sup> In 1902, the British established a boundary commission mandated to establish boundary features and to map out citizens' ethnic identities.<sup>72</sup> In 1908, an agreement was reached and the final line drawn.<sup>73</sup> North of the line became Ethiopia and its South became Kenya.<sup>74</sup> This resulted in the split of several communities (Borana, Gabbra, Daasanatch, Garreh, et cetera) between Ethiopia and Kenya. This boundary stands to this day.<sup>75</sup>

At first, the British called the North their 'protectorate', then 'colony' and much later gave it an operative term the 'Northern Frontier District (NFD)'.<sup>76</sup> This territory stretched from Isiolo to Moyale and in 1947, the colonial authority combined the NFD with Turkana District to form Northern Kenya.<sup>77</sup> The British's main concern was to keep away the well-armed Ethiopians whom they viewed as raiders and poachers, while ensuring that 'their pastoralist subjects had access to their grazing land as well as those in the Ethiopian territory'.<sup>78</sup> The British established border posts at Moyale (Fort Harrington), Forole (Fort Wickenburg) and later at Dukana (North of present North Horr) and Banya.<sup>79</sup> By independence, Kenya was practically divided in two - the North and the South.

### 2.4.2 The colonial legacy and laws

In an effort to control the Somali movement into the hinterland and to enforce the integration of the Kenyan group with other peoples of British East Africa, the colonial Government enacted several legislations specifically targeting the NFD.

The first law enacted was the Outlying District Ordinance (1902) which effectively closed the NFD. Movement in and out of the area was restricted, and entry and exit to and from the region was only possible for bearers of a special pass. The second legislation, the Special Districts (Administration) Ordinance (1934), together with the Stock Theft and Produce Ordinance (1933), gave the colonial administrators extensive powers of arrest, restraint, detention, and seizure of properties of 'hostile tribes'.<sup>80</sup> Furthermore, the Stock Theft and Produce Ordinance legalised collective punishment of tribes and clans for the offences of their members, once the Provincial Commissioner declared such a tribe hostile. The said Ordinance in its preamble stated that its purpose was:

.....to provide for the recovery of fines imposed on Africans (including Somalis) for the theft of stock or produce by levy on the property of the offender or his family, sub-tribe or tribe...

### 2.4.3 The law as an instrument of discrimination – The betrayal

On 1 June 1963, Kenya gained independence.<sup>81</sup> Rather than dismantle the colonial laws applying to the Northern region, the first independence Government added more punitive measures. The Government made several constitutional amendments aimed at controlling citizens in the region. By the time Kenya became a Republic in 1964, the Government had transferred the powers enjoyed by the Governor-General under section 19 of the Independence Constitution to the President. This became section 127 of the Republican Constitution giving the President the power to rule NEP by decree. These powers were complemented by the already existing draconian legislation applied to the region in line with the report and recommendations of the Committee on the Bill of Rights at the Lancaster House constitutional talks. This Committee recommended continued imposition of the restrictions authorised under the Special Districts (Administrations) Ordinance and the Outlying Districts Ordinance.<sup>82</sup>

There have been several other amendments to the Independence Constitution. However, three particular amendments affected the NEP and the NFD most significantly. These are:

1. The third amendment which altered the parliamentary majority required for approval of a declaration of a state of emergency, from 65% to a simple majority. It also extended the period after which a parliamentary resolution must be sought from 7 to 21 days. Declaration of the state of emergency was made valid for 3 months instead of two;<sup>83</sup>
2. The fourth amendment which extended the President's power to rule the NEP by decree to Marsabit, Isiolo, Tana River and Lamu districts; The regulations were published under the Preservation of Public Security Act, Chapter 57, Laws of Kenya as the North Eastern Province and Contiguous Districts Regulations, 1966;<sup>84</sup> and
3. The sixth amendment which effectively enlarged Government's emergency powers, removed existing legislation relating to parliamentary control over emergency legislation and the law relating to public order.<sup>85</sup> Parliament repealed and replaced the existing constitutional provisions with an amendment, which gave the President a blank cheque power, 'at any time by order in the Kenya Gazette to bring into operation generally or in any part of Kenya, part III of the Preservation of Public Security Act or any part thereof.'

At the same time, the Preservation of Public Security Act (1960) was amended to define the full scope and operation of the new powers. A distinction was made between public security measures and 'special' public security measures. The former was available under Part II of the Act and could be enacted by the President without approval of Parliament.

The constitutional and legislative framework for the application of emergency laws in the Northern region can be said to have been completed in 1970, with the passing of the Indemnity Act.<sup>86</sup> This Act, which came into force on 5 June 1970, was meant to indemnify Government agents and members of the security forces working in the region against any claims on account of any loss or damage occasioned by their actions. The objective of the Act is clearly stated in the preamble thus:

...an Act of Parliament to restrict the taking of legal proceedings in respect of certain acts and matters done in certain areas between the 25 December 1963 and 1 December 1967....



Section 3 of the Act states that:

No proceeding or claim to compensation or injury shall be instituted or entertained by any Court or by any authority or tribunal established by or under any law for or on account of or in respect of an act, matter or thing done within or in respect of the prescribed area, after the 25<sup>th</sup> December 1963 and before 1<sup>st</sup> December 1967... If it was done in good faith or done in execution of duty in the public interest by a public officer or member of the armed forces...

Section 2 of the Act defines a prescribed area as the NEP together with Isiolo, Marsabit, Tana River and Lamu districts. It is instructive to note that a lot of human rights violations occurred in the NFD after 1967, and that those responsible for those violations cannot claim indemnity under this Act.

#### **2.4.4 The results of carving NFD and applying alternative laws**

The results of creating the NFD and respective emergency laws cemented the notion of a divided state, sanctioning human rights violations.

The application of emergency laws first in NEP and later, in 1966, throughout the NFD meant that, in effect, Kenya had two separate legal regimes - one applied exclusively to NFD, and the other to the rest of the regions. In addition to the already existing laws affecting the NFD specifically such as the Outlying Districts Act, the Special Districts (Administration) Act and the Stock Theft and Produce Act, detailed provisions of the emergency law contained in the North Eastern Province and Contiguous Districts Regulations, 1966, were made under the Preservation of Public Security Act,<sup>87</sup> pursuant to the provisions of section 127 of the Constitution.

The Regulations formed the basis for the derogation of human rights, and explicitly endorsed instances when the fundamental human rights of the person could be violated. In the process, the Government arrogated to itself powers that could only apply to the rest of the country when Kenya was at war. The Northern region was thus technically a war zone, virtually becoming a police state. The Regulations created certain offences that were punishable without the due process of the law. It also created 'prohibited' and 'prescribed' zones in the region.<sup>88</sup> In these areas, the offence of possession of firearms, consorting or harbouring an individual with a firearm was punishable by death. The offence of harbouring anyone who may act in a manner prejudicial to the preservation of public security was punishable by life imprisonment. Even the owning, operating or use of boats or any other means of transport on Tana River was made a crime punishable by imprisonment.

Entry into the region by civilians other than civil servants was prohibited. Members of the armed forces were empowered to carry out the functions of police officers, with wide powers of search, arrest, restriction, and detention of persons in the region. Members of the provincial administration and the security forces were given power to preside over 'judicial trials.' District administrators were sitting as 'magistrates' in these tribunals. The Regulations also suspended the application of sections 386 and 387 of the Criminal Procedure Code (which require the holding of an inquest on the death of persons in police custody or under suspicious circumstances) and instead provided that the provisions will not apply in the case of persons dying or found dead in the 'prohibited' zone.

The net effect of these early colonial legislations and subsequent post-independence Government acts was that Northern Kenya was turned into a

closed zone, which had no contact or relation with the other parts of the State. Indeed, by independence, other Kenyans did not know much about the NFD.<sup>89</sup> This situation continues decades after independence.

### **2.5 NFD's ethno-cultural mosaic and the civic challenge**

While regional and legal exclusion affected the integration of Northern Kenya, its ethnic diversity negatively challenged the civic voice of its people. The region is known to be a melting pot of pastoralists of different ethnicities creating a complex, fluid and heterogeneous ethnic mosaic. The ethnic groups found in this region are broadly divided into two categories, namely the Nilo-Hermite (Samburu and Turkana), and the Hermitics (Oromo and Somali speakers). From time immemorial, the groups have interacted, creating mixed communities.<sup>90</sup> These ethnic groups are in a mode of perpetual transformation, made of clans and sub-clans with different backgrounds. By the 19<sup>th</sup> Century, diverse groups of agro-pastoralists and pastoralists inhabited the area East of Lake Turkana. At the Oromo River delta were the Dassanetch, Hamar and Koke, then the Gabbra and the Garreh. Sharing in this symbiotic co-existence were hunter-gatherer communities known as the Waata and the blacksmith community, Konso, from the Konsoland in Southern Ethiopia.<sup>91</sup>

A slow expansion of the Nilotic Maasai speakers started in the 12<sup>th</sup> Century, followed by their closer and distant cousins, the Samburu and the Turkana respectively. They drifted from the Nile Basin into the Rift Valley, herding their livestock.<sup>92</sup> The Maasai expansion stretched into Tanzania while the Turkana occupied the space West of Lake Turkana.<sup>93</sup> In the 16<sup>th</sup> Century, there was a sudden and rapid expansion of Oromo-speaking<sup>94</sup> agriculturalists from Bale Mountains migrating North, East, and South.<sup>95</sup> The Southern group of Oromo found itself in an arid area and therefore concentrated on pastoralist activities, raising their white short-horned cattle, sheep, and goats. This group extended to Tana River - their descendants exist today as the Orma. After them came the Boran from the Southern Ethiopia grassy highlands of the Liban, Dirre and Melbana. From the East came the Somali-speaking camel herders. The interaction of Somali speakers and Boran speakers developed the Garreh and Sakuye, while that of Oromo speakers with the Samburu gave rise to the Rendille.

Rather than communities in the region uniting on a common agenda to address their common problems, institutionalised marginalization; religion; livelihood and resource struggles; and identity politics have challenged the cause for cohesion of the region. Political leadership has hardly influenced decisions or effectively succeeded in challenging human rights violations in the region.

### **2.6 Social allocation**

A look at social indicators shows that Northern Kenya has a low life expectancy of 52.4 years (lower than the national average of 54.7 years), very low literacy and numeracy rates<sup>96</sup> and limited social amenities. For instance, there are very few health facilities in the region. Residents of Sericho Division in Isiolo, for instance, trek hundreds of kilometres to Modogashe Health Centre in Garrisa District for essential medical services. According to Provincial Medical staff in NEP 'in Mandera, the community has to travel about 70 km to get medical attention, since the nearest centres are often ill-equipped, have no drugs

and are inadequately staffed.<sup>97</sup> Access to improved sanitation is lower in the Northern Districts compared to Central and Western provinces at 99.7% and 96%, respectively. NEP's so-called 'improved' sanitation stands at 36.7%, with Samburu and Turkana Districts at 11.6% and 17.7% respectively.



*Besides camels, donkeys are the main mode of transportation in the region*



The adult literacy and numeracy rates in NEP are the lowest in the country. Literacy in the Province stands at 8.1% compared to the national average of 61.5% while the numeracy level is at 9.1% compared to the national average of 64.6%.<sup>98</sup> Nairobi Province which has the highest literacy and numeracy levels stands at 87.1% and 86.6%, respectively.<sup>99</sup> Despite there being a tremendous increment in school enrolment and retention in the country,<sup>100</sup> the Northern Kenya region has the lowest enrolment levels in primary and secondary schools.

For a long period after independence, budgetary allocations to the region have been centred on security yet the region remains very insecure.<sup>101</sup> In addition, the social allocations in Northern Kenya, as elsewhere, are dependent on population size among many other indicators, but not geographical cover.<sup>102</sup> For years, the Kenya Government did not have reliable data on Northern Kenya; it was only in 2005 when the Ministry of Planning and National Development finally filled the information gaps caused by the omission of the region's rural areas through two Welfare Monitoring Surveys (WMS). The Ministry extrapolated the 1999 population and housing data with the WMS for Coast Province, using an appropriate regression technique. This exercise resulted in reliable data on poverty in NEP by administration units and constituencies.

### **2.7 Women and trans-sectionality**

The enormity of citizenship problems in NEP are best illustrated through the challenges encountered by its female population. Women in Northern Kenya experience State, cultural, as well as religious barriers in many aspects of their public and domestic life.

According to the 1999 census, the NEP had a population of 962,150. Assuming a population growth rate of 3%, the Province in 2006 was estimated to have a population of about 1,147,983 people. Of these, 52% are male while

47% are female. The census indicated that of those in paid employment in the region, 80% were male compared to 20% female. The same census report also states that the proportion of economically inactive women was 63.3 % compared to 36.7% males.

Women have low literacy levels, little access to and ownership of resources (such as large animals like camels, cattle, et cetera), no participation in decision-making and low educational attainment. For instance, their ability to inherit property such as land is inhibited. Through Government action land in the region is



*The plight of women in the region is compounded by cultural beliefs and practices*

regulated as trust and therefore few individuals possess it. According to Islam, a widow with children is only allowed to own 1/8<sup>th</sup> of her deceased husband's property, while girls are entitled to own half of what boys own. Culturally, women in the region must be circumcised to be accorded womanhood status. Wife battery, for instance among the Boran community, is a norm. Traditional gender roles overburden the girl child, limiting her opportunities for academic, social, and economic development. HIV/AIDS has become increasingly common in the region, particularly due to high incidences of divorce and limited education on reproductive health rights issues.

### **2.8 Economic factors**

Although the region has a large number of animals that can be utilised in wealth creation, the occupants are increasingly impoverished. The region is also characterised by high incidence of poverty. For instance, poverty in Garissa District varies between 60% and 67% at the divisional levels and 56% and 70% at the locational level.<sup>103</sup> This pattern is repeated in the other three districts of NEP. This suggests the existence of high incidence of localized poverty in remote villages in all districts within the Province.

Causes of poverty in the region include, inter alia, cyclic droughts, over-reliance on a pastoral economy, diseases (livestock and human), lack of fully developed livestock markets and improper road and telecommunication networks.<sup>104</sup> In addition, social under-development is manifested by illiteracy, lack of proper planning, low public investment, unemployment, lack of innovativeness, insecurity, land tenure problems; recurrent cross-border incursions from both Ethiopia and Somalia have also led to loss of livestock.<sup>105</sup> Livestock, being the main economic contribution of the region, is limited by poor marketing

infrastructure, endemic droughts, conflicts and lack of animal health facilities which have compromised economic mainstay and livestock.<sup>106</sup>



*Northern Kenya is predominantly inhabited by pastoralists who mainly derive their livelihood from rearing livestock*

Government response to drought has been to distribute relief food.<sup>107</sup> The food distribution has been encouraging the emergence of settlements; however, mass settlements in most parts of the region are certainly not viable for permanent settlements. These settlements are the worst hit in times of drought. Northern Kenya Development actors while setting the agenda for 2007 elections noted that:<sup>108</sup>

Nomadic pastoralism which is the mainstay of the region has continued to suffer a myriad of problems both natural and man-made such as recurrent and cyclic drought and resultant famines, floods, ethnic conflict, cross border raids and livestock rustling making it unstable, each episode decimating internal displacement and clusters of peri-urban poor.

## **2.9 Summary**

Although the history of organized communities predates the colonial times, the documented incidences of formal and substantive citizenship in Kenyan territory start with colonialism. Accordingly, Kenya's population has been divided into two categories, citizens and subjects. The implications of such an arrangement are that the subjects lack automatic recognition, have limited participation in public life and are physically, socially and economically excluded, exacerbating under development. Northern Kenya in today and in colonial time provides a classical example of geographical marginalisation affecting acquisition of citizenship.



## Chapter 3

# RESEARCH FINDINGS

### 3.1 Introduction

**C**an citizenship be made to count for Kenyans? This question is the essence of the study which sought to assess whether location affects enjoyment and access to citizenship taking the case of Northern Kenya. Presented herein are the study findings based on the following questions:

- What constitutes citizens' needs and Governments' priorities in Northern Kenya?
- What critical challenges are limiting Governments' efforts in dispensing citizenship rights in Northern Kenya?

The outcomes of the questions seek to establish an understanding of:

- Effective citizenship within the key concepts of recognition, participation, structural discrimination and statelessness; and
- Implications to national reforms.

Studies<sup>109</sup> affirm differential treatment in accessing national resources and institutions but do not state whether citizenship rights are actually enjoyed. This is partly because citizenship is expressed as 'forbearance rights'.<sup>110</sup> That is, citizenship tends to be designed to 'diminish or eliminate possible restrictions on the freedom to act in pursuit of citizens' own purposes, rather than to entitle them (citizens) to take particular action.... [Thus] it is not possible to specifically identify activities or practices resulting from negative rights.'<sup>111</sup> This study however, opted to interrogate recognition in Kenya as expressed in the issuance of ID cards; and to assess citizens' participation through the analysis of public needs and Government's priority in addressing these needs. With respect to Northern Kenya, the study compares public needs and Government priorities, and interrogates the variances.

### 3.2 What are citizenship needs and Government priorities in Northern Kenya?

Identifying public needs and Government priorities was considered a necessary step in gauging public participation and Government's target allocations. It was also considered important to establish the variances between these needs and priorities. Lastly, understanding the associated meanings and nuances of these needs and priorities was also a denominator to demonstrate where Government emphasis lies and whether the citizens can effectively access citizenship rights.

**Table 1: Comparison between citizens' needs and Government priorities in Northern Kenya**

Citizens' needs	Government's priorities <sup>112</sup>
<ol style="list-style-type: none"> <li>1. Local security of property and public safety;</li> <li>2. Tackling corruption and social discrimination in issuance of ID cards, devolved funds and land allocation;</li> <li>3. Acknowledgement of pastoralism as a viable economic activity and facilitation of livestock &amp; market development</li> <li>4. Diversification of livelihood through additional livelihood ventures (additional and transforming);</li> <li>5. Public investment in social and physical infrastructure;</li> <li>6. Land use systems to manage resource conflicts; and</li> <li>7. Need to belong.</li> </ol> <p><i>Sources: Field work notes / Northern Kenya Agenda</i></p>	<ol style="list-style-type: none"> <li>1. National security and public safety;</li> <li>2. Tackling corruption in issuance of ID cards;</li> <li>3. Tackling poverty through sustainable livestock development and marketing;</li> <li>4. Diversification of livelihood through alternative livelihood such as agriculture (substitution or replacement);</li> <li>5. Public investment in social and physical infrastructure e.g. water, education, health and roads; and</li> <li>6. Land use systems to formalize tenure.</li> </ol> <p><i>Sources: Economic Recovery Strategy for Wealth and Employment Creation (2003-2007)</i></p>

Table 1 provides a synthesis of citizens' needs and Government priorities in Northern Kenya and ASAL region. In developing the list in Table 1, the study reviewed the ERS and The people's manifesto: Democratic governance and sustainable environmental management, a compilation of demands collected by Human Rights Networks (HRN) through village barazas (public meetings) convened between August – September 2007. While the study found similarity in terminology in both the needs and Government priorities, it identified significant differences. The only concurrence in both needs and Government priority may have been public investment in social and physical infrastructure, water, education, health, roads and market for livestock. The study established two facts in relation to both agreement and divergence. First, Northern Kenyan region is starved of physical infrastructural development. This resonates in both Government priorities and citizens' needs. Second, the list of needs and priorities are based on different priorities thus possessing divergent meanings.

Assessing the listed needs in the table, the crux is integration, belonging, justice and rights. The reasons as to why citizens in the region may be preoccupied with issues of justice and integration include the following: Historical injustices such as state sponsored killings, state directed exclusion and partial recognition. While wanting to maintain their ethnic identity, citizens in the region yearn to belong to Kenya rather than their ethnic category.



Ghai argues that:<sup>113</sup>

There are communities who share kinship with communities beyond Kenya's border such as Somali [Oromo speaking groups], who feel that their loyalty to Kenya is questioned and that they are not accepted as Kenyans.

For the Northern Kenya population, this is a universal need. In the words of a respondent in Garissa, 'tunataka kuwa huru kama wakenya wengine ilitujivunie nchi yetu' [we want to be like other Kenyans, free and proud of our country]. Despite the injustices meted on the people of the region, seeking redress remains an insurmountable challenge. Northern Kenyan descendants want to belong to their State not as subjects but as bonafide citizens with equal rights and freedoms. The dual exclusion of both the region and its people remains a problem to citizenship access.

Looking at the priority lists, the Government may be said to have defined the region's priorities based on national interest and international obligations, and not on the dynamics of the region. For instance, Government's efforts in free health provision, free primary and secondary education, and CDF are such priorities that were initiated based on international Millennium Development Goals (MDGs) and national obligations. Although security is a principle need and Government priority, Northern Kenya residents demand security for their property and lives. On its part, the Government sees the inhabitants as a source of national insecurity. During an interview with a Government official in Garissa, the officer argued that: '...you see these people cannot be trusted, they harbour dangerous foreigners.'<sup>114</sup>

In the ERS, the Government admits that 'since independence, the economic potential of the arid and semi-arid lands remain unexploited because of, among other reasons, the security problems in the area.'<sup>115</sup> This is contrary to the communities' expectation of integration, empowerment and justice. Long after independence, the largest budget allocations for Northern Kenya region had been for security.<sup>116</sup> Security budget however, is rarely questioned by parliamentarians or CSOs, even Members of Parliament from the region.<sup>117</sup>

In the absence of a minimum standard of citizens' rights, the study addressed itself to three areas: Security, infrastructure and social development i.e. water, schools and health provision as expressed by communities as critical needs and important Government priorities for the ASAL region.

### **3.3 The question of recognition and the challenge of identity cards (ID)**

Under the Registration of Persons Act (Registration Act), section 2, all Kenyan citizens aged 18 or over must register with the National Registration Bureau and obtain a national ID card.<sup>118</sup> This is the basis of recognition. Failure to register constitutes a criminal offence.<sup>119</sup> A report aptly describes the ID card as being 'at the core in determining the extent to which an individual enjoys ... rights and freedoms.'<sup>120</sup> ID cards, the report adds, are necessary to register as a voter, obtain a passport, purchase property, open a bank account, conduct business, access higher education, enter Government buildings, receive emergency aid, seek employment, and get married.<sup>121</sup> Summarizing the importance of the national ID cards to a Kenyan, an elderly person has stated that '[it is a] matter of survival. Without it, you are a non-entity. You don't exist.'<sup>122</sup> Although the Government has elevated recognition status through the provision of ID cards, the practice of the registration process in Northern Kenya has been found wanting by the human rights circle.

The registration process requires individuals to present proof of age and proof of citizenship. Requirements for proof of citizenship are dictated by the Constitution and the Kenya Citizenship Act, but its practice has presented obstacles for minority groups. Under the Registration Act, an officer may require an applicant to furnish any additional evidence 'as it is within the power of that person to furnish.'<sup>123</sup> Elsewhere in the law, the Principle Registrar may require, and demand proof of, 'such other particulars as may be prescribed.'<sup>124</sup> This open-ended language grants broad discretion to officers determining whether to issue a national ID card.

In Northern Kenya, registration and issuance of ID cards may have fostered mistrust between Government officials and residents. In addition, this could have challenged residents' access to citizenship rights and freedoms. To a number of Northern Kenya residents, ID cards are perhaps the only document linking them to the country, but most descendants from the region are either denied or delayed this important document.

The study further highlighted key areas that hinder the effective and efficient registration of persons in Kenya. These include: historical prejudice, ethnic stigmatization, a weak policy and legislative framework, lack of institutional capacity and general Government disinterest in the registration department.<sup>13</sup> Of these issues, none has more impact than the vetting process.

### 3.3.1 Vetting policy

Vetting is directly linked to acquisition of ID cards and passports for selected groups. It is a process used by Government on the pretext of validating ethnic lineage, confirming nationality and residency of a person in Kenya. The process perhaps emanated from the (in) famous screening of people of Somalian descent in the 1980s, as will be discussed in the next subsection. Residents of Northern Kenyan are subjected to this additional process and are required to overcome several huddles in order to realise their right to a nationality.



*Majority of the residents of Northern Kenya face serious challenges in acquiring documents required for recognition as citizens under Kenyan law*

The Kenya Government argues that the vetting of border communities is a necessary security option. However, this study found out that in its current operational form, the vetting process maybe a security risk to both the country and the people in Northern Kenya. People in desperate need of ID cards have learnt to circumvent the process through all forms of bribery. In Box 1 this study shows selected cases of 'innovative ways' people have devised to acquire Kenya documents. The notable strategy as indicated in these case studies is the use of mainstream ethnic groups' names.

### Box 1: Selected cases of adaptive mechanisms to acquiring ID cards

#### Case 1

*'I was born to Kenyan parents in Wajir. I went to primary school in Wajir and Starehe Boys Center in Nairobi. I turned 18 years while in Starehe Boys Center. A team of officials from the National Registration Bureau came to register students who had turned 18 years .Of all the students registered that day, I was the only one denied registration. I was referred back to Wajir for vetting before registration. The registration officials allowed me to register after I protested. Although I deserved registration as a Kenyan citizen, I was only given registration because I protested.'*

#### Case 2

*'I am in possession of Kenyan documents not because I was born or I am of Kenyan descent, but because I assumed a Kenyan name. I was born in Shabele in Somalia. I was married to a European national who migrated to Kenya. I was harassed for my look and for being in possession of a Somali passport. I could not move freely in Nairobi. I therefore decided to look for Kenyan registration documents. I assumed Kikuyu names which granted me a birth certificate and therefore an identification card and passport.'*

#### Case 3

*'I am of Luo descent. I was born in Dar es Salaam and in possession of a Tanzanian birth certificate obtained at birth in Tanzania when my parents lived and worked for the East African Railways and Harbours. I had an easier time getting my ID card because I am of Luo descent. On applying for a Kenyan passport, immigration officials did not accept my documents because I had a Tanzanian birth certificate. I enquired from Sheria House in Nairobi on how I could get a birth certificate and I was informed that I could benefit from late birth registration which I applied for. I got a birth certificate and later on went on to process my passport. I am in possession of a Kenyan passport, not because I was born in Kenya, because I am Luo.'*

*Source: Filed Research Interviews*

For years communities in Northern Kenya have complained about many issues related to the vetting process including bribery and discrimination. Despite increasing rural-urban migration in Kenya, the Government demands that applicants emerging from Northern Kenya make their ID card applications in their rural areas where they can be vetted.<sup>126</sup>

Vetting raises issues of trust and 'foreignness' of Northern Kenya citizens. The Government through administration officials appoints elders to perform the vetting.<sup>127</sup> The nomination of the vetting committee members has no guideline or procedure, raising controversy. The vetting process therefore is abused by the elders who are selected by Government officials.<sup>128</sup> Whereas Government officials accuse community leaders of harbouring aliens and foreigners, community members accuse the same leaders of colluding with Government officials in the corrupt deals. In addition to mistrust, Northern Kenya communities are looked at with suspicion of being foreigners.<sup>129</sup>

The KNCHR found out that some specific ethnic groups faced almost insurmountable challenges in obtaining ID cards. In addition to ethnic identity, this study established that religious affiliation too affects the issuance of Government documents. This study found out application difficulties increase as one moves from Northwest, predominantly traditionalists and Christians, to NEP with a large proportion of Islamic population. People with Islamic names have higher tendencies of being vetted in acquisition of ID cards than those with traditional or European names. The largest number of people vetted has Islamic nomenclature or are of Islamic background.<sup>130</sup>

Not only the border ethnic communities are victims, selected groups too are vetted. 'We Samburu within Isiolo District get vetted because; Government officials cannot differentiate us from Oromo who are direct targets for vetting.'<sup>131</sup> In all, the vetting and all the processes related to acquisition of the ID card are arbitrary and discriminatory;<sup>132</sup> they violate citizens' 'human rights and aid corruption, according to KNCHR. In describing the national ID card registration and related processes, the KNCHR report says the processes are 'opaque without sufficient safeguards for promoting accountability and good governance within the National Registration Bureau (NRB).' It further argues that there is a strong institutionalised link between citizenship and ethnicity identity where stricter application rules are imposed with respect to Kenyan Somalis, Kenyan Nubians and Kenyan Arabs as opposed to other Kenyan ethnic groups.

### 3.3.2 The screening policy

For what was considered a security operation the Government ordered the screening and issuance of 'pink ID cards' to all Kenyans of Somalian descent. The Registration Act was used to implement the screening exercise.<sup>133</sup> Through a Legal Notice No.5320 of a Kenya Gazette dated 10 November 1989, the Principal Registrar of Persons ordered the screening exercise to be conducted between 13 November and 4 December 1989. The justification for the notice was stated as follows:

The Government is to register all Kenyan Somalis and expel those found to have sympathy with Somalia. The Government cannot tolerate citizens who pretend to be patriotic to Kenya while they involve themselves in anti-Kenya activities. The Government has therefore found it necessary to register Kenyans of Somali ethnic group to make them easily identifiable by our security forces.

The screening exercise, which was in effect a mass verification exercise, was carried out through the use of vetting committees made of some selected elders and members of the provincial administration and civil service. Although it was quickly disbanded, according to Muslims for Human Rights,<sup>134</sup> all those who appeared before these structures had to prove their citizenship or their right to claim it. Those who satisfied the committee were issued with a 'pink ID card' that bore their names, family, sub-clan, clan and tribe. Those who failed to satisfy the committee were either denied registration or had their ID cards cancelled if they had one before. These citizens were thus effectively declared non-citizens and indeed stateless.

An unpublished report by CEMIRIDE alludes to the deportation of some victims to Somalia while others opted to settle elsewhere in East Africa. Those who remained despite the cancellation of their ID cards have endured much more. In an interview conducted for this study in November 2006, some of the survivors kicked out of Danisa into a forest in Ngumo testify that 'kwasababu ya vitambulisho vyetu kubatilishwa hatukupewa nafasi yakukusanya vyombo nyumbani au madukani' ['we were not even given time to organize ourselves or our property for relocation, because our ID cards were cancelled.']<sup>135</sup> They left behind their belongings and businesses unattended which other people inherited without their consent. While the problem is more than a decade old the effects live on today affecting the next generation of Galje'el as illustrated in Box 2. Most of the people who were affected by the screening process were people who had established effective ties in Kenya.

### **Box 2: Screening and vetting in action: The pink cards and the Galje'el conundrum**

#### ***The Galje'el***

*Galje'el is a clan of the large Somali community also referred to as the Wardei. The Galje'el started moving from Wajir, their ancestral land, from 1935 and permanently settled at their present home in Tana River District, Mwina Location and Bondeni Sub-location, in 1959. The screening process ended years ago.*

*At the time of screening, those in possession of ID cards had them withdrawn by Government. They were issued with screening cards instead. The screening cards served as evidence that the holder was still under scrutiny to determine his/her citizenship status. The screening process itself involved a vetting exercise which, as confessed by some of the victims, was brutal. Despite premature disbanding of the screening committee, those who had surrendered their IDs never got them back. The Government also never took practical steps to correct the violations it had committed. As Kenya issues third generation ID cards, several Galje'el are without any form of ID cards and have not been reported to the UNHCR for processing. In all, the negative impacts of the exercise remains as follows:*

***Non-renewal and non-issuance of IDs:*** *Some of the Galje'el members who surrendered their IDs during the screening exercise never got them back despite having successfully gone through the vetting exercise more than ten*

years ago. This group missed out on the second generation ID cards in 1995/96 and are now likely to be denied third generation ID cards yet to be introduced. In the absence of parents' ID, a higher onus is imposed on the applicants to prove their descent. The applicants are always required to prove descent and parenthood and are subjected to vetting. The failure by the Government to re-issue IDs to the Galje'el has made it difficult for their children to acquire IDs.

**Victimization:** The Galje'el have most times been subjects of victimization and abuse by the provincial administration, and on several occasions have been blamed for insecurity within Tana River District. The attack on then Baringo District Commissioner, Hussein Dado, by bandits in January 1999, for instance, triggered off a series of arrests, seizure of ID cards, displacement and extraditions of some Galje'el to Somalia on the pretext that they were foreigners, on account of their not having identity cards.<sup>136</sup> In the same vein, the administration police, aware of the IDs predicament of the Galje'el, deliberately harass them to produce ID cards. In the event, they use it as an avenue to solicit money (bribes) from them. It does not matter how many times one is arrested.

**Restricted movement:** The screening exercise also meant limited movement from one place to the other. People were not allowed to move freely from their local place of abode to another. The necessity of such movement required notice being given to the provincial administration who would later on issue a permit to move. The onus was always upon the applicant to give sufficient reasons for the movement, and the officer in charge had the discretion to issue or not to issue the permit. Sometimes the process to get a permit was long, tedious, and untenable.

**Public suspicion:** The Galje'el, who had lived harmoniously with other neighbouring communities have since then been looked at suspiciously as gun-smugglers and a threat to peace regardless of their innocence. Conflicts in the area between communities over limited resources have always been explained away by pointing fingers to the Galje'el as the intruders and source of the problem. The problem is manifested also in the political debates of the area. This form of public suspicion has rendered the community helpless and it cannot fight for its rights effectively.

Source: MUHURI (1999 p.5) and Filed Interviews November 2006

The legality of the screening and vetting exercise has been questioned.<sup>137</sup> Is the Registrar's role to register and issue a citizen with an ID card, or is it to confer citizenship or deprive one of the same?

Although both screening and vetting processes have been termed cases of ethnic discrimination by the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Rodolfo Stavenhagen,<sup>138</sup> Kenya has never taken practical steps to correct these violations. The screening exercise did not effectively deal with illegal immigrants. The lack of political stability in Somalia for over two decades has continued to increase pressure on Kenya in terms of the number of refugees, illegal immigrants and

proliferation of Small Arms and Light Weapons (SALW). Some of the refugees and illegal migrants have stayed in Kenya long enough and attempted to acquire Kenyan citizenship documents. The irony is that while the Government has put in place stringent rules to regulate the issuance of IDs, especially on the Somali community, illegal immigrants who have money have been able to buy their way through and acquire IDs (see Box 1). The illegal immigrants may largely be arms traders and smugglers. In October, 2008, for instance, a bus headed for Mandera was intercepted and a consignment of arms recovered.

Government officials interviewed insisted that the Galje'el within Kenya territory are foreigners. A letter by the Control & Research "A" of the National Registration Bureau for the Principal Registrar dated 28 March 2008,<sup>139</sup> in response to an application for an ID card by a Gal'jeel stated as follows:

RE: C & R "A" /CON/H 08/03/16  
APPLICATION: 2228760344  
IDENTITY CARD NO: 4653796

'The above named quoted application cannot be processed because the holder was declared to be non-Kenyan by the Yusuf Haji Task Force of 1989. Please ask him/her to regularise his/her citizenship through the Immigration Department for our further necessary actions.'

Yet the Government has never presented a report on this group to the UNHCR for protection as stateless people. The community on its side claims to be Kenyans and victims of Government harassment. They are often raided to produce arms by security agents. According to RI, the consequences of Kenya Government actions in the 1980s and the subsequent restrictions in the Northern region have forced groups like the Galje'el to the edge of statelessness as explained in Box 2. The report argues that:<sup>140</sup>

Members of the Galje'el community, ...numbering around 3,000 in the Tana River region, have reported some members being stripped of citizenship and others being forced to pay bribes as high as \$USD165 to obtain ID cards. Others have changed their identity to expedite registration, declaring they are from a different ethnic group or naming another individual as their father or mother.

### **3.3.3 The consequences of the screening and vetting**

The consequences of the two policies – vetting and screening are many. These range from public apathy, exploitation, discrimination among others.

Communities in Northern Kenya, despite knowing the importance of ID cards, do not seem motivated enough to apply say the aforementioned KNCHR report. Their apathy stems from years of systemic discrimination and from bad experiences when they attempted to get registered.

Although the screening and vetting policies have been instituted on the basis of security they are hardly known by many Kenyans. They are discriminatory and demonstrate how citizens are never involved in design but forced into implementation of Government policies. The Government has done little to raise public awareness on the importance of IDs and the procedures and processes for acquiring them. Ignorance of the applicants has therefore led to manipulation including making forced unofficial payments. It has also led to the problem of late registration among those who were eligible to vote such as was witnessed in many districts.

In addition, the registration policy and legal framework for registration of persons is not applied equally and there is need for reform in terms of equal application befitting the democratic context of Kenya today. Inequalities and discrimination undermine democracy in pluralistic societies. Besides, it offends the tenets of equal treatment.<sup>141</sup> Denying or delaying specific ethnic groups IDs is not only discriminatory; it also enhances opportunities for corrupt deals and further marginalizes these communities. The numerous cases of corruption and extortion reported by the citizens against public officers in remote districts are adequate proof of this. Perhaps, 'an open selection is needed to democratize the nomination of vetting committee members.'<sup>142</sup> The KNCHR recommends that before a proper system of registry is introduced an efficient documentation and registration of all births of children to Kenyan parents would alleviate fears of registering foreigners since these children would automatically, on attaining 18 years, be entitled to IDs. This study recommends that a one time compulsory registration of all late births be conducted to eliminate future discrimination.

### 3.4 Discrimination and citizenship: An analysis

Discrimination stands out as the overall effect of differential treatment before the law.<sup>143</sup> Discrimination has a way of affecting foundational rights of individuals.<sup>144</sup> Indeed, the enjoyment of human rights without discrimination is one of the most fundamental principles underlying international human rights law.

By virtue of being human, every person is entitled to basic human rights according to the UDHR, Article 1.<sup>145</sup> The tradition where rights were an entitlement of citizens is long gone and non-citizens enjoy rights by virtues of their residence in a particular jurisdiction.<sup>146</sup> For instance, Kenya has enacted the Refugee Act (Act No.13 of 2006) providing that refugees can now enjoy some freedoms which were hitherto a preserve of citizens, except participation in decision making. Refugees will have to be registered and granted documents to facilitate their freedom of movement under the Refugee Act.<sup>147</sup> However, citizenship upon which the enjoyment of a number of human rights is dependent is often affected by discrimination. In Northern Kenya where there are several refugee camps some residents admire the refugee life. According to a recent study, Kenyans in the North, particularly Somalis, may be considered to be on the edge of statelessness because of many factors which deny them automatic access to citizenship rights.

Globally, citizenship has gained a central significance in contemporary political and social analysis. Once a neglected issue in political discourse, citizenship has now emerged as a concept of interest for political scientists, policy analysts, media commentators, and practicing politicians. Societal changes such as the fall of social class as a basis societal analysis, changes in the nature of the nuclear family, the improving of position and role of women in society, and the development of large urban areas with racial and cultural diversity enhanced the centrality of citizenship. Citizenship is now,<sup>148</sup>

...a highly contested conceptual territory [where] Individuals are less defined as members of social class within economic relations but rather as citizens - a multi-stranded concept that addresses relationships between individual members and community's institutions of government and between individual members themselves.



Thus, citizenship, which focuses on the relationships between an individual and institutions of State, offers a possible framework for equality among people with divergent social backgrounds. Despite centuries of evolution of the idea,<sup>149</sup> citizenship may be said to have remained a politically controversial practice. The present dialogue on citizenship is in response to ever increasing social ills such as exclusion and discrimination, in addition to increasing citizens' participation in public life.<sup>150</sup> In addition, philosophical discussions on the nature of citizenship itself and the relationship with those social ills also take place. Present dialogue on citizenship surrounds governmental policies particularly those aimed at promoting and strengthening citizenship access and quality.

Decades of associating citizenship with human rights may have elevated its profile, according to Harrington, but has not liberated citizenship from political manipulations and violations; neither has it become a mainstream human rights topic.<sup>151</sup> While the idea of citizenship has been evolving since the Ancient Greek no definite interpretation has ever emerged. The development of the idea of 'citizenship', conjures the notion of civic duties, unwavering loyalty to and a legal link to a polity, and equal access to opportunities.<sup>152</sup> However, limits to these notions span across social and spatial divide, and power relationships. An overview of the historic genesis of the concept of citizenship demonstrates that its evolution continues even to date. In the Ancient Greece, 'civic citizens' was the operative word centred on legal rights to participate in the affairs of the state with express exclusion of slaves and women. In the 19<sup>th</sup> Century, the liberal view emphasized rights for all citizens. As a result, justice and political rights became a reality for an increasing proportion of the population. In addition, the supporters of 'social citizenship' went further, in recognizing that civil and political rights are only part of what citizens ought to be able to expect from the State. Today the concept of 'multiple citizenship' is in operation around Africa and the world. According to the Council of Europe in 'Compass: A manual of human rights education with young people', developing the idea of 'created citizenship' brings about the issue of 'knowledge citizenship' which involves the concept of education.<sup>153</sup> Loyalty and responsibility, that form the whole mark of civic citizenship, for example, are learned and cultivated. Therefore, if there are qualities that are essential to being a citizen in the full meaning of the term, then 'real' citizens need to be educated – in the broadest sense of the word.<sup>154</sup>

The effectiveness of citizenship may depend on how the concept is understood, accessed by citizens and applied by government. The term 'citizenship' is very generic and unless qualified it remains undistinguished between an individual's right to citizenship and the state's recognition of that citizenship. Kenya's, like most states' citizenship regime is problematic in that it treats citizenship as an administrative privilege, rather than a right requiring judicial protection and due process guarantees. This is why it is all too easy to violate the right to citizenship - because it is not as well protected as a human right should be in the first place. Lack of IDs or state's claim that an individual is not a citizen means that the individual has no citizenship rights; on the contrary, it may simply mean that the individual's right to recognition of his or her citizenship is being violated.

Although every individual has a clear right to citizenship under international law, this study shows that Kenyans do not acquire citizenship automatically. While the State cannot legally take away citizenship, it can refuse to recognize it.

Although an individual may hold documentation showing that (s)he is a citizen, meaning that (s)he is both a *de jure* and *de facto* citizen, it is possible that his/her citizenship may not be useful. According to Ghai, members of ethnic minority groups may hold citizenship papers yet still be barred from political participation, denied public services, and denied freedom of movement or freedom of expression through harassment by the authorities.<sup>155</sup> International law is clear that citizenship laws and practices must prohibit discrimination and statelessness. In Africa, the African Charter prohibits arbitrary and discriminatory interference with citizenship.<sup>156</sup> However, Africa has witnessed increasing spectre of citizenship challenges (denationalisation, discrimination) despite these strong international law prohibitions. In most of African states, guaranteeing the right to citizenship and enabling citizens in the continent to co-exist, pursue livelihoods, move freely, and participate in the Government of their countries without arbitrary interference is a never-ending challenge. For the average African, these basic characteristics of effective citizenship do not exist today.<sup>157</sup> For instance, international law clearly prohibits statelessness, yet statelessness is all too common. Members of pastoralist and border populations around the African continent, such as the Maasai of Kenya and Tanzania, the Somalis of Kenya, Somalia and Ethiopia, and the Foullahs and Mandingo of West Africa risk the danger of being rendered stateless because they straddle the borders of multiple African countries but are unable to effectively claim the nationality of any country.<sup>158</sup>

Kenya is obligated to observe the above and several other international human rights instruments. Here below is a highlight of the most important instruments on nationality:

- The Universal Declaration of Human Rights (UDHR), Article 15, entitles everyone to the right to a nationality and prohibits arbitrary deprivation of nationality;
- The International Covenant on Civil and Political Rights (ICCPR), Articles 24 and 25, provides all children with the right to a nationality and citizens the right to vote;
- The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), Article 9, guarantees women equal right with men in respect to the nationality of their children;
- The United Nations Convention on the Rights of the Child (CRC), Article 7 and 8, provides for the rights of children to acquire a nationality and prohibit the illegal deprivation of their identity; and
- The African Charter (ACHPR) recognizes the right to recognition of a person's legal status and has language throughout the Charter affirming nationality as a matter of right, and participation in government of choice.

Although states maintain the sovereign right to regulate nationality, international human rights standards that protect individuals against arbitrary state actions must limit States' discretion.<sup>159</sup> Therefore, Kenya is not only obligated to grant citizenship based on equality by international law, but also by its own Constitution.

The human right to nationality, protected by the aforementioned international human rights instruments, is, thus, not just a formality. For the right to citizenship to be respected, the individual must enjoy not only *de jure* citizenship and recognition of that citizenship, but effective citizenship.

International human rights law clearly stipulates that citizenship laws and their practice must be compatible with human rights norms such as those prohibiting non-discrimination and statelessness.<sup>160</sup> However, governments often breach these human rights and norms. Moreover, ethnic discrimination in access to citizenship clearly contradicts the universal non-discrimination norm. In many states, ethnicity is still a criteria for nationality. For instance, the ACoHPR noted that ethnic discrimination evident in a case submitted by Amnesty International on behalf of an individual who had been wrongfully deported from Zambia amounted to discrimination on the basis of ethnic origin and political opinion, as well as numerous violations of other rights in the African Charter.<sup>161</sup>

The challenges of citizenship are many just as the opportunities to effect the concept. Ghai offers the following solution:<sup>162</sup>

If we focus on problems instead of communities, we find that as a nation, Kenyans have to ensure the full rights of citizenship (including the obtaining of ID, voting cards and passports) of all people (for even the poor of so-called 'dominant' communities have difficulties obtaining these), while recognizing the special difficulties Somalis, Nubians, and Asians etc. face. [In addition to other grievances] grievances such as exclusion from public employment .....should be solved through fair and non-discriminatory [processes].

### 3.5 Guaranteeing basic rights: The case of education and health in Northern Kenya

The Kenya Government has since 2004 increased its funding of social sectors such as education, water and health.<sup>163</sup> Today, Kenya runs free primary and secondary education as well as free primary health care for children under the age of five. Unfortunately, in Northern Kenya, officials admit that even these best efforts are heavily challenged by past neglect and underdevelopment.

#### *Education*

Regarding education, this study established that despite increased efforts and existence of free primary education, Government is not meeting its education target in both Upper Eastern and NEP.



*Makarim Primary School in Sericho Division, Gar-ba-tulla District is one of the schools built through the CDF*

Previously, infrastructural problems such as few classrooms were evident. However, following the CDF resources, additional classrooms have been built and new schools have sprung up.

The expanded educational facilities as well as the free primary school education programme have increased primary school enrolment and improved performance by some schools in the Northern region. Ijara District Primary School was ranked second nationally in the 2007 Kenya Certificate of Primary Education (KCPE) results.<sup>164</sup>

Although learning equipments (especially science and laboratories in secondary schools) are still lacking, there are two additional challenges directly facing the education sector in the region – that of staff retention and transfers. Perhaps the greatest challenge facing education sector in Northern Kenya today is managing high turnover of teachers.<sup>165</sup> Despite a good hardship package compared to other sectors such as health, there are high teacher transfer rates in the region. This has increased staff shortage. ‘This high turnover has been attributed to the underdevelopment in the area as well as insecurity. The study was informed that teachers accept to be employed and posted in the region only to seek transfers soon thereafter citing health grounds and insecurity.’<sup>166</sup> In addition, there is a Government ban on staff recruitment in the education sector. Trained personnel from other areas are reluctant to be deployed to the region. Further, there are few local community members trained as teachers.

While the national transition target rate from primary to secondary school is set at 70%, the national transfer rate in 2007 stood at 60% while NEP enrolment to secondary school in 2007 stood 7.3%.<sup>167</sup> As noted in this study, cultural harmful practices such as early marriages, female genital mutilation (FGM) as well as poverty stand against girls’ advancement in terms of education.<sup>168</sup> This hinders the near-gender parity achieved in the education cycle at lower primary schools.<sup>169</sup> ‘Several donor and relief organizations are involved in ‘girl child campaigns’ sending the brightest girls from the region to secondary schools in other provinces. The Government has also set up bursary funds for needy students.

Whilst the education sector could arguably be said to have done its level best under the circumstances, the remedy to the turnover rate is beyond the sector. It requires concerted efforts of both developing the region’s infrastructure and guaranteeing security. To improve education in NEP ‘do the roads, do the roads and again open up the roads’ says one respondent. Increase in the bursary funds level is highly recommended in addition to depoliticising the disbursement process. In terms of relationship, the Government should consider having some of the schools’ national activities conducted in these areas as part of building bridges and fostering ethnic coexistence.

#### *Health:*

Like in education, the Government has failed to meet its targets for primary health care provisions in both Upper Eastern and NEP.

Although NEP immunization of the under five improved from 48% in 2005 to 72% in 2007,<sup>170</sup> more is needed. According to raw data from the region, maternal mortality in the NEP stands at 1000 - 1300 deaths for every 100,000 births compared to the national average which is 414 deaths for every 100,000 births. The table below contains information regarding the top 10 diseases and immunization coverage in the four districts of NEP.

**Table 2: Top 10 diseases prevalent in NEP**

	<b>Garissa</b>	<b>Wajir</b>	<b>Mandera</b>	<b>Ijara</b>
Malaria	85030	28751	52126	24685
Diarrhoeal Diseases	15559	9406	22351	3484
Pneumonia	21641	8965	29998	6054
Other Diseases of the Respiratory System	36821	21597	41664	12601
Anaemia	3741	2606	3801	1948
Dysentery	1067	907	1566	286
Intestinal Worms	6925	4610	9028	2625
Sexually Transmitted Infections	2051	330	1387	386
Urinary Tract Infection	6778	3946	8639	2368
Eye Infections	2528	2535	5217	862
<b>Immunization Coverage</b>	<b>Garissa</b>	<b>Wajir</b>	<b>Mandera</b>	<b>Ijara</b>
Whooping cough	13812	7073	5805	1847
Measles	17439	7800	5898	1476
Polio	12934	6988	6014	1790

*Source: Data provided by PMO NEP*

According to health officials in NEP, the greatest challenge facing the sector relates to human resource for health (HRH) with the following prevailing circumstances:

- 75% of staff working in NEP is employed on short term projects to work in Government facilities. Government is however, planning to absorb these staff at the end of their contracts;
- There is a shortage of health personnel and as a result some facilities have closed down;
- Low staff morale; due to shortage of staff the employed work for long hours without breaks and some have their leaves cancelled; and
- There is high staff turnover due to frequent transfers. Staff get employed to work in Northern Kenya but quickly seek transfers to different areas in the country

Like in the education sector, the second greatest challenge facing the health sector is related to the underdevelopment of the region and the harsh environmental conditions. These discourage staff from working in the region. The challenges include:

- Lack of amenities (housing/water/ electricity /TV, Radio etc);
- Poor transport and communication network and infrastructure (old vehicles, limited allocation for maintenance/fuel from Government);
- The new districts (Fafi; Wajir North, East, South and West; and Mandera Central, East and West) have no infrastructure;
- In the old districts, equipment and physical facilities are dilapidated and require rehabilitation. For instance, Wajir District Hospital which was built in 1944 has limited physical structure and space to accommodate the increasing population;
- NEP is prone to drought and disease outbreaks – these include, measles/ polio/ Rift Valley fever/cholera;

- Poor road and communication network is affecting access to healthcare and also makes the region unattractive to competent staff; and
- The high poverty and illiteracy rates have affected the realisation of the right to health since many people in the region do not seek medical attention when sick.<sup>171</sup>



*Health facilities in Northern region are far between and ill-equipped to manage the population's health concerns*

From the cases above, it is clear that guaranteeing basic rights in Northern Kenya is a major challenge. The Government may still not meet its priority for the region even with the best support for social sectors like education and health. As stated above, this may be attributed to the past neglect and underdevelopment.

### **3.6 Citizenship challenge - Results analysis**

This study points to three challenges related to citizenship in the case of Northern Kenya. The study finds that Northern Kenya's descendants are not only directly discriminated upon but also face indirect as well as structural discrimination.

First, some residents suffer selective recognition and arbitrary delays or even denial in accessing citizenship documents. Citizens from the region and particularly of Somalian descent are often vetted. As a citizenship pre-qualification process the vetting creates a notion that these residents are not citizens. Since its administration is selective and targeted it is therefore discriminatory. While the practice is, on the face of it, normal it is eventually harmful because it results in indirect discrimination.

Second, the Northern Kenya region has been discriminated against in resource allocations, in development, et cetera. In addition, prolonged segregation of the region has rendered communities in this part of the country structurally amenable to discrimination. Even with the best efforts aimed at alleviating poverty, the region is still the poorest in the country. Kenya's national poverty levels might have reduced from 52% in 2002 to 46% in 2006. However, according to a survey released in 2008, the ten constituencies with the highest population of the poor (more than 85%) are all in Northern Kenya.<sup>172</sup>

Lastly, Government desire to meet basic rights for the people is challenged by historical discrimination visited upon the region.

### 3.6.1 Discrimination

Acts of differential treatment of a segment of society (discrimination) are complex matters. This has been a subject of intensive debate around the world resulting in all kind of terminologies. Many constitutions in the world prohibit discrimination along several social indicators such as ethnicity, religion, amongst others. This is direct discrimination. Despite legal protection against discrimination the practice persists not only due to historical and contemporary reasons, but also its changing face. This increases the complexity and challenges of tackling the problem.

As a solution to the problems of discrimination in modern states, nearly all UN treaties have contained anti-discrimination clauses. Regional institutions and most national constitutions prohibit discrimination. For instance, the UDHR (Article 1) espouses the equality of human beings; while the ICCPR points to the non-discrimination of minority groups and CEDAW prohibit discrimination on gender basis to name but a few.

One way of addressing 'group discrimination' or 'indirect discrimination' has been illegalising exclusion of groups. The European Union has been the most aggressive body in addressing the illegality of indirect discrimination among minority groups. The Council of European Union in its 'Council Directive' 2000/43/ of 29 /June/ 2000 provides that while the Council's Article 14 only guarantees non-discrimination in relation to the rights contained in the text of its Convention, its newly-enacted Protocol 12 extends protection to vulnerable groups on 'any right set forth by law', which may be understood to mean both international law and the constitutional law of member states. Protocol 12 entered into force on April 1, 2005, but as of November 10, 2006, only 15 member states had ratified the Protocol. Furthermore, due to the paucity of signatory nations, the influence of Protocol 12 in litigating racial discrimination cases is presently limited.<sup>173</sup>

An additional category of discrimination has been 'structural discrimination' defined as "a system of social structures that produces cumulative, durable, race-based inequalities."<sup>174</sup> As opposed to individualist concepts of racial discrimination, structural discrimination is viewed as a societal outcome, and focuses on the effects, rather than the actual content of the discriminatory behaviour.<sup>175</sup> Structural theorists also note that this type of discrimination may not be intentional because it is reinforced within all institutions of society over time. Therefore, overcoming these inequities requires affirmative integration on the part of the government or state.<sup>176</sup>

Richard Ford argues that de jure segregation perpetuates political disenfranchisement and economic stratification, and that such policies consistently reinforce over time.<sup>177</sup> He further argues that the state of de facto segregation ensues as a result of the interactive institutional forces described by the theory of structural discrimination. Structural discrimination thus ensures previously disadvantaged groups' access to education and gainful employment increases an individual's likelihood of accessing other resources, such as better schools, healthier neighbourhood environments, and better jobs.

The two theories aptly explain Northern Kenyans descendants' predicament. This study affirms that Northern Kenyan descendants are not only

directly discriminated but also indirectly and structurally discriminated. According to the aforementioned KNCHR report, these people are ethnically discriminated upon through acquisition of ID cards processes. While the practice seems normal and harmless it is unacceptable because it amounts to indirect discrimination. The prolonged de jure segregation in colonial and post independence days have rendered communities in this region structurally discriminated.

While affirmative action and legal redress are few preferred mechanisms to address structural, indirect and direct discrimination, Kenya is limited in its options. Kenya has an anti-discrimination provision in its Constitution but lacks enforcement mechanisms. As early as 1979, Kenya realised that national economic growth would not be attained without incorporating the ASALs region dominated by Northern Kenya.<sup>178</sup> This followed the Sessional Paper 10 of 1965 on African Socialism and its Application to Planning in Kenya, which excluded the region from investment. By 1992, the country realised that the 1979 policy achieved little and commenced a stream of policy processes since 2003 calling for the need for 'special treatment' of ASALs.<sup>179</sup> By resorting to political solutions without Constitutional, legal and institutional mechanisms to address Northern Kenya's problems the country may be backing the wrong tree.

### **3.6.2 The effects of marginalisation on participation in Northern Kenya**

This study established that residing in Northern Kenya not only limits ones access to many basic rights and freedoms but also affects ones effective participation in decision making. In Kenya, like in many African states, citizenship participation is best expressed through voting. However, citizens' participation is determined not only by social, legal, or political status, but also by one's physical location in relation to resources and opportunities. Since the built environment reflects and maintains social forms, the physical and spatial configuration of places themselves can either enhance or erode social solidarity.<sup>180</sup>

Citizenship has allocative as well as integrative functions.<sup>181</sup> First, effective citizenship can mitigate inequalities through the allocation of socio economic resources, thereby securing social solidarity within communities divided by class, ethnicity, gender, or age. Therefore expanding citizenship participation (inclusion) allows groups access to scarce resources while retaining their diversity within a common national culture, a common set of identities and common values system.<sup>182</sup> Conversely, excluding one or more groups from participation denies or restricts their access to resources, and hence reduces the possibility of a common national culture, identity, and value system, while increasing the likelihood of conflict and fragmentation. Further, access to places well located in relation to economic opportunities, as well as health, education and social amenities, plays a central role in both the allocative and integrative capacities of citizenship. Groups (differentiated along race, ethnic, gender, class, region et cetera) can be denied important types of spatial access due to social custom, legislation, or the cost incurred in travel (distance, time, price of transport, and safety).

An education official informed the study, that 'if you must improve education access, retention and transfer rates in NEP, improve the road network.'<sup>183</sup> Following the delays in examination papers for primary schools in Wajir, Mrs Oray Adam, Maendeleo ya Wanawake (Women's Development) Chairperson says, 'if the Government does not improve the roads, the examination calendar should be reviewed.'<sup>184</sup> The delays happen every year. Examination papers



delay, students sit for long sessions of exams into the night due to impassable roads and seasonal rains.



*This is a section of the road in Dujis constituency, Garissa District; during the seasonal rains, roads in the region are flooded and impassable*

Officials in the health sector too argued that Northern Kenya should not be associated with punishment; it should rather be considered part of Kenya. The region under review has remained an extension of Kenya, perceived and administered differently, challenging residents' access to citizenship and related rights. These challenges have both historic and legal genesis.

Since 1950, successive regimes have initiated a number of programmes and projects in Northern Kenya and the ASAL region.<sup>185</sup> The region, however, received low priority in terms of investments and allocation of development resources.<sup>186</sup> It was perceived that if sufficient resources were put in the high rainfall highlands, the resultant production would drive the country's economic growth, which would then 'trickle down' to the ASALs. This did not work but instead it led to the neglect and marginalization witnessed in the ASALs today. As indicated in table 1 above, Government priorities had the aim of managing the environment, improving livestock economy, diversifying livelihood, improving social and physical infrastructure, all which have failed over time. The Government today admits that these areas have enormous economic potential for livestock production, mining, tourism rain-fed and irrigated agriculture and alternative energy sources, among others. Northern Kenya is part of the ASALs which constitute about 80% of the country's land mass, with about 10 million people and approximately 70% of the national livestock herd.<sup>187</sup> Compared to the rest of the country, Northern Kenya is extremely underdeveloped and has over 60% of its population living below the poverty line. In addition, these areas have the lowest development indicators and regularly suffer from conflicts and insecurity, droughts and other hazards that destabilize socio economic activities and deplete natural resource base leading to low productivity, food insecurity and loss of livelihoods.<sup>188</sup>

This study establishes, however, that these past development initiatives and policies in ASALs had limited impacts. Today, the Government admits that past development approaches and policies were weak in many aspects – inappropriate programmes and poor design that had little regard for the unique features of livelihood systems. In the ‘Draft National Policy for Sustainable Development of Arid and Semi Arid Lands of Kenya’ the Government argues that:<sup>189</sup>

The current situation in the ASALs is characterised by inappropriate policy designed with little regard for the unique features of livelihood systems in the ASALs<sup>190</sup>..... Many development analysts have argued in the past that pastoral production is not economically rational while nomadic livestock management systems are environmentally destructive yet this is the main livelihood strategy in these areas. That ASALs cannot sustain themselves and do not contribute substantially to the national economy. The prescribed solution has been to introduce more efficient and “modern systems”, such as ranches and irrigation schemes, with the Government putting most of its resources into high rainfall areas where human population is high and returns to investment are deemed to be better.

Moreover, past policies had inadequate legal and institutional frameworks and above all had ineffective coordination mechanisms. The programmes had limited involvement of the communities in initiation, planning, and implementation. There was also ineffective coordination among development agencies, sectoral ministries/departments and the implementing agencies.<sup>191</sup>

The greatest challenge to Northern Kenya’s development has been the failure to accompany past development initiatives and policies with effective resources. Lobbying groups - political leadership, CSOs and members of public in the area - have never effectively influenced the budget in their favour.<sup>192</sup> The lack of resource allocation has had to do with institutional marginalization.

### **3.6.3 Citizenship: The role of law, policies and practices in Northern Kenya 193**

‘The laws on citizenship in Kenya are ambiguous and discriminatory both in content and in the manner in which they are implemented’, argues Korir Singoei.<sup>194</sup> Citizenship in Kenya is governed by the Constitution, the Citizenship Act and the Registrations Act while the Children’s Act and the Aliens Act among others have implication on it. Under the Constitution one is a citizen by operation of law (ex lege) - by registration and naturalisation. Merits and demerits of both the registration and naturalisation have been a subject of debate.<sup>195</sup>

Acquiring citizenship under the operation of the law in Kenya is based on the Constitutional proclamation without accompanying acts on the part of its beneficiaries. Sections 87 and 89 of the Constitution provide citizenship under the following categories:

- All persons born in Kenya before the date of attainment of independence (December 12 1964) with citizenship connected with United Kingdom and its colonies or who were protected persons of parents who must have been born in Kenya;
- Every person born outside Kenya before the date of independence whose father became a citizen by virtue of being a British citizen or a British protected person and one of whose parents was born in Kenya; and
- All persons born in Kenya after the date of independence, one of whose parents is a citizen.

These provisions set a very onerous chain to access citizenship based on both *jus soli* (birth in Kenya territory) and *jus sanguinis* (link to a parentage) principles. 'Citizenship by operation of law targeted children of second generation British settlers in Kenya, whose British citizenship by virtue of the British Nationality Act, 1948, would also be based on descent'.<sup>196</sup> The same would apply to Kenya citizenship. Without documentation and knowledge of state boundaries how is one to prove that the parents were born in Kenya? Secondly, what does the term British Protected Persons mean? For closed districts such the NFD what prove will suffice the criteria?

To understand the challenges and impact of this law and its application on citizens of the region one needs to revisit the issue of NFD and the effects it has on residents of the region.

At all times, NFD has been the buffer between Kenya and foreign intruders. The creation of NFD and the subsequent application of emergency laws, in the NEP, in particular, and the NFD in general have had serious consequences for the people and the region. The effects of these laws can be grouped into three distinct categories, namely a) gross violations of fundamental human rights, such as mass murder in different districts, violent conflicts and insecurity; b) discrimination of the people of the region and c) marginalization and underdevelopment of the people and the region. These effects are intertwined as demonstrated in the cases below:

### Box 3: A catalogue of mass killings in Northern Kenya districts

#### Catalogue of massacre

Violations of citizens' rights in Northern Kenya have come in different forms; the most disturbing have been massacres. The region under review has experienced mass killings most of which have gone unpunished. Starting with shifta wars (1963-1967); Bulla Karatasi 1980;<sup>197</sup> Torbi Massacre 2005, among others. While some of these killings have been attributed to State institutions most are yet to be resolved as in the most publicized Wagalla Massacre.<sup>198</sup> The Wagalla massacre is discussed below.

#### The Wagalla Massacre

The Wagalla Massacre of 1984 is perhaps the most publicized atrocity in the history of independent Kenya, thanks to the extensive advocacy by Human Rights Watch,<sup>199</sup> Amnesty International,<sup>200</sup> the United Nations, and Truth Be Told Network (TBT) amongst others. TBT records that in February 1984, security forces mounted a major security operation aimed at disarming competing local groups, particularly the Degodia. At the beginning of February, the army closed all the water points - with the exception of Wajir town - to the Degodia. Many of the nomadic groups with big camel herds moved out of the District into Ethiopia. The semi sedentary people could not do the same and made long journeys in search of water. Many of their animals died.

On 10 February the same year, there was a roundup of Degodia men who were given an ultimatum to surrender their weapons.<sup>201</sup> Government security forces are then said to have doused people in petrol and burned them at the Wagalla Airstrip, Wajir. Although it is estimated that about 2,000 people died during the massacre, only about 363 of them were identified by name.<sup>202</sup> An additional 7,000 people, including children, women and the elderly were left destitute. Survivors were prevented from receiving any treatment. According to witnesses, the injured had to be moved into remote areas.

Under pressure, the Government admitted the killings, but only of fifty-seven people. On 27 March 1984, then Minister of State in the Office of the President in charge of Internal Security, William Ole Tipis, stated before the National Assembly that only fifty-seven people had been killed in the security operation. He said 'firm action' had been taken but added that 'this did not condone excessive force that might have been meted out.' The Minister agreed to set up a committee of inquiry into 'causes of tension.' The Government did not hold a public inquiry, and has never compensated the families of the fifty-seven it acknowledged were killed.<sup>203</sup>

The Wagalla massacre is one such example in a series of violent crackdowns and repressive measures by the Police in the NFD coupled with trumped-up allegations and unsubtle innuendo by the Kenyan media charging the region's almost exclusively Somali inhabitants with 'banditry' and other vices.<sup>204</sup>



*Residents of the region continue to suffer inhuman and degrading treatment in the hands of state officials and bandits*

*A victim shows wounds inflicted upon him during a police and military operation conducted in October 2008*



At the end of the Shifta War in 1967, the Government enacted the Indemnity Act, which came into force in 1972. The Act identified the prescribed area as NEP and Isiolo, Marsabit, Tana River and Lamu in section 2 thereof, and fixed the duration of the existence of the indemnity between 25 December 1963 and 1 December 1967. Article 3(1)(a) and (b) of the Act stated that:

No proceeding or claim to compensation or indemnity shall be instituted or made in or entertained by any court, or by any authority or tribunal established by or under any law, for or on account of or in respect of any act, matter or thing done within or in respect of the prescribed area after the 25th December, 1963, and before 1st December, 1967, if it was - (a) done in good faith; and (b) done or purported to be done in the execution of duty in the interests of public safety or of the maintenance of public order, or otherwise in the public interest, by a public officer or by a member of the armed forces, or by a person acting under the authority of a public officer or of a member of the armed forces.

However, even after the Act effectively lapsed in practice, its application continued, as was evident by Government's failure to act against perpetration of human rights violations by public servants within the designated areas. It was not until late 2000 under the administration of Provincial Commissioner Mohammoud Saleh -- a Somali -- when there was a serious drop in violent activities, partially attributable to Saleh's zero tolerance policy towards abuse by security forces. Ironically, Saleh himself was the target of the local police, having been arrested and booked several times during the wee hours of the night. Wearing plain clothes, Saleh was apparently mistaken for an ordinary inhabitant of the NFD.<sup>205</sup>

### **3.7 Civic knowledge and civic voice in Northern Kenya**

Whereas citizenship helps in claiming rights, in Kenya, region, gender, and political affiliations determine which rights one enjoys. For instance, despite Kenya being a signatory to international instruments proclaiming equality and non-discrimination such as CEDAW, women in Kenya cannot confer citizenship to their foreign spouses as is the case with men.<sup>206</sup> Children born out of unions between Kenyan woman and foreigners are consequently likely to be stateless. In addition, there are Kenyans for whom citizenship only counts during elections.

There is scarcity of knowledge amongst Kenyans regarding citizenship and the resultant rights. On the other hand, CSOs find the topic sensitive to disseminate. As elsewhere, granting citizenship and guaranteeing inherent rights is often treated as Government's prerogative. Different governments interpret civic education on citizenship rights as subversion. Such has been the story of Northern Kenya.

Ineffective civic voice may be an immediate result of marginalization and poor public participation in decision making. Public participation in decision-making in Kenya is majorly indirect through elected representatives - MPs and local authority councillors. It has been argued that the emergence of NGOs and Peace Committees are avenues of participation. While NGOs remain Government partners in development, and although some have mandates entailing monitoring of Government activities, the NGOs fraternity is limited in capacity and responsibility. Only elected leadership has legal mandate to participate on behalf of communities. Whereas there is no region in Kenya that can claim to have effective public participation, invariably, Northern Kenya

leadership has been unable to effectively influence Government decisions. According to one MP, lobbying for development of the Northern region has been difficult. The space for NGOs to challenge human rights violations in the region has, equally, been limited. Often, NGOs are confronted with nationality issues; the regions inaccessibility (Northern Kenya is the least accessible region) as well as prohibitive laws. Lack of knowledge by the citizens, questioned citizenship status for most residents, under development, and historical prejudices amongst other reasons, inhibit the ability of various actors to redeem the region.

In 2004, communities from Upper Eastern districts of Isiolo, Marsabit and Moyale, with the support of 53 CSOs and their elected representatives conducted a protest walk. The 510 km walk was not only aimed at compelling Government to construct proper roads in the region but also raise national consciousness to the plight of the Northern Kenya citizens. The campaign termed 'The Great Trek' was conducted for a period of 21 days between 11 November and 1 December 2004. The process exposed and put Government to task. Writing as one of the 'trekkers' Kwamchetsi Makokha the then Standard Editor wrote:<sup>207</sup>

....that all promises that were made to develop Northern Kenya by the current Government will become talking points across Kenya. And when the rest of the country listens, it will know that their [Northern Kenyans'] causes are just.

*A Sensitization forum on the newly enacted Water Act conducted by the KHRC in Modo-gashe divion, Isiolo; education and awareness are imperative to strengthen civic voice in Northern Kenya*



### 3.8 Signs of better things

Nothing better could have come out of the recent violent conflicts in Kenya than the possibility of reforms. The disputed General Elections in 2007 and subsequent violence shocked the nation. The political class, which had been averse to constitutional, institutional and legal reforms since independence, woke to realise that the same has been proposed as part of the Peace Accord. In its preamble 'The National Accord and Reconciliation Act 2008' affirmed the existence of a crisis in Kenya following the disputed election. Resulting from the accord is the 'Acting together for Kenya: Agreement on the Principle of Partnership of the Coalition Government' which also notes that:<sup>208</sup>

The crisis triggered by the 2007 disputed presidential election has brought to the surface deep seated and long-standing divisions within Kenyan society. If left unchecked threatens the very existence of Kenya as a unified country.

The Accord addressed itself to 'power distribution' by re-introducing a position of Prime Minister in the Executive. It called on the country to address the 'post election violence'<sup>209</sup>, 'truth and justice'<sup>210</sup> and 'the Constitution'. Today, the Coalition Government appears set to spearhead constitutional, legal and institutional reforms in its life time. Speaking on the 44<sup>th</sup> anniversary of Kenyatta Day, President Mwai Kibaki was quoted saying:<sup>211</sup>

I believe our new constitution is within reach. I believe this is an opportunity for the Grand Coalition Government to seal its place in history for providing future generations with a legacy of a sound and durable constitution and legal framework.

In addition to the Constitution, policies on land, historical injustices, electoral reforms, among other reforms have been earmarked.

Government has also expanded the mandate of the Ministry of Justice and Constitutional Affairs under the Coalition Government to include issues of ethnic relations and national cohesion. Despite being limited to elite groups, signs of open debate on sensitive issues that define belonging in Kenya are now under discussion. In a report in the Nairobi Star, panellists argues that while every Kenyan is a product of multiple identities linked to ethnicity, race, language and religion, what entails 'Kenyanness' remains elusive.<sup>212</sup> As for Northern Kenya, the question of belonging will not just be limited to ethnic relations within the region, but will include the integration of the region into mainstream processes and the country at large.

Further, in pursuit of the elusive integration and development in Northern Kenya and ASAL region, the Coalition Government has established a full-fledged Ministry of Northern Kenya and other ASALs in line with Uganda's Karamoja regional strategy. This is in addition to the Ministry for Livestock and Fisheries which also targets the livestock and marketing sector in the region. Emergency livestock vaccinations, for instance, are immediate results of these efforts. There are discussions regarding the carrying out of livestock censuses. For the first time, the 2008/2009 National Budget has granted the Northern Kenya region a large sum of 2.4 billion Kenya shillings for infrastructure and social development.<sup>213</sup>

Rehabilitation and construction of Garissa – Hola road has been allocated 900 million Kenya shillings while Marsabit/Maralal water supply project has been granted 200 million shillings.<sup>214</sup>



*A section of the Isiolo-Marsabit road currently (2008) under construction*

Other items under the Budget for consideration are: the school feeding programme, rural electrification and livestock support programme, et cetera. While these budget lines reflect an intention to uplift the standards of living in Northern Kenya, the challenge remains that the voice of the people in the budget making process is still very limited. While the 2008/09 budget may have applied both targeted and universal principles in resource allocation for the region, the absence of legislative safeguards or affirmative action for Northern Kenya makes the process whimsical.

Northern Kenya development has benefited from the generous contribution of the donor groups. For instance, a number of donor agencies and NGOs have been involved in the conflict management and peace building, relief and drought emergencies, education and health in Northern Kenya. Donors have responded to Government calls for support and partnerships. Previously, girls in the Province would not attend secondary school because of school fees. According to the NEP Provincial Education Officer, a number of donors and successful women from the region have teamed up under 'a girl child program' sending several brightest girl students to the top schools in the country. In addition to free secondary school and Constituency Bursary Funds the girl child program gives the Province hope that girls may not be left out of secondary school.<sup>215</sup>

The political leadership in Northern Kenya region has contributed little in advocating for the region's development. Many believe that past injustices have and will inhibit the growth of the region and therefore nothing worthwhile is likely to emerge from the current situation. However, the current political goodwill in the form of ministerial and budget allocations should be used by political leaders, CSOs and the community to address the many problems afflicting the region. For instance, there is need to 'transform the Pastoralists Parliamentary Group into a Parliamentary House Committee, establish a pastoralists' development authority, put to rest historical injustices, improve infrastructural development, and increase public participation in critical decision-making.'<sup>216</sup>

In the year 2009, Kenya is set to conduct national censuses<sup>217</sup>. Actual population figures have been noted to be important in resource allocation. On its part, the National Registration Bureau has earmarked creating a centralized database for birth and registration to help reduce the practice of discriminatory identification procedures in adulthood. The registration of refugees has also been earmarked. In addition, the Bureau is set to issue third generation ID cards.<sup>218</sup>

The issue of dual nationality has been discussed in the past; in addition, the region has accelerated the process leading to the formation of an East African Federation. Moreover, the yearning for Constitutional, legal and institutional reforms could probably help solve the problems bedeviling Northern Kenya.



## Chapter 4

### CONCLUSION AND RECOMMENDATIONS

#### 4.1 Concluding observations

The study has established that quality of citizenship in Kenya is affected by ones location of residency, gender and region. For historical and post-colonial practices, among many reasons, Northern residents invariably endure defective access to citizenship.

In conclusion, irrespective of the challenges afflicting access to citizenship rights in Northern Kenya, the country can make citizenship work for its entire population. Citizenship may form a flag point for social, legal and institutional reforms. In particular, reforms and discussion on ethnic relations, historical injustices and national integration, electoral and constitutional reforms may require a vibrant dialogue on citizenship. Constitutional reform has become more salient especially after the 2007 general elections. Reassessing the relationship between central Government and the provinces presents an opportunity to redefine identity and cultural belonging in Kenya. Officials must now consider new legislation to enhance citizenship rights of minority groups, women, children, and refugees. Addressing citizenship challenges may be an important aspect for Kenya while the opportunity to integrate the region and its people still exists. Otherwise the country will wake up to xenophobic chaos as experienced in January 2008.

Although citizenship has gained a significant role in social and political life, its access as well as enjoyment of its rights remains challenged. Kenya has always had *unequal* citizens despite having fought for independence and therefore non-discrimination. Formal citizenship in Kenya territory has its genesis in colonialism. In theory, Kenya had equal citizens although in practice the country had citizens and subjects. During the colonial days, white settlers enjoyed all citizens' rights while the native Africans assumed the 'subjects' status. Rather than eliminate this inequality in citizenship access and enjoyment, independent Kenya only rationalised the *status quo*. Women, for instance, do not as a right confer citizenship to their foreign spouses. While some ethnic group members are *bonafide* citizens others have to qualify.

While the basis of citizenship acquisition is birth, marriage and residency in the rest of the world, in Kenya descent plays a key role. Birth in Kenya territory has to be proven through lineage. In all, citizenship access in Kenya is challenged by ethnic, regional and gender discrimination. Despite signing many international instruments prohibiting discrimination and fostering equality for all, Kenya may be considered a State rife with citizenship-based discrimination. The Kenya Constitution too prohibits discrimination on many social grounds such ethnicity, gender, among others.

Since 1990s, some African countries witnessed dramatic denationalisation of their people. Some state leaders were denationalised, some ethnic communities' expelled; Kenya only experienced tacit dialogue on citizenship despite having witnessed all the forms of denationalisation. Citizenship related problems in Kenya are peripheral and have been mostly confined to those affected and CSOs because of the state centric nature of the processes. For instance, 'vetting' is one such process mostly well known to those who have undergone the process. The mainstream societies hardly get involved. These have perpetuated citizenship challenges which are based on ethnicity, region as well as gender.

Most CSOs' programmes on citizenship have targeted Government policies. It is, perhaps, only the National Civic Education Programme (*Uraia*) that has been designed with members of the public in mind. *Uraia* is the Second Phase of National Civic Education Program. The term (citizen in Swahili) was hoped to capture the overriding theme of citizenship.

The program is about rights and responsibilities of citizens; it is also about the role and responsibilities of Government institutions at national and local levels. In Kenya the interest in civic education has been increasing with the gradual increase in freedom of expression over the past two decade.<sup>219</sup>

Although the *Uraia* programme seeks to strengthen the public voice to demand accountability from the State, it is far from achieving this aim because the corpus of citizenship knowledge controversially remains state-centric. Like many programmes of this nature *Uraia* assumes that every citizen accesses their nationality rights and therefore does not address the topic.

Although citizenship has been reduced to mere attainment of ID cards and linked to voting without the ability to influence, studies have thus proposed that it should be made compulsory that the Kenya Government issues IDs as a right. IDs acquisition at present is not a right but a State prerogative. Further, Government issuance of IDs is not equal to all citizens. In Northern Kenya, every person must be vetted before the provision of IDs, a situation that is not replicated in the other regions. This selective vetting is a form of direct, indirect and structural discrimination which denies community members in the region valuable access and enjoyment of their rights.

Historical marginalisation and poor resource allocations have worsened the exclusion of Northern Kenya region. The region has been neglected in resource allocation as well as infrastructural development. Consequently, residents of this region sit on the edge of 'statelessness'. Thus, different inhabitants admire being refugees than being citizens. Descendants of Northern Kenya may not be able to count on their citizenship let alone their nationality. Residents of the region continue to face difficulties in accessing citizenship documents and associated freedoms. Thus, recognition, participation rights and space affect not only quality, but also access to citizenship rights. Residency may determine the quality of one's citizenship rights because it determines effective ties and level of participation; it defines the nature of services and types of freedoms of movement.

National institutions are taking steps to streamline the registration process, to allow for the construing of national identification as a right rather than as a privilege. The National Registration Bureau issued a nationwide directive in 2006 to desist requests for grandparents' documentation, though it is suggested that the directive has been implemented in an *ad-hoc* manner. In 2007, the KNCHR published an in-depth report on IDs issuance, with recommendations for legal and administrative reforms. Preliminary proposals have been circulating for the creation of a centralized database for birth registration information to help reduce the practice of discriminatory identification procedures in adulthood.

RI in a report published in 2008 called on the Kenya Government and international organisations such as the UNHCR to work towards protecting minorities from becoming stateless. This study makes recommendations aimed at curbing arbitrary citizenship denials, citizenship-based discrimination and protection against statelessness as follows:

**Policy recommendations for Government bodies:**

- The National Registration Bureau ought to adopt a clear and uniformly applicable registration process, giving full consideration to the KNCHR recommendations to abolish vetting on the basis of ethnicity, thereby eliminating corruption;
- The Government ought to modify the statutory framework governing citizenship to ensure women, children, and all other minority groups have equal access to citizenship;
- As part of constitutional reform and national reconciliation processes, Kenya should shift from a paradigm of 42 'official' ethnic groups to a more fully inclusive approach to identity;
- The UNHCR, through monitoring and education, could encourage Kenya's efforts to eliminate discriminatory practices, find durable solutions for refugees, and prevent statelessness;
- The Kenya State ought to ratify the 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness;
- Oversight bodies such as KNCHR, the National Commission on Gender and Development, the Law Society Kenya, and CSOs should challenge Government to review the discriminatory legislations; and
- The Government, oversight bodies, and Parliament should revisit the concept of citizenship and nationality and facilitate the development of a policy on citizenship and nationality in line with democratic norms of equality.

**Recommendations for NGOs:**

NGOs ought to:

- Advocate for legal and constitutional reforms towards equal citizenship and equal access to citizenship rights and the reform of any other laws and practices that do not conform to international human rights standards;
- Advocate for the establishment of specialized tribunals to review denials and revocations of citizenship as well as ensure equal enjoyment of citizenship rights;
- Undertake further research, documentation and monitoring of discrimination; examine laws, policies, practices and political imperatives, and/or sociological factors that lead to citizenship-based discrimination or equal access to citizenship rights;
- Monitor the implementation of laws and policies on equal citizenship and equal access to citizenship rights;
- Challenge discriminatory practices to expose the problem;
- Advocate for accession/ratification and domestication of international human rights instruments relating to the reduction of statelessness and in particular, the 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness; and
- Conduct civic education campaigns for State and non-state actors and the general public on citizenship

**Policy recommendations on historical injustices:**

Although the Government eliminated indemnity rules which facilitated human rights violations in Northern Kenya in 1997, this dark past and other historical injustices must be brought to a closure. With exception of North Rift, nearly all districts in Northern Kenya have experienced one form of massacre or another. The study therefore recommends that;

- All stakeholders such as Government, KNCHR, CBOs, NGOs and community leaders should aggressively participate in bringing these atrocities to light; and
- Perpetrators of the various violations of human rights be brought to book.

**Policy recommendations on Northern Kenya development:**

For effective citizenship to be realised, the Government must consistently meet basic rights of the people of Northern Kenya. CSOs, political leaders and communities in the region should take advantage of the current political goodwill and address the issue of citizenship in the region, establish a pastoralists' development authority, put to rest historical injustices, develop infrastructural development, increase public participation in critical decision making, amongst others.

The creation of the Ministry of Northern Kenya and other ASALs ought to be seen as a first step towards pursuing the now elusive development in Northern Kenya and the ASALs. The Ministry cannot only be a coordinating unit but rather a key driver in the development of the region. Therefore, the Ministry should effectively be accorded resources to implement its programmes.

In addition, accountability to the citizens may be better enhanced by strengthening the Pastoralists Parliamentary Group and turning it into a 'Parliamentary House Committee'. This would consolidate pastoralist groups into a unit responsible for checking Government's performance and also as a forum for engagement with other communities and CSOs.

Lastly, resources allocated to the region may have to be both universal and targeted. Government could meet its socio-development targets for Northern Kenya through a deliberate effort that is grounded in a proper legislative framework. Public monies should be invested in the area's infrastructure such as roads, water and schools to make the region attractive for private development.

The Government, through its different ministries, should facilitate consultations with members of the public. Furthermore, the Government should invest in the security of the area through improving border controls and fostering trust with the local communities. The Government should also improve the pay package for its staff posted in the region so as to attract competent staff as well as encourage the locals to remain and work in the region.

**Donor agencies and partners:**

Donor support in development and protection of the girl child in NEP is laudable; however, there is need to encompass the entire Northern Kenya. Without spreading the programme to all underprivileged areas in the North of Kenya, the processes may become self-defeating. There is also a need to expand educational bursary funds in the Northern Kenya region and to depoliticize their disbursement.<sup>220</sup>

<sup>1</sup> Abdurraheem, Tajudeen. Nkunda, Dismas and Odinkalu, Chidi Anselm. (2007) *'Ghana's Golden Jubilee: Africa's Citizenship.'* New York: CRAI Publication obtained at <http://www.citizenshiprightsinafrica.org/>. According to this contribution, in many States in Africa citizenship rights are treated like a privilege, which individuals enjoy only at the pleasure of their State. States exclude and denationalize parts of its citizenry for different reasons. For instance women compared to men in many states cannot confer citizenship to their foreign husbands. Ethnic discrimination in access to citizenship clearly contradicts the universal anti-discrimination norm, but in many states, ethnicity is still a criterion for nationality and is often meant to silence political opponents. Since the 1950's political leaders have been denationalised. On 24 January 1980, Nigeria's President, Alhaji Shehu Shagari, expelled to Chad the Majority leader of the opposition-controlled state legislature of the North-Eastern State of Borno, Alhaji Shugaba Abdulrahman Darman, alleging that he was Chadian and not Nigerian. In 1995, Zambia's septuagenarian founding President, Kenneth Kaunda, was stripped of his citizenship by his successor. In the same year, Cote d'Ivoire's former Prime Minister, Alassane Ouattara, was similarly stripped of his Ivoirien citizenship. In 2001, Tanzania threw out its leading journalist and media proprietor, Jenerali Ulimwengu. At the end of 2006, it was the turn of the publisher of the only existing independent newspaper in Zimbabwe, Trevor Ncube to be rendered stateless by his country.

<sup>2</sup> Communication 97/93, *Modise v. Botswana*, (2000) AHRLR 30 (ACHPR 2000)

<sup>3</sup> Communication 212/98, *Amnesty International v. Zambia* (2000) AHRLR 325 (ACHPR 1999) para. 37

<sup>4</sup> FM Deng (2005) 'Ethnic marginalisation as statelessness: Lessons from the Great Lakes region of Africa' in A Aleinikoff & D Klusmeyer, *Citizenship today global perspectives and practices* (2005) 208.

<sup>5</sup> O Chidi (2008) 'Inclusive citizenship and identity and the prospects for peace and security in Africa' in *Openspace: A digest of the Open Society Initiative for Southern Africa* (2008) 13 – 19.

<sup>6</sup> M Mamdani (1996) *Citizen and subject: The contemporary Africa and legacy of late colonialism.*

<sup>7</sup> KHRC (2006) 'Brother killing brother' in *Bi-Annual Human Rights Report*. January – June 2006. Nairobi: KHRC Vol. 8, No. 1, p. 17-18

<sup>8</sup> See M Mwanza & J Ratemo 'Torture claims against officers surface: Residents of Mandera allege the military and police conducted a dawn raid and inflicted injuries on them' in the *East African Standard* 30 October, 2008. The news item quotes Dr. Fred Otsyena who stated that Elwak District Hospital, which has a 32 bed capacity, had up to 112 people admitted after a week long operation. An additional 100 were admitted at Wargadud Health Centre.

<sup>9</sup> KHRC (2000) *The Forgotten People Revisited; Human Rights Abuses in Marsabit and Moyale Districts*. Nairobi: KHRC Publication

<sup>10</sup> See KNHRC (2007) *An identity crisis? A study on the issuance of National Identity Cards.*

<sup>11</sup> Refugees International (2008) Kenya: 'National registration process leaves minorities on the edge of statelessness.' *Bulletin*. Washington: [www.refugeesinternational.org](http://www.refugeesinternational.org)

<sup>12</sup> See [http://www.ncep2.or.ke/default2.asp?active\\_page\\_id=265](http://www.ncep2.or.ke/default2.asp?active_page_id=265)

<sup>13</sup> The parties to the mediation (now in the Grand Coalition Government) have agreed on 'urgent' reforms including, comprehensive constitutional reforms; comprehensive electoral reform – including of the electoral laws, the electoral commission and dispute resolution mechanisms; the establishment of a Truth, Justice and Reconciliation Commission; identification and prosecution of perpetrators of violence; reforms on respect for human rights; parliamentary reform; police reform; legal and judicial reforms; commitment to a shared national agenda in Parliament for these reforms; and other legislative, structural, political and economic reforms as needed. Along with these reforms, they have agreed on long-term reforms regarding: consolidating national cohesion and unity; land reform; tackling poverty and inequity; as well as combating regional development imbalances, particularly promoting equal access to opportunity; tackling unemployment especially among the youth; reform of the Public Service; strengthening of anti-corruption laws and public accountability mechanisms; reform of public finance and revenue management systems and institutions; and addressing issues of accountability and transparency.

<sup>14</sup> Previously the APRM recommended reforms to address inequality, human rights violations, historical injustices and nationhood among other reforms.

<sup>15</sup> APRM (2006) *Country Review Report of the Republic of Kenya*. The report is obtainable at <http://www.nepad.org/2005/files/aprm/APRMKenya-report.pdf> (19 December, 2006).

<sup>16</sup> See Ministry of Planning and National Development (2005) *MDGs Status Report for Kenya*. Nairobi: GOK p. 9

<sup>17</sup> J Kiringai (2006) 'Public spending in Kenya: An inequality perspective' in *SID Readings on inequality in Kenya: Sectoral dynamics and perspective* (2006) 18.

<sup>18</sup> T Mboya (1993) *The challenge of Nationhood* p. 101.

<sup>19</sup> See for instance <http://www.ideas.repec.org/p/uct/uconnp/2005-42.html> (accessed on 20 December 2006); also see OSIEA (2008) *The CDF social audit guide: A hand book for communities*.

<sup>20</sup> GOK (2003) *Kenya Economic Recovery Strategy for Wealth and Employment Creation 2003 – 2007*.

<sup>21</sup> The following districts - Tana River in the Coast; Garissa, Ijara, Wajir, and Mandera in North Eastern; Isiolo, Marsabit, and Moyale in Upper Eastern; and West Pokot, East Pokot (East Baringo), Samburu and Turkana in Rift Valley constituted the former Northern Frontier Districts (NFD) of Kenya, a vast geographical landmass forming nearly two thirds of the country. Reference to Northern Kenya in this study will therefore generally connote this expansive territory.

<sup>22</sup> Chapter 107, Laws of Kenya.

<sup>23</sup> JA Goldston (2006) 'Holes in the rights framework: Racial discrimination, citizenship and the rights of non-citizens,' in *Ethics & International Affairs*. Vol. 20, Number 3. Carnegies Council Report: USA.

<sup>24</sup> P David, S John & W Kieron *Citizenship rights, community and participation* (1995) 5.

<sup>25</sup> Deng (n 4 above).

<sup>26</sup> T H Marshal (1950) *Citizenship and social class and other essays*.

<sup>27</sup> Article 1 of the 1954 UN Convention Relating to the Status of Stateless Person

<sup>28</sup> See O Doyle 'Direct discrimination, indirect discrimination and autonomy' 27 (2007) OXFORD J. LEGAL STUD. 537, 538. For a more expansive definition of indirect discrimination, see norms under the European Union and Council of Europe. For instance, under the Race Directive, indirect discrimination entails any 'apparently neutral provision, criterion or practice' placing 'persons of a racial or ethnic origin at a particular disadvantage compared with other persons unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.'

<sup>29</sup> See *Griggs v Duke Power Co.*, 401 U.S. 424, 431 (1971). In Europe, there is a recent famous precedent from the European Court (*The DH v Czech Republic* case) which ruled that where statistics show a disproportionate impact of a State policy on a specific ethnic group, the burden of proof shifts to the Government to prove that such disproportionate impact is justified. Proof of discrimination is through statistics, rather than through proof of motivation.

<sup>30</sup> Council Directive 2000/43/EC of 29 June, 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin. *Official Journal of the European Communities*, L 180/22.

<sup>31</sup> See A Grant-Thomas & J Powell 'Towards a structural framework' 15(6) POVERTY & RACE 1, 4 (2006).

<sup>32</sup> A David 'Cow power and pastoralist in Africa' *African Affairs* (1993) 121.

<sup>33</sup> The first colonial Governor of Kenya, Sir Charles Elliot, regarded pastoralism as a primitive way of life that had no future in Kenya. See *ibid*.

<sup>34</sup> Central Depository Unit (2003) 'Political violence in marginal areas: A case study of Samburu and Lamu districts' *CDU Report*.

<sup>35</sup> (N 9 above) 5.

<sup>36</sup> Quoting the unpublished report by HI Ahmed (2002) *Northern Eastern Province and The Constitution Process – Lesson from History* posted at [www.kenyaconstitution.org](http://www.kenyaconstitution.org). CDU says since secessionists war, Somali people have been named 'Shifita' a loose term for bandits

<sup>37</sup> SID (n 17 above).

<sup>38</sup> G Yash forward to MO Makoloo *Kenya: Minorities, indigenous people and ethnic diversity* (2005) 4.

<sup>39</sup> See K Kanyinga (2005) 'Ethnicity, inequality and public sector governance in Kenya' in SID (2006) *Reading on inequality in Kenya: Sectoral dynamics and perspective* Volume 1, pg.15-55.

<sup>40</sup> A Chesoni 'Ethnic chauvinism, xenophobia and gender inequality in Kenya' in SID *Readings on inequality in Kenya: Sectoral dynamics and perspectives*, Vol. 1 (2006)

<sup>41</sup> Kenya claims to be a country composite of 42 ethnic groups; yet it has more than 97 specific ethnic codes that are used in both census and ID cards records. These codes have become controversial and contested with different communities using them as a basis to demand for recognition. According to David Nalo, then Permanent Secretary in charge of the census, a letter to Sakuye people said the codes are reserved for 'major tribes'.

<sup>42</sup> See KNCHR (2007) *An identity crisis? A study on the issuance of National Identity Cards*, pg. 10, where it states: 'However, for proof of citizenship, the law does not specify what documentation may be used for that purpose and seems to give the Principal Registrar discretion to decide on which documents are relevant for proof of citizenship.'

<sup>43</sup> Countries such as Uganda, Somalia, Eritrea and Ethiopia.

<sup>44</sup> N 15 above.

<sup>45</sup> *Ibid.*

<sup>46</sup> *Ibid.*

<sup>47</sup> SID (2006 a) *The State of East Africa Report; Trends, Tensions and Contradictions: The Leadership Challenge*. Nairobi: Jamana Printers Ltd

<sup>48</sup> As above.

<sup>49</sup> TP Wolf *et al A new dawn? Popular optimism in Kenya after the transition* (2004) 24.

<sup>50</sup> Using 12 social, economic, political, and military indicators, the index ranked 148 states in order of their vulnerability to violent internal conflict and societal dysfunction. These indicators include: Demographic pressures, refugees & displaced persons, group grievance, human flight, uneven development, economy, and legitimacy of the state; public services, human rights, security apparatus, factionalized elites, and external influence. See <http://www.fundforpeace.org/programs/fsi/fsiprofiles.php> for more information.

<sup>51</sup> See [www.freedomhouse.org/template.cfm](http://www.freedomhouse.org/template.cfm)

<sup>52</sup> See [http://www.transparency.org/policy\\_research/surveys\\_indices/cpi/2006](http://www.transparency.org/policy_research/surveys_indices/cpi/2006)

<sup>53</sup> See for instance, *Kenya: Closing up Freedom* (1986) 162 Human Rights Watch.

<sup>54</sup> See [www.moibrahimfoundation.org](http://www.moibrahimfoundation.org). The Ibrahim index of African Governance addresses issues of safety and security; rule of law; transparency and corruption; participation and human rights; sustainable economic opportunity and human development. Since the first sets of data were obtained in 2000 the following states have occupied the first five positions: Mauritius, Seychelles, Cape Verde, Botswana and South Africa.

<sup>55</sup> CDU (n 34 above) 29.

<sup>56</sup> USAID (2001) *Creating synergies in pastoral zones: A report on a workshop convened in Addis Ababa*. USAID/REDSO.

<sup>57</sup> N 42 above.

<sup>58</sup> CDU (n 34 above) 6.

<sup>59</sup> B Baker *Escape from domination in Africa: Political disengagement & its consequences* (2003) 83.

<sup>60</sup> Baker (n 59 above) 7.

<sup>61</sup> Baker (n 59 above) 6.

<sup>62</sup> Baker (n 59 above) 8.

<sup>63</sup> As above.

<sup>64</sup> R E Howard *Human rights in Commonwealth Africa* (1986) 95.

<sup>65</sup> See [http://en.wikipedia.org/wiki/Shifta\\_War](http://en.wikipedia.org/wiki/Shifta_War)

<sup>66</sup> Oromo Liberation Front (OLF) is today a legal political party 1991 – 92. The party had however, been branded an illegal terrorist group following its war with Emperor Haile Selassie in 1974. The group fought against domination and marginalization of Borana speakers by both

Selassie and Colonel Haile Mariam Mengistu who succeeded him. Since 1992 the organization has disintegrated into splinter groups.

<sup>67</sup> K Koross 'Army accused of torture' *Daily Nation* 30 October 2008.

<sup>68</sup> BA Godana & PW Gargute *The impact of insecurity on resource: Use and the environment in Northern Kenya* (1999) 4.

<sup>69</sup> N 9 above.

<sup>70</sup> As above.

<sup>71</sup> As above.

<sup>72</sup> As above.

<sup>73</sup> As above.

<sup>74</sup> As above.

<sup>75</sup> As above.

<sup>76</sup> See KHRC (n 9 above) 5.

<sup>77</sup> Quoting CC Trench *The men who ruled Kenya*, where he describes the administrative situation of NFD and Turkana, KHRC report *The forgotten people revisited* argues that 'the administration of the NFD and Turkana was based on the Out-lying District Ordinance (1902) and Special District Ordinance (1934).'

<sup>78</sup> See KHRC, *The forgotten people revisited*, where it is stated that: 'The British dithered. The Government did not want to be burdened with vast arid territory but eventually decided that even less did they want Menelik to have the region'

<sup>79</sup> KHRC (n 9 above) 5.

<sup>80</sup> These laws empowered the Provincial Administration to determine what constitutes a hostile tribe. These ordinances not only applied to NFD but also to Tana River, Lamu, Kajiado and Samburu districts.

<sup>81</sup> The instrument granting independence was contained in an extra-ordinary issue of the Kenya Gazette, vide Legal Notice No. 69 of 10 December, 1963. Acting under the Provisions of the Kenya Independence Order in Council, 1963, the Queen of England granted Independence to Kenya by virtue and in exercise of the Powers granted to her by the British Settlements Acts, 1887, and 1945, and the Foreign Jurisdiction Act, 1890.

<sup>82</sup> In its report under the heading of freedom of movement, the Committee justified the act saying: "...in the present circumstances it is necessary to lay down certain limits within which such legislation may be operated in the Bill of Rights and that this might be suitably achieved in the following ways: the two particular Ordinances in question would be specifically preserved until such time as the legislature decided that they could be dispensed with. The Committee considers whether it was desirable for the Bill of Rights to permit the continued imposition of such restrictions of freedom of movement as are now authorised under the Special Districts (Administrations) Ordinance and the Outlying Districts Ordinance. The Committee recognises that there may be certain objections to permitting the continuation of legislation of this type but on balance they consider that in present circumstances it is necessary to do so, provided that the Bill of Rights lays down certain limits within which such legislation may be operated."

<sup>83</sup> Vide Act No. 14 of 1965.

<sup>84</sup> Vide Act No. 16 of 1966.

<sup>85</sup> Vide Act No. 18 of 1966.

<sup>86</sup> Chapter 44, Laws of Kenya.

<sup>87</sup> Chapter 57, Laws of Kenya.

<sup>88</sup> The Regulations defined a "prescribed" area to mean the area comprising the North Eastern Province and the Isiolo, Marsabit, Tana River and Lamu districts, and a "prohibited zone" as the aggregate of the areas within the prescribed area.

<sup>89</sup> N 34 above.

<sup>90</sup> Schlee as cited in S Salvatore (1997) in KHRC *The forgotten people*

<sup>91</sup> As above.

<sup>92</sup> As above.

<sup>93</sup> As above.

<sup>94</sup> Oromo language is a Cushitic tongue of the lowland Eastern Cushitic group.

<sup>95</sup> N 90 above.



- <sup>96</sup> GOK (2007) *Millennium development Goal Status Report for Kenya*. Nairobi: Ministry of State for Planning and National development and Vision 2030 GOK.
- <sup>97</sup> Study team interview on status of health sector and challenges faced in meeting health goals in the province with Provincial Medical team in Garissa on 10 March 2008.
- <sup>98</sup> N 96 above.
- <sup>99</sup> GOK (n 96 above) 13.
- <sup>100</sup> According to MDG report 2007: 'The total pupil enrolment in standard 1 - 8 increased from 6.06 million in 2002 to 7.4 in 2004 and further to 7.6 million in 2006 and 8.2million in 2007 (pg11)'. This translates to an increment from 93% in 2002 to 107.6% in 2007.'
- <sup>101</sup> See GOK (2006) Chapter 2 'rational for the policy', *First Draft of the National Policy on Peace building and Conflict Management*, Office of the President.
- <sup>102</sup> Kiringai (n 17 above).
- <sup>103</sup> CBS (2005) 'Geographical of well-being in Kenya: Where are the poor?' A constituency level profile. Volume II.
- <sup>104</sup> N 20 above.
- <sup>105</sup> As above.
- <sup>106</sup> As above.
- <sup>107</sup> As above.
- <sup>108</sup> An account of proceedings of the preparatory meeting: 'Northern Kenya Development Agenda Fostering Dialogue and Strategic Partnership' held at Silver Springs Hotel by the Coalition of Development Actors, 22 August 2006.
- <sup>109</sup> See SID (n 17 above).
- <sup>110</sup> P David, S John and W Kieron (1990) *Citizenship: rights, community and participation*.
- <sup>111</sup> As above.
- <sup>112</sup> GOK (2003) *Economic Recovery Strategy for Wealth and Employment Creation 2003-2007*. GOK publication
- <sup>113</sup> MO Makoloo (2005) *Kenya: Minorities, indigenous peoples and ethnic diversities*.
- <sup>114</sup> Study team interview on ID cards process and challenges faced by the registry in meeting its goals in the province with the Garissa District Senior Registration Officer on 10 March 2008 and 13 March 2008.
- <sup>115</sup> GOK (n 20 above) 45.
- <sup>116</sup> As above.
- <sup>117</sup> An account of proceedings of the Pastoralists Parliamentary Group meeting themed: 'Exploring Parliamentary Engagement in Combating Cattle Rustling and Advancing Human Security' on 6-7 June 2008, Mombasa convened by Eastern Africa Police Chiefs Cooperation Organization (EAPCCO), the Institute for Security Studies (ISS) and the Centre for Minority Rights Development (CEMIRIDE).
- <sup>118</sup> Other core laws such as the Constitution of Kenya, the Kenya Citizenship Act (Cap 170 Laws of Kenya), the Aliens Restriction Act (Cap 173, Laws of Kenya) and the Refugee Act No. 13 of 2006 are important with regard to registration of persons.
- <sup>119</sup> See Section 14(1) (a) of the Registration of Persons Act (Cap 107, Laws of Kenya).
- <sup>120</sup> N 10 above.
- <sup>121</sup> As above.
- <sup>122</sup> N 11 above.
- <sup>123</sup> Section 6(1) of the Registration of Persons Act stipulates that every person shall present himself before a registration officer and register himself by "giving to the registration officer the particulars specified..." Rule 4 (2) (b) under the Act, without specifics, states that the registrar shall "demand proof of Kenyan citizenship" from the applicant.
- <sup>124</sup> Kenya Registration of Persons Act § 5(1) (j).
- <sup>125</sup> Compared to the rest of the country Northern Kenya people apply for ID cards seasonally because of funding among other reasons. That adds up to the delays. In Embu district the registration is an every day affair while in Garissa it is seasonal. The study was informed that in 2008 the registry has planned to conduct registration twice but yet to fix the dates. An official in Garissa informed the team that the funding for the registry department is often limited to administrative costs. However, on election year the government gives a comparatively large sum

of money to facilitate registration. Garissa district for instance, requested for Kshs. 2,000,000 for 2007-2008 financial years but the government granted it approximately 10% of the requisition. According to the officer in the financial year 2008-2009, the registry might receive even far less funding. The situation is further complicated by poor physical infrastructure of the registry in the region. The offices in Garissa and Embu have poor equipment and working facilities.

<sup>126</sup> N 10 above.

<sup>127</sup> FGD interview with respondents in Garissa and Isiolo in March 2008

<sup>128</sup> N 10 above.

<sup>129</sup> As above.

<sup>130</sup> An observation made from a public file at the immigration containing names and letters inviting candidates for the vetting exercise. The study also held discussions with candidates who have undergone vetting at the immigration.

<sup>131</sup> Study interview in Isiolo on 14 March 2008.

<sup>132</sup> The study established that vetting in this region perpetuated ethnic and social discrimination. The local vetting officers use the process to settle score among different clans and sub-clans. Unfortunately, government officials either remain by-standers or active participants.

<sup>133</sup> The Provisions of the Registration of Persons Act were used to implement the screening exercise. The Principal Registrar of Persons then issued a notice in the Kenya Gazette under Legal Notice No.5320 of 10 November 1989 which stated as follows: 'In accordance with section 8 of the Registration of Persons Act, the Principal Registrar requires all persons of the Somali ethnic community resident in Kenya who are of eighteen (18) years and above to attend before registration officers at the centres specified in the second column of the schedule and furnish such documentary or other evidence of the truth of their registration between 13 November 1989 and 4 December 1989'.

<sup>134</sup> MUHURI (1999) *Banditry and the politics of citizenship: The Case of the Galje'el Somali of Tana River*.

<sup>135</sup> FGD with Galjeel elders and victims of cancelled ID cards at Ngumo Primary School in Garsen on November 2006. The discussion focused on what transpired on the cancellation of ID cards, the challenges the community is facing, and their fear and hope for the future. The study team was informed of the following challenges: 1) ethnic discrimination even in relief food allocation and devolved funds; 2) victimization and harassment and 3) social relocation - children from the community have to adapt alternative ethnic identity or acquire a new family. The community also informed the study of its fear of the third generation ID cards. Members showed that they are likely not to have any kind of documentations.

<sup>136</sup> Muslims for Human Rights (MUHURI) *Banditry and Politics of Citizenship* (1999), pg 5.

<sup>137</sup> N 10 above.

<sup>138</sup> See Report of The Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Rodolfo Stavenhagen, during his Mission to Kenya A/HRC/4/32/Add.3 (15 February 2007) 22.

<sup>139</sup> The letter emanated from the Ministry of State for Immigration and Registration of Persons. Ref. No.NRB/CTRC/PC/2<sup>ND</sup> GEN/VOL/

<sup>140</sup> Refugee International (2008) *Kenya: The Registration Process Leaves Minority Groups on the Edge of Statelessness*. RI publications

<sup>141</sup> N 10 above.

<sup>142</sup> FGD in Garissa in March 2008 on acquisition of citizenship documents; the discussion focused on the following on procedures and challenges facing the community: 1) vetting as a problem today and similarity to screening in the past 2) ethnic discrimination in accessing the documents and generally, 3) victimization and harassment when travelling out of the region. The community also informed the study of its hope that the procedure for electing community leaders for the vetting process will change.

<sup>143</sup> Amnesty International (2001) *A Handbook: Using the international Human Rights System to combat racial discrimination*: Amnesty International publication also available on [www.amnesty.org](http://www.amnesty.org)

<sup>144</sup> Amnesty International (n 142 above) 3.

<sup>145</sup> Article 1 of UDHR states: 'All human being are born free and equal in dignity and rights'.

- <sup>146</sup> Y Ghai (2001) *Public participation and minority*.
- <sup>147</sup> N 10 above.
- <sup>148</sup> P David, S John & W Kieron (n 25 above) 165.
- <sup>149</sup> Otieno argues that 'the origin of the idea of citizenship takes us back to ancestral wisdom, to antiquity, the times of Plato and Aristotle' O Nicholas (2002) 'On citizenship' in (ed) W Smokin, AS Kichamu & K Kibwana *Yearning for Democracy: Kenya at The Dawn of A New Century* (2002).
- <sup>150</sup> N 147 above.
- <sup>151</sup> See article by H Julia 'Theory and status: the 'hidden logic' of citizenship?' in *Open Space: A Digest of the Open Society Initiative for Southern Africa*. Johannesburg: OSISA. Vol 2, Issue 2. June 2008. 7-12
- <sup>152</sup> Council of Europe (2002) *Compass: A manual of Human Rights Education with Young People*. Strasbourg: Council of Europe Publishing
- <sup>153</sup> As above.
- <sup>154</sup> As above.
- <sup>155</sup> Ghai (n 145 above).
- <sup>156</sup> The African Charter on Human and People's Rights was adopted by the eighteenth Assembly of Heads of State and Government, in June 1981 in Nairobi, Kenya. Article 2 of the African Charter states that: 'Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status'.
- <sup>157</sup> N 5 above.
- <sup>158</sup> N 5 above.
- <sup>159</sup> See *Dilcia Yean and Violeta Bosico v Dominican Republic* Judgment of September 8, 2005, Inter-American Ct. H.R., (Ser. C) No. 130 (2005). See <http://www1.umn.edu/humanrts/iachr/C/130-ing.html> as at June 2007.
- <sup>160</sup> See 1954 Convention relating to the Status of Stateless Persons which entered into force on 6 June 1960; and 1961 Convention on the Reduction of Statelessness which entered into force on 13 December 1975.
- <sup>161</sup> 212/98 Amnesty International / Zambia (Decided 5 May 1999), in the Twelfth Annual Activity Report of the African Commission on Human and People's Rights, 1998-1999.
- <sup>162</sup> N 113 above.
- <sup>163</sup> GOK (n 96 above) 1.
- <sup>164</sup> Interview with Provincial Education Officers in Garissa on 10 March 2008. The discussion focused on the trends, challenges and hope in education in NEP. The study noted the following: increasing enrolment in primary schools, increasing teachers' transfers, signs of good performance in the region; challenges: retention – high dropout of girls, low transfer from primary to secondary schools; hope: bursary for poor secondary schools, free secondary school education, girl child support from donor groups.
- <sup>165</sup> Study interview with the Provincial Education Officer in Garissa.
- <sup>166</sup> *Ibid.*
- <sup>167</sup> GOK (n 96 above) 12, 15.
- <sup>168</sup> GOK (n 96 above) 13.
- <sup>169</sup> GOK (n 96 above) 12.
- <sup>170</sup> As above.
- <sup>171</sup> FGD with Provincial Medical Officers in Embu and interview with NEP Provincial Medical Officer.
- <sup>172</sup> S Siringi 'Wealth distribution revealed: The richest and poorest regions' *Daily Nation* 19 November 2008.
- <sup>173</sup> Prohibitions against discrimination in the Council of Europe norms are premised on the provisions of Article 14 of the European Convention of Human Rights, which affirms that the rights of the Convention shall be secured 'without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a

national minority, property, birth or other status.' Many leading European nations, including the United Kingdom, France, Germany, and Russia, have failed to sign Protocol 12.

<sup>174</sup> See Kirwan Institute for the Study of Race and Ethnicity, Overview of Structural Racism Research Area, available at <http://www.kirwaninstitute.org/research/structural-racism.php>

<sup>175</sup> See E Bonilla-Silva 'Rethinking racism: Toward a structural interpretation' 62 (3) *Am. Soc. Rev.* 465-74 (1997).

<sup>176</sup> See, e.g., 'Brief of the Caucus for Structural Equity as Amicus Curiae Supporting Respondents', *Parents Involved in Community Schools v. Seattle School District No. 1 et al.*, 285 F.3d 1236 (9<sup>th</sup> Cir. 2002) (Nos. 05-908 and 05-915), 2006 WL 2882691.

<sup>177</sup> RT Ford 'The boundaries of race: Political geography in legal analysis' 107 HARV. L. REV. 1841, 1844 (1994).

<sup>178</sup> Northern Kenya Districts – Turkana, Moyale, Marsabit, Isiolo, Wajir, Mandera, Garissa, Ijara are 100% ASAL, and occupy 62% of total land mass, that is Arid and Semi-Arid part of Kenya. See N 107 above.

<sup>179</sup> N 20 above.

<sup>180</sup> AD King 'Introduction' in King (ed) *Building and society: Essays on the social development of the build environment* (1980) 1 – 33.

<sup>181</sup> Laloo (1998) 'Citizenship and Place: Spatial Definitions of Oppression and Agency in South Africa' in *Africa Today*; July – December 1998; 45, ¾; Research Library pg 439 – 460.

<sup>182</sup> TS Brayan 'Citizenship studies: A general theory' in *Citizenship Studies* 1, No.1 (1997) pg 5-18.

<sup>183</sup> Interview with the Provincial Education Officers among other officers in Garissa on 10 March 2008; the discussion focused on the trends, challenges and hope in education in NEP. The study challenges are: Retention – high dropout of girls, low rates of transition from primary to secondary schools *et cetera*; hope: bursary for poor secondary schools, free secondary schools, girl child support from donor groups.

<sup>184</sup> O Boniface 'Woes of candidates in North Eastern' *East African Standard* 19 November 2008.

<sup>185</sup> The Draft Sessional Paper on Sustainable Development Policy of Arid and Semi Arid Lands notes: 'In 1950, the colonial Government established the African Lands Development Board (ALDEV) to rigorously enforce controls and regulations that helped reduce environmental degradation and damage to the ecological systems. In the early days of independence, the Government introduced Special Rural Development Programmes (SRDPs) of 1968 – 1972 in Mbeere, Kwale, and West Pokot as an Integrated Rural Development Programme in the country. The Kenya Livestock Development Programme of 1969 – 1979 developed several grazing blocks in Northern Kenya and group ranches in Southern rangelands with the aim of transforming pastoralists into commercial ranchers. In 1974, the Government attempted to decentralise the co-ordination of planning and development at the district level to address the rural development needs by creating District Development Offices and strengthening the district as a planning unit. Due to the lessons learnt from the previous attempts, the Government commissioned studies to formulate Integrated Development Programmes and Projects in 1977 mainly in the semi arid districts resulting in the establishment of an ASAL Development Branch as established in the Ministry of Agriculture to co-ordinate implementation of the programmes and projects. In the 1980s, the Government introduced a second generation Integrated ASAL Development and Food Security Programme to address development needs in ASAL areas. The Ministries of Agriculture, Planning and National Development co-ordinated these programmes. In 1983, the Government developed a Policy aimed at strengthening decision making and planning at district level through the introduction of the District Focus for Rural Development. In 1986, the Government produced a Sessional Paper No. 1 on *Economic Management for Renewed Growth*, which acknowledged that ASALs have fragile environments and hence the need to manage ASAL development carefully in order to improve income generation, employment creation, and food self-sufficiency goals.'

<sup>186</sup> N 20 above.

<sup>187</sup> As above.

<sup>188</sup> As above.

- <sup>189</sup> As above.
- <sup>190</sup> As above.
- <sup>191</sup> As above.
- <sup>192</sup> As above.
- <sup>193</sup> This section of the report benefited from an analysis by Ahmed Issack Hassan, Commissioner of the defunct Constitution of Kenya Review Commission on Human Rights Violations in Northern Kenya available at <http://www.commonlii.org/ke/other/KECKRC/2002/index.html> (accessed on December 22, 2006). It also benefited from a memorandum by Womankind to the United Nations Special Rapporteur on Fundamental Rights and Freedoms of Indigenous Populations (November 2006).
- <sup>194</sup> KS Abraham 'Citizenship and minority in Kenya' in *Ethnicity, Human Rights and Constitutionalism in Africa* (2008) 97 – 120.
- <sup>195</sup> As above.
- <sup>196</sup> As above.
- <sup>197</sup> In November 1980, security forces burned down Bulla Karatasi, an entire village in the capital of the NEP, Garissa, after six Government officials were killed. Security forces swept through the village in arbitrary and gruesome retaliation. Hundreds of people died and many were wounded as they tried to flee. Bodies of those killed in what the Government called 'a necessary security measure' were buried early in the morning in a mass grave. Other bodies were said to have been thrown in a river. The massacre reportedly began following revenge killings by a local Kenyan Somali nicknamed 'Madhobe'. He killed six Government officials before being arrested. After the massacre, the local population was rounded up and interrogated. Thousands of Kenyan Somalis were beaten by the security personnel. Three MPs from NEP called for an emergency debate in Parliament, which was dismissed ostensibly because of a parliamentary technicality requiring that at least a statutory minimum of fifteen MPs support the motion. There was otherwise no sign of alarm or sympathy in Parliament; MPs continued to call for 'strict measures' against the Shifta.
- <sup>198</sup> See GG Kariuki (2002) *Illusions of power*. Here, Kariuki seems to cast aspersions at the State's willingness to pursue justice for human rights violations by asking: 'Why does the Government refuse the occasional demands of the people of Northern Kenya for an independent investigation regarding the Wagalla Massacre of February 1984, or similar incidents in Garissa in 1981 as well as others committed in the name of Shifta wars?'
- <sup>199</sup> Human Rights Watch *Kenya: Closing up freedom* (1986) 162.
- <sup>200</sup> Amnesty International's 1984 Report condemning the Wagalla Massacre.
- <sup>201</sup> See "Kenya admits mistakes over 'massacre'", *BBC News*, 18 October 2000.
- <sup>202</sup> As above.
- <sup>203</sup> N 198 above.
- <sup>204</sup> V Broch-Due *Violence and belonging: The quest for identity in post-colonial Africa* (2005) 174 - 175.
- <sup>205</sup> 'Fading images: How province is fighting one-eyed bandit's legacy' *East African Standard*, 9 December 2004
- <sup>206</sup> See Section 91 of the Constitution of Kenya.
- <sup>207</sup> 'The great trek for great road shows people are unhappy' *East African Standard* 12 November 2004
- <sup>208</sup> 'Acting together for Kenya: Agreement on the Principle of Partnership of the Coalition Government' sourced from <http://www.peaceinkenya.net/signed%20deal.pdf>.
- <sup>209</sup> Gazette Notice No. 4473 established a Commission to Inquire into the Post Elections Violence (CIPEV) which concluded its work and submitted its findings on 16 October 2008.
- <sup>210</sup> The Truth, Justice and Reconciliation Commission Bill, 2008 was published on 9 May 2008.
- <sup>211</sup> 'Reconciliation, President, PM address the nation, promise law reform and justice soon' *Nairobi Star* 21 October 2008.
- <sup>212</sup> 'The search for elusive national identity: Panel at SAMOSA Cultural Festival discusses race, tribalism, religion and class, what it means to be Kenyan and whether it matters' *Nairobi Star* 20 November 2008.

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- <sup>213</sup> DCDM and Githongo & Co. *The 2008/09 Balancing Act: Budget Brief*, a presentation to Accounting Associates and Business Partners on fiscal policy in 2008/09 budget.
- <sup>214</sup> As above.
- <sup>215</sup> Interview with Provincial Education Officers in Garissa on 10 March 2008.
- <sup>216</sup> An Account of proceedings of the Pastoralists Parliamentary Group meeting themed: 'Exploring Parliamentary Engagement in Combating Cattle Rustling and Advancing Human Security' held on 6-7 June 2008 in Mombasa, convened by Eastern Africa Police Chiefs Cooperation Organization (EAPCCO), the Institute for Security Studies (ISS) and the Centre for Minority Rights Development (CEMIRIDE).
- <sup>217</sup> Censuses in Kenya take place every 10 years. The last census was conducted in 1999.
- <sup>218</sup> 'Kenya: ID project must be clean' *Daily Nation* (Nairobi) Editorial 13 May 2008 - 'What is puzzling, however, is that the department is investing in speeding up issuance of cards it admits are based on expensive and obsolete technology, while at the same time working on a completely separate project for the so-called third generation IDs'
- <sup>219</sup> Kenya National Civic Education Programme: 'The URAIA: The Resource File'
- <sup>220</sup> Interview with Provincial Education Officers in Garissa on 10 March 2008.

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