THE REPUBLIC OF KENYA

LEGISLATIVE HANDBOOK

on Principles of Equality and Non-Discrimination

NGEC
National Gender and Equality Commission

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on Principles of Equality
and Non-Discrimination

Compiled by the
National Gender and Equality Commission

NATIONAL GENDER AND EQUALITY COMMISSION

In Collaboration with International Development Law Organisation

This publication was generously supported by DANIDA.

Compiled by:
Dr. Kibaya Imaana Laibuta
Advocate of the High Court of Kenya and Legislative Counsel
P. O. Box 6455-00300, Nairobi
Tel: +254 (0)722 521708: Email: laibuta@adrconsultants.law

Published by

National Gender and Equality Commission Headquarters
Solution Tech Place, 1st Flr, Longonot Road,
Upperhill, next to Crowne Plaza Hotel
P.O.BOX 27512-00506, Nairobi, Kenya
Tel +254 2(20)-272-7778/ +254 (20) 3213199
www.ngeckenya.org
Twitter: @NGECKENYA
www.facebook.com/NGECKenya
Toll Free Line: 0800720187
SMS: 20459

Kisumu Office
Reinsurance Plaza, 3rd Floor, Wing B
Oginga Odinga Street

Nakuru Office
Tamoh Plaza, 1st Floor, Kijabe Street
P.O BOX 15263-401, NAKURU

Garissa Office
Opposite Care International Offices,
Garissa Town

Malindi Office
Malindi Complex, off Lamu-Malindi Road
Malindi Town

Kitui Office
Nzambani Park, off Kitui Referral Hospital Road
Kitui Town

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List of Acronyms

AG	Attorney General
AIDS	Acquired Immunodeficiency Syndrome
AU	African Union
BPS	Budget Policy Statement
CAJ	Commission on Administrative Justice
CARB	County Allocation of Revenue Bill
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CERD	Convention on the Elimination of All Forms of Racial Discrimination
CESCR	Convention on Economic, Social and Cultural Rights
CFSP	County Fiscal Strategy Paper
COMESA	Common Market for Eastern and Southern Africa
CRA	Commission for Revenue Allocation
CRC	Convention on the Rights of the Child
CREAW	Centre for Rights Education and Awareness
CRPD	Convention on the Rights of Persons with Disabilities
DoRB	Division of Revenue Bill
EAC	East African Community
ECOSOC	United Nations Economic and Social Council
EAC	East African Community
FGM	Female Genital Mutilation
FIDA	Federation of Women Lawyers
GNP	Gross National Product
GRB	Gender Responsive Budgeting
HIV	Human Immunodeficiency Virus
HRC	Human Rights Committee
ICCPR	International Convention on Civil and Political Rights
ICESCR	International Convention on Economic, Social and Cultural Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
IDLO	International Development Law Organisation
ILO	International Labour Organisation
KENAO	Kenya National Audit Office

KNCHR	Kenya National Commission on Human Rights
MDGs	Millennium Development Goals
MDA	Ministerial Departments and Agencies
MTP	Medium Term Plan
NCIC	National Cohesion and Integration Commission
NCPD	National Council for Persons with Disabilities
NGEC	National Gender and Equality Commission
NPGD	National Policy on Gender and Development
PWDs	Persons with Disabilities
SDGs	Sustainable Development Goals
SGBV	Sexual and Gender Based Violence
SIGs	Special Interest Groups
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organization

Acknowledgements

The Constitution establishes an unequivocal framework of principles for ensuring gender equality and freedom from discrimination of marginalised and disadvantaged groups such as women, minorities and marginalised groups, persons with disabilities, children and youth. Post-promulgation legislation has in many instances attempted to make provisions for enabling these constitutional principles. As an example, many statutes include requirements that members of established institutions shall include both men and women. Yet these statutory initiatives have amounted to token mentions or representations which have failed to pierce the veil of patriarchal (in the case of gender), disableist (in the case of disability), and ageist (in the case of children and older persons) establishments. At other times, these initiatives have made inexact or even inept propositions which have been difficult to implement or which indeed have failed to address substantive inequalities and exclusion.

This handbook clarifies the different roles of legislators at the National Assembly, Senate and County Assemblies in coming up with responsive laws, rules and regulations and policies that address equality and inclusion issues concerning the SIGs. Properly used, the handbook is an invaluable tool for the realisation of gender equality and inclusion of SIGs in mainstream society. To this end, legislators at both levels of government should undertake purposive policy review and development, legislation, and advocate for the formulation and implementation of appropriate programmes and actions. This handbook guides every step of these processes and should comprise the legislators' companion in service delivery in Parliament and County Assemblies, as well as state departments, state and non-state agencies that have a stake in gender equality and inclusive development.

NGEC acknowledges the immense efforts of the consultant, Dr. K. I. Laibuta, in putting together this handbook. His immense expertise in human rights, governance and gender issues and the ability to synthesize complex equality and inclusion concepts into simple language that can

be easily understood by our legislators enhanced the quality of this legislators' resource tool.

We acknowledge NGEC team led by the former Chairperson, Commissioner Winfred Lichuma, Convener of the Legal, Complaints and Investigations department, for offering general guidance in the consultancy; Paul Kuria, Sylvester Mbithi and Daniel Waitere, who worked tirelessly to ensure completion of this handbook and all other NGEC Commissioners and staff for their contribution to this publication. To all other persons whom we have not mentioned by name but made significant contributions to the process of producing this guide, we sincerely thank you for your role in enriching the publication.

Last but not least, the Commission appreciates financial and technical support from the International Development Law Organisation (IDLO) and DANIDA. In particular, the Commission thanks Ms. Kimberly M. Brown who tirelessly followed up on the entire consultancy as well as made valuable input on the content of the handbook.

Sora Katelo
Ag. Commission Secretary/CEO

Foreword

The promulgation of the Constitution on 27th August 2010 ushered in an unprecedented era of civil liberties backed by a robust Bill of Rights containing progressive provisions on economic, social and cultural rights. The transformative Constitution provided the foundational basis for reform in legislation and enhanced institutional frameworks for the respect, promotion and protection of human rights, including the right to equality and freedom from discrimination on the basis of gender and other social status specified in Article 27. These constitutional guarantees opened wide doors for heightened advocacy for the advancement of, among other things, gender equality and far reaching reforms towards gender mainstreaming and the safeguarding of women's rights and the rights of other vulnerable and marginalised groups.

Despite the broad spectrum of constitutional guarantees, which have heightened the legitimate expectations and aspirations of the people of Kenya, the majority are yet to enjoy equal opportunity and inclusion in all spheres of social-cultural, economic and political life. Indeed, Special Interest Groups (SIGs) do not enjoy equal access to fundamental rights and freedoms and remain subject to differential treatment and exclusion in the fields of healthcare, education, employment, economic and social life. Yet they are more than ever before entitled to recognition and equal protection of the law, which is only attainable through sound policy and legislation, administrative procedures and institutional frameworks founded on the core principles of equality and inclusion. To this end, state and non-state agencies have made concerted efforts to facilitate the realisation of human rights for marginalised groups and vulnerable minorities by influencing legislation and institutional reforms to motivate gender equality and inclusive development.

To make these rights real, Article 59 of the Constitution established the Kenya National Human Rights and Equality Commission, which was subsequently restructured into the present-day Kenya National Commission on Human Rights (KNCHR), the National Gender and Equality Commission (NGEC) and the Commission on Administrative Justice (CAJ) to oversee the promotion and protection of human rights and freedoms.

It is on this footing that NGEC, with the technical support of IDLO, for which we are sincerely grateful, commissioned the developing of a handbook for legislators to guide policy and legislation responsive to issues of gender equality and inclusion.

Among other things, the handbook contains a simplified tool suitably designed to guide legislators at the national and county levels in the review of policy and legislation, and in advocating for, and overseeing the formulation and implementation by state and non-state agencies of, appropriate programmes, plans and actions towards full realisation of gender equality and inclusion of SIGs in mainstream society in accord with the universal standards that form part of the law of Kenya under and by virtue of Article 2(5) and (6) of the Constitution.

Commisioner Dr. Florence Nyokabi Wachira, MBS
Ag. Chairperson NGEC

Executive Summary

The preamble to the Constitution of Kenya, 2010 lists equality as one of the six essential values upon which good governance is based. However, the robust constitutional guarantees of equality and non-discrimination would count for little in the absence of apposite policy and legislation. This handbook provides legislators with timely guidelines for (a) appropriate reforms in policy and legislation; (b) a framework for effective implementation; and (c) periodic review. Only then can Kenya hope to discharge her international obligations to facilitate the realisation of equality, non-discrimination and inclusion by SIGs.

The universal standards of gender equality and inclusion of SIGs in Kenya's mainstream society are anchored in the country's constitutional order under and by virtue of Article 2(5) and (6) of the Constitution. This article imports and applies (a) the general rules of international law; and (b) treaties and conventions ratified by Kenya, as part of the law of Kenya. It is in this context that the handbook is informed by, and seeks to conform to, the international standards set out in various instruments.

The first three chapters of the handbook are conceptual. They comprise the first, which outlines our understanding of the principles of gender equality, equity and inclusion. This part demystifies the concepts of gender mainstreaming and inclusive development. The second chapter deals with international and regional standards for gender equality and inclusion, while chapter three addresses constitutional and legal frameworks for gender equality and inclusion of SIGs in mainstream society.

The second part is concerned with the general and specific roles of legislators at both levels of government and the legislative process. The third and final part focuses on the measures required to be undertaken by legislators for the realisation of gender equality and inclusion of SIGs in social-cultural, economic and political life. In particular, chapter seven guides legislators in influencing and facilitating the design and

implementation of programmes, plans and actions for inclusion of SIGs in mainstream society.

The common thread that runs through this handbook is that policy and legislation count for little unless they are purposive and suitably designed to achieve specific objectives. It is necessary, therefore, to ensure that periodic review of policy and legislation is undertaken to determine whether the intended universal standards of gender equality and inclusion of SIGs have been, or are being, achieved towards full implementation of the Constitution.

Introduction

The promulgation of the Kenya Constitution 2010 makes pressing demands for review and reform of the legal and policy frameworks for inclusion of special interest groups (SIGs) in mainstream society. The SIGs include women, persons with disabilities, children, youth, elderly, minority and marginalized groups and communities, all of whom have for decades clamored for inclusion in Kenya's social-economic, cultural and political life. Guided by the proposed handbook, the legislators will facilitate the formulation and enactment of statute law and subsidiary legislation characterized by the twin principles of equality and inclusion to the ends of improved legal framework and effective use of legal resources in Kenya's development agenda in which her citizenry (including SIGs) has a stake on an equal basis with others.

In the spirit of equality and inclusive development, Article 27 of the Constitution and the National Gender and Equality Commission Act, 2011 mandate NGEC to promote gender equality and freedom from discrimination for all Kenyans. In discharge of its constitutional mandate, the commission is empowered to monitor, facilitate and advise both state and non-state agencies on the integration of the principles of equality and freedom from discrimination in the policy and legal frameworks at the national and county levels.

In addition to its statutory obligation, the Commission is the principal state organ responsible for ensuring compliance by the State with, and discharge of all treaty obligations imposed by, various international instruments ratified by Kenya on matters relating to equality and freedom from discrimination of women and other special interest groups. To this end, the Commission coordinates and facilitates the mainstreaming of issues of SIGs and investigates, either on its own initiative or on the basis of complaints, any matter in respect of any violations of the principle of equality and freedom from discrimination. In this regard, the Commission undertakes periodic audits and regularly reports on the status and progress made by the State towards mainstreaming issues of special interest populations.

NGEC is also mandated to ensure that both public and private sector institutions comply with the constitutional provisions relating to equality and non-discrimination. In discharge of this mandate, the Commission recently collaborated with the Ministry of Devolution and Planning to develop a reporting template and Guidebook, which are designed to guide the public sector in the realization of these constitutional standards. It is noteworthy, though, that the nature of these standards and the process by which they are to be realized in the private sector are not fully understood. Hence the initiative by the Commission and its development partners to provide technical support to, facilitate and guide, both state and non-state agencies towards the full realization of these standards.

The proposed Legislators Handbook is suitably designed to guide reforms in policy and legislation so as to meet the international standards for inclusion and guide the discharge of Kenya's legal obligations (a) in the context of the general rules of international law, treaties and conventions ratified by Kenya (such as the UN Conventions and AU Treaty Instruments); and (b) in the backdrop of the constitutional right to freedom from discrimination (as guaranteed by Article 27) to the ends of human dignity (as guaranteed by Article 28), besides the various legislative instruments on inclusion and anti-discrimination. This will, in turn, contribute to the establishment, progressive development and application in Kenya of good governance and the rule of law in the context of gender equality and inclusion of SIGs. Only then will the transformative 2010 Constitution and the appurtenant legislative and institutional reforms find meaning in the lives of ordinary Kenyans, whose high expectations would otherwise be a distant dream.

With regard to legislation, the handbook guides reform in law to ensure harmony in the relevant statutory provisions and the Constitution. It constitutes invaluable technical assistance to legislators at the national and county levels. In addition, the handbook provides an effective guide to the implementation of the anticipated reformed policy and legislation. To this end, it is suitably designed to (a) identify the respective duty bearers; and (b) specify their respective roles in (i) the formulation and implementation of policies, programmes, plans and actions, to facilitate the realization by SIGs of equality and inclusion; (ii) legislation; and (iii) enforcement of substantive law and administrative procedures with

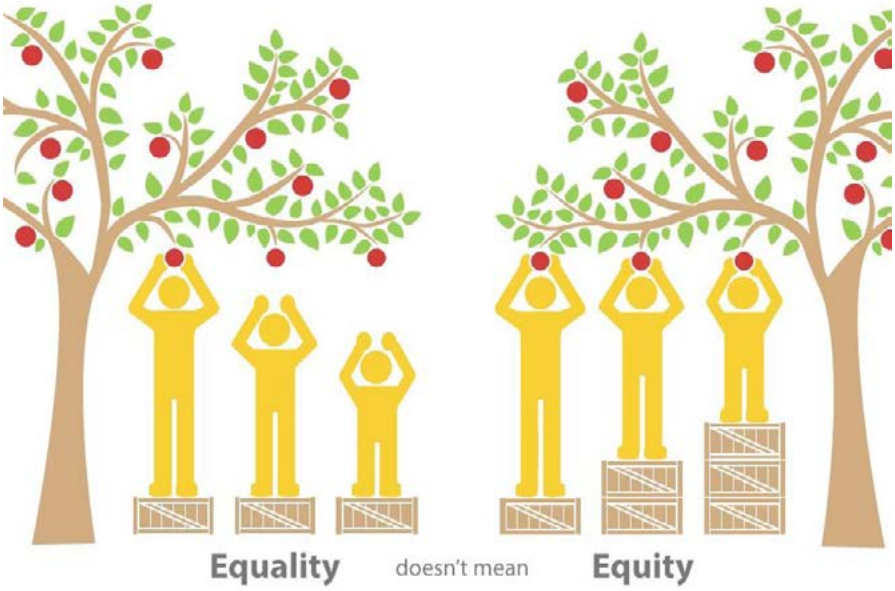
a view to making equality and the right to inclusion real, backed by an effective framework of access to justice and effective remedies.

The primary objective of this handbook is to effectively aid legislators at both levels of government to proactively influence and facilitate reforms in policy and legislation to counter the incessant growth in inequality and exclusion of minority, marginalized and vulnerable groups, such as women and girls, youth, elderly, persons with disabilities, indigenous peoples, refugees and migrants. Indeed, gender equality, equity and inclusion of SIGs would guarantee a reasonable measure of participation in decision-making by SIGs, to whom the Government and all state organs are accountable in equal measure. In the end, the citizenry will have confidence in the State, which will in turn enjoy investor confidence and economic development. We need not over emphasise the need for Kenya to empower her SIGs and strengthen her legal and institutional frameworks to the ends of peace and sustainable development, a key objective in the formulation of this handbook.

PART I

Chapter One

1.0 Understanding the Principles of Gender Equality, Equity and Inclusion



1.1 The Concept of Gender

The development of appropriate policy and legislation, and the formulation and implementation of gender-sensitive programmes, plans and actions, depends on the clarity of our understanding of the concept of gender. We need to understand the concept of gender as a cross-cutting socio-cultural variable. It is an overarching variable in the

sense that gender can also be applied with reference to all other cross-cutting variables, such as race, class, age and ethnicity. In other words, the concept of gender is at play in relation to any of these social variables and contexts. It is in this sense that we refer to "an old man or woman", "a young girl or boy" or "an African woman or man").

Gender systems are established in different socio-cultural contexts which determine what is expected, allowed and valued in a woman/man and girl/boy in these specific contexts. Gender roles are learned and assumed through processes of socialization. These roles are not fixed, but are interchangeable. Gender systems are institutionalized through education systems, political and economic systems, legislation, culture and traditions. In utilizing a gender-responsive approach, the focus should not be on individual women and men, but on the system which determines gender roles / responsibilities, access to and control over resources, and decision-making potentials.[1]

In principle, legislators stand on a platform of advantage in influencing the direction of policy and legislation that in turn guides decision-making on matters relating to the assignment of gender roles and access to, and control over, resources. In effect, they have the opportunity to influence change and correct the age-old social-cultural systems that have contributed to institutionalized gender inequality and exclusion to the prejudice of SIGs. In this regard, legislators at the national and county levels should at all times maintain a scorecard and take stock of the extent to which:

(a) the social model of gender roles in our local communities affects the fundamental rights and freedoms of SIGs;
(b) the society can lay legitimate claims on gender equality and inclusion of SIGs in mainstream society;
(c) both gender have equal opportunity to access and exercise effective control over social-economic resources;
(d) SIGs enjoy equitable representation in decision-making, policy development and legislative processes;
(e) gender equality and inclusion guides policy development, legislation and economic planning; and

1 Office of the Special Advisor on Gender Issues and the Advancement of Women, United Nations 'Important Concepts Underlying Gender Mainstreaming' August, 2001 available at http://www.un.org/womenwatch/osagi/pdf/factsheet2.pdf (last accessed on 28th June, 2017)

(f) the extent to which policy and legislation in Kenya conforms to the universal standards of gender equality, non-discrimination and inclusion of SIGs in all spheres of social-cultural, economic and political life.

In doing so, it is imperative to bear in mind that the concept of gender is not synonymous to, or interchangeable with, women. Indeed, the term gender refers to both women and men. Gender has a bearing on the resulting relational factors that influence the way we treat one or the other when determining the design of our policy, legislative and institutional frameworks. For this reason, all programmes, plans and actions designed to facilitate the promotion of gender equality and inclusive development should concern itself with and actively engage men as well as women.

In recent years, there has been a much stronger and direct focus on men in research on gender perspectives with three main approaches taken in the increased focus on men, namely:

(a) the need to identify men as allies for gender equality and involve them more actively in these initiatives;
(b) the recognition that gender equality is not attainable unless there is attitudinal and behaviour change among men in many areas, such as in matters relating to reproductive rights and health, education, vocational training and labour relations; and
(c) the recognition of the fact that the prevailing gender systems in many contexts, and the traditional assignment of gender roles, prejudicially affect the interests of both men and women, which (i) creates unrealistic demands on men; and (ii) requires men to behave in narrowly defined ways.

To address these emerging issues, a considerable number of research initiatives are being undertaken by both women and men on issues of male identities and masculinity. The increased focus on men will invariably have significant impact on future strategies for working with gender perspectives in inclusive development. Back to our scorecard, legislators need to continually appraise themselves with recent developments in gender perspectives and the dynamic nature of the social constructs of gender that have a direct impact on social development.

1.2 The Principle of Gender Equality

Simply put, "[g]ender equality requires equal enjoyment by women and men of socially valued goods, opportunities, resources and rewards". In contrast, "[g]ender equity is the process of being fair to women and men".[2]

Compared to the less affirmative concept of gender equity (which is a process towards equality), "gender equality" is the preferred terminology within the United Nations. Notably, gender equity denotes an element of interpretation of social justice, usually based on tradition, custom, religion or culture, which is often applied to the detriment of women. For this reason, the use of the term "equity" in relation to gender issues and the advancement of women in society is unacceptable. This explains why, during the 1995 Beijing Conference, it was agreed that the more progressive term "equality" be used. This calls to question the extent to which legislators ensure that the term "gender equality" features prominently in relevant policy and legislation in relation to inclusive development programmes that directly impact on women and men on the basis of gender.[3]

Our interpretation of "equality" influences the way we think and act in the design of our social-cultural, economic and political agenda. It should be borne in mind that the concept of gender equality means that the basic rights, responsibilities and opportunities of individual women and men do not depend on whether they are born male or female. However, the term "equality" does not mean "the same as". In other words, our promotion of gender equality does not suggest that women and men will become the same. In principle, equality between women and men has both a quantitative and qualitative component. The quantitative component refers to the desire to achieve equitable representation of women, i.e. increasing balance and parity, while the quantitative component refers to achieving equitable influence on establishing development priorities and outcomes for both women and men.[4]

2 United Nations Fund for Population Activities "Difference Between Gender Equality and Gender Equity" Available at www.unfpa.org/#2 (last accessed on 24th November, 2017).

3 Office of the Special Advisor on Gender Issues and the Advancement of Women, United Nations 'Important Concepts Underlying Gender Mainstreaming' August, 2001 available at http://www.un.org/womenwatch/osagi/pdf/factsheet2.pdf (last accessed on 28th June, 2017)

4 ibid

In practice, the principle of equality dictates that policy makers, legislators and the executive ensure that the perceptions, interests, needs and priorities of women and men (which are divergent due to the differing roles and responsibilities of women and men in society) will be given equal weight in planning and decision-making. Accordingly, the concept of gender equality guides state and non-state agencies in determining the integrity of social structures that guarantee equality of opportunity for both women and men and the inclusion of SIGs in the development agenda.

The rationale for promoting gender equality is twofold, namely, that

(a) equality between women and men (i.e. equal rights, opportunities and responsibilities) is a matter of human rights and social justice; and

(b) greater equality between women and men is also a precondition for (and effective indicator of) sustainable people-centered development.

This means that the perceptions, interests, needs and priorities of both women and men must be taken into consideration not only as a matter of social justice, but because they are necessary to enrich the processes of social-economic and political development.

Simply put, equality is about creating a fairer society where everyone can participate and has the same opportunity to fulfill their potential. Equality is backed by, among other things, policy and legislation suitably designed to address unfair discrimination based on membership of a particular protected group. To this end, Article 27(6) of the Constitution mandates the State to "… take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination". Only then can the State give full effect to the realization of the guaranteed right to equality and freedom from discrimination. The foregoing image illustrates the need for appropriate intervention in policy, legislation and administrative procedures to guarantee equality of opportunity (i.e. a platform of equality) for SIGs in all spheres of social-cultural, economic and political life. This in turn guarantees equal access to and control over resources.

Article 27(1) provides that "[e]very person is equal before the law and has the right to equal protection and equal benefit of the law". Sub-article (2) explains the meaning of "equality", i.e. "… the full and equal enjoyment of all rights and fundamental freedoms". Accordingly, "[w] women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres" under and by virtue of sub-article (3). The right to equality and freedom from discrimination are more comprehensively discussed in Chapter Two.

Discrimination on the basis of gender has been defined as "… any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."
Every legislator must consciously reflect on the concept of gender equality and address the following issues:

(a) To what extent do the extant policy, legislation, administrative procedures and institutional frameworks demonstrate equality of opportunity for both women and men?
(b) Do women and men have access to and control over resources on a platform of equality?
(c) What intervention measures, including affirmative action, need to be taken to address any inequality or discriminatory practices, whether real or perceived?
(d) While policy and legislation may not contain any discriminatory provisions, is their implementation likely to produce outcomes that place any of the SIGs in a position of disadvantage?
(e) What are special interest groups advocating for, and what intervention measures need to be employed to address their concerns?

These and many other questions must continually keep legislators alive to the special needs of SIGs, which are more often than not sacrificed on the altar of democracy, demographic imperatives and fairness, leaving little room for the much-needed affirmative action.

In addition to the foregoing, legislators at both levels of government must seek to apply the twin principles of equality and inclusion guided by the concept of proportionality. The notion of proportionality requires them to focus on the demographic trends, i.e. the actual numbers of men, women, youth, aged and other vulnerable and minority groups in their communities. In other words, realistic policy and legislative interventions are best informed by the actual numbers of those population groups that are intended to benefit from, or are directly or indirectly affected by such policies and the ensuing programmes, plans and actions. It becomes necessary, therefore, for legislators to pay keen attention to disaggregated statistical data on all population groups in their bid to influence reforms in policy, policy development and legislation.

As is the case with all national institutions, political parties have an obligation to implement the national policy and legislation on gender equality, non-discrimination and inclusion of SIGs. Accordingly, they are bound to accord equal opportunity to women, persons with disabilities and other minority and marginalized groups in their governance and political activity. Registered political parties must demonstrate regional and ethnic diversity, gender balance and representation of minorities and marginalised groups in their rank and file in accordance with the Constitution and the Political Parties Act, 2011.

In discharge of this constitutional obligation, political parties are obligated to institute appropriate programmes to encourage inclusion and participation of SIGs in their political activity. To ensure gender equity and inclusion, the parties are required to implement administrative procedures to facilitate the allocation of Special Seats in Parliament and County Assemblies in accordance with Article 177 (1) (b) of the Constitution, which mandates the Independent Electoral and Boundaries Commission (IEBC) to draw such number of special seat members in the order given by each party, necessary to ensure gender equity and inclusion.

It is for this reason that section 7 of the 2011 Act requires, as a condition for registration, that every political party is comprised of members whose composition respects regional and ethnic diversity, gender balance and representation of minorities and marginalised groups. In any event, not

more than two-thirds of the members of its governing body shall be of the same gender.

(a) Policy, legislation, administrative procedures and institutional frameworks must demonstrate equality of opportunity for both women and men.

(b) They must have access to and control over social-economic, cultural and political resources on equal basis.

(c) Policy and legislation must be suitably designed to support programmes and actions for the elimination of discrimination and differential treatment of women, men and special interest groups.

(d) The implementation of policy and legislation must not place SIGs to a position of disadvantage even though they are by no means discriminatory.

(e) All intervention measures must be suitably designed to address the concerns and special needs of SIGs.

(f) The principles of equality, non-discrimination, social inclusion of SIGs and proportionality must be effectively applied to guarantee equality of opportunity for all.

(g) It is real numbers in population groups that inform effective planning and successful programing.

1.3 The Concept of Gender Equity

The principle of equity is based on the concept of "fairness" between different (albeit unequal) groups. In certain circumstances, fairness can be attained through positive discrimination. An example of positive discrimination is where affirmative action measures are taken with the aim of promoting the representation of one group relative to

another. For instance, Parliament may approve a disproportionately high budgetary allocation for health services or educational facilities for the benefit of, and to improve the welfare of, a marginalized rural community. However, it must be shown that such a community had not enjoyed equal access to health or educational facilities for a long time in comparison to communities in close proximity to cities and urban areas in which such services are enjoyed in abundance. Alternatively, fairness can be expressed in investment in the provision of special equipment to facilitate the needs of one group relative to another. Notably, the more compelling concept of "equality" is preferable to the notion of "equity." This is much the same way as parity should override fairness in the distribution of social goods and services.

1.4 Gender Mainstreaming and Inclusive Development

1.4.1 What is Gender Mainstreaming?

Gender mainstreaming is one of the most effective strategies for the attainment of gender equality and inclusive development. But what is meant by gender mainstreaming? The ECOSOC Agreed Conclusions 1997/2 provided a clear definition of the mainstreaming strategy as:

"... the process of assessing the implications for women and men of any planned action, including legislation, policies or programmes, in all areas and at all levels. It is a strategy for making women's as well as men's concerns and experiences an integral dimension of the design, implementation, monitoring and evaluation of policies and programmes in all political, economic and societal spheres so that women and men benefit equally and inequality is not perpetuated. The ultimate goal is to achieve gender equality."[5]

5 Office of the Special Advisor on Gender Issues and Advancement of Women 'Gender Mainstreaming: Strategy for Promoting Gender Equality' August 2001 available at http://www.un-.org/womenwatch/osagi/pdf/factsheet1.pdf (last accessed on 28th June, 2017)

To facilitate effective gender mainstreaming, legislators must ask themselves the following questions:

(a) What implications will the proposed (or extant) policy and legislation have on the needs and interests of women and men in all spheres of social life?

(b) Do (or will) the programmes, plans and actions founded on such policies and legislation address the various issues with which women and men are faced in all spheres of social life?

(c) Does the proposed policy and legislation aim to address the concerns, needs and interests of both women and men, and to eliminate differential treatment on the basis of gender?

(d) When properly evaluated, do such policies, legislation, programmes, plans and actions, uphold the principle of gender equality and inclusive development of SIGs?

(e) What measures of intervention should be undertaken to address any gaps in the realization of gender equality and inclusive development while addressing the target issues?

Caution! It should be borne in mind, though, that the mainstreaming strategy is utilized in situations where the principal objective is not merely the promotion of gender equality, but the promotion of other goals, such as poverty elimination, environmentally sustainable development, health development, peace support operations or economic development. In effect, gender mainstreaming involves taking up gender equality perspectives as relevant in analysis, data collection and other activities to ensure that all processes take into account the contributions, priorities and needs of women and men in the entire population group. Accordingly,

the ultimate goal of gender equality needs to be mainstreamed into research, analysis, policy development as well as operational activities.

The Platform for Action (Beijing Conference, 1995) clarified the process and observed that gender analysis is the first essential step in the mainstreaming strategy. This means that before any decisions are taken in any area of societal development, analysis should be made of the current responsibilities and contributions of both women and men and the potential impact of planned processes and activities on women and men respectively. However, gender mainstreaming does not replace the need for targeted, women-specific policies and programmes or positive legislation. Gender mainstreaming and the empowerment of women are complementary strategies. The mainstreaming strategy should always be implemented in a manner which facilitates the empowerment of women.

The mainstreaming strategy does not mean that targeted activities to support women are no longer necessary. For example, such activities specifically target women's needs and priorities through legislation, policy development, research and projects or programmes on the ground. Women-specific projects continue to play an important role in promoting gender equality. They are still needed because gender equality has not yet been attained. Moreover, gender mainstreaming processes are not well developed. Accordingly, targeted initiatives focusing specifically on women or the promotion of gender equality are important for reducing existing disparities. They serve as a catalyst for promotion of gender equality and for creating a constituency for changing the mainstream. In effect, women-specific initiatives can create an empowering space for women and act as an important incubator for ideas and strategies than can be transferred to mainstream interventions.

In addition, initiatives focused on men lend support to the promotion of gender equality by developing male allies. It is crucial to understand that these two strategies – gender mainstreaming and women's empowerment – are in no way in competition with each other. The endorsement of gender mainstreaming within an organization does not imply that targeted activities are no longer needed. The two strategies are complementary in a very real sense as gender mainstreaming must be carried out in a manner which is empowering for women.

It must be noted, though, that gender mainstreaming does not replace special policies designed to promote gender equality and inclusive development. It should be viewed as a tool whose application is made easier by the existence of special policies and programmes suitably designed to achieve the desired goals. It must be further noted that gender mainstreaming and social inclusion find meaning in implementation. Indeed, we can legislate all we want, but implementation is key. It is implementation that makes the right to equality and inclusive development of SIGs real.

1.4.2 The Mandate of Gender Mainstreaming

Questions may arise as to the origin of the mandate for gender mainstreaming. The mandate on the mainstreaming strategy arose from the Platform for Action (Beijing, 1995) where mainstreaming was established as the main global strategy for promoting gender equality, which is required in all critical areas of concern for women and men. Similarly, the ECOSOC Agreed Conclusions 1997/2 also established some basic overall principles of mainstreaming. It was recommended that initial definitions of issues/problems across all areas of activity should always be done in such a manner that gender differences and disparities are easily identified. On the other hand, assumptions that issues/problems are neutral from a gender perspective should never be made. In effect, gender analysis should always be carried out. Concerted effort should be made to broaden women's equitable participation at all levels of decision-making, and in all areas of societal development.[6]

1.4.3 How to Realise Gender Mainstreaming

Having understood the concept and mandate of gender mainstreaming, it is important to appreciate how it is realised. The first step required is an assessment of the linkages between gender equality and the specific issue or sector being addressed, that is, to identify the gender implications of working on, for example, environment, poverty elimination, health development and all other areas of development. This involves understanding why promotion of gender equality is important for securing human rights/social justice for both women and

6 Office of the Special Advisor on Gender Issues and the Advancement of Women, United Nations 'The Development of the Gender Mainstreaming Strategy' August 2001http://www.un-.org/womenwatch/osagi/pdf/factsheet3.pdf (last accessed on 27th June, 2017)

men, as well as for the achievement of the targeted development goals.[7]

Next, the opportunities for introducing gender perspectives need to be identified in the specific tasks being undertaken. These opportunities or entry-points can be found in research and analysis, policy development, use of statistics, training events and workshops/conferences, as well as in planning and implementing projects and programmes.[8]

Finally, an approach or methodology has to be identified for successfully incorporating gender perspectives into these work tasks in a manner which facilitates influencing goals, strategies, resource allocation and outcomes. For example, this could include paying attention to gender perspectives and the goal of gender equality in relation to terms of employment or job descriptions. Likewise, gender mainstreaming may be supported by institutional development by developing guidelines, utilizing gender specialists and providing competence development for all personnel.[9]

Attention must be focused on the following, among other questions with which legislators must be constantly concerned:

7 Office of the Special Advisor on Gender Issues and the Advancement of Women, United Nations 'The Development of the Gender Mainstreaming Strategy' August 2001http://www.un-.org/womenwatch/osagi/pdf/factsheet3.pdf (last accessed on 27th June, 2017)

8 ibid

9 Office of the Special Advisor on Gender Issues and the Advancement of Women, United Nations 'The Development of the Gender Mainstreaming Strategy' August 2001http://www.un-.org/womenwatch/osagi/pdf/factsheet3.pdf (last accessed on 27th June, 2017)

Principles of integrating gender

(a) Are women and men engaged as active participants in the process of policy development on an equal basis, or do opinion leaders and political representatives assume the role of arbitrary decision-makers on their behalf?

(b) What is the form and degree of public participation in the legislative process, and are women and men engaged on an equal basis?

(c) Do legislators effectively consult women and men with a view of ascertaining their specific needs and interests in the development agenda?

(d) To what extent do legislators address the real issues facing women and men in determining the structure of budgetary allocations for programmes, plans and actions designed to implement government policies and breathe life to legislation?

(e) To what extent can legislators lay claim to gender mainstreaming and gender equality in the process of policy development and legislation?

(f) In answer to the foregoing questions, what gaps exist, and how can they be addressed?

1.5 The Concept of Inclusion and Inclusive Development

1.5.1 Understanding Inclusion

The principle of inclusion requires (a) the taking of positive steps and continually striving to meet the diverse needs of different population groups; and (b) taking deliberate action to create environments where everyone feels respected and able to achieve their full potential. Inclusion is the complete acceptance and integration of all regardless of their diversity or backgrounds, which proactively leads to a sense of belonging,

engagement and full participation within society. In effect, inclusion goes beyond participatory democracy and creates a platform of equality that enables every person access and exercise control over the resources that fall to be distributed on the basis of equality of opportunity.

An inclusive society is one that is conscious of the need to continually:

(a) take decisive policy and legislative steps to meet the needs of all its members without distinction on the basis of any of the grounds specified in Article 27 of the Constitution;

(b) formulate and implement appropriate programmes, plans and actions suitably designed to create and maintain an environment in which its members feel respected and able to achieve their full potential; and

(c) create and maintain an environment in which its members, including SIGs, are fully accepted and integrated into mainstream society regardless of their diversity which is otherwise likely to prejudicially expose them to the risk of marginalization and differential treatment.

As discussed in section 1.4 with reference to gender mainstreaming, inclusion of SIGs, including persons with disabilities, youth, aged, vulnerable and minority groups, may be attained through mainstreaming strategies. Disability mainstreaming refers to the assessment of the implications for PWDs of any planned action, including legislation, policies or programmes, in any area and at all levels. It is a strategy for making the concerns and experiences of PWDs an integral part of the design, implementation, monitoring and evaluation of policies and programmes in all political, economic and societal spheres. Disability mainstreaming results in (a) benefits and equal opportunities for PWDs; and (b) elimination of perpetual inequality on the basis of disability. The same approach applies to social inclusion of the youth, aged, vulnerable and minority groups.

Inclusion of SIGs guarantees diversity in a society. Diversity comprises of a mosaic of people from all walks of life, who bring a variety of backgrounds, styles, perspectives, values and beliefs as assets to all

those with whom they interact. In effect, the principle of inclusion and the derivative concept of diversity are essential ingredients of inclusive development. The question to ask is how inclusive our society is, and what can be done to enhance inclusion of SIGs in mainstream society to guarantee equality and inclusive development.

1.5.2 The Adverse Effect of Social Exclusion

Social exclusion invariably leads to marginalisation with the detrimental effect of eroding the very social fabric that characterizes the integrity of a nation. In addition, social exclusion leads to subordination of one section of the society to another as that other exercises economic, social and political dominance. The affected groups are usually socially illiterate, uneducated and reliant on others. They are usually poor and lack basic necessities of life, including access to basic healthcare, social services and amenities. Marginalised groups include the poor, working children, victims of gender inequality, persons with disabilities and those that share a minority language. They constitute the special interest groups to which special attention must be paid in the process of policy development and legislation, all of which must be suitably designed to address their special needs.

It must be noted that social exclusion and marginalisation have a detrimental effect on the individual, the population group with which the individual is identified, entire households and the nation as a whole. Social exclusion and marginalisation provide a rich recipe for civil strife and, in extreme cases, armed conflict. Indeed, the integrity and stability of a nation depends on the extent to which the State upholds and facilitates the realisation of the fundamental rights of its most vulnerable, marginalised and disadvantaged groups and communities. Understanding the nature, identity and special needs of these groups equips legislators at both levels of government with relevant information that enables them to take appropriate reform measures towards effective intervention through policy and legislation.

The term "marginalised groups" refer to a group of people who, because of laws or practices before, on, or after the effective date (i.e. the date on which the Constitution came into effect), were or are disadvantaged by discrimination. The Constitution defines a "marginalised community" as:

(a) a community that, because of its relatively small population or for any other reason, has been unable to fully participate (in the social, cultural, economic or political life);
(b) a traditional community that, out of a need or desire to preserve its unique culture and identity from assimilation, has remained outside mainstream society;
(c) an indigenous community that has retained and maintained a traditional lifestyle and livelihood based on a hunter or gatherer economy; or
(d) pastoral persons and communities, whether they are (i) nomadic; or (ii) a settled community that, because of its relative geographic isolation, has experienced only marginal participation in the integrated social and economic life of Kenya as a whole.

A marginalised community may be described as a group which is confined to the lower or peripheral edge of the society. Marginalised groups have been described as "… groups of people that have traditionally been explicitly or implicitly treated as insignificant or peripheral (e.g. women, sexual minorities, particular ethnic communities, etc."[10] Such a group is denied meaningful involvement in mainstream economic, political, cultural and social activities. Consequently, marginalisation or social exclusion deprives a group or community of its rightful share of access to productive resources and of the ways in which it may utilise its maximum potential for prosperity. Marginalisation is directed at groups that are considered as indifferent to what is popularly perceived as the social norms.

Marginalisation invariably affects a community at the macro-level. Its members may lack access to affordable formal education, equal employment or gender-related opportunities. At this level, the victims are denied influence or access to the official power structure, and cannot participate in decision-making processes. At the micro-level, exclusion is manifested in income discrepancies, occupational status and social networking around race, religion or gender.

10 The Kenya National Commission on Human Rights "Guidelines for a Human Rights-Based Approach to Public Policy and Law Making at the National and County Levels" (Report) 2017.

Chapter Two

2.0 International Obligations Relating to Gender Equality and Inclusion

Sustainable Development Goals

2.1 Introduction

The preamble to the Constitution lists equality as one of the six essential values upon which good governance is based. However, the robust constitutional guarantees of equality and non-discrimination would count for little in the absence of appropriate policy and legislation. This handbook, therefore, provides timely guidelines for (a) the necessary reforms in policy and legislation; (b) a framework for effective implementation; and (c) periodic review and intervention. Only then can Kenya hope to discharge her international obligations to facilitate the realisation by SIGs of equality, non-discrimination and inclusion.

Kenya is a member of the community of nations. As a member of the UN, Kenya is obligated to aspire to the universal standards of equality and non-discrimination, gender equality and social inclusion of SIGs. Accordingly, both Houses of Parliament and County Assemblies should

be guided by the international instruments to which this chapter relates. The realisation of these standards should be a source of pride for Kenya, a country that has taken the lead in making commendable representations at the UN bodies at which the decisions leading to these treaty instruments are made. Moreover, these form part of the law of Kenya by virtue of Article 2(5) and (6) of the Constitution.

The universal standards of gender equality and inclusion of SIGs in Kenya's mainstream society are anchored in the country's constitutional order under and by virtue of Article 2(5) and (6) of the Constitution. This article imports and applies (a) the general rules of international law; and (b) treaties and conventions ratified by Kenya, as part of the law of Kenya. It is in this context that the handbook is informed by, and seeks to conform to, the international obligations set out in various international and regional instruments.

When guiding policy development and legislation, Houses of Parliament and County Assemblies are mandated to constantly seek to ascertain the extent to which policy, statute law and administrative procedures that regulate private and public institutions conform to the international and regional standards for gender equality, gender mainstreaming and inclusion of SIGs in all spheres of social, cultural, economic and political life. In addition, the legislative bodies are obligated to undertake periodic review and (a) hold state organs and non-state agencies to account on that score; and (b) take appropriate legislative measures to counter any form of discrimination and social exclusion. Moreover, Parliament and County Assemblies are accountable to their electorate to create conducive environment for the realisation of the right to gender equality, freedom from discrimination and social inclusion, principles to which social-economic and political development programmes must conform.

Under the 2010 Constitution, international treaties and obligations take immediate effect and require implementation without need for corresponding domestic legislation. According to Article 2(6) of the Constitution, any treaty or convention duly ratified by Kenya "… form part of the law of Kenya". In effect, international and regional instruments that guarantee social inclusion, equality and freedom from discrimination are directly enforceable as they form part of the law of Kenya.

2.2 UN Treaties, Conventions and Declarations

Kenya is party to seven of the eight UN human rights treaties which expressly provide protection from discrimination. Accordingly, legislators are obligated to ensure that domestic law provides clarity on both substance and procedure for the realisation by all persons of these rights and freedoms. Below is a summary of the standards of equality and non-discrimination set out in various UN human rights instruments to which Kenya subscribes.

Article 2 of the 1948 Universal Declaration of Human Rights provides that "everyone is entitled to all the rights and freedoms set forth in this Declaration without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status". These rights include (a) the right to recognition everywhere as a person before the law (Article 6); and (b) the right to equality before the law, and equal entitlement without any discrimination to protection of the law (Article 7). In effect, this instrument puts women, men, minority and vulnerable groups on an equal footing.

Likewise, Article 3 of the 1976 International Covenant on Economic, Social and Cultural Rights requires State Parties to "… ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the … Covenant", unless limited by law pursuant to Article 4. However, such limitation must meet the standards for limitation prescribed in Article 24 of the Constitution.

The relevant rights to which the 1976 Covenant relates, and to which legislators should pay due attention to, include:

(a) the right to work and to enjoyment of just and favourable conditions of work (articles 6 and 7);
(b) the right to social security (Article 9);
(c) the right to adequate standards of living (Article 11);
(d) the right to enjoy the highest attainable standards of physical and mental health (Article 12); and
(e) the right to education (Article 13).

Article 3 of the 1976 International Covenant on Civil and Political Rights expresses the undertaking by State Parties "… to ensure the equal right to men and women to the enjoyment of all civil and political rights set forth in the … Covenant" including (a) the right to dignity (Article 10); (b) the right to equality before the law and equal protection of the law (Article 26), and the right to equality before courts and tribunals (Article 14); (c) the right to recognition everywhere as a person before the law (Article 16); (d) the right to equal opportunity (Article 25); and (e) the rights of minorities (Article 27).

The comprehensive provisions of articles 2 and 3 of the 1981 Convention on the Elimination of All Forms of Discrimination Against Women provides instructive guidelines to policy and legislation that guarantees gender equality. According to Article 2, State Parties condemn discrimination against women in all its forms, and agree to pursue by all appropriate means, and without delay, a policy of eliminating discrimination against women and, to this end, undertake:

(a) to embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realisation of this principle;
(b) to adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;
(c) to establish legal protection of the rights of women on an equal basis with men and to ensure, through competent national tribunals and other public institutions, the effective protection of women against any act of discrimination;
(d) to refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;
(e) to take all appropriate measures to eliminate discrimination against women by any person, organisation or enterprise;
(f) to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women; and
(g) to repeal all national penal provisions which constitute discrimination against women.

Article 3 of the 1981 Convention mandates State Parties to take in all fields (particularly political, social, economic and cultural) all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men. Article 4 contemplates the adoption by State Parties of temporary special measures (such as affirmative action programmes and policies envisaged in Article 27(6) of the Constitution) aimed at accelerating *de facto* equality between men and women.

Articles 5 and 7 of the Convention require State Parties (a) to take appropriate measures to eliminate prejudices and customary practices based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women; and (b) to eliminate discrimination against women in the political and public life of the country. Similarly, articles 10-12 require State Parties to take appropriate measures to ensure equality of opportunity to men and women in the fields of education, employment and healthcare respectively. Article 13 (which should be read together with Article 14, and which relates to rural areas) requires State Parties to take appropriate measures to eliminate discrimination against women in areas of economic and social life. Finally, Article 15 requires State Parties to accord to women equality before the law.

It is more than three decades since the governments (which included Kenya) participating in the Fourth World Conference on Women in Beijing in 1995 made a declaration and adopted the Beijing Declaration and Platform for Action by which they reaffirmed the commitment to:

(a) the equal rights and inherent human dignity of women and men and other purposes and principles enshrined in the Charter of the United Nations, to the Universal Declaration of Human Rights and other international human rights instruments, in particular (i) the Convention on the Elimination of All Forms of Discrimination Against Women; (ii) the Convention on the Rights of the Child; (iii) the Declaration on the Elimination of Violence Against Women; and (iv) the Declaration on the Right to Development; and

(b) achieve the full and effective implementation of the Nairobi Forward-looking Strategies for the Advancement of Women.

With regard to older persons, the United Nations Principles for Older Persons, 1991 encourage governments to incorporate the following principles into their national programmes whenever possible, namely, independence, participation, care, self-fulfillment and dignity.[11] These Principles require that all national programmes take into account the recommended intervention mechanisms specified in each thematic area when undertaking policy review or development, and legislation, on which such programmes are founded.

With regard to differential treatment of SIGs in employment, all Member States are obligated under Article 2 of the 1958 Discrimination (Employment and Occupation) Convention to declare and pursue a national policy designed to promote equality of opportunity and treatment in respect of employment and occupation with a view to eliminating any discrimination in respect of employment and occupation of SIGs.

Notably, Kenya has adopted a number of key ILO Conventions prohibiting discrimination in employment, including the 1951 Equal Remuneration Convention and the 1958 Discrimination (Employment and Occupation) Convention.[12] However, Kenya is yet to sign the 1989 Indigenous and Tribal Peoples Convention despite the social exclusion and disadvantaged position that many of Kenya's indigenous groups find themselves in. On the other hand, this does not diminish the legislators' primary obligation to influence policy and legislation to eliminate social exclusion of SIGs from mainstream society.

Due attention has also been drawn to the international community to guarantee the promotion and protection of the rights of the child. Accordingly, it is imperative that the institutional and legal frameworks of State Parties are designed in such a way as to respect the mandatory provisions of Article 2 of the 1990 Convention on the Rights of the Child which, among other things, requires State Parties to respect and ensure the rights set forth in the Convention to each child within their jurisdiction without discrimination of any kind. These guarantees are due

11 The United Nations Principles For Older Persons, 1991 available at ohchr.org (last accessed on 28th November, 2017).

12 ILOLEX, Database of International Labour Standards, Kenya, 2011, available at: http://www. ilo. org/ilolex/english/newratframeE.htm.

irrespective of the child's or his or her parents' or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status. To this end, the handbook guides legislators to ensure that legislation touching on children's affairs is suitably designed to eliminate discrimination on any of the basis outlined in the foregoing treaty instruments.

Over and above the bid to eliminate discrimination, Article 2.2 of the 1990 Convention mandates State Parties to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions or beliefs of the child's parents, legal guardians or family members. Article 4 mandates State Parties to undertake all appropriate legislative, administrative and other measures for the implementation of the rights of the child recognized in the Convention, but which we need not particularise in this handbook.

In addition to the universal obligation to guarantee gender equality and to uphold the right of the child, special attention has been drawn to the pressing need for the inclusion of persons with disabilities in mainstream society. The general principles set out in Article 3 of the 2006 UN Convention on the Rights of Persons with Disabilities provide a firm foundation for legislation, programmes, plans and actions for the inclusion of persons with disabilities in the development agenda. These principles include:

(a) respect for inherent dignity, individual autonomy, including the freedom to make one's own choices, and independence of persons;
(b) non-discrimination;
(c) full and effective participation and inclusion in society;
(d) respect for difference and acceptance of persons with disabilities as part of diversity and humanity;
(e) equality of opportunity;
(f) accessibility;
g) equality between men and women; and
(h) respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.

By adopting this Convention, State Parties recognise that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law. Accordingly, they are mandated to prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds. In order to promote equality and eliminate discrimination, State Parties shall take all appropriate steps to ensure that reasonable accommodation is provided. To this end, State Parties are obligated to take such affirmative action as may be necessary to accelerate or achieve *de facto* equality of persons with disabilities.

2.3 Regional Instruments on Gender Equality and Inclusion

Article 2 of the 1986 African Charter on Human and Peoples Rights guarantees the right to freedom from discrimination on the basis *inter alia* of race, ethnic group, colour, sex, language, religion, political or any other opinion, national or social origin, fortune, birth or other status. Article 3 guarantees equality before the law. Accordingly, every person, including SIGs, is entitled to equal protection of the law. In addition, articles 4 and 5 guarantee everyone's right to respect for their life and the dignity of their person, and to the respect in a human being and to recognition of his or her legal status.

Under Article 13 of the Charter, every citizen has the right to participate freely in the government of his country either directly or through freely chosen representatives in accordance with the law. This guarantee dictates that women and other SIGs have an equal voice in the management of the affairs of government in the context of inclusive and participatory engagement on equal basis. The need for inclusion in the social-economic life is underscored in articles 14 and 15, which guarantee the right to (a) property; and (b) work under equitable and satisfactory conditions on the basis of "equal pay for equal work".

In addition to the right to access education and the best attainable state of physical and mental health (articles 16 and 17), every person has the right to freedom from discrimination as protected by Article 18(3). In

this regard, the State is mandated to ensure the elimination of every discrimination against women and censure the protection of the rights of the women and the child as stipulated in international declarations and conventions, most of which are recited in this handbook.

Article 18(4) guarantees the right to special measures of protection of the aged and the disabled in keeping with their physical or moral needs. Only then would all people be deemed as equal and entitled to enjoy the same respect and have the same rights, as contemplated in Article 19. In view of the foregoing, the State Parties are obligated by Article 25 to promote and ensure, through teaching, education and publication, the respect of the rights and freedoms contained in the 1986 Charter.

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the Maputo Protocol), 2003 serves as the primary regional instrument for the promotion and protection of the right to equality and non-discrimination of women in society. Article 2 of the 2003 Protocol mandates State Parties to "… combat all forms of discrimination against women through appropriate legislation, institutional and other measures".

Article 5 of the Protocol mandates State Parties to prohibit and condemn all forms of harmful practices which negatively affect the human rights of women and which are contrary to recognised international standards. To this end, State Parties are required to take all necessary legislative and other measures to eliminate such practices. Article 8 guarantees all women the right of access to justice and equal protection before the law.

Article 9 mandates State Parties to "… take specific positive action to promote participative governance and the equal participation of women in the political life of their countries through affirmative action, enabling national legislation and other measures". With regard to economic and social welfare, Article 13 mandates State Parties to "… adopt and enforce legislative and other measures to guarantee women equal opportunities in work and career advancement and other economic activities". Under Article 22 of the Protocol, State Parties undertake to accord special protection to the elderly women. It mandates State Parties to (a) provide protection to elderly women and take specific measures commensurate

with their physical, economic and social needs as well as their access to employment and professional training; and (b) ensure the rights of elderly women to freedom from violence, including sexual abuse, discrimination based on age, and the right to be treated with dignity.

Article 23 of the 2003 Protocol guarantees special protection of women with disabilities. It mandates State Parties to (a) ensure the protection of women with disabilities and take specific measures commensurate with their physical, economic and social needs to facilitate their access to employment, professional and vocational training, as well as their participation in decision-making; and (ensure the right of women with disabilities to freedom from violence, including sexual abuse, discrimination based on disability and the right to be treated with dignity).

The African Union Commission *Agenda 2063: The Africa We Want* (final edition 2015) sets out the African aspirations for the year 2063, which reflect our common desire for (a) shared prosperity and well-being; (b) unity and integration; and (c) a continent of free citizens and expanded horizons, where the full potential of women and youth, boys and girls are realized, and with freedom from fear, disease and want. One of the seven aspirations is Aspiration 6, which provides for an Africa whose development is people-driven, relying on the potential of African people (especially its women and youth) and caring for children. Below are some of the aspirations relevant to this handbook.

"All the citizens of Africa will be actively involved in decision-making in all aspects." In effect, Africa shall be an inclusive continent where no child, woman or man will be left behind or excluded, on the basis of gender, political affiliation, religion, ethnic affiliation, locality, age or other factors.

"All the citizens of Africa will be actively involved in decision making in all aspects of development, including social, economic, political and environmental."

"All forms of gender-based violence and discrimination (social, economic, political) against women and girls will be eliminated and the latter will fully enjoy all their human rights. All harmful social practices (especially

female genital mutilation and child marriages) will be ended and barriers to quality health and education for women and girls eliminated."

"Africa of 2063 will have full gender parity, with women occupying at least 50% of elected public offices at all levels and half of managerial positions in the public and the private sectors. The economic and political glass ceiling that restricted women's progress will have been shattered."

"All forms of systemic inequalities, exploitation, marginalisation and discrimination of young people will be eliminated and youth issues mainstreamed in all aspects of the development agenda."

In respect to older persons, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa, 2016 guarantees the right to special measures of protection of older persons. Article 2 obligates State Parties to recognise the rights and freedoms enshrined in the Protocol and undertake to adopt legislative or other measures to give effect to the specified rights and freedoms.[13]

These rights and freedoms include:

(a) elimination of discrimination against older persons (Article 3);
(b) the right of access to justice and legal protection before the law (Article 4);
(c) the right to make decisions (Article 5);
(d) the right to freedom from discrimination in employment (Article 6);
(e) the right to social protection (Article 7);
(f) the right to protection from abuse and harmful traditional practices (Article 8);
(g) the right to protection of older women (Article 9);
(h) the right to care and support (Article 10);
(i) the right to residential care (Article 11);
(j) the right to support for older persons taking care of vulnerable children (Article 12);
(k) the right to protection of older persons with disabilities (Article 13);

13 The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa, 2016 art 2.

(l) the right to protection of older persons in conflict and disaster situations (Article 14);
(m) the right of access to health services (Article 15);
(n) the right of access to education (Article 16);
(o) the right to participate in programmes and recreational activities (Article 17);
(p) the right of access to infrastructure, including buildings and public transport (Article18); and
(q) the right to awareness on ageing and preparation for old age (Article 19).

Legislators at both levels of government are mandated to advocate for policy review and development, and to take legislative measures, to give effect to these rights and freedoms. To-date, no legislative steps have been taken to this end despite the pressing need to give effect to Article 57 of the Constitution which mandates the State to take measures to ensure the rights of older persons:

(a) to fully participate in the affairs of society;
(b) to pursue their personal development;
(c) to live in dignity and respect, and be free from abuse; and
(d) to receive reasonable care and assistance from their family and the State.

The rights of the child and the antidiscrimination provisions of the 1999 African Charter on the Rights and Welfare of the Child are fairly comparable to those of the 1990 Convention on the Rights of the Child. As a regional Charter, the 1999 Instrument provides a suitable guide for appropriate legislation for the promotion and protection of the rights of the child in the African context. Accordingly, legislators are mandated to reflect the respective concerns of African states when enacting legislation with respect to children. They should pay attention to the fact that the Children's Charter originated because the member states of the AU believed that the Convention on the Rights of the Child omitted important social-cultural and economic realities unique to Africa.

The 2006 African Youth Charter addresses issues of concern to youth. Youth constitute SIGs with whom we are equally concerned. Accordingly, the handbook is suitably designed to guide legislation that meets the

international and regional standards for the promotion and protection of the rights and freedoms of the youth. These include (a) the right to freedom from discrimination (Article 2); (b) protection of private life (Article 7); (c) youth participation in all spheres of society (Article 11); (d) education and skills development (Article 13); poverty eradication and social-economic integration of youth (Article 14); (e) sustainable livelihoods and youth employment (Article 15); and (f) the right to the best attainable state of physical, mental and spiritual health (Article 16). In particular, legislators are required to recognise the right of mentally and physically challenged youth to special care, and shall ensure that they have equal and effective access to education, training, healthcare services, employment, sports, physical education and cultural and recreational activities (Article 24).

Likewise, the 1999 EAC Treaty recognises gender as one of the principle cornerstones of the Community's integration programme. Of particular interest is Article 6, which falls under the Fundamental Principles of the Community, and which include good governance, adherence to the principles of democracy, the rule of law, accountability, gender equality, as well as the recognition, promotion and protection of human and people's rights in accordance with the African Charter on Human and People's Rights.

Other specific references to gender equality are found in Article 121 (on the role of women in development) and Article 122 (on women and business within the treaty for the establishment of the East African Community).

Even though Kenya is not a signatory to the 1993 Treaty of the Common Market for Eastern and Southern Africa (COMESA Treaty), the standards of gender equality and inclusion of SIGs contained in the Treaty provide comparative value to legislators. In articles 154 and 155 of the 1993 Treaty, Member States recognise the critical and important contribution of women to the economic and social transformation of the region. COMESA recognises that sustainable economic and social development of the region, requires the full and equal participation of women, men and youth. It realises that women make significant contribution towards the process of socio-economic transformation and sustainable growth.

Under the Treaty, and in accord with the 2008 COMESA Gender Policy, Member States undertake, through appropriate legislative and other measures:

(a) to promote the effective integration and participation of women at all levels of development, especially at the decision-making levels;
(b) to eliminate regulations and customs that are discriminatory against women and, specifically, regulations and customs which prevent women from owning land and other assets;
(c) to promote effective education awareness programmes aimed at changing negative attitudes towards women;
(d) to create or adopt technologies which will ensure the stability of employment and professional progress for women workers; and
(e) to encourage and strengthen institutions which are engaged in the promotion and development of labour saving devices aimed at improving the productive capacity of women.

The 2008 Policy is premised on recognition of the fact that despite many commitments to gender equality by COMESA and other international organisations, gender disparities persist due to numerous factors, which include social norms, negative cultural practices and customs, gender biased laws, systems and structures. These factors are compounded by other national, regional and international factors to perpetuate gender discrimination. In order to redress this situation and create an environment in which women and men in the region can equally and equitably contribute to and benefit from regional integration and cooperation, COMESA embarked on a process of putting in place a comprehensive legal and institutional framework backed by its 2008 Gender Policy. The policy is an integral part of COMESA's efforts to empower women and ensure their equal and effective participation and benefit from all development activities in the region.

What We Must Remember

(a) Kenya has played a critical role in shaping the landscape of the universal and regional standards for the promotion of the right to equality, non-discrimination and social inclusion of SIGs.

(b) These rights and freedoms are an integral part of our constitutional and treaty obligations.

(c) We must, therefore, live up to our cherished values and aspirations.

(d) These standards guide the review and development of policy and legislation by national and county governments, and should form an integral part of our legislative agenda.

(e) The UN Treaties, Conventions and Declarations cited in section 2.2, and the regional treaty instruments cited in part 2.3 form part of our law and are binding on Kenya.

(f) Legislators must pay due attention to the State's obligation to develop policy and legislation, and to formulate and implement programmes, plans and actions, that give effect to these treaty obligations.

(g) The common theme of the treaty instruments referred to in this chapter is the obligatory need to promote and protect the right to equality (including gender equality), the inclusion of SIGs in social development and freedom from discrimination.

(h) The legislative bodies are mandated to ensure that policy and legislation are designed to ensure full realisation of the right to equality and inclusion of SIGs in social-cultural, economic and political life.

(i) The special interest groups that require special measures of protection include women, children and the youth, elderly persons, persons with disabilities, vulnerable and minority groups.

Chapter Three

3.0 Constitutional and Legal Framework for Gender Equality and Inclusion of SIGs

Former President Hon Mwai Kibaki during the promulgation of the Constitution, Nairobi

3.1 Introduction

This chapter draws the legislators' attention to the constitutional and policy frameworks for social inclusion, equality and non-discrimination. It provides a firm foundation for intervention and highlights the opportunities which the legislators have to actively influence policy and law reform towards the realisation of gender equality and inclusive development. The chapter equips Parliament and County Assemblies with points of reference as they strive to address the various patterns of discrimination and inequalities by which SIGs continue to be disadvantaged. It addresses both the international legal obligations of the State and the domestic legal and policy frameworks. With regard to domestic law, the chapter highlights the Constitution of Kenya, specific

anti-discrimination laws, and non-discrimination provisions in other areas of law. Attention is also drawn to the mechanisms for implementation and enforcement of the law through the judicial system and other specialised institutions with a view to identifying critical principles of concern to legislators as they endeavour to influence policy and legislation.

Notably, Kenya has, in the recent past, taken big strides in the development of legal and policy frameworks towards the realisation of inclusive development, equality and non-discrimination. Among the most significant milestones is the promulgation of the transformative 2010 Constitution, which ushered in a hitherto unknown constitutional order and a robust Bill of Rights. The Constitution provides the basic guide to all state and non-state organs towards the much-cherished ideals of gender equality, non-discrimination and social inclusion of vulnerable groups and marginalised communities, whose rights and freedoms demand special attention and protection through suitably designed programmes, plans and actions without which those constitutional guarantees count for little.

In addition to the constitutional guarantees of equality and non-discrimination, the Constitution provides a range of measures designed to address the long-standing issues of social exclusion and ethno-regional disadvantage. Similarly, measures for the legal protection of SIGs from discrimination has been significantly enhanced by the enactment in the recent past of two specific anti-discrimination statutes on disability and race, and the Employment Act containing robust provisions on equality.

Even though the Constitution extends protection from discrimination to a wide range of grounds and prohibits discrimination by both public and private actors, gaps exist in the legal protection in the absence of legislation prohibiting all forms of discrimination on particular grounds (such as sex and age) and the absence of provisions prohibiting discrimination on all grounds in specified areas of life (such as provision of education or health services). Lack of specific anti-discrimination law providing protection in relation to all relevant grounds specified in the Constitution deprives the legal framework of clarity on definition of key concepts and the scope of protection from discrimination on the grounds of gender and social exclusion of SIGs.

While the Constitution and statute law may not expressly contain discriminatory provisions, their implementation leaves room for practices and outcomes that place women, vulnerable groups and marginalised communities in positions of disadvantage. It is these practices and outcomes against which state and non-state organs must guard. This handbook provides legislators with a compound eye to facilitate their proactive approach to policy and legislation towards full realisation of gender equality and inclusion.

3.2 Constitutional Foundations of Gender Equality and Inclusion of SIGs

The Constitution of Kenya, 2010 manifests a strong commitment to the principles of equality and non-discrimination, which are invoked as either values or interpretive principles in various provisions. Article 27 enshrines the right to equality and freedom from discrimination. It substantially expands the list of protected grounds and the scope of the right to non-discrimination. This Article is supplemented by the Bill of Rights, whose articles provide for the promotion and protection of various rights and freedoms in relation to particular population groups. In addition, the Constitution introduces both a general permission for positive discrimination and a number of specific requirements for affirmative action on particular grounds.

The preamble to the Constitution lists equality as one of the six essential values on which good governance should be based. This principle is given legal force in Article 10, which includes human dignity, equity, social justice, inclusiveness, equality, non-discrimination and protection of the marginalised among the national values and principles of governance that are to be used in applying and interpreting the Constitution and other laws, and in making or implementing policy decisions. This is backed by (a) Article 20(4) (a), which lists equality and equity among the values to be promoted in interpreting the Bill of Rights; and (b) Article 21(3), which creates a duty on state actors to address the needs of "vulnerable groups" in society.

Chapter Four sets out the Bill of Rights. It states that the rights and fundamental freedoms in the Bill of Rights belong to each individual,[14] and that every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom.[15]

Article 27, which provides for equality and freedom from discrimination under the Bill of Rights, states:

(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.
(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.
(3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.
(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.
(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).
(6) To give full effect to the realisation of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.
(7) Any measure taken under clause (6) shall adequately provide for any benefits to be on the basis of genuine need.
(8) In addition to the measures contemplated in clause (6), the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.

Notably, Article 27(4) prohibits discrimination on a comprehensive list of specified grounds, i.e. "race, sex, pregnancy, marital status, health status,

14 Constitution of Kenya, 2010, Article 19(3).
15 *Ibid*., Article 20(2).

ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth". This list accords substantially increased protection to women, who are likely to benefit from explicit reference to pregnancy and marital status. In addition, it prohibits discrimination on grounds of disability and age, a significant milestone in Kenya's legal framework in the protection of vulnerable groups.

It should be noted, though, that the categories of the grounds for protection set out in Article 27 are merely indicative and not exhaustive. The phrase "[the State shall not discriminate directly or indirectly on any ground, including…" is instructive. This leaves ample room for legal challenge by those who may be subjected to discrimination on grounds which are not expressly listed in Article 27(4). This approach is backed by the definition of "includes" provided in Article 259(4)(b).[16]

Article 27(4) and (5) prohibit both direct and indirect discrimination. However, the two terms are not defined in the Constitution and, therefore, should be construed within their literal (as opposed to technical) sense. It is also notable that the Constitution does not explicitly prohibit segregation, harassment, or victimisation, though some of these types of conduct are prohibited by statute law governing specific areas of life.[17] The prohibition on discrimination in Article 27(5) applies to both natural and legal persons.

Kenya's international obligation to guarantee equality and non-discrimination extends not only to eliminating discrimination, but also requires it to take measures to promote substantive equality through positive action (commonly referred to as "affirmative action" in Kenya).[18] The UN HRC has stated that the "principle of equality sometimes requires State Parties to take affirmative action in order to diminish or eliminate

16 Constitution of Kenya, 2010, Article 259(4)(b): "The word 'includes' means 'includes but is not limited to'."

17 The National Cohesion and Integration Act, 2008 (Act No.12 of 2008) prohibits segregation, harassment and victimisation; The Sexual Offences Act, 2006 (Act No. 3 of 2006) creates the criminal offence of sexual harassment.

18 The International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), 1966, Article 2(2); Committee on Economic, Social and Cultural Rights, General Comment 20: *Nondiscrimination in economic, social and cultural rights*, UN Doc. E/C.12/GC/20, 2009, Para 9; see also Committee on the Elimination of Discrimination against Women, *General Recommendation 25: Temporary special measures*, 2004, Paras 14, 18.

conditions which cause or help to perpetuate discrimination prohibited by the Covenant"[19], while CESCR has stated that "State Parties may be, and in some cases are, under an obligation to adopt special measures to attenuate or suppress conditions that perpetuate discrimination".[20] It is particularly welcome that Article 27(6) creates the duty to take affirmative action, a concept which is defined in Article 260 as including "any measure designed to overcome or ameliorate an inequity or the systemic denial or infringement of a right or fundamental freedom".

Article 56 provides further protections for "minorities and marginalised groups", a classification which encompasses all those vulnerable to discrimination. The term "minority" is not defined in the Constitution. However, Article 260 of the Constitution defines "marginalised groups" as all those disadvantaged by discrimination on one or more of the grounds set out in Article 27(4). This article requires the state to undertake measures, including affirmative action, to ensure the participation of these population groups in governance, education and employment, to have access to water, health services and infrastructure, and to develop their cultural values, languages and practices. The article guarantees significant additional rights on all grounds and constitutes a useful guide to the interpretation of Article 27(6). Legislators at both levels of government should be alert to these constitutional guarantees and international standards in policy development and legislative process to ensure strict adherence to gender equality and social inclusion of SIGs.

In addition, legislators should appreciate the fact that positive action is an important tool for accelerating progress towards substantive equality for particular population groups. When properly designed, and implemented, affirmative action is consistent with the principle of equality of opportunity and the right to freedom from discrimination. In effect, suitably designed affirmative action programmes effectively facilitate the realisation of the right to equality and freedom from discrimination.

Article 27(7) prescribes the only constitutional condition for the implementation of affirmative action. It states that such measures "shall adequately provide for any benefits to be on the basis of genuine

19 Human Rights Committee, *General Comment 18: Non-discrimination*, 1989, Para 10.

20 Committee on Economic, Social and Cultural Rights, *General Comment 20: Non-discrimination in economic, social and cultural rights*, UN Doc. E/C.12/GC/20, 2009, Para 9.

need". On the other hand, article 27(6) envisages that the state will take measures other than affirmative action. While not all these measures will need to satisfy, the conditions set out in UN treaty instruments, Kenya should ensure that any affirmative action measures taken in the implementation of Article 27(6) are compatible with the conditions set out in the respective international and regional treaty instruments.

Article 33 of the Constitution explicitly excludes hate speech and advocacy of hatred that "constitutes ethnic incitement, vilification of others or incitement to cause harm" from the right to freedom of expression, in line with Kenya's obligations under Article 4 of ICERD as elaborated in CERD's General Recommendation on this matter.[21] It also excludes advocacy of hatred based on any of the grounds of discrimination specified in Article 27(4). The Constitution states that political parties must have a "national character" and prohibits the creation of political parties founded "on a religious, linguistic, racial, ethnic, gender or regional basis or [which] seek to engage in advocacy of hatred on any such basis". This reflects, in part, Kenya's obligations under Article 4(b) of ICERD. As people's elected representatives in legislative bodies, legislators bear the primary obligation to ensure that party politics and political activity in general is not only inclusive, but is by no means discriminatory on any of the grounds set out in Article 27(4).

In addition to the overarching right to freedom from discrimination guaranteed by Article 27, the Bill of Rights makes specific provision for the protection of particular vulnerable groups, including children, persons with disabilities, youth, minorities and marginalised groups and older persons.

Articles 53, 55 and 57 provide specific rights for children, youth and older people respectively. Article 260 defines (a) children as persons under 18 years of age; (b) youth as persons between the ages of 18 and 35; and (c) older persons as those over the age of 60. These Articles provide a range of specific rights for each group, including guarantees of (i) in relation to children and the youth, the right to access education;[22] (ii) in relation to the youth, access to employment; and (iii) with respect to older persons,

21 Committee on the Elimination of Racial Discrimination, *General Recommendation 15: Organised violence based on ethnic origin,* UN Doc. A/48/18, 1993, Para 4.

22 The Constitution of Kenya, 2010 Article 53. Article 55

the right to receive reasonable care and assistance from their family and the State.

Article 53 mirrors on many of Kenya's obligations under the CRC, including the principle that the child's best interests are of paramount importance in matters concerning the child.[23] Article 57 enshrines the various themes that run through the United Nations Principles for Older Persons, namely, independence, participation, care, self-fulfillment and dignity.[24] The range of guarantees for each group is a welcome addition to the protection from discrimination provided under Article 27, recognising their specific needs, and should provide a useful basis to secure equal participation for each group in areas of particular concern.

What remains to be answered by our legislative bodies is the question as to (a) how far policy and legislation have entrenched these values and principles; (b) the extent to which these constitutional protections form the basis of programmes and actions designed to enhance gender equality and social inclusion of SIGs; and (c) whether policy development, the legislative process and programming have been meaningfully participatory so as to accommodate the voices of vulnerable groups and marginalized communities.

Article 54 focuses on the rights of persons with disabilities. Disability is defined in Article 260 as including physical, sensory, mental, psychological or other impairment that affects a person's "ability to carry out ordinary day-to-day activities". The range of impairments which are classified as forms of disability compares favourably to that presented in the CRPD, save that there is no reference to "intellectual" impairments. The reference to ability to conduct ordinary activities arguably results in a narrower concept of disability than that provided by the Convention, which adopts a more "social model" by making clear that it is the interaction of those impairments with external barriers which creates a disability in hindering "full and effective participation on an equal basis with others".

23 *Ibid*., Article 53(2).
24 *United Nations Principles for Older Persons, G.A. Res. 46/91, 1991.*

Article 54 of the Constitution imposes a duty on the State to ensure progressive implementation of the principle that persons with disabilities should occupy five percent of positions on appointed and elected bodies. It also creates specific rights of access to educational institutions "that are integrated into society to the extent compatible with the interests of the person" and to all places, public transport and information. Article 54 also contains a right to use sign language, Braille or other means of communication, and to materials or devices to overcome constraints arising from disability. This supplement other constitutional provisions requiring the State to promote Kenyan sign language, Braille and "other communication formats and technologies accessible to persons with disabilities".

Notably, though, articles 27 and 54 do not define failure to provide reasonable accommodation as a form of discrimination. They do not give protection to the general right to reasonable accommodation outside specific areas. Yet this right is crucial to ensuring equality for persons with disabilities. However, the incorporation of the basic principles of accessibility, inclusiveness and participation of persons with disabilities in mainstream society is a significant step towards their social inclusion and compliance with the UN CRPD.

In addition to the rights of vulnerable groups and marginalised communities, gender equality occupies a special place in the 2010 Constitution. Article 27(3) provides broad guarantees of equal treatment of women and men "including the right to equal opportunities in political, economic, cultural and social activities". The Constitution also guarantees equal rights for men and women during marriage and at its dissolution.

The Constitution also guarantees the right to equality between male and female parents and spouses in relation to acquisition of citizenship through birth and marriage. In addition, the principles of land policy contribute to the "elimination of gender discrimination in law, customs and practices" related to land.

Likewise, the supremacy of the Constitution over customary law, among others, as declared in Article 2 of the Constitution, extends the right to non-discrimination to a range of areas of law which affect

women, including those governing personal and family relationships, and property rights. In line with Kenya's obligations under CEDAW,[25] the 2010 Constitution introduces substantial guarantees to increase the representation of women in public life. Article 27(8) requires the State to take measures to ensure that "not more than two-thirds of the members of elective or appointive bodies" are of the same gender. In August 2011, Parliament passed a number of Bills establishing elective and appointive bodies. In a positive step, the Bills contained provisions requiring that not more than two-thirds of the membership of the bodies is of the same gender. Many also contained provisions requiring that membership include persons with disabilities, ethnic minorities and marginalised groups. Separate provisions create reserved places for women in the National Assembly, Senate and County Assemblies.[26]

These provisions were designed to have a positive effect on women's representation and role in the decision-making process at all levels of government. To this end, Parliament has, since the momentous promulgation of the Constitution in August 2010, enacted a number of statutes establishing a range of elective and appointive positions in various state organs. These Acts contained provisions requiring adherence to what is popularly known as "the two-thirds gender rule", i.e. that not more than two-thirds of the membership of those state organs is of the same gender.

In addition to the foregoing, Article 232 of the Constitution sets out the values and principles of public service with which national policy and legislation should accord. These include:

(a) involvement of the people (including women, men and special interest groups) in the process of policy making;
(b) representation of Kenya's diverse communities (including marginalised communities); and
(c) affording adequate and equal opportunities for appointment,

25 Committee on the Elimination of Discrimination against Women, *General Recommendation No. 23: Women in Political and Public Life*, 1997, Para 15.

26 The Constitution of Kenya, 2010 Articles 97(1)(b), 98(1)(b) and 177(1)(b). The Elections Act 2011, sections 35 and 36, reflect the requirements of Articles 97(1)(b) and 98(1)(b), as well as the requirements relating to youth, persons with disabilities and workers contained in Articles 97(1)(c), 98(1)(c) and 98(1)(d). These sections require political parties to submit their nominations of women, youth, persons with disabilities and workers for these reserved seats at the same time they are submitting the general nominations for election.

training and advancement at all levels of the public service of (i) men and women; (ii) the members of all ethnic groups; and (iii) persons with disabilities.

In addition to legislation designed to enforce gender equity, a number of other statutes contain provisions requiring that membership to state agencies includes persons with disabilities, ethnic minorities and marginalised groups. Examples of provisions aimed at the realisation of equality and inclusion include (a) sections 13 and 14 of the Urban Areas and Cities Act, 2011; (b) sections 5 and 6 of the National Police Service Commission Act, 2011; (c) sections 4 and 6 of the Ethics and Anti-Corruption Commission Act, 2011; (d) section 25 of the Environment and Land Court Act, 2011; and (e) section 10 of the Power of Mercy Act, 2011. These provisions constitute model sections that guide legislators towards strict adherence to the principles of gender equality and social inclusion of SIGs in the legislative process.

Legislative and administrative interventions should, however, target equal representation of both gender in elective and appointive positions, and that the two-thirds gender rule should only serve as a starting point towards equality and full inclusion of SIGs in social development. With regard to PWDs, Parliament and County Assemblies are obligated to ensure that legislative and administrative interventions guarantee 5% representation in elective and appointive positions. Reference in the Constitution to "progressive realization" of the 5% quota does not of itself motivate adherence to these constitutional standards. Positive steps should be taken to implement programmes and actions which ensure the realisation of these aspirations.

Legislators should consider that Kenya's international obligations relating to equality and non-discrimination cannot be fully discharged by mere enactment of legislation protecting individuals against discrimination and social exclusion. Such legislation find meaning only if effective mechanisms are established to (a) facilitate redress for any harm suffered by individuals; and (b) address any structural causes of discrimination. To this end, articles 22 and 23 of the Constitution prescribes a simple and accessible procedure for lodging claims under the Bill of Rights, which includes (i) the right to equality and non-discrimination under Article

27; and (ii) the specific rights granted to special interest groups under articles 53, 54, 55, 56 and 57.

To make these rights real, legislators should ensure that statutory instruments and administrative procedures do not contain provisions that impede on the right to redress for breach of any of the rights to equality and freedom from discrimination. Neither should Article 24 be invoked in the legislative process so as to erode or limit the efficacy of any mechanisms for redress, access to justice or legal aid under the law for the time being in force.

Article 24 restricts any limitation of rights or fundamental freedoms in the Bill of Rights, including the right to equality and freedom from discrimination. Article 24(1) states:

(1) *A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—*
   - *(a) the nature of the right or fundamental freedom;*
   - *(b) the importance of the purpose of the limitation;*
   - *(c) the nature and extent of the limitation;*
   - *(d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and*
   - *(e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.*

The only other limiting provision is Article 58 (concerning a state of emergency), which permits legislation enacted in consequence of a declaration of a state of emergency to limit a right or fundamental freedom in the Bill of Rights only to the extent that-
   - *(a) the limitation is strictly required by the emergency; and*
   - *(b) the legislation is consistent with the Republic's obligations under international law applicable to a state of emergency.…*

Article 22(1) provides that every person has the right to institute court proceedings claiming that their rights under the Bill of Rights have been denied, violated, infringed or threatened. Subsection 2 extends this right to other interested parties, permitting proceedings by (a) persons acting on behalf of another person "who cannot act in their own name"; (b) those acting as a member of, or on behalf of a group or class of persons; (c) those acting in the public interest; and (d) associations acting in the interests of their members.

In addition to the foregoing complaints procedure, Article 59(3) provides that every person has the right to complain to the Kenya National Human Rights and Equality Commission established under Article 59 of the Constitution, alleging that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened. Likewise, complaints may be lodged with the National Gender and Equality Commission and the Commission on Administrative Justice.

In view of the fact that these commissions submit periodic reports that are liable to scrutiny by Parliament, legislators have the opportunity to make recommendations and lend budgetary and other support to the commissions to (a) establish effective complaints and investigative mechanisms; and (b) facilitate effective promotion and protection of the right to gender equality and social inclusion of SIGs. Otherwise, the right to equality and freedom from discrimination would amount to no more than mere declaratory statements of little or no value to SIGs.

With regard to marginalised communities, devolution of power and the establishment of an "Equalisation Fund" under the 2010 Constitution goes a long way in addressing the historical imbalances between different regions. This impacts significantly on the equal enjoyment of social-economic rights and freedoms, but only if legislators play their role objectively in planning and the process of revenue allocation. In doing so, they should consider the fact that devolution of power was primarily intended to foster national unity and inclusive development by recognising diversity and ensuring equitable sharing of resources.

Under the devolved system of government, a wide range of functions are assigned to county governments. The Constitution of Kenya, 2010

guarantees that, subject to proper planning and prudent budgetary process, county governments are properly resourced to discharge their functions. Article 202 requires revenue to be shared "equitably" among national and county governments. Article 203 establishes the criteria for the determination of the manner in which equitable shares of revenue shall be allocated, including (a) the need to ensure that county governments have adequate resources to perform their functions; (b) the need to address economic disparities within and between counties; and (c) the different needs for affirmative action for disadvantaged areas and marginalised groups. To this end, Article 203(2) guarantees that at least 15% of annual national revenue shall be allocated to county governments.

The pressing need for states to address disparities in the enjoyment of economic, social and cultural rights between different regions and localities is underscored by the CESCR. In recognition of the disparities in the provision of basic services between different regions, the 2010 Constitution establishes an Equalisation Fund to accelerate progress towards equality in marginalised areas. The Fund is established as 0.5% of annual national revenue for a period of 20 years from the promulgation date, i.e. the 27th day of August 2010, but liable to extension by an Act of Parliament with the support of at least 50% of the members of the National Assembly and the Senate.

Other constitutional provisions that address inequality in the enjoyment of economic and social rights include (a) Article 6(3), which creates a duty on the State to ensure reasonable access to government services throughout the country; and (b) Article 60(1), which lists equitable access to land as the first principle of Land Policy.[27] The effective discharge of this duty is dependent on (i) policy and legislative intervention with which legislators are directly charged; and (b) appropriate programmes, plans and actions guided by policy and legislation designed to redress gender inequality and social exclusion of SIGs.

Articles 6(3) and 60(1) seek to address the serious ethno regional discrimination in the allocation of public resources. However, ERT's research suggests that the law in this area may be insufficient to

27 The Constitution of Kenya, 2010 Article 60(1)(a).

ensure full and equal enjoyment of economic and social rights as guaranteed under ICESCR, unless more is done to ensure their effective implementation. The continuing problems of severe discrimination by state actors identified in ERT's research indicate that measures introduced in the National Cohesion and Integration Act in 2008 to prohibit discrimination in the allocation of public resources[28] are not adequately enforced, and that discrimination by public officials remains a serious challenge. Accordingly, questions remain as to whether the necessary political will exists to ensure effective implementation of the measures to devolve power and enforce the Equalisation Fund. This poses a challenge to legislators, as people's representatives, to prove their worth in guiding devolution towards the desired goal of equal access to national resources and social development.

3.3 National Legislation on Equality and Non-Discrimination

3.3.1 Introduction

In addition to the primary obligation of every state to respect the right to equality and freedom from discrimination, Kenya is mandated to protect every person from discrimination by state and non-state agencies. To this end, Parliament and County Assemblies are mandated to enact legislation that meets the universal standards of equality and non-discrimination. In accordance with the ICCPR, the HRC underscored the responsibility of every State Parties to ensure that the "law shall guarantee to all persons equal and effective protection against discrimination on any of the enumerated grounds." Accordingly, State Parties are encouraged to adopt specific legislation to prohibit discrimination in the field of economic, social and cultural rights".

In view of the foregoing, Parliament and County Assemblies are obligated to enact legislation for the protection of all persons from discrimination on all the grounds specified in Article 27(4) of the Constitution. In addition, Kenya is obligated by CEDAW, ICERD and the CRPD to prohibit discrimination against women, racial or ethnic groups, and persons with disabilities by public and private actors in all areas specified by these Conventions.[29]

28 National Cohesion and Integration Act, 2008 sections 10, 11 and 12.

29 Committee on the Elimination of Discrimination against Women, Paras 10 and 13; International

Even though the scope of protection from discrimination and social exclusion provided under the Constitution substantially meets these standards and obligations by (a) allowing individuals to institute proceedings against both state and non-state agencies; and (b) access a range of remedies, there is need for specific anti-discrimination legislation providing definitions of key terms, measures to ensure access to justice and appropriate remedies.

Notably, Kenya does not have an overarching statute law on equality and non-discrimination, or a focal agency charged with the responsibility of enforcing these rights and freedoms. However, two specific anti-discrimination Acts (i.e. the Persons with Disabilities Act and the National Cohesion and Integration Act) address discrimination on specific grounds. The enactment of these statutes demonstrates appreciable progress in addressing the pre-existing lack of legal protection from discrimination on the grounds of disability and race respectively. The two Acts go a long way towards meeting Kenya's obligations under the CRPD and ICERD respectively.

It is noteworthy that more remains to be done to meet the need for a comprehensive legislative framework for the protection from discrimination and social exclusion of SIGs in relation to other grounds specified in Article 27, including gender (as obligated by CEDAW) and those specified in the ICCPR and ICESCR. The two statutes provide a model for legislation on equality and non-discrimination and demonstrate the extent to which legislators should go in facilitating the realisation of these ideals.

Convention on the Elimination of All Forms of Racial Discrimination, Article 2(1); Convention on the Rights of Persons with Disabilities, Article 5(2).

3.3.2 The Persons with Disabilities Act

Image of Persons with Disabilities

(a) What implications will the proposed (or extant) policy and legislation have on the needs and interests of women and men in all spheres of social life?

(b) Do (or will) the programmes, plans and actions founded on such policies and legislation address the various issues with which women and men are faced in all spheres of social life?

(c) Does the proposed policy and legislation aim to address the concerns, needs and interests of both women and men, and to eliminate differential treatment on the basis of gender?

(d) When properly evaluated, do such policies, legislation, programmes, plans and actions, uphold the principle of gender equality and inclusive development of SIGs?

(e) What measures of intervention should be undertaken to address any gaps in the realization of gender equality and inclusive development while addressing the target issues?

The Persons with Disabilities Act, 2003 is a significant milestone towards the prohibition of discrimination against, and the promotion of equality (in the context of inclusion) for, persons with disabilities. The Act illustrates the extent to which legislators should go in formulating statute law to guarantee effective promotion and protection of the right to equality and freedom from discrimination of SIGs. Notably, though, the Act does not exhaustively protect PWDs in that it does not expressly prohibit all forms of discrimination in all relevant areas of social, cultural, economic and political life. While statute law cannot possibly legislate for each and every mundane aspect of life, legislators are mandated to ensure that protective measures are taken, whether by legislation or administrative procedures, to guarantee full realisation by PWDs of the right to equality and social inclusion in all spheres of life.

A few examples of the provisions in the 2003 Act will suffice to illustrate how legislators attempted to close this gap. The Act prohibits direct discrimination in employment, admission to learning institutions and access to premises, services and amenities. In addition, it sets out a range of measures intended to promote equal participation in, and access to, specific areas (such as education, health, public buildings, public service vehicles, sports and recreation, polling stations, voting, legal services, television programmes, telephone, postal charges, credit), but without express provision for the right of individuals to enforce each of those rights. Notably, though, this legislative gap has been partly redressed by the general prohibition of discrimination on grounds of disability under Article 27(5) of the Constitution. However, gaps remain in respect to enforceable rights to reasonable accommodation, which suggests that not all omissions or breaches are intended to attract penal consequences. Indeed, incentives may, in certain circumstances, be more effective in the realisation of certain rights relating to equality and inclusion.

The statutory definition of disability in the 2003 Act guides legislators in identifying other opportunities for legislative and administrative intervention to facilitate equality and social inclusion of PWDs in mainstream society. The Act broadly defines "disability" in the context of inclusion as "a physical, sensory, mental or other impairment, including

any visual, hearing, learning or physical incapability, which impacts adversely on social, economic or environmental participation". The Act defines "discriminate" as according "different treatment to different persons solely or mainly as a result of their disabilities".

Section 15(1) of the Act prohibits discrimination by both public and private employers in all processes relating to (a) employment, including advertisements, recruitment, the creation, classification or abolition of posts; (b) the determination or allocation of wages, salaries, pensions, accommodation, leave or other such benefits; and (c) the choice of persons for posts, training, advancement, apprenticeships, transfer and promotion or retrenchment. In addition, this section contains a requirement for employers to make reasonable accommodation for persons with disabilities by providing facilities and modifications. Legislators should be keen to incorporate corresponding provisions in Bills that contain provisions relating to employment or appointment to public bodies.

Section 15(2) imposes restrictions on the prohibition of discrimination and duty to make reasonable accommodations in cases where an act or omission was not wholly or mainly attributable to the disability of the person. In effect, the Act fails to address cases in which disability played a minor role in a discriminatory decision relating to employment. Notable among the promotional initiatives is the fact that Section 15 of the 2003 Act provides tax incentives for the employment of PWDs. In addition, section 13 requires that the NCPD endeavours to reserve five percent of all casual, emergency and contractual positions in employment in the public and private sectors for persons with disabilities. These measures reflect favourably on the State's adherence to its obligations under the CRPD to promote the employment of persons with disabilities in the public and private sectors.[30]

Section 25(1) (b) of the Act provides protection from discrimination in access to premises, services or amenities which are available to the public. With respect to education, section 18(1) prohibits all persons and learning institutions from denying admission to any course of study to any person on the basis of their disability. In

30 Convention on the Rights of Persons with Disabilities, Article 27(1)(h) and (g).

addition, learning institutions are obligated to "take into account the special needs of persons with disabilities" with respect to, *inter alia*, entry requirements, curriculum and the use of school facilities.[31] While section 18 responds to a number of Kenya's obligations under Article 24 on CRPD to prevent discrimination in education, the realisation of this right is also dependent on budgetary allocations to which legislators should pay special attention, failing which these rights would amount to no more than a pack of hollow declaratory statements.

Notably, section 18(1) provides protection from direct discrimination, but restricted to only those cases where disability is the sole reason for denial of admission, and subject to a subjective judgement of whether the person "has the ability to acquire substantial learning in that course". Furthermore, the only explicit protection from discrimination is in relation to admissions and, therefore, does not provide protection from discriminatory treatment in relation to such aspects as the curriculum content, exclusions or discipline. Moreover, the obligation rests with the service provider to "take account" of particular needs. To address these and other gaps, legislators should be sensitive to the special needs of learners with disabilities and provide legislative interventions to allow for full inclusion in basic education and vocational training of PWDs. In the absence of national standards to guide the administration of these and similar rights, the scope of the obligation to "take account" remains unclear.

In line with its underlying principle of inclusiveness, the CRPD emphasises that persons with disabilities should not be segregated within the education system. Article 24 of the Convention provides that the education system should be inclusive and that persons with disabilities should not be excluded from the mainstream education system on the basis of disability. Sections 18(3) and 19 of the Act, focused as they are on the establishment of "special schools", fail to guarantee such inclusiveness. Subsection (3) provides that "special schools and institutions," especially for the deaf, blind and those with developmental disorders "… shall be established." Section 19 creates a duty on the NCPD to facilitate the provision of an "an integrated system of special and non-formal education for persons with all forms of disabilities".

31 The Persons with Disabilities Act,2003, section 18(2).

However, the statutory provisions relating to education seek to address some of Kenya's obligations under Article 24(3) of the CRPD to facilitate the learning of, *inter alia*, Braille, alternative scripts and sign language. Section 19 creates a duty on the NCPD to facilitate the provision of "the establishment where possible of Braille and recorded libraries for persons with visual disabilities".

In relation to healthcare, section 20 establishes a special consultative role for the NCPD in the implementation of national health programmes, with twofold objectives, namely, (a) the prevention and identification of disability and the rehabilitation of persons with disabilities; and (b) ensuring that persons with disabilities receive appropriate healthcare. In the second limb, the section makes specific reference to ensuring that essential health services are available at an affordable cost and provides for the availability of field medical personnel. These provisions do not appear to create an obligation on the NCPD, county governments or the Ministry of Health to undertake particular measures to facilitate the realisation of these rights. In the circumstances, County Assemblies are obligated to formulate county legislation to streamline the provision of healthcare services in conformity with the Act.

Questions arise as to whether the 2003 Act creates sufficiently strong obligations on the national and county governments to meet their constitutional obligations under Article 25 on the CRPD in respect of ensuring that persons with disabilities enjoy the highest attainable standard of health without discrimination and enabling persons with disabilities to attain and maintain independence through provision of habilitation and rehabilitation services.[32] In such cases, legislators should take steps to ensure that state agencies (such as the NCPD, which are best suited for advisory, monitoring, oversight and facilitative roles, are not burdened with executive functions which should be discharged by county and national governments.

In addition to the foregoing, sections 29 and 30 of the Act relate to participation in elections. They respectively provide that (a) persons with disabilities are entitled to assistance by a person of their choice to enable them cast their vote; and (b) polling stations be made accessible for

32 Convention on the Rights of Persons with Disabilities., Article 26.

persons with disabilities by provision of assistive devices. These represent important protections with regard to Kenya's obligation to ensure equal participation in political and public life under the CRPD, including specific obligations under Article 29(a) (i) and (iii).

Notably, legislation governing political parties does not contain elaborate provisions on the engagement of PWDs in the political process at the party level. However, the Constitution reserves seats in elective and appointive bodies for persons with disabilities. What remains to be done is for legislators to ensure that statute law extends to other areas of social, cultural, economic and political life to ensure full inclusion and equal opportunity for PWDs and other SIGs.

With regard to sports and recreation, persons with disabilities are entitled, free of charge, to the use of recreational or sports facilities owned or operated by the government during social, sporting or recreational activities.[33] These provisions are supplemented by Regulations aimed at ensuring "optimum access and use of recreation, culture, sport and tourist events and services for persons with disabilities" through, *inter alia*, the adaptation of the physical environment and the provision of information in special formats. These measures represent a welcome attempt to give effect to Kenya's obligations under Article 30 of the CRPD, which require states to ensure that persons with disabilities have access to cultural, sporting and recreational activities. Section 41 exempts from postal charges "printed and recorded literature, articles, equipment and other devices" sent by mail for the use of persons with disabilities.

The need to secure equal access to information and communications by, among other means, promoting access to information and communication technologies and systems, is one of the themes which run throughout the CRPD and is specifically required by Article 9(1) (b) and 9(2)(f), (g) and (h). This requirement is addressed in part by section 40 of the Act which states that organisations providing public telephone services shall "as far as possible install and maintain" services with adjustments for persons with hearing and visual disabilities and by section 39, which requires the use of sub-titles or sign language in all television programmes providing news, educational programmes

33 The Persons with Disabilities Act, 2003 section 28(1).

and programmes "covering events of national significance". These provisions are supplemented by Regulations which require information to be made available in accessible formats in a variety of contexts.[34]

It is noteworthy that breach of the rights guaranteed by the 2003 Act attracts penal sanctions. For example, it is an offence contrary to section 26(1) for any person to (a) fail to comply with an adjustment order; (b) contravene the prohibition on discrimination in employment; (c) deny a person with disability entry to premises or use of services or amenities on grounds of disability alone; or (d) discriminate against a person with disability on the ground of any ethnic, communal, cultural or religious custom or practice. Subsection (2) imposes minimum fines and sentences for those offences, while subsection (3) confers on the injured person the right to recover damages.

To facilitate access to judicial services in the enforcement of disability rights, section 38 of the Act provides for access to legal services, which has been supplemented by the recently enacted Legal Aid Act, 2016. The 2003 Act requires the Attorney General to introduce regulations providing free legal services for persons with disabilities with respect to, *inter alia*, violation of rights, deprivation of property and cases involving capital punishment.

It also requires the Chief Justice to exempt persons with disabilities from court fees in respect of these types of legal action and for the provision of free sign language interpretation, Braille services and physical guide assistance for persons with disabilities in judicial proceedings. As required by the CRPD,[35] section 38(3) requires persons with disabilities to be held in custody in facilities which are modified to provide reasonable accommodations, which accords with the provisions of the Persons Deprived of Liberty Act, 2014. Subsection (4) states that the Chief Justice "shall endeavour to ensure that all suits involving persons with disabilities are disposed of expeditiously having due regard to the particular disability and suffering of such persons".

34 The Persons with Disabilities, Regulations 8, 9(4), 14(c), 15, 16 and 17.
35 Convention on the Rights of Persons with Disabilities, Article 14(2).

3.3.3 The National Cohesion and Integration Act

The National Cohesion and Integration Act enacted in the wake of the post-election violence in 2008 is the principal legislation by which the Government of Kenya prohibits racial and religious discrimination by state and non-state agencies. The 2008 Act provides protection across a range of areas of life, even though it leaves a number of gaps, exceptions and inconsistencies which limit its scope and effectiveness.

The Act defines discrimination rather broadly, reflecting many of the elements found in Article 1 (1) of ICERD. Section 3 covers both direct discrimination on "ethnic grounds" and indirect discrimination disadvantaging persons from a particular "ethnic group".[36] The Act prohibits such conduct as segregation in accord with Article 3 of the ICERD, harassment on ethnic grounds,[37] and victimisation by reason of action taken against the discriminator.[38] The term "ethnic grounds" is defined as "any of the following grounds, namely colour, race, religion, nationality or ethnic or national origins".

Section 7 prohibits discrimination in employment (a) in relation to the process of recruitment and appointment; and (b) in the course of employment in relation to the terms of employment, opportunities for promotion, transfer, training or other benefits, and dismissal.[39] Accordingly, the Act meets the basic State obligation to guarantee the rights, without distinction as to race, colour, or national or ethnic origin, to work, to free choice of employment, to just conditions of work and to equal pay for equal work.[40] The section also prohibits harassment by an employer, or employer's representative, of employees and job applicants.[41] In addition, the Act imposes a duty on all public establishments to ensure representation of Kenya's diversity and to employ no more than one-third of staff from the same ethnic community.[42] In this regard, the 2008 Act sets the pace for the protection of minority and marginalised groups from discrimination in social, economic and

36 The National Cohesion and Integration Act, 2008, sections 3(1)(a) and 3(1)(b).
37 *Ibid.*, section 6.
38 *Ibid.*, section 4. section 2.
39 **Ibid.**, sections 7(3) and (4).
40 International Convention on the Elimination of all Forms of Racial Discrimination, Article 5(e)(i).
41 The National Cohesion and Integration Act, 2008, section 7(5).
42 *ibid* sections 7(1) and (2).

political life. It provides a model for inclusion against which all legislation and administrative procedures should be gauged.

Even though section 7 of the 2008 Act does not apply to private enterprises in all respects, the Employment Act provides statutory protection from discrimination in all forms of employment (in both public and private sectors) on specified grounds, which include race, colour, nationality and ethnic or national origin. However, section 8(1) provides an exception to the prohibition of discrimination in employment where the differential treatment is based on a genuine and determining occupational requirement in respect of particular artistic or cultural activities, or in respect of personal services promoting the welfare of a particular ethnic group where services can be most effectively provided by persons of the same ethnicity. Subsection (2) provides that this exception does not apply where an employer already has a sufficient number of employees of the required ethnic group who are capable of carrying out the specified duties.

Section 9 prohibits discrimination against any person applying for membership to an organisation (in relation to the terms of membership or denial of membership) and members of organisations (in respect of access to benefits, facilities and services, varying the terms of membership or denying membership, and any other form of detriment).[43] Subsection (4) provides an exception to this provision in cases where membership is limited to a specified religious persuasion or profession. While this limitation may be justifiable to the extent that it allows religious persons to associate with their faithfuls, it appears too broad in scope, effectively excluding cases of discrimination by religious organisations on grounds of race, colour, nationality and ethnic or national origin from the application of the prohibition in section 9 of the Act.

Section 10 prohibits discrimination in the provision of services by any "qualifying body, licensing authority, planning authority, public authority, employment agency, educational establishment or body offering training". Notably, this definition excludes non-state providers of services other than employment, education or training, such as those which provide goods and services for sale. This exclusion gives broad

43 *Ibid* sections 9(1) and (2).

scope for discrimination in a range of settings and limits the government's ability to effectively combat discrimination. Similarly, land and property transactions in the private sphere are not covered by the Act. Section 10(2)(b)(iii) provides a broad exception in respect to discrimination in the exercise of immigration functions. It states:

> *Subsection (1) shall not apply [to…] iii. An action undertaken by the Minister for Immigration under the Immigration Act, in relation to cases relating to immigration and nationality.*

This provision appears to allow discrimination in the administration of the immigration and nationality system beyond the scope of permitted differentiation between citizens and non-citizens provided in Article 1(2) of ICERD. As CERD has stated, states must "ensure that immigration policies do not have the effect of discriminating against persons on the basis of race, colour, descent, national or ethnic origin".[44] Concern raised by this exception is heightened by research undertaken by ERT, which shows that certain ethnic groups within Kenya (such as Kenyan Somalis and Kenyan Nubians) are subject to discrimination in the process of acquiring citizenship documents. ERT research indicates that these groups face barriers to registering their citizenship, with regard to requirements for the production of additional evidence, "vetting" procedures and bureaucratic obstacles, which render many *de facto* stateless. Furthermore, the denial of citizenship documents restricts the ability of those affected to enjoy a range of civil and political rights guaranteed by ICERD, including the right to participate in elections, the right to freedom of movement within the state, and the right to leave and return to the country.[45]

The need for states to address disparities in the enjoyment of economic, social and cultural rights between different communities, regions and localities has been clearly set out by CESCR.[46] Section 11 of the National Cohesion and Integration Act, 2008 introduces important provisions for the "ethnically equitable" distribution of public resources and stipulates that distribution of public resources should take into account Kenya's diverse population and poverty index. It provides that it is unlawful for

44 Committee on the Elimination of Racial Discrimination, General Recommendation No. 30: Discrimination against non-citizens, 2004, Para 9.
45 Ibid Articles 5(c), 5(d)(i) and (d)(ii).
46 Committee on Economic, Social and Cultural Rights, Para 34.

any public officer to distribute resources in an ethnically inequitable manner and that resources shall be deemed to have been so distributed when *inter alia* specific regions consistently and unjustifiably receive more resources than others, or more resources are allocated to regions that require remedial resources than those that require start up resources.

Section 12 prohibits discrimination on ethnic grounds in the acquisition, management or disposal of public property. These measures are a commendable attempt to address the problems posed by ethnic discrimination in the allocation of public resources, and the associated ethno-political tensions. However, as discussed above, ERT research found significant regional imbalances in wealth, coupled with significant inequality in infrastructure and access to public services. Testimony from communities interviewed by ERT provided evidence of indirect discrimination in development policy, which, as noted by SID, among others, arises as a result of the "concentration by policy makers on 'high productive' areas (...) in provision of infrastructure such as schools, roads, health centres, etc.". – which further disadvantages those ethnic groups in the poorest areas of the country.[47] It is apparent that these measures to prohibit discrimination in the allocation of public resources are not adequately enforced. This calls for legislators to pay special attention to the needs of disadvantaged communities in their budgetary process to ensure elimination of disparities in the distribution and access to national resources.

The National Cohesion and Integration Act establishes the National Cohesion and Integration Commission (NCIC) with a mandate to "facilitate and promote equality of opportunity, good relations, harmony and peaceful co-existence between different ethnic and racial communities of Kenya".[48] CERD has recommended that states establish national commissions or other appropriate bodies, in line with the Paris Principles.[49] CERD recommends that such bodies should "promote respect for the enjoyment of human rights without any discrimination",

47 Society for International Development, Kenya's Vision 2030: An Audit from an Income and Gender Inequalities Perspective, 2010, p. 5.

48 National Cohesion and Integration Commission Act 2008, section 25(1).

49 Committee on the Elimination of Racial Discrimination, General Recommendation 17: Establishment of national institutions to facilitate implementation of the Convention, UN Doc. A/48/18, 1993, Para 1.

review government policy on racial discrimination, monitor legislative compliance, undertake public education and assist the government in the preparation of reports submitted to it.

The NCIC's powers include *inter alia power* to (a) promote equal access and enjoyment by persons of all ethnic communities and racial groups to public services; (b) investigate complaints of ethnic or racial discrimination and make recommendations to the Attorney-General, the Human Rights Commission or any other relevant authority; (c) determine strategic priorities in all the socio-economic political and development policies of the government impacting on ethnic relations and advise on their implementation; and (d) initiate policy, legal or administrative reforms on issues affecting ethnic relations.[50] Section 43 of the Act makes provision for any aggrieved person to lodge a complaint regarding contravention of the Act to the Commission. In such cases, the Commission has the power to refer the case for conciliation,[51] or issue a notice of compliance setting out duties on the responsible party.[52] Section 59 confers power on the Commission to investigate instances of discrimination on its own initiative.

3.3.4 The Law on Nationality, Citizenship and Immigration

The Kenyan law on citizenship was recently reformed following the promulgation of the 2010 Constitution and the enactment of the Kenya Citizenship and Immigration Act, 2011 pursuant to Article 18 of the Constitution. This brought Kenya's legislative framework in line with the recommendations made by the Committee on the Elimination of Discrimination against Women. Prior to the constitutional and the ensuing statutory reforms, the law on the acquisition of citizenship through birth and marriage discriminated against female parents and spouses.[53] Presently, the Constitution and the Kenya Citizenship and Immigration Act, 2011 recognise the equality between women and men in respect of acquisition of citizenship through marriage[54] and through

50 National Cohesion and Integration Commission Act 2008, section 25(2).
51 *Ibid.*, section 49.
52 Ibid., sections 56 and 57.
53 Constitution of Kenya 1963 (repealed), Articles 90 and 91.
54 The Constitution of Kenya, 2010 Article 15(1); Kenya Citizenship and Immigration Act, 2011 section 11.

birth.[55] The Committee welcomed the constitutional changes in its Concluding Observations on Kenya's periodic report under CEDAW.[56]

In addition to gender equality, the 2011 Act enables stateless persons to acquire Kenyan citizenship. Stateless persons may be described as persons who do "not have an enforceable claim to the citizenship of any recognised state."[57] The same applies to migrants who have been living in Kenya since independence and who meet various other conditions.[58] While these provisions present the opportunity to citizenship for particular communities (such as Kenyan Somalis and Nubians residing in the country at the time of independence), members of these communities continue to experience administrative barriers.

Despite introducing positive changes in relation to gender equality, the Kenya Citizenship and Immigration Act does not contain express provisions prohibiting discrimination. Yet Kenya has an obligation under CEDAW,[59] ICERD[60] and CRPD,[61] to ensure that women, persons of all races, ethnicities and colours and persons with disabilities enjoy the right to a nationality without discrimination. While the general prohibition on discrimination by state actors contained in Article 27(4) of the Constitution applies in this regard, a specific non-discrimination provision in respect to the acquisition of citizenship would enhance the effectiveness of this right. Once again, this highlights the pressing need for specific legislation to lend clarity to the scope of rights and mechanisms of enforcement in the context of issues to which the respective statutes relate.

The Refugees Act, 2006 provides protection from discrimination for asylum seekers, refugees and the families of refugees on entering Kenya. Section 3 defines the term "refugee" in line with the definitions provided in the UN Convention Relating to the Status of Refugees of 1951 and the 1967 Protocol to the Convention. Section 11 of the 2006 Act sets out a

55 *ibid,* Article 14(1); Kenya Citizenship and Immigration Act, 2011, section 6.
56 Committee on the Elimination of Discrimination against Women, *Concluding Observations of the Committee on the Elimination of Discrimination of Women: Kenya*, UN Doc. CEDAW/C/KEN/CO/7, 2011, Para 4(b).
57 Kenya Citizenship and Immigration Act, 2011, section 15.
58 ibid., section 16.
59 Committee on the Elimination of Discrimination against Women, Article 9(1).
60 International Convention on the Elimination of Racial Discrimination, Article 5(d)(iii).
61 Convention on the Rights of Persons with Disabilities, Article 18(1).

process for recognition as a refugee. Section 12 guarantees protection for those seeking recognition as a refugee, providing leave to remain pending determination of their application and any appeals. However, protection under the Act is restricted to recognised refugees, and are not extended to all persons within the jurisdiction of the State. Section 16 states that every recognised refugee and every member of their family in Kenya shall be entitled to all rights contained in international treaties to which Kenya is a party while they reside in the country. Section 18(a) of the Act provides that no person shall be refused entry into Kenya, expelled, extradited from Kenya or returned to any other country where he would be persecuted on account of race, religion, nationality, membership of a particular association or political opinion. As well as implementing Kenya's obligation of *non-refoulement*, an essential protection given Kenya's status as a major destination for refugees from other African countries, this provision enhances the protection against the most severe forms of extraterritorial discrimination.

3.3.5 Family Law

The family law regime in Kenya, which covers marriage, divorce and the division and disposal of matrimonial property on separation or death, has been consolidated. The hitherto diversity of legal regimes resulted in discrimination or inequality between different groups. The scale and impact of discrimination against women in the operation of family law regimes meant that provisions guaranteeing formal legal equality were of particular importance. The consolidation of family laws by the enactment of the Marriage Act, 2014 goes a long way in minimising discriminatory practices while recognising diversity on the basis of religion and customs.

Kenya is obligated by CEDAW to "take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations".[62] As a party to ICCPR, it has an obligation "to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution".[63]

Similarly, the general provisions governing intestate succession under the Law of Succession Act guarantee equal inheritance rights for male

62 Convention on the Elimination of Discrimination against Women, Article 16(1).
63 International Covenant on Civil and Political Rights, Article 23(4).

and female children, and the equal right to produce a will by both male and female parents.[64] The enactment in 2014 of the Family Protection Act, the Marriage Act and the Matrimonial Property Act go a long way in contributing to the gradual realisation of the right to gender equality and non-discrimination with regard to marriage, divorce, family life and property rights. The Marriage Act, 2014 harmonises the range of existing legislation relating to marriage by consolidating all marriage laws in Kenya.

The Matrimonial Property Act defines what constitutes matrimonial property and ensures that once property has been determined as matrimonial, it will be shared equally between the spouses. In effect, it facilitates compliance with Article 16(1)(h) of CEDAW, which requires State Parties to ensure that domestic law provides "the same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property". Under the Act, contribution to the acquisition of matrimonial property may be monetary or non-monetary and includes domestic work, child care and companionship as contributions. It sets out that where property is acquired before the marriage by one spouse and the other spouse contributes to its development, the contributing spouse will acquire a benefit equivalent to the contribution made. The Act prohibits matrimonial property from being sold, leased or mortgaged by either spouse during the subsistence of their marriage without the other's consent. The two statutes significantly enhance equality in matters relating to family and marriage, and go a long way towards implementing Kenya's obligations under Article 16 of CEDAW.[65]

3.3.6 Criminal Law

Even though the Constitution guarantees freedom from discrimination by state agencies, there are no express provisions in legislation that regulate the criminal justice system prohibiting discriminatory conduct by law-enforcement officers, courts and judicial officers involved in the criminal justice system. However, the legislation protects vulnerable groups and individuals from discriminatory harassment, speech and violence.

64 Law of Succession Act 1981, sections 38 and 5(2).
65 Convention on the Elimination of Discrimination against Women, Article 16

Section 77 of the Penal Code imposes penal sanctions for subversive conduct, including activities "intended or calculated to promote feelings of hatred or enmity between different races or communities in Kenya".[66] The section states that this does "not extend to comments or criticisms made in good faith and with a view to the removal of any causes of hatred or enmity between races or communities."[67]

This offence is supplemented by the National Cohesion and Integration Act which imposes penal sanctions for publications, or public performances, which are threatening, abusive or insulting (or involve the use of threatening, abusive or insulting words or behaviour), and are undertaken with the intention of stirring up ethnic hatred, (or in circumstances in which ethnic hatred is likely to be stirred up).[68] Read together, these statutory interventions address Kenya's obligation to prohibit "advocacy of national, racial or religious hatred, that constitutes incitement to discrimination, hostility or violence" under the ICCPR[69] and to declare illegal the "dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin" under ICERD.[70]

Section 23 of the Sexual Offences Act, 2006 creates the offence of sexual harassment (which occurs when any person in a position of authority or holding a public office persistently makes sexual advances or requests which he or she knows or ought reasonably to know, are unwelcome). The offence is punishable by imprisonment for a term of not less than three years and/or a fine of not less than one hundred thousand shillings.[71]

This definition is narrower than the one outlined by the Committee on the Elimination of Discrimination against Women, which states that sexual harassment includes such "unwelcome sexually determined behaviour as physical contact and advances, sexually coloured remarks, showing

66 *Ibid.*
67 The National Cohesion and Integration Act, 2008, section 13.
68 The National Cohesion and Integration Act, 2008, section 13.
69 International Covenant on Civil and Political Rights, Article 20(2).
70 International Convention on the Elimination of Racial Discrimination, Article 4.
71 The Sexual Offences Act, 2006, section 23(1).

pornography and sexual demand, whether by words or actions." The narrow definition of harassment should be expanded in employment and other laws for effective enforcement of section 23 of the 2006 Act in relation to sexual abuse and harassment of vulnerable individuals at the workplace, schools and other institutions.

3.3.7 Employment Law

The Employment Act, 2007 provides protection from discrimination in all aspects of employment. It relates to Kenya's obligations to provide protection against discrimination in all areas of life in keeping with Article 26 of the ICCPR. The Act is designed to ensure, without discrimination, the enjoyment of the rights to work and to just and favourable conditions of work guaranteed under ICESCR[72] and those provisions relating to work provided for in CEDAW, CPWD and ICERD. However, the Act contains broad exceptions which appear disproportionate and inconsistent with the provisions of other legislation, such as the National Cohesion and Integration Act.

Section 5(3) of the Act prohibits discrimination on the grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, mental status or HIV status. The list excludes such grounds as property, birth, health status, civil, political or social status, which are protected under ICESCR.[73] Neither does the Act prohibit discrimination on any "other status", such as the ICESCR, and Article 27(4) of the Constitution. In effect, the Act prescribes a closed list of grounds, which limits the scope of protection and range of claims. The list of specified grounds is similar to that prescribed in the Constitution.

The Act covers both direct and indirect discrimination and harassment, although it does not define these forms of conduct.[74] In line with the rest of the Act (which governs all forms of employment) discrimination in employment is prohibited in both public and private sector.[75] This is

72 International Committee on Economic, Social and Cultural Rights, Articles 6 and 7 read with Article 2(2).

73 *Ibid,* Article 2(2), with Articles 7 and 8; General Comment No. 18: The Right to Work, UN Doc. E/C.12/GC/18, 2006, Para 12(b)(i).

74 Employment Act 2007, section 5(3).

75 *Ibid,* section 3(1), section 5(3)(b).

unlike the National Cohesion and Integration Act, enacted one year after the Employment Act, which does not apply to discrimination on certain grounds common in private sector enterprises. The prohibition on discrimination applies to all aspects of employment including recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment. In effect, the scope of the prohibition compares favourably with CEDAW and the CRPD, both of which list aspects of employment where the State should introduce measures to eliminate discrimination.[76] The scope of protection extends to both employees and applicants for employment.

Section 5(5) specifically provides for equal remuneration for work of equal value, as required by ICESCR[77] and CEDAW.[78] The Act provides a number of exceptions to the protection against discrimination in employment. Section 5(4) prescribes an exception on the grounds of occupational requirement and stipulates that it does not constitute discrimination to distinguish, exclude or prefer any person on the basis of an inherent requirement of a job. This exception is in line with that specified under the 1958 ILO Discrimination (Employment and Occupation) Convention.

Section 5(6) of the Employment Act states that contravention of the provisions elsewhere in section 5 constitutes an offence, while section 88 provides that any person found guilty of an offence under the Act for which no penalty is expressly provided (which includes the prohibition on discrimination), is liable to a fine or term of imprisonment not exceeding one year, or both. Where contravention is alleged, the burden of proof lies with the employer, who must prove that the discrimination did not take place as alleged, and that the act or omission is not based on any of the protected grounds.[79] This provision is in line with acknowledged best practice in civil proceedings. While the transfer of the burden of proof is necessary to ensure that victims of discrimination are able to successfully bring civil

76 Convention on the Elimination of all Forms of Discrimination Against Women, Article 11(1)(b), (c), (d) and (f); and, Convention on the Rights of Persons with Disabilities Articles 27(1)(a) and (b).

77 International Committee on Economic, Social and Cultural Rights, Article 7(a)(i).

78 Convention on the Elimination of all Forms of Discrimination Against Women, Article 11(1)(d).

79 The Employment Act, 2007 section 5(7).

cases, shifting the burden of proof in criminal proceedings, particularly where the accused is liable to a term of imprisonment, is likely to conflict with the right to fair trial.

The provisions dealing with sexual harassment are inadequate. While the Sexual Offences Act, 2006 criminalises sexual harassment, there is no separate civil law prohibition on such behaviour. The Employment Act simply requires employers to take policy measures to address sexual harassment, without giving rise to individual rights for victims. It is presumed that any preferred action in civil or criminal proceedings lies under the law relating to sexual offences.

Section 6 of the Employment Act defines sexual harassment as a situation in which an employer or employee directly or indirectly requests that employee for sexual intercourse, sexual contact or any other form of sexual activity that contains an implied or express

(a) promise of preferential treatment in employment;
(b) threat of detrimental treatment in employment; or
(c) threat about the present or future employment status of the employee;
(d) uses language whether written or spoken of a sexual nature;
(e) uses visual material of a sexual nature; or
(f) shows physical behaviour of a sexual nature which directly or indirectly subjects the employee to behaviour that is unwelcome or offensive to that employee and that by its nature has a detrimental effect on that employee's employment, job performance, or job satisfaction.

The Act requires employers with a staff compliment of more than 20 to develop, issue and publicise a policy statement on sexual harassment. No requirement is made on organisations employing fewer than 20 persons. Notably, the Act defines sexual harassment, but does not impose penal sanctions for such conduct, leaving it to the complainant to lodge a complaint under the Sexual Offences Act with a further option of civil proceedings for compensation. Under the Sexual Offences Act, 2006, section 23(1) provides that any person in a position of authority or holding a public office who persistently makes sexual advances or requests

which he or she knows or ought reasonably to know, are unwelcome, is guilty of the offence of sexual harassment. This offence is punishable by imprisonment of not less than three years or a fine of not less than one hundred thousand shillings, or both.

In addition to the foregoing, section 29 of the Employment Act guarantees the right to paid maternity leave in accord with the universal standards prescribed in both CEDAW and the ICESCR.[80] Discrimination on grounds of pregnancy is prohibited by section 5, as required by CEDAW.[81] Subsection (1) provides that female employees are entitled to three months' maternity leave with full pay. Subsection (2) states that a woman has the right to return to the job which she held immediately prior to her maternity leave or to a "reasonably suitable job on terms and conditions not less favourable than those which would have applied had she not been on maternity leave". The period of maternity leave may be extended with the consent of the employer, or where a woman goes on sick leave, or, with the consent of the employer (a) on annual leave; (b) compassionate leave; or (c) any other leave.[82] Women are required to give notice, in writing,[83] no less than seven days in advance of their intention to take maternity leave,[84] and may be required to produce a medical certificate.[85] Section 29(7) protects women's annual leave entitlement whilst on maternity leave. Under subsection 29(8), male employees are entitled to two weeks' paternity leave with full pay.

Notably, the Act imposes a positive duty on the Employment Ministry, labour officers and the Industrial Court to "promote equality of opportunity … in order to eliminate discrimination in employment".[86] Section 5(2) imposes a general obligation on employers – albeit narrower in scope – which requires them to promote equal opportunity and "strive to eliminate discrimination in any employment policy or practice". In addition, subsection (4) (a) permits affirmative action

80 Convention on the Elimination of all forms of Discrimination Against Women, Article 11(2)(b) and International Committee on Economic, Social and Cultural Rights, Article 10(2).
81 Convention on the Elimination of all forms of Discrimination Against Women, Article 11(2)(a).
82 The Employment Act,2007 section 29(3).
83 *Ibid.*, section 29(5).
84 *Ibid..*, section 29(4).
85 *Ibid.*, section 29(6).
86 *Ibid..*, section 5(1).

measures "consistent with the promotion of equality or the elimination of discrimination in the workplace".

Even though section 5(1) and (2) impose duties on the Ministry of Employment and employers to promote equality of opportunity in employment in order to eliminate discrimination, neither establishes mechanisms for the enforcement of those duties. It should be noted, though, that under the National Cohesion and Integration Act, all public establishments are required to ensure representation of Kenya's diversity and to employ no more than one third of staff from the same ethnic community.[87] Accordingly, it is incumbent upon legislators to establish reporting mechanisms to facilitate periodic audit on compliance by state agencies with these standards of inclusion.

3.3.8 Other Statutory Protection Against Discrimination

In addition to the foregoing, the Children Act, 2001 provides a general prohibition on discrimination for all children on a range of specified grounds. Similarly, the HIV and AIDS Prevention and Control Act, 2006 provides protection from discrimination on the ground of one's HIV status.

Section 5 of the Children Act, 2001 provides that no child "shall be subjected to discrimination on grounds of origin, sex, religion, creed, custom, language, opinion, conscience, colour, birth, social, political, economic or other status, race, disability, tribe, residence or local connection". Even though the Act does not include provisions on procedural matters or remedies, it provides protection for all children on an extensive range of grounds in all areas of life. In addition, the 2001 Act provides a range of other protective measures in relation to abuse, parental care, armed conflict, forced labour, harmful cultural practices and religious discrimination.

The HIV and AIDS Prevention and Control Act 2006 was enacted to regulate appropriate treatment, counselling, support and care of persons infected or at risk of being infected with HIV.[88] Part VII of the Act contains provisions prohibiting discrimination on the basis of actual,

87 The National Cohesion and Integration Act, 2008 sections 7(1) and (2).
88 HIV and AIDS Prevention and Control Act, 2006 section 3.

perceived or suspected HIV status. Section 31 prohibits denial of access to employment, transfer, denial of promotion or termination of employment on the basis of one's HIV status. However, this prohibition is limited by subsection (2), which states that the prohibition shall not apply "where an employer can prove … that the requirements of the employment in question are that a person be in a particular state of health or medical or clinical condition". Other sections in this part of the Act expressly prohibit discriminatory conduct and policies in schools, public transport, or choice of abode, in seeking elective or other public office, in accessing credit facilities or insurance, healthcare services and burial services.[89] Section 38 imposes penal sanctions for breach of the foregoing provisions relating to protection from discrimination.

Section 25 of the HIV and AIDS Prevention and Control Act, 2006 establishes an HIV and AIDS Tribunal with jurisdiction to hear and determine complaints, appeals and matters arising from contravention of the Act. The Tribunal has power to make orders for payment of damages in respect of proven financial losses and direct that specific steps be taken to address the discriminatory practice, among other orders. An award of damages by the Tribunal is enforceable in the High Court as a decree of the court. In the alternative, the claimant may institute proceedings for damages in the High Court.

Even though the non-discrimination provisions in the Constitution guarantee protection from discrimination in healthcare services and provide mechanisms for individuals to bring claims and secure remedies, the Public Health Act, 1961 does not contain any non-discrimination provisions. The ongoing attempt to reform national legislation on public health, and the much-anticipated county legislation on basic healthcare, are well positioned to fill this gap. Accordingly, legislators at both levels of government are obligated to ensure that healthcare services are accessible to all regardless of their social-economic status on the basis of which vulnerable groups and marginalised communities are often disadvantaged.

The Basic Education Act, 2013 which governs primary and secondary educational institutions, contains no express provisions prohibiting

89 Ibid, sections 32-37.

discrimination in education. In particular, the Act does not address the special needs, and the indirect exclusion, of learners with disabilities. Neither does the Act establish administrative procedures to guarantee equal access to education services by disadvantaged groups beyond the constitutional guarantees that count for little in the absence of institutional and administrative frameworks for full realisation by SIGs of the right to education. This calls for policy, legislative and administrative intervention to ensure that Kenya meets its obligations to provide effective protection from discrimination in accordance with Article 26 of the ICCPR, and to ensure enjoyment, without discrimination, of the right to education in accordance with the ICESCR.[90]

The Political Parties Act, 2011 contains a number of provisions which seek to ensure that parties reflect Kenya's diversity. Among the conditions for registration of a political party are that the membership of the party must reflect regional and ethnic diversity, gender balance, and must include representatives of minorities and marginalised groups.[91] Additionally, the memberships of the governing body of the party must reflect these requirements and not more than two-thirds of the membership of the governing body may be of the same gender.[92] Parties can be deregistered if they contravene Article 91 of the Constitution, which requires parties to respect and promote human rights, gender equality and equity, and prohibits them from seeking to advocate hatred on religious, linguistic, racial, ethnic, gender or regional basis.[93] Political parties can also be deregistered if they fail to uphold national values and principles of the Constitution (provided in Article 10) which include equality and non-discrimination.[94] It should be noted, however, that some smaller minority groups may be disadvantaged by the registration requirement that a party have no less than 1000 members in more than half the counties.[95]

3.3.9 Conclusion

Apart from the statutory protection provided under the Constitution, the Persons with Disabilities Act and the National Cohesion and Integration

90 International Committee on Economic, Social and Cultural Rights, Article 13 read with Article 2(2).
91 Political Parties Act, 2011, section 7(2)(b).
92 Ibid, sections 7(2)(c) and 7(2)(d).
93 Ibid, section 21(1)(a).
94 The Political Parties Act, 2011, section 21(1)(d).
95 Ibid, section 7(2)(a).

Act contain more comprehensive provisions on equality and non-discrimination. On the other hand, protection from discrimination in other legislation is patchy and inconsistent. While some Acts, such as the Employment Act, the Universities Act and the Children Act, contain provisions which prohibit discrimination based on diverse grounds, legislation in other fields (such as healthcare and education) does not contain statutory guarantees for equality and non-discrimination. Such gaps need to be addressed to ensure that the legal framework exhaustively addresses our deep-seated concerns for gender equality and social inclusion of SIGs.

These gaps raise questions as to the extent to which Kenya has met its international obligations. Kenya has an obligation under article 26 of the ICCPR to ensure that "the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground".

In addition, Kenya has respective obligations under the ICESCR, Article 12 read together with Article 2(2) and the ICESCR Article 13 read together with Article 2(2) to ensure that all persons enjoy their rights to *inter alia* education and the highest attainable standard of physical and mental health without discrimination. This is in addition to the specific obligations in relation to discrimination against women under CEDAW for which there is no specific legislation on discrimination on the basis of gender. The same applies to other special interest groups that are more vulnerable to differential treatment and social exclusion.

The general prohibition on discrimination by state and non-state actors provided by articles 27(4) and (5) of the Constitution substantially offer protection from discrimination. Even though articles 22 and 23 provide mechanisms for enforcement, the need for specific substantive and subsidiary legislation on gender equality, non-discrimination and social inclusion of all vulnerable groups and marginalised communities cannot be overemphasised. This would lend clarity to the process of enforcement in proceedings for relief for breach of the right to social inclusion, equality and non-discrimination.

According to the CESCR, the adoption of legislation to address discrimination is indispensable in compliance with Article 2, paragraph 2. To this end, State Parties are therefore encouraged to adopt specific legislation that prohibits discrimination in the field of economic, social and cultural rights. Such legislation should aim at eliminating direct and indirect discrimination on all grounds contemplated in the Constitution and provide certainty in relation to (a) the scope of the respective constitutional rights; (b) the appropriate measures to ensure access to justice; and (c) appropriate provisions for remedies. In addition, the legislation should be suitably designed to impose obligations on all public and private institutions to facilitate the realisation by SIGs of the right to inclusion, gender equality and freedom from discrimination.

In addition to the foregoing, there are significant variations between provisions in existing legislation. Definitions of key concepts, forms of prohibited conduct and the treatment of protected grounds of discrimination. In addition, there are direct inconsistencies where several different statutes govern the same area of life. For example, the protection provided in private sector employment against discrimination on grounds of race and ethnicity is found in both the Employment Act and the National Cohesion and Integration Act, which are contradictory. Lack of comprehensive protection means that multiple discriminations are inadequately addressed. Finally, there are gaps, limitations and definitional difficulties in existing legislation. As a result, the legal framework provides differing levels of protection in different areas of life and on different grounds. This means that the scope of protection available to individual victims can be unclear, which has the potential to create confusion not only for rights holders, but also for duty bearers and law enforcement agencies. Indeed, it is widely accepted that there is a close correlation between the clarity of legal rights and duties and the extent to which duty-bearers comply. The range of competing legal norms suggests that there is need to harmonise legislation on gender equality and social inclusion.

The foregoing analysis of statute law on equality and non-discrimination is by no means exhaustive. The selected statutes are reviewed merely as illustrative of the attempts made by Parliament to facilitate Kenya's compliance with international standards and treaty obligations to

guarantee the right to equality and freedom from discrimination on commonly accepted grounds in social, cultural, economic and political life. The foregoing review demonstrates the extent to which Kenya has attained to the ideals of gender equality and social inclusion of SIGs.

What then is our call for action?

It is recommended that the two Houses of Parliament and County Assemblies establish a programme to facilitate:

(a) periodic audit of existing legislation;
(b) technical review of legislative proposals and policy frameworks on which they are founded;
(c) ascertainment of the extent to which policy and legislation comply with (i) the constitutional standards of equality and non-discrimination, and social inclusion of SIGs; (ii) the universal standards of equality and non-discrimination; and (iii) treaty obligations binding on Kenya;
(d) law reform towards (i) full realisation of gender equality and social inclusion of vulnerable groups and marginalised communities; and (ii) a harmonised legal framework for the protection of the right to equality and freedom from discrimination;
(e) meaningful public participation by all, including women and other SIGs; and
(f) adequate budgetary allocation to support programmes, plans and actions designed to ensure the realisation of gender equality and inclusion of SIGs in mainstream society.

3.4 Legislative Framework for Gender Equality and Inclusion at the County Level

The Constitution of Kenya, 2010 established the system of devolved government comprised of the national and forty-seven county governments. However, since the operationalisation of county governments in March 2013, County Assemblies are yet to have a foothold in legislation beyond the basic operational county legislation relating to development planning, trade and licensing and finance. A quick survey of county legislation reveals little or no statutory concern for gender equality and inclusion of SIGs, except on matters relating to recruitment

of personnel in county executives, as guided by national legislation. It is safe to conclude that county governments are yet to address themselves substantively to issues of gender equality and inclusion in all areas relating to functions assigned to county governments in accordance with the Fourth Schedule of the Constitution. In the meantime, national legislation holds sway over all state organs, including county governments.

It may be argued, though, that the existence of national legislation on equality and non-discrimination suffices, and that County Assemblies do well to legislate on similar issues by reference. That said, in an ideal situation, county legislation should be as complete and comprehensive as possible. This would provide a one-stop legal framework without the need to search national legislation to discover what anti-discrimination provisions apply in statutes governing the administration of respective functions of county governments. On the other hand, it would suffice to make reference to relevant national legislation and, thereafter, incorporate additional provisions relevant to the particular county legislation. In effect, county legislation should be suitably designed to give effect to the Constitution and national legislation in matters relating to the functions assigned to county governments.

3.5 The Status of Administrative Procedures for the Realisation of Gender Equality and Inclusion of SIGs at the National and County Levels

Public awareness of the establishment and mandate of the KNCHR, CAJ and NGEC and, the utilisation of their services has been on the rise. The year 2014 saw an exponential growth in the number of complaints on issues of maladministration, human rights and equality to the three commissions. This is a result of concerted efforts by the commissions to reach citizens through various activities implemented in 2014 to inform them of their mandate and the services provided, as well as their strengthened cooperation with government ministries, departments and agencies (MDAs) through performance contracting.

Complaints to the three commissions have steadily risen in the last few years. In discharge of its constitutional and statutory mandate, the NGEC

established a specific department dedicated to handling complaints from members of the public on matters relating to equality and inclusion. In addition, the Commission has been initiating and influencing key national reform processes in this regard. Since 2014, the Commission has been instrumental in the incessant attempts to enforce the constitutional minimum standards of gender equality and the requisite affirmative action agenda. To this end, it chaired and coordinated a committee established by the Attorney General to develop a framework for the realisation of the two-third principle of gender equity at the National Assembly and Senate. The committee reviewed and submitted legislative options, none of which has borne fruit despite introduction to the two Houses of Parliament of Bills designed to enforce this constitutional principle.

The NGEC and KNCHR have also played important roles in advocating for the review of key statute laws, including the Prison Service Act (Cap.90) and the Borstal Act, as well as the Persons with Disabilities Act, 2003. The KNCHR initiated the review of Cap.90 and the Borstal Act (Cap.92), supporting key stakeholder involvement. There have been considerable strides made towards the review with Kenya Prison Service taking the lead with the support of the working group. Review of those statutes will significantly contribute to ongoing penal reforms to accommodate the special needs of women, PWDs and other vulnerable groups. The KNCHR and NGEC also facilitated the review of the PWD Act of 2003 to expand the range of benefits and increase equality of opportunity for PWDs. The revised bill has been submitted for Cabinet approval pending publication and enactment. It is the Commission's hope that any other legislation on equality and inclusion will attract the legislators' attention as a matter of priority.

The NGEC has substantially contributed to the realisation of the rights of minority groups and marginalised communities by undertaking periodic audits and investigations. The Commission's periodic reports and recommendations form the basis of legislative and administrative intervention to which legislators are attend. For example, after investigations and subsequent reports on the rights of older persons (on social and physical protection) NGEC lobbied and advised the government on inclusion of the rights of the older persons. County governments were given informal advisory and three have now made adjustments to their

five-year plans to accommodate programmes and interventions on older persons. The recommendations made by NGEC have also contributed to the increased budget allocation to social protection programmes for older persons to 4.9 billion shillings in 2014.

In addition to the foregoing, the three commissions played a key role in 2014 in monitoring and reporting on government treaty obligations. The Universal Periodic Reporting process reached the 4.5-year milestone to assess Kenya's compliance and progress in implementing recommendations received during the first UPR review in 2010. The KNCHR participated in the development of the government report and coordinated the submission of key shadow reports to provide the Human Rights Council with a holistic picture of Kenya's human rights situation. The KNCHR's facilitation of the UPR process has been highlighted as best practice in Africa.[96]

In conclusion, effective administrative action and procedures to facilitate gender equality and social inclusion of SIGs depend on sound legislation in accord with universal standards and treaty obligations. To this end, legislators have a continued obligation to gauge Kenya's compliance with treaty instruments to which it is party and evaluate the extent to which the legal framework meets these standards. The need for proactive response, rather than reaction to advocacy by civil society organisations, cannot be overemphasised. The critical role of legislators in the realisation of gender equality and social inclusion of SIGs should be appreciated by all legislative bodies at both levels of government.

3.6 The Status of Gender Equality and Inclusion of SIGs in Mainstream Society

Despite the robust and ambitious nature of Kenya's Constitution, which is arguably East Africa's most progressive or liberal Constitution, Kenya has the lowest level of women representation at almost all levels of decision-making. The continued failure to establish a suitable legislative or political mechanism for the realisation of what is commonly referred to

96 Ministry of Foreign Affairs of Finland Support to the Realisation of Human Rights and Access to Justice in Kenya (Annual Progress Report) (2014)

as the two-thirds gender principle designed to guarantee gender equity and representation (with particular reference to the representation of women in Parliament) poses the risk of a constitutional crisis.

Even though Kenya is considered a democracy with a vibrant civil society, and which holds periodic and predictable elections, Kenya's performance on women's representation has been dismal compared with her East African neighbours. Women make only 10 percent of Kenya's Parliament, compared with Rwanda's 56 %, Tanzania's 36%, Uganda's 35% and Burundi's 30%. Indeed, Kenya's record falls 10 percentile points below the EAC's regional average of 20% women representation in parliament.

History shows that women have not fared well in elective politics in the successive post-colonial General Elections since 1963. Kenya's first Parliament did not have even a single nominated woman representative. Even though Ms. Grace Onyango was elected in the second General Election in 1969 to represent Kisumu Town Constituency, women have not fared well in the successive General Elections despite the increasing number of women candidates for both civic and parliamentary seats. It is no wonder that gender equality and inclusive development continues to elude our society's imagination. This state of affairs should reignite our resolve to address these disparities with finality.

Notably, though, women representation has markedly risen in County Assemblies. In contrast, representation in the Senate and National Assembly, which require substantial financial resources and social capital, has been markedly dismal. Two main reasons account for women's exclusion from higher elective offices, namely, (a) Kenya's patriarchal culture and electoral system; (b) a political contest that requires enormous investment in social capital. Yet the processes of economic, cultural and political capital accumulation favour men over women across ethnic, religious and social divides. Even though women continue to play an important role in party politics, their participation in the often alpha-male led political parties, with strong ethno-regional appeals, has been confined to 'entertaining' power and voting rather than representation. Indeed, it is this dilemma on women's representation that made the women's caucus, arguably the most organised and representative of the caucuses in Kenya's protracted constitutional making process, advocate

for several provisions that would remedy the historical legacies of women's exclusion and marginalisation in decision making processes.

A number of constitutional provisions, including articles 27(3), 27(6), 81(b), 177(b) and 197, stand out as significant milestones in Women's quest for gender equality in political representation at the two levels of government, i.e. national and county.

While Article 27 (3) unequivocally states that 'women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres', Article 27(6) and 81(b) constitute an unfavourable compromise in Kenya's constitution-making process. The two articles may be viewed as the derailing course in the women's quest for gender equity in representative politics at the national level. Accordingly, the two Houses of Parliament are obligated to break the impasse through legislation to operationalise the two-third gender rule and facilitate the realisation of gender equity and inclusion of other SIGs in appointive and elective positions at both levels of government.

Article 27 (3) states that 'the state shall take legislative and other measures including affirmative action programmes and policies to redress any disadvantage suffered by individuals or groups because of past discrimination'. Article 81 (b) states that 'not more than 2/3 of members of elective public bodies shall be of the same gender' and Article 177 (b) and 197 state 'that gender principles must apply in County Assemblies and the County Executive Committee'. In effect, the makers of the Constitution merely postponed the dilemma of women's representation instead of making express provisions to regulate the manner in which these provisions would be realised.

By implicitly endorsing the single member district constituencies, the drafters of the Constitution constrained Kenya's options on mechanism or formulas for effecting the provisions on gender equity. It is generally accepted that a proportional representation system of election could be less adversarial, makes more votes count and is amenable to various affirmative action formulas. However, Kenya's options are delimited by the constitutional prescriptions in Article 89 and 97(1) (a).

Notably, Article 89 fixes the maximum number of seats in Parliament at 290. This provision ties constituencies to geo-spatial grids and populations instead of communities of interests regardless of their geographical locations. On the other hand, Article 90 only provides for a limited application of proportional representation for nominations to Parliament, i.e. only 12 seats in a 290 seat Parliament. Even if all the 12 seats were allocated to women only, and not any other vulnerable group that experienced historical discrimination, Kenya would still have a deficit of about 85 women representatives in order to meet the Constitutional requirement on gender equity in representation. Failing this, the looming constitutional crisis will soon become a reality. Yet, the solution (if any) will not present itself, and delayed legislative intervention does not in itself resolve the matter.

To preempt the immanent constitutional crisis in the event that the electorate fails to elect women comprising at least one-third of the members of Parliament in General Election, one of the following political options may be open to consideration, namely, either (a) expediently amend the Constitution to repeal the provision relating to the two-third gender rule; or (b) reserve about 90 out of 290 constituencies for women candidates only, an option that has the effect of negating the ideals of competitive democratic elections. Either way, legislators have a daunting task of resolving this constitutional dilemma sooner than later.

Notably, the first proposal runs counter to the progressive spirit of the Constitution, which guarantees the right to social inclusion, equality and freedom from discrimination. And there lies the dilemma. The intended realisation of women's equitable representation is not only good for Kenya's democracy in the short run (signaling an end to systemic exclusion or marginalisation of women in the ultimate decision and rule making institutions), but also in the long-run, bringing in women's perspectives to bear upon Kenya's political decision and ruling making processes. However, a bold step towards the first option would defeat this cherished ideal.

While the second option is plausible and pragmatic, it poses the risk of curtailing fundamental rights and freedoms of others, i.e. the freedom to elect and be elected to public office. It is debatable whether designating

women contestants only constituencies, anchored only in the Independent Electoral and Boundaries Commission's rules on elections, as suggested by Kenya Human Rights Commission, would constitute a fair administrative action.

Indeed, it's worth considering whether limiting the fundamental rights and freedoms of a cross-section of the electorate would be 'reasonable and justifiable in an open and democratic society' and 'whether there are less restrictive means to achieving' gender equity, as the Constitution of Kenya, 2010 suggests in its general provisions relating to the Bill of Rights.

Although the court has made a pronouncement on this conundrum 'FIDA, CREAW & Others Vs. the Attorney General', the court's ruling did not give adequate direction on how to effect Article 27 (8). The Article states that 'the state shall take legislative and other measures to implement the principle that not more than 2/3 of the members of elective or appointive bodies shall be of the same gender'. However, the High Court ruling, by an all men bench, that suggested that women's representation (a civil political rights), like the right to housing (a socio-economic right), 'are progressive and can only be attained over a period of time'.

The court also suggested that Kenyan women should wait for the state to institute legislation and other measures to promote gender equity in elective and appointive offices. Through this ruling, the court largely ignores the necessity of affirmative action in creating a critical mass of women, whose agency can catalyze cultural change, a measure which could improve women's chances of being elected to public office and cut short the waiting period for cultural change.

While the court's decision has been challenged, and a higher court could overturn its verdict, the National Gender and Equality Commission has yet another proposal: Amend Article 97, especially 97 (C) so that the National Assembly seats are made up of elected and special seats 'necessary to ensure that no more than two-thirds of the membership of the Assembly are of the same gender' – similar to the provisions on the County Assemblies in Article 177 (a).

Such a provision could fundamentally alter Kenya's electoral system. It could open up creative possibilities. Instead of providing an inflexible number of Single Member Districts (constituencies) and a First Past the Post electoral system, it would provide for a Mixed Member Proportional Representation, thereby combining a significant number of electoral constituencies, which Kenyans are familiar with, with an equal significant number of special seats, which can be allocated on the basis of party votes and clear rules of nomination after an electoral contest.

Such a constitutional amendment could guarantee women's representation through affirmative action through party lists. Moreover, if party nominations rules are clearly spelt out and takes into account the Constitution of Kenya, 2010 principles and objectives, the process could greatly enhance women's representation across class, religious and ethnic divides. It could be a prudent move in light of the limited lifespan of the current Parliament. It could be costly in the short-run, but a good investment in a more inclusive future in the long run.

If the clumsy constitutional settlement in 2010 on gender equity on representation signaled a major patriarchal concession in Kenya's struggle for gender equality, then the recent struggle over the mechanism for effecting gender equity provisions, suggests that the Kenyan women's hard won provisions could be reversed, if there is no counter-veiling force against a resurgent patriarchal, and mostly male-led political parties and Parliament. It is a battle that is likely to be won in a court of law, rather than in Parliament, only if the Kenyan courts embrace a more progressive jurisprudence on women and representation.[97]

97 Akoko Aketch 'Gender equity: Kenya at crossroads' available at <http://www.sidint.net/content/gender-equity-kenya-crossroads> (last accessed on 5th July, 2017)

PART II

Chapter Four

4.0 The Role of Legislators

The National Assembly in session

4.1 The Role of Legislators as Peoples Representatives

While democratic rule denotes popular sovereignty, it is impracticable for tens of millions of citizens to convene on a common platform to legislate. For this reason, representative law-making becomes imperative. Accordingly, assemblies of elected members are established to represent the sovereign people who, in certain circumstances and jurisdictions, may directly vote on proposed laws or public policy in referenda and other elections.

Kenya is a fitting example of jurisdictions in which the people exercise legislative authority by representation through the Senate, National and County Assemblies and, in certain special cases, exercise their collective will by vote in a referendum on matters of fundamental constitutional reforms. Direct vote in such cases constitutes active participation by individual citizens in the process of determining the content and effect of the legislation in question.

Even though the ideal democratic scenario would be to have the literal presence in the lawmaking process of all interested parties, as posited by Waldron (2008), in reality, the colossal numbers of those involved would render it impracticable.[98] The object of allowing "… every shade of opinion in the community to really and truly speak for itself" would be unattainable. For this reason, policy development and lawmaking are representative. Accordingly, the only course for concern is the extent to which the general populace and, in particular, vulnerable groups and marginalised communities, are accorded the rightful space to articulate its individual or group interests in an atmosphere often charged with party politics and the personal (or collective) interests of the individual legislators.

In addition to the legislative assemblies at both levels of government, the national and county executive have power to make what is commonly referred to as delegated or subsidiary legislation often comprised of regulations or administrative procedures designed to guide their administrative action. The Constitution permits Parliament to delegate its legislative powers to executive bodies to give effect to a diverse range of sectoral legislation implemented by respective Cabinet Secretaries. The enabling legislation delimits the executive power and defines the subject matter of the delegated legislation. Accordingly, the executive bodies may adopt laws only on the basis of the powers delegated by Parliament.[99] In any event, legislators should closely guard the ideals for which legislation is intended, as they are accountable to the electorate, including minority groups whose voices are often muffled by the will of the majority.

Notably, the comprehensive procedure for subsidiary legislation in Kenya (including antecedent and subsequent publication of proposals for public views) is, in principle, consultative and participatory. The procedure for the formulation of substantive and subsidiary legislation is comprehensively set out in the respective Standing Orders and need

98 Waldron J "The Most Disparaged Branch: The Role of Congress in the 21st Century" a paper presented at Boston University School of Law, November 14th 2008.

99 Bogdanovskaia I "The Legislative Bodies in the Law-Making Process" available at <https://www.google.com/search?q=lawmaking+in+democratic+states&ie=utf-8&oe=utf-8> (last accessed on 5th October 2015)

not be recited in this handbook. The groups affected by the legislation are accorded the opportunity to engage the executive bodies in the development of both policy and delegated legislation. In effect, public participation is imperative.

In discharge of their respective roles, Parliament and County Assemblies must demonstrate their effectiveness in the defence of the constitutional values of equality, non-discrimination and social inclusion. The question as to whether Parliament and County Assemblies make a difference, and whether they make an impact on government and society should always draw answers in the affirmative. Indeed, the two Houses of Parliament and County Assemblies must prove to be relevant by being seen as proactive institutions that connect to the higher issues of the day (such as the promotion and protection of the right to equality and freedom from discrimination, social inclusion and inclusive development). Only then can they be seen as vital state organs that make a difference in people's lives.

On the score of effective representation and relevance in the life of the people, Parliament and County Assemblies must gauge the extent to which:

(a) they are truly representative of the diverse needs and interests of the divergent population groups (including women and other special interest groups) in the parliamentary chamber and assemblies, committees, party caucuses and constituencies;
(b) they influence policy and enact legislation that has a positive impact on the lives of the people, including vulnerable groups and marginalised communities;
(c) they accord minority groups equal opportunity to articulate their needs and interests in the process of legislation;
(d) they maintain a structured process of inclusive public participation in their law-making activities; and
(e) the outcomes of their activity (such as debates, laws, resolutions, reports and assistance to constituents) are not only effective and relevant to, but have a positive impact on, and address the real needs of, all special interest groups.

4.2 The Role of Legislators in Policy Development

Policy making and legislation are invariably influenced by the dynamism of every politically organised society. In practice, party politics play a decisive role in the legislative process and in determining the content of policy and legislation. Kenya's experience during the period between 1963 and 1966 is a fitting example of how party politics can influence far-reaching constitutional reforms and the erosion of fundamental rights and freedoms in complete disregard of the common good of society. Loyalty to one's party impels legislators to generate legislation that reflects their party's manifesto.[100] In the alternative, they are quick to criticize policies that conflict with the political aspirations of their party.

Political parties influence legislation by compelling representative legislators to make fundamental choices as between what is advocated in the legislative sphere and what is embraced by the party.[101] In effect, the content of legislation invariably reflects the majority or ruling party's belief system, policy and legislative agenda. A party's legislative programme almost invariably wins the support of its entire leadership in and outside Parliament, which explains why the legislative process is driven by the political vision and mission of the majority in Parliament.

It is not uncommon for political parties to advocate for the adoption of policies and legislation that appeal to the popular support of the electorate but which may not necessarily be sound from the economic, religious, moral or social point of view. A good example is the recent near-collapse of the Greek economy as a result of a flawed but populist policy position not to reduce public borrowing or spending, which resulted in unprecedented inflation and grave economic consequences.

Political parties play a significant role in shaping public opinion. They mobilise support for and party programmes, planning and perspectives among its members and the general public. In effect, they play a pivotal role in the flow of political information and mobilise the electorate to

100 Kanan A "How Do Political Parties Influence Policy Making?" available at www.enotes.com/homework-help/how-do-political-parties-influence-policy-making-291376 (last accessed on 5th October, 2015).

101 ibid.

vote for office holders in representative democracies by selling partisan messages and appeals.[102] Accordingly, mobilisation for political support, policy and legislation in developed democracies is mostly dependent on formal institutional arrangements of the party on an ongoing basis.

Every party mobilises to propagate its systems of belief, specific objectives and political programmes that ultimately inform policy development and the legislative agenda of the party that emerges victorious in an election. Accordingly, parties are used as a means of assessing the suitability of their sponsored candidates and, therefore, provide a linkage between the electorate and their representatives, who are in turn expected to advocate and legislate for their social interests and the common good of society. Accordingly, the realisation of gender equality and social inclusion of SIGs depends on the extent to which individual political parties espouse these democratic ideals for which every legislator is accountable.

The extent to which party politics guides policy and legislation for the common good of society in Kenya remains to be seen. If the 1963-1966 and the 1982 constitutional reforms are anything to go by, it may be safely concluded that party politics in Kenya focuses on the means of consolidating political power with token reference to issues of concern to the general public. Even where social issues are addressed in political campaigns, most parties lack a clear vision and focus on rhetoric slogans cunningly coined to court the electorate. They pursue power for its sake and, if victorious, spend the remainder of their term investing on survival as the opposition remains infatuated with criticism and condemnation over anything and everything, including what may turn out to be sound policy and legislation.

In their bid to mobilise popular support, political parties and their sponsored candidates to the legislative assemblies at both levels of government should be keen to take on board the concerns of minority groups and marginalised communities whose voices go a long way in legitimising their leadership. Indeed, the integrity of any government

102 Fredrich Ebert Foundation "Institutionalising Political Parties in Kenya" available at https://www.google.com/search?q=how+party+politics+influence+legislators+in+kenya&ie=utf-8 (last accessed on 6th October, 2015).

is tested on the extent to which they address and meet the needs and interests of their most vulnerable groups.

To this end, legislators at both levels of government are mandated to discharge their duties by influencing the development of policy on gender equality. Only then can gender equality find meaningful provision in legislation and the programmatic interventions designed for the realisation of the right to gender equality and social inclusion of SIGs to which the Constitution is committed. Such national policy would guide legislation by Parliament and County Assemblies to the ends of the realisation of the universal standards of equality and inclusion of SIGs.

4.3 The Legislative Role

In any civilised society, legislation is designed to meet the diverse social needs and interests of the general populace, minority and vulnerable groups, and marginalised communities. These needs and interests include (a) individual interests asserted for the titles of individual life; (b) public interests, which are claims or demands, or desires involved in life in a politically organised society and asserted as entitlements of that organisation; and (c) social interests comprised of claims, demands or desires involved in the social life and asserted in title of that life.[103]

In theory, the three categories of legal interests need to be balanced against each other under a legislative framework in respect of whose content all interested groups and individuals have a say in its formulation. It must be appreciated, though, that these interests are not mutually exclusive. They overlap and form what Pound (1943) views as "three perspectives of a single set of interests which co-exist in the context of unity and variation".[104]

According to Pound, "law is social engineering which means a balance between the competing interests in society in which applied science[s] are used for resolving individual and social problems"[105] (such as social

103 Nalbandian E "Sociological Jurisprudence: Roscoe Pound's Discussion on Legal Interests and Jural Postulates" Hein Online available at http://heinonline.org (last accessed on 5th October, 2015).

104 Pound R (1943) "A Survey of Social Interests" 57 Harvard Law Review p.99.

105 ibid.

exclusion and gender inequality). Therefore, it may be concluded that no sound balance between competing interests can be struck if those with claims, demands and interests sought to be balanced are excluded from the law-making process, which seeks to satisfy such interest as would be in the benefit of the majority.

To illustrate, it is in every person's interest that national legislation curbs discrimination and social exclusion of SIGs to the same extent as it seeks to curb corruption and economic crimes for which it imposes heavy penalties. The enactment and successful enforcement of such legislation would result in economic growth and stability attributable to inclusive development and investor confidence. Consequently, the economic growth results in increase in job opportunities and availability of resources to support state-funded social welfare programmes. In effect, laws are used as a means to shape society and regulate peoples' behaviour for the common good of society. Indeed, inclusion and empowerment of the weakest members of our society makes for a strong nation.

In principle, political organisation of society in modern-day democracies recognises the need for representation in legislative institutions to ensure that law making effectively accommodates and balances the competing needs and interests of society. In any event, legislators should be cognizant of the fact that their primary role relates to representation of each and every member of the society in which all are equal and deserving of equal recognition and protection of the law.

Constitutional states are considered democratic. The democratic model of government is based on the principle of the people's sovereignty. It means that the source of the State authority is the people. The people, as a social entity, form the governmental authority and determine the content of the activity of the governmental bodies and, consequently, the content of law- making and the activity of the legislative bodies.[106] In effect, decisions of the State must be legitimate, i.e. supported by the people. To a large extent, the legislative body, which is representative of the people's popular will, corresponds to their demands. The State creates conditions for expressing of opinion. To this end, individuals may unite in associations or political parties for collective expression of

106 I. Bogdanovskaia 'The legislative bodies in the law – making process' available at http://www.nato.int/acad/fellow/97-99/bogdanovskaia.pdf (last accessed on 13th July, 2017).

opinions. However, those least resourced in society lack the social or political instruments for the expression of their collective will. For this reason, legislators play a significant representative role to guarantee inclusion of these special interest groups in social development. In this regard, legislators ought to ask themselves the question as to what extent the voices of the vulnerable and marginalised groups in society are heard as they ventilate their needs and interests.

Article 1 of the Constitution expresses the principle of the sovereignty of the people. It states:

(1) All sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution.
(2) The people may exercise their sovereign power either directly or through their democratically elected representatives.
(3) Sovereign power under this Constitution is delegated to the following State organs, which shall perform their functions in accordance with this Constitution––
    (a) Parliament and the legislative assemblies in the county governments;
    (b) the national executive and the executive structures in the county governments; and
    (c) the Judiciary and independent tribunals.
(4) The sovereign power of the people is exercised at—
    (a) the national level; and
    (b) the county level."

4.4 The Oversight Role of Legislators

Parliament and County Assemblies are popularly elected representative political assemblies. They ensure responsiveness and accountability of the national and county governments to the citizenry by performing two vital political functions, namely, (a) conducting free and open political debate in the law-making process, budgetary allocations, public spending and implementation of government policies; and (b) representing citizens and groups, including special interest groups, in their dealings with government. In other words, Parliament and County Assemblies bear the mandate of representing the concerns of citizens.

Failure to discharge this primary task renders them passive rubber-stamp conveyors in an insensitive legislative process. Accordingly, Parliament and County Assemblies should be responsive to the needs of citizens and, in particular, of SIGs, whose voices can easily be muffled in the name of popular democracy.

The importance of parliamentary institutions in the development agenda cannot be overemphasised. Moreover, successful development requires a healthy balance between a vital and diverse civil society, an economically competitive and productive marketplace and effective accountable government. Within this network of institutions, legislative assemblies play an important role in ensuring accountability, participation of the people, democratic development and transparency in government.[107] Accordingly, parliamentary performance is weighed against the overall impact of legislation on the needs and interests of the diverse population groups in the society, including vulnerable groups and marginalised communities, whose voices must be clearly heard and needs met in the process of policy development and legislation.

In addition to the foregoing, vetting of candidates to public office by legislative bodies provides one of the most practical accountability mechanisms to ensure gender equality and inclusion of SIGs in social development. Effective vetting procedures in such appointments would serve to guarantee the realisation of the two-third gender rule, among other principles designed to facilitate the realisation of the right to gender equality and non-discrimination in the spirit of articles 27(8) and 232(1) (h) and (i) of the Constitution..

4.5 The Role of Legislators in the Budgetary Process

The parliamentary budget process is critical in facilitating the realisation of gender equality and inclusion of SIGs in national development. It is an effective tool in addressing the country's pressing and important issues, such as inequality and social exclusion of SIGs. To achieve this goal, the process must address the critical issues of the day (such as the much-

107 The Parliamentary Centre and the World Bank Institute "Parliaments that work: A Conceptual Framework for Measuring Parliamentary Performance".

needed support for programmes, plans and actions aimed at poverty reduction, the elimination of gender inequality and social exclusion of minority and marginalised groups).

The fact that Parliament and County Assemblies have a recognised constitutional role in the budget process places them in a position of advantage in building constructive relations with other state organs with a view of influencing policy development and facilitating the formulation and implementation of programmes, plans and actions to address the needs and interests of SIGs. To this end, the budgetary process must be participatory in the sense that the budget making process at the national and county levels is open and accessible to citizens. Accordingly, Parliament and County Assemblies are obligated to facilitate inclusive and meaningful public participation in the budget activities (at all levels, i.e. the committees, in the chambers, the constituencies and caucuses) and ensure that SIGs have an equal voice in the process. The desired goal is that budget outputs, (debates, amendments, resolutions and reports) achieve acceptable quality and quantity in support of programmes and actions aimed at the realisation of gender equality and inclusive social development. In this regard, legislators must bear in mind that they are accountable to the people and, in turn, must hold the national and county governments accountable on that score.

Check List on the Role of Legislators

Phase	Action Points	Issues to be Addressed
Gender-responsive policy analysis	Identify targets and objectives for policy analysis; data collection and analysis; collate issues and factors that contribute to gender inequality, differential treatment on the basis of gender, inequality of opportunity to access resources and services on an equal basis, and disparity in accessing elective and appointive offices in public service.	Is the policy in issue and the appurtenant actions suitably designed to meet the desired goals/objectives of realising gender equality? Are there programmes in place to this end? What are the best means of integrating gender equality in such policy, programmes and actions? Can the impact of such programmes be measured by use of sex-aggregated data? Are the needs of target groups identifiable by use of sex-aggregated data? To what extent do such programmes enable women and men to access and exercise control over national resources? Are women and SIGs accorded equal opportunity to participate in the development of policy, programmes and legislation? Who enjoys the benefits of these programmes? By whom are these programmatic actions driven?

Phase	Action Points	Issues to be Addressed
Gender-responsive policy formulation	Review/reformulate gender-responsive policy/ programmes Identify gender indicators	What measures can be taken to overcome gender disparity? How can the participation of women be guaranteed? How should objectives be formulated to ensure gender justice? What indicators should be developed?
Action plan	Prepare action plan Identify clear targets	What actions should be taken to implement gender and inclusion policy? Are the proposed actions sufficient to implement the programme(s)? Are the programmes and actions adequately funded? Is the impact of such programmes and actions measurable? When does the impact fall to be reviewed?

Chapter Five

5.0 The Legislative Process

Parliament Buildings, Nairobi

5.1 Introduction

The legislative power of the Republic is vested in the Parliament of Kenya (i.e. the Senate and National Assembly) and County Assemblies. This power is exercisable by Bills passed by Parliament or a County Assembly, and assented by the President (in the case of national legislation) or Governor (in the case of county legislation).

A Bill may be described as a legislative proposal (a proposed law) at post-publication stage. It may be intended either to (a) enact new statute law to give effect to national policy; or (b) amend or repeal existing statute or statutes.

The law-making process at the national level is prescribed in the Constitution and the National Assembly Standing Orders. A Bill passes through various stages before enactment to statute law. A Bill is draft law. It is a statute in draft. Bills may be classified into (a) Government and Private members' Bills; and (b) Public and Private bills. A legislative Bill introduced by the Cabinet is drafted by the ministry having the jurisdiction over the matter or matters to which it relates. A ministry draws up the first draft of a legislative Bill on deciding either to enact a new law or to amend or abolish an existing law in order to achieve a policy goal set in the performance of its administrative duties.

On the basis of this first draft, consultations take place with other ministries concerned. In addition, where necessary, procedures are followed for its referral to advisory councils or public hearings. Once all the above has been completed and the legislative Bill is considered ready, the ministry in charge puts the draft into a proper statutory form. The final draft of the legislative Bill has now been prepared.

All legislative Bills intended to be introduced by the Cabinet are examined by the Attorney General before submission for Cabinet approval. During the examination by the Attorney General, the Bill is scrutinized to ensure its technical soundness, internal consistency and conformity with the Constitution.

During the scrutiny, the Attorney General seeks to establish:

(a) the relationship between the proposed Bill on one hand and the Constitution and other existing laws on the other, as well as the legal appropriateness of the contents of the Bill;

(b) whether or not the intentions of the proposed Bill are accurately expressed in the text;

(c) whether or not the structure of the Bill (e.g. the order of articles.) is appropriate;

(d) whether the usage of letters or words is correct, particularly with regard to gender-neutral or gender-sensitive language to guarantee respect for the principles of gender equity, equality and inclusion;

(e) whether Bills intended to establish public bodies have express provisions that require nominating institutions to nominate a man and a woman so that the appointing authority has the discretion to make appointments that respect the principle of gender parity;

(f) whether the Bill makes provision for non-governmental agencies concerned with disability and minority rights to nominate persons from minority and vulnerable groups to guarantee respect for inclusion of SIGs; and

(g) in any other case, whether minority populations and vulnerable groups are accorded to enjoy the benefits of the proposed legislation.

NOTE: These questions shall also guide County Assemblies with necessary modifications.

Government Bills are mooted by the national government and introduced to the National Assembly for debate and enactment into statute law. All government Bills are drafted by the office of the Attorney General.

In contrast, private members Bills are mooted by a Member of Parliament in his capacity as such, and which he introduces to the National Assembly for debate and enactment into statute law. On the other hand, Public Bills seek to introduce or amend law applicable throughout Kenya. Such Bills may be government or private member Bills.

A Private Bill is one which seeks to introduce or amend law applicable in some parts of Kenya or to regulate a specific group of persons. Such a Bill may be a government or private member Bill.

Whatever its nature, every Bill must take into account the transcending principles of gender equality and social inclusion, which constitute common threads that run through every aspect of our social, cultural, economic and political life to which statute law applies. Accordingly, the sponsoring authorities (i.e. government and private members) must be alive to the need to ensure that the proposed legislation conforms to the universal standards of gender equality and inclusion of SIGs, especially where such legislation relates to issues of access to and distribution of national resources and social services.

5.2 The Process of National Legislation

The law-making process at the national level begins with legislative instructions drawn from national policy whose content is sought to give legislative effect. The instructions are submitted to a legislative counsel, who formulates a Bill, which is subjected to Cabinet approval before publication in the Gazette at least fourteen days before introduction to the National Assembly, which has power to reduce the number of days during which the Bill is to be published.[108]

The publication of Bills in the Gazette is intended to inform the public and legislators of the proposed statute law. Publication expands the democratic space for the expression of views by members of the public

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either individually or in groups organised by their political representatives or civil society organisations. This democratic space presents equality of opportunity to present issue-based views on the proposed legislation. It is at this moment in time that legislators and their electorate should take time to consider the implications of the proposed legislation and the extent to which it addresses issues of concern to women, men and special interest groups. If the Bill contains pertinent issues of gender and inclusion, legislators should address the following, among other issues:

(a) does the Bill approach gender issues on the basis of the less-preferred principle of equity?

(b) what modifications could be made to address gender issues on the basis of the superior principle of equality?

(c) if the Bill confers any social-economic, cultural, economic or political benefits, is it inclusive enough to accommodate the special needs and interests of SIGs?

(d) what mechanisms are in place to guarantee adequate and meaningful participation of women and other SIGs in the legislative process?

(e) what steps should be taken in the process to guarantee gender equality and social inclusion of SIGs in the final output?

The first reading of the Bill (which is a mere formality with no debate) gives every legislator the opportunity to take note of the proposed legislation and prepare to engage the public and fellow legislators on its content pending the second reading.

The second reading opens the floor for debate during which legislators contribute to the content of the Bill. At this stage, amendments or alterations may be proposed and made to achieve the purpose for which it was introduced. After exhaustive debate, the Bill proceeds to the committee/committal stage.

At the committee/committal stage, the Bill is committed either to a select committee of members or to the entire House as a committee for a critical analysis. At this stage, the Bill is analysed word for word to gauge its efficacy for the purpose for which it was introduced. Once again, the legislators have an opportunity to consider the foregoing questions and satisfy themselves that the Bill meets the minimum threshold for gender equality and social inclusion of SIGs. Where issues of grave concern to the public are involved, the committee (or select committee, as the case may be) might consider taking submissions of memoranda or engaging the public in hearings to ensure that their concerns are taken on board before tabling its report to the House.

At the reporting stage, the chairperson of the Select Committee tenders its report before the House. If the report is adopted, the Bill proceeds to the third reading at which no debate takes place. When read for the third time, members take a vote and, if supported by the required majority, it is transmitted to the President for his assent.

On presentation to the President, he or she must, within twenty-one days, signify his or her assent or refusal to the Speaker of the House. If the president refuses to give his or her assent, he or she must within 14 days thereof deliver to the speaker, a memorandum on the specific provisions which, in his opinion, should be reconsidered together with his or her recommendations for amendment.

The House is then obligated to reconsider the Bill taking into account the president's recommendations and must either (a) approve the recommendations with or without any amendments and re-submit the Bill to the President for assent; OR (b) ignore the President's recommendations and re-enact the Bill in its original state. If the resolution to re-enact the Bill is supported by not less than 65% of all the members of the House (excluding the ex-officio members), the President must signify his assent within 14 days of the resolution. This process gives the President the opportunity to intervene and ensure that issues of grave concern to the State's commitment to gender equality and social inclusion of SIGs are addressed with finality and that legislation would not be the genesis of inequality and social exclusion of vulnerable groups and marginalised communities.

The final stage of the legislative process is publication in the Gazette. Statute law passed by Parliament must be published in the Gazette before coming into force. It comes into operation either on the date of publication in the Gazette or on such other dates as may be specified by the Cabinet Secretary by notice in the Gazette.

The same process applies to the Senate with necessary modifications to accommodate the Standing Orders of the Senate and the subject of legislation.

5.3 The Process of County Legislation

5.3.1 Understanding the Process

Legislative authority at the county level is vested in the County Assembly, and is exercised through enactment of Bills. The Standing Orders distinguish between two types of Bills, namely, (a) Private Bills intended to affect or benefit some particular person, association or body corporate; and (b) Public Bills intended to affect the public generally, or a section of the public.

A Bill may be introduced by any Member or Committee of the County Assembly, but a Money Bill may be introduced only after it has been considered by the Budget and Appropriations Committee. According to section 21 of the County Governments Act, a Money Bill contains provisions dealing with:

(a) taxes;
(b) the imposition of charges on a public fund or the variation or repeal of those charges;
(c) the appropriation, receipt, custody, investment or issue of public money; or
(d) the raising or guaranteeing of any loan or its repayment.

The legislative process begins when a Member or a Committee submits a legislative proposal together with a memorandum setting out its objectives and matters specified in the Standing Order (relating to the Memorandum of objectives and reasons) to the Speaker. The Speaker then refers the legislative proposal and the memorandum to the Clerk,

who considers it by drafting it in proper form where necessary and submits it back to the Speaker with comments on:

(a) whether the legislative proposal is a draft Money Bill in terms of Article 114 of the Constitution; and
(b) whether the legislative proposal conforms to the Constitution and the law, and is in order as to format and style in accordance with the Standing Orders.

Upon receipt of comments from the Clerk, and the Speaker is of the opinion that the draft Bill is a Money Bill, it is referred to the Budget and Appropriations Committee and shall thereupon proceed in accordance with the recommendations of the Committee after considering the views of the County Executive Committee Member in charge of the Finance docket. If there is no committee in charge of the legislative proposal, the speaker refers it to the relevant Committee for pre-publication scrutiny and comments after which the Committee submits its comments to the Speaker within 14 days. On receiving the recommendations, the Speaker directs that the Bill either proceeds for publication or it is inadmissible. If the Speaker certifies that the legislative proposal is accepted, the proposal is published as a Bill in the County Gazette and the Kenya Gazette. Upon publication, the Clerk avails a copy of the Bill to every member. The publication period of any Bill is fourteen days (14), save for a County Revenue Fund Bill, and Appropriation Bill or a Supplementary Appropriation Bill, whose publication period is seven (7) days. However, the Assembly may reduce the publication period by a resolution of the Assembly. Publication offers members of the Assembly and the public the opportunity to address any conceptual issue, including matters relating to equality and non-discrimination. The Bill is then subjected to the first reading and committal to relevant Sectoral Committees and stakeholder participation.

Every Bill is read a first time without question being put on the order of the day for the First Reading. The Clerk reads the whole title and no debate ensues. A Bill having been read a first time is deemed to be committed to the relevant Sectoral Committee, unless a specific committee has been established for that purpose, without question put. The Committee facilitates public participation and takes public recommendations

(including those recommendations made after meaningful participation of special interest groups), which are considered when the Chair presents the Committee's report to the House. The report must be made within 20 Calendar days upon which the Bill shall be read a second time. If the period elapses before the Committee presents its report, the Chair must report progress.

On the order of the day of Second Reading, a motion shall be made that, "That the …. Bill be now read a second time". The mover then explains the principles of the Bill and key policy issues involved followed by debate on the general principles of the Bill. At this stage, the Assembly must demonstrate commitment to critical issues of inclusive development and ensure that the Bill does not culminate into legislation that in any way offends the constitutional right to equality and freedom from discrimination.

After the Second Reading, a Bill is committed to the Committee of the whole County Assembly, the Speaker leaves the Chair without question put. The rules of debate are relaxed as signified by the lowering of the mess by the Sergeant at-arms. The Chairperson of Committees of the Whole Assembly presides. In Nairobi, the Standing Order 126 provides the procedure in the Committee of the Whole Assembly. In the Committee, the Bill is considered in the following sequence:

(i) clauses as printed, excluding the clauses providing for the citation of the Bill, the commencement, if any, and the interpretation;
(ii) new clauses;
(iii) schedules;
(iv) new schedules;
(v) interpretation;
(vi) preamble, if any;
(vii) long title;
(viii) the clauses providing for the citation of the Bill and the commencement.

The Clerk calls severally each part of the Bill in the specified sequence and, if no amendment is proposed or when all proposed amendments have been disposed of, the Chairperson shall propose the question

"That, ... (as amended) stand part of the Bill". Members may move amendments to the Bill which must be submitted to the Clerk twenty-four (24) hours after the commencement of the siting. Amendments which propose to unreasonably or unduly expand the subject of the Bill or are not appropriate/logical are not allowed. A member may interrupt the proceedings of the Committee of the Whole House to another day by moving a motion that the Committee reports progress.

When a Committee of the Whole County Assembly has agreed that a Bill or a number of Bills be reported, the Chairperson leaves the Chair of the Committee and the County Assembly resumes and, if the Chairperson has taken the Speaker's Chair, the Member in charge of the Bill reports the Bill to the County Assembly. Each Bill is reported separately in cases where several Bills are under consideration.

The Third Reading may take place immediately after the report stage (i.e. after adoption of the report) or on a later date as the speaker may determine. At this stage, a motion is moved "That the …. Bill be read a Third Time". Amendments may be moved.

After the passage of a Bill by the County Assembly, the Speaker within fourteen days forwards it to the Governor who shall within fourteen days either assent to it or refer it back to the County Assembly with a memorandum outlining reasons for the referral.

If the Bill is referred back, the County Assembly may amend it, taking into account issues raised by the Governor or pass it without amendment by a vote supported by two-thirds of members of the County Assembly.

If the Bill is passed with the concerns of the Governor, the Speaker submits it within fourteen days to the Governor for Assent. However, if it is passed for a second time without consideration of the Governors concerns, the Speaker shall forward it to the Governor for assent within seven days and, if the Governor declines to assent, it automatically becomes law after the expiry of the seven days' period.

Legislation passed by the County Assembly and assented to by the Governor shall be published in the County Gazette and Kenya Gazette

within seven days after assent. The Legislation comes into force on the fourteenth day after its publication in the County Gazette and Kenya Gazette, whichever comes earlier, unless the legislation stipulates a different date on or time at which it shall come into force.[109]

5.3.2 The Nature of County Legislation

The legislative authority of County Assemblies is exercisable only over matters that fall within the scope of those functions assigned to county governments in accordance with Schedule Four to the Constitution. However, county governments may legislate over the manner in which national legislation is intended to be applied or enforced at the county level.

There has been a trend where county governments adopt, cut and paste national legislation and enact it as county legislation. An example is where certain county governments have re-enacted the Persons with Disabilities Act in the exact words of the national legislation with minimal variations intended to give it the county look. Yet, county governments are only expected to legislate on the manner in which such national legislation would be given effect by the county government.

In the process of county legislation, care should be taken to ensure that the legislation relates only to those functions assigned to county governments pursuant to Schedule Four to the Constitution. In every case, county legislation conforms to the Constitution and in harmony with national legislation. County legislation, therefore, is primarily designed to implement national policy and legislation at the county level and not merely to replicate their content.

109 Nairobi City County Assembly 'Bills write-up' available at http://www.nrbcountyassembly.go.ke/index.php/bills/80-assembly/183-bills-writeup (last accessed on 14th July, 2017)

Questions to Ask

(a) Do we clearly understand the scope of county functions as assigned under Schedule Four to the Constitution?

(b) What national policy and legislation exists to guide the discharge of those functions at the county level?

(c) Guided by national policy and legislation, how can the county government demonstrate respect for gender equality, non-discrimination and social inclusion of SIGs?

(d) What is the nature and scope of county legislation required to implement the particular national policy and legislation, and how should such legislation be formulated to guarantee gender responsiveness and inclusive development?

(e) Is there room for intergovernmental relations as respects such legislation, and how should those relations be regulated?

5.4 Mapping Policy on Legislation

In principle, policy guides legislation. Our earlier discussion on the role of legislators in policy development finds meaning in the ultimate embodiment of national policy in statute law. To this end, legislators must keep in mind the content of the particular national policy which the proposed legislation is intended to implement. In any event, policy and legislation must reflect the ideals of gender equality and social inclusion of SIGs.

5.5 Public Participation of SIGs in the Law-Making Process

The constitutional structure of government in Kenya is premised on the principle expressed in Article 1(1) and (2) to the effect that "[a [all sovereign power belongs to the people of Kenya" and may be exercised "... either directly or through their democratically elected representatives". In

effect, the legislative authority of Parliament draws from the sovereignty of the people of Kenya.

As elected representatives, legislators at the national and county levels owe it to the people of Kenya to maximize opportunities for public participation in the legislative process to ensure that policy and legislation reflect the popular will of the people to whom sovereign power belongs. The people have the constitutional right under Article 118 to ensure access to and participate in parliamentary matters. For instance, they have the right under Article 119 to petition for the enactment, amendment or repeal of legislation. It is no wonder that public participation constitutes one of the most treasured national values and principles prescribed in Article 10. The only issue is as to the extent to which meaningful public participation is attainable.

Article 118(1) mandates Parliament to (a) conduct its business in an open manner and ensure that its sittings and those of its committees are held in public; and (b) facilitate public participation and involvement in the legislative and other business of Parliament and its committees. Clause (2) prohibits Parliament from excluding the public or any media from any sitting unless in exceptional circumstances in which the relevant Speaker has determined that there are justifiable reasons for exclusion.

In principle, active participation in democratic elections, policy development and legislation, among other things, offers citizens of modern democratic governments the opportunity to express their collective will and signify their consent (albeit tacitly) to their desired political order and for their common good. The conception of "common good" is a critical factor that motivates meaningful participation of the people in public administration and in the development of appropriate policy and legislation that guides the affairs of government.

The term "people" in this context refers to both individuals and groups who agree to form themselves into a single whole for the purpose of living together in a state established by a constitution, which they create and hold in common. In doing so, they establish themselves into a politically united people to which the preamble of the 2010 Constitution refers as "we, the people of Kenya". To form a "political people", they must

mutually consent on the basis of equality (among the majority and the minority SIGs) to establish a single democratic state without any degree of forcible inclusion in the name of "majority rule".[110] The "people" are usually characterised by ethnic, religious, social and cultural diversity in relation to which they individually and collectively desire to influence policy and legislation for their common good.

The notion of popular participation in decision-making traces back to the Greek City-States, where it was believed that every citizen had the right to participate in decision-making.[111] Even though the Greek model of citizen participation has changed over the years as it adapts to the ideals of modern democratic governance, public participation may nonetheless be viewed as a fundamental element of planning and decision-making. According to Sala, "… participation through normal institutional channels of elections, has little impact on the substance of government policies, which [leads] to diminishing trust [and confidence] in government".[112] In effect, popular sovereignty in determination of policy and legislation does not end at the election of representatives to the legislative bodies. Rather, it finds full meaning in the engagement of individuals and interest groups in policy development and legislation in order to balance the competing interests in society.[113]

In the context of public participation, the term "public" refers to "citizens… that are directly or indirectly affected by the decisions taken by the… government". This includes "the private sector and stakeholders or organisations that represent or claim to represent a group of people, as well as individuals from different backgrounds".[114] Examples of "the public" include men and women, people in different geographical areas, persons with disabilities, children, youth and interest group organisations.

Notably, there is not one but many ways in which public participation may be undertaken in an environment where traditional representative democracy has failed to effectively respond to the apparent decline in

110 Bah Müller (2007) p.16).

111 Sala M *The Participation of Informal Settlement Communities in City-Level Policy-Making Processes* (University of Witwatersrand Johannesburg 2009) p.27.

112 ibid p.29.

113 Pound (1943) p.99.

114 Maseko L *The Public Participation Strategy of the Gauteng Provincial Legislature* (Switchboard Gauteng Provincial Legislature Johannesburg 2001) p.10.

public participation in political processes. These ways include, among others:

(a) participation through representative democracy and resultant institutions; (b) civil society action in advocacy and challenge; (c) direct action and protest; (d) communicative participation; (e) extended engagement with various committees; (f) co-optive engagement; and (g) participation in the core democratic institutions.[115]

It may be argued that, whatever the means, citizens must be accorded the opportunity to exercise meaningful control over decisions which affect their lives. This requires innovative programmes that lend meaning to the principle of public participation without the need for statutory prescription of the forms and arenas. In addition to market mechanisms, there is need to improve the existing forms of citizen participation to enhance the equality of opportunity to present views on critical matters of interest in policy and legislation.

Public participation is premised on the presumption that every democratic nation has defined mechanisms through which elected representatives engage and receive views from their electorate. The question is whether a democratic nation should have mandatory mechanisms for give-and-take between legislative leaders and the public. This question was answered in the affirmative in South Africa in *Doctors for Life* v *The Speaker of National Assembly* and Others (2006).[116]

The Applicant complained that during the legislative process leading to the enactment of four health statutes, the National Council of Provinces (NCOP) and some of the Provincial Legislatures failed to comply with their constitutional obligation to facilitate public involvement in their legislative processes. They argued that there has been failure to invite written submissions and conduct public hearings on these statutes. Denying the claim, the Respondent challenged the Applicant's assertion as to the scope of the duty to facilitate public involvement. They argued that, although the duty to facilitate public involvement requires public

115 *ibid* p.14.

116 *Doctors for Life* v *The Speaker of National Assembly* and Others (2006) (12) BCLR 1399 (CC) (S.Afr.) pp.36-37.

participation in the law-making process, essentially all that is required of the legislature to provide is the opportunity to make either written or oral submissions at some point in the national legislative process.

The issues before the Court were: (a) the nature and scope of the constitutional obligation over legislative organs of the state to facilitate public involvement in its legislative processes and in the processes of its committees, and the consequences of failure to comply with that obligation; (b) the extent to which the Constitutional Court may interfere in the process of a legislative body in order to enforce the obligation to facilitate public involvement in law-making processes; and (c) whether the Court was the only court that may consider the questions raised in the case.

The majority of the Court found that Parliament had failed to comply with its constitutional obligation to facilitate public involvement before passing the health statutes. Adopting a social and historical context approach, the Court held that certain statutes require mandatory public consultations depending on, among other things, (a) the nature and importance of the Bill; (b) whether there has been any request for consultation; and (c) whether or not promises had been made in response to such requests. In its considered view, public consultation in such circumstances would demonstrate respect for the views of those affected by the legislation.

As to the adequacy of public consultation, the Court was of the view that adequate consultation was even more crucial in situations where the affected groups have been previously discriminated against, marginalised, silenced, received no recognition and have an interest in laws that would directly impact them. The Court concluded that NCOP is not a rubberstamp of the provinces in relation to the duty to facilitate public involvement. It is required by the Constitution to provide a national forum for public consideration of issues affecting the provinces.

The constitutional duty to facilitate public participation is premised on the principle that government is founded on the popular will and sovereign power of its people, which constitute the tenets of democratic

rule. According to the judges, the emphasis on democratic participation is strongly reflected in South Africa's democratic Constitution and the entrenchment of public participation in Parliament and the legislatures.[117]

The right to public participation in Kenya is a constitutional imperative realizable in different forms and processes, including the right to petition Parliament, present written submissions, complaints and requests, and the holding of referenda.[118] Article 10(2)(a) recognises "participation of the people" as one of the national values and principles of governance by which all state organs (including the legislature), state officers, public offices and all person are bound in discharge of their duties relating to: (a) the application or interpretation of the Constitution; (b) the enactment, application or interpretation of any law; or (c) making or implementing public policy decisions. Accordingly, the Constitution mandates all state organs to facilitate public participation in policy development and legislation.

At the national level, Article 118(1)(b) requires Parliament to facilitate public participation and involvement in the legislative and other business of Parliament and its committees. In addition, Article 119(1) guarantees the right of every person to petition Parliament to consider any matter within its authority, including to enact, amend or repeal any legislation. Clause (2) mandates Parliament to make provision for the procedure for the exercise of this right. Indeed, the constitutional right to be involved in, and the corresponding duty of the State to facilitate public participation are attainable depending on the forms and venues provided for in regulations and the Standing Orders of the two Houses of Parliament.

Public participation is one of the principal objects of devolution. Article 174(c) stipulates one of the objects of devolution as "… to give powers of self-governance to the people and enhance the participation of the people in the exercise of the powers of the State and in making decisions that affect them". Similarly, Article 196(1)(b) mandates County Assemblies to facilitate public participation and involvement in the legislative and other business of the Assembly and its committees. This is in harmony with the democratic ideals on which public participation is founded.

117 *ibid* p.119.

118 The Constitution of Kenya, 2010 arts 10, 118 (1)(a) and (b), 119(1) and (2), 174(c), 196(1)(b), 201(a) and 255.

The principles of public finance set out in Article 201 include public participation. Article 201(a) requires openness and accountability, including public participation in financial matters. Article 255 specifies the circumstances in which the public has a constitutional right to vote in a referendum to determine the fate of certain proposals to amend the Constitution.

At the county level, the County Government Act sets out the principles of public participation in county governments.[119] Section 115 of the 2012 Act makes public participation mandatory in matters relating to the planning process. Subsection (2) requires each County Assembly to develop laws and regulations giving effect to the requirements for effective citizen participation in development planning and performance management within the county.[120] Such laws and guidelines are required to adhere to minimum national requirements.

Public participation ought not be viewed as a derogation from parliamentary representation or representation at the County Assembly level. Justice Ngcobo accurately sums up the rationale for this principle. According to the judge,

"[i]n the overall scheme of our Constitution, the representative and participatory element of our democracy should not be seen as being in tension with each other. They must be seen as mutually supportive. General elections, the foundation of representative democracy, would be meaningless without massive participation by the voters. The participation by the public on a continuous basis provides vitality to the functioning of representative democracy. It encourages citizens of the country to be actively involved in public affairs, identify themselves with institutions of government and become familiar with the laws as they are made. It enhances the civic dignity of those who participate by enabling their voices to be heard and taken account of. It promotes a spirit of democratic and pluralistic accommodation calculated to produce laws that are likely to be widely accepted and effective in practice. It strengthens the legitimacy of legislation in the eyes of the people. Finally, because of its open and public character, it acts as a counterweight

119 The County Governments Act, 2012 s 87.
120 *ibid* s 115(2).

to secret lobbying and influence peddling. Participatory democracy is of special importance to those who are relatively disempowered in a country like ours where great disparities of wealth and influence exists. Therefore, our democracy includes, as one of its basic and fundamental principles, the principle of participatory democracy."[121]

A recent survey reveals that county governments and civil society are innovatively engaging citizens by publishing citizen-friendly budgets, holding structured planning and budgeting forums and using social media to share and receive information. However, these good practices are unique to only a few counties.[122] The World Bank report on Kenya observes that, while there is a strong impetus towards conducting public participation, there is a wide gap between theory and practice. In addition, there are divergent views on what constitutes meaningful public participation.[123]

A quick look at the legislative process and the statutory requirements for public participation reveals a spirit of willingness to engage individual members of public and interest groups and accord them the opportunity to express views on the content of legislative proposals at both national and county levels. The narrow gap between theory and practice is not difficult to fill, provided that appropriate measures are taken to ensure meaningful public participation. The need to engage meaningful public participation in policy development and legislation cannot be overemphasised. However, this requires innovation and strategy to balance the influence of party politics and the often-overbearing executive authority. The challenges often posed by political interests in legislation are by no means minor. The following are a few of the recommended measures that would ensure a degree of success in realising meaningful public participation, which is indeed attainable:

(a) development of clear guidelines and minimum standards of public participation, civic education and outreach to create awareness and motivate voluntary engagement in public forums;

121 *Doctors for Life International* v *Speaker of the National Assembly and Others* (2006) P.64-65.

122 The World Bank "Public Participation Key to Kenya's Devolution" available at www.worldbank.org/en/news/feature/2015/04/30/public-participation-central-to-kenyas-ambitious-devolution (last accessed on 6th October, 2015).

123 *ibid.*

(b) adequate resource allocation and effective strategies to engage disadvantaged communities, especially in marginalised areas, including arid and semi-arid regions;
(c) adequate budgetary allocation to support effective public consultation and outreach;
(d) development of feedback mechanisms and building capacity of public officers to facilitate public consultations and disseminate user-friendly information;
(e) creation of units or desks dedicated to manage public participation in the affairs of key state organs involved in policy development and legislation;
(f) establishment of performance management systems to facilitate performance review by all state departments and agencies;
(g) creation of a system of knowledge management and sharing of data and experiences among public institutions on public engagement processes, outcomes and challenges;
(h) development of training programmes to build the capacity of public officers and their stakeholders and citizens on engagement skills and practices;
(i) adoption of more successful and participatory formats for public forums; and
(j) setting of annual or periodic participation goals and plans at the ward, county and national levels.

The foregoing recommendations are by no means exhaustive. However, they suitably inform the development of programmes, plans and actions to facilitate meaningful public participation in policy development and legislation. They serve to augment the existing mechanisms of public engagement founded on participatory democracy and popular sovereignty. It may be safely concluded that the importance of effective public participation in the political process cannot be overemphasised, particularly if one hopes to empower women and marginalised groups in society and eliminate social exclusion and inequality. Whatever the participatory model, the voices of these target groups should be heard and accounted for to give meaning to equality and social inclusion of SIGs in all spheres of public life.

Check List on the Legislative Process

Phases	Action points	Issues to be Addressed
The legislative process	Formulate legislative proposals for the protection and promotion of gender equality and social inclusion of SIGs Undertake law review and reform Undertake analysis of legislation to ensure compliance with the Constitution, international and regional human rights instruments Facilitate meaningful public participation	Does statute law guarantee gender equality and full inclusion of SIGs in all aspects of social, cultural, economic and political life? Does statute law comply with the Constitutional standards, international and regional obligations in that regard? Is the legislative process fully participatory? Does legislation meet the needs of target groups?
Oversight of implementation	Oversee the implementation by the national and county executive of policy and legislation Make adequate budgetary allocations to support programmes and actions for the realisation of gender equality and inclusion	Are national and county executives effective in implementing policy and legislation towards the desired goals? What gaps, if any, exist? What legislative intervention is necessary to achieve the desired goals? What administrative procedures may be adopted for desirable outcomes?

PART III

Chapter Six

6.0 Realising Gender Equality and Inclusion of SIGs

Kenyan woman farmer on the phone

(a) does the Bill approach gender issues on the basis of the less-preferred principle of equity?

(b) what modifications could be made to address gender issues on the basis of the superior principle of equality?

(c) if the Bill confers any social-economic, cultural, economic or political benefits, is it inclusive enough to accommodate the special needs and interests of SIGs?

(d) what mechanisms are in place to guarantee adequate and meaningful participation of women and other SIGs in the legislative process?

(e) what steps should be taken in the process to guarantee gender equality and social inclusion of SIGs in the final output?

6.1 Introduction

Gender equality is an essential component of sustainable economic growth and poverty reduction. Some of the basic rights guaranteed in the Constitution include the economic and social rights of every person. These basic rights include the right:

(a) to the highest attainable standard of health, which includes the right to basic healthcare services and reproductive healthcare;
(b) to accessible and adequate housing, and to reasonable standards of sanitation;
(c) to be free from hunger, and to have adequate food of acceptable quality;
(d) to clean and safe water in adequate quantities;
to social security; and
(e) to education.

The World Bank observes that greater gender equality can enhance productivity, improve development outcomes for the next generation, and make institutions more representative.
The National Gender and Equality Commission Act, 2011 establishes the National Gender and Equality Commission as a successor to the Kenya National Human Rights and Equality Commission pursuant to Article 59(4) of the Constitution. The Act seeks to achieve gender mainstreaming.

Gender mainstreaming means ensuring that the concerns of women and men form an integral dimension of the design of all policies, laws and administrative procedures including budgeting and budget implementation, and the monitoring and evaluation of programmes implementing such policies, laws and administrative procedures in all political, economic and societal spheres.

Gender mainstreaming is intended to ensure that women and men benefit equally, and that inequality is not perpetuated. Its main aim is to facilitate realisation of a just and equitable society where both men and women are treated fairly and equally. The NGEC can indeed go a long way in promoting gender equality in the country and facilitating active participation of both men and women in the country's agenda on achieving sustainable development. The right to equality means that

both men and women should be empowered to effectively participate in the country's development.[124]

Gender equality in Kenya is influenced by a number of factors, some of which impede on progress in the realisation of the right to equality and freedom from discrimination. These include disease, poverty and culture as well as politically enhanced restrictions, such as corruption, lack of good representation, among others.[125]

In addition, cultural factors play a significant role in impeding gender equality and inclusive social development. The assignment of gender roles in society has almost invariably continued to tip the balance against women. As a matter of tradition, women continue to be assigned a general low status in society, which has resulted in a hard-to-overcome inequality between women and men. This is despite the continued support from the government which has enacted a number of statutes, as well as formulating and implementing policies aimed at the empowerment of women and their inclusion in social development. The traditional roles assigned to women in most communities stand in the way of their right to education, which in turn limits their ability to enjoy equal opportunities. Most of these communities should understand the importance of educating women so as to prepare them for inclusive social-economic and political development and leadership. This in turn would help in achieving gender equity which goes beyond the primary goal of empowering women.[126]

The rate of population growth contributes to the exclusion of women from inclusive development. Kenya's lack of effective family planning is one of the factors that have led to the high population growth rate, which is largely attributable to cultural practices and traditions, among others. Women are traditionally viewed as wives and mothers, which stands in the way of their meaningful participation in national

124 Dr Kariuki Maigua "Attaining Gender Equity for Inclusive Development in Kenya" (a paper developed to critically examine the concept of gender equity and the role it plays in achievement of inclusive development in Kenya, May 2015)

125 Agnes W. Kibui PhD and Bernard Mwaniki 'Gender equity in Education development in Kenya and the New Constitution for Vision 2030' (September 2014) International Journal of Scientific and innovative Technology Vol 1 No 2, 22.

126 Agnes W. Kibui PhD and Bernard Mwaniki 'Gender equity in Education development in Kenya and the New Constitution for Vision 2030' (September 2014) International Journal of Scientific and innovative Technology Vol 1 No 2, 23

development. The result is that Kenya's progress in attaining the desired middle level economic status as envisioned in Vision 2030 will gradually grind to a halt. If not contained, the rate of population growth will ultimately affect the country's future development plans. This is because the size of a country's population substantially affects the extent to which it is capable of providing such basic services as health and education. Moreover, the critical role of education in the realization of gender equity and social development cannot be overemphasized.[127]

Although religion is widely embraced in the Kenyan society, it has also been noted to be an impediment to the achievement of gender equity in education development and employment, as well as the development of the country. Certain religions assign women a subordinate role in society, which impedes the realisation of gender equity. Some faith-based communities restrict students from the female and male gender from working together due to their religious beliefs. Consequently, the practices serve to deny the girls an opportunity to gain knowledge and skills in technical and scientific areas that are continually asserted as the main driving forces of the transformation of the country into a middle-income economy as envisaged in Kenya's Vision 2030.

Poverty is yet another factor that significantly impedes gender equality and inclusive development. Women form the majority of the uneducated population in Kenya and, consequently, they are more vulnerable to becoming victims of poverty. This explains why women are categorized with vulnerable groups in the development agenda. This has continued to contribute to the gender inequality. In effect, poverty continues to be one of the main factors that continue to hinder the country's achievement of gender equality.[128]

The low rate of transition of female students in education has also contributed to restricted progress towards gender equality. The result of the low transition rates has led to the decline in the proportion of the women and girls enrolled in institutions of higher learning, such as universities and middle level colleges. This has led to the under-representation of women in technological, scientific and mathematical programmes, which greatly impede the achievement of gender equity

127 ibid
128 ibid

In view of the foregoing, Kenya requires strategic interventions to eliminate impediments to enhanced transition rates in education such as suitable policy frameworks, programmes, plans and actions that would effectively make education accessible to children in marginalized communities in the arid and semi-arid areas where pastoralist communities and nomadic culture continue to deny many children, especially girls, their basic right to education.[129]

Under-representation of women in key decision-making organs is compounded by multiple factors to which legislators should pay keen attention as they seek to influence policy and legislation. Indeed, the low transition rates of girls to positions of higher education as well as other factors such as poverty and culture have resulted in the low proportion of women in professional positions as compared to men. This is despite the fact that women account for slightly more than half of the total population. The under-representation of women in elective and appointive bodies has resulted in social exclusion of women in strategic decision-making positions.[130]

Generally speaking, poverty, disease and ignorance go together. Disease is one of the most challenging factors that continues to impede progress in the realization of gender equity and social inclusion of women and other SIGs in most sectors of our society. Communicable diseases, such as malaria, tuberculosis and HIV/AIDS are greatly propagated in environments characterized by poverty. Since poverty is prevalent among women, who form the majority of the poor in the country, it is safe to conclude that women form the largest proportion of those vulnerable to disease. This leads to their exclusion from quality education and employment.[131]

In view of the foregoing, legislators at both levels of government have the daunting task of shaping policy and legislation to meet the basic needs of women and SIGs towards gender equality and inclusive development.

129 Agnes W. Kibui PhD and Bernard Mwaniki 'Gender equity in Education development in Kenya and the New Constitution for Vision 2030' (September 2014) International Journal of Scientific and innovative Technology Vol 1 No 2, 25

130 ibid

131 Agnes W. Kibui PhD and Bernard Mwaniki 'Gender equity in Education development in Kenya and the New Constitution for Vision 2030' (September 2014) International Journal of Scientific and innovative Technology Vol 1 No 2, 26

These democratic ideals are largely dependent on the full realisation of such basic rights as education, quality healthcare, equal representation in decision-making organs and employment.

What then is the call of action for legislators? Legislators must undertake periodic audits to ascertain the extent to which policy and legislation, coupled with administrative action, meet the basic needs of women and SIGs to the ends of gender equity and inclusion. This role is discussed in detail in Chapter Seven.

6.2 Influencing Policy Development and Law Reform

One of the core functions of government is to formulate and implement policy designed to facilitate the realisation of its Social Development Goals. Policy frameworks are some of the means by which government delimits the activities of stakeholder groups, including its own institutions. Appropriate policies can encourage participatory, demand-driven and sustainable development. Policies provide the foundation for statute law, which is suitably designed to facilitate the realisation of the goals to which the policy relates.

Policy development and reform is a political process, which often calls for negotiation aimed at accommodating diverse social-economic and political interests, most of which are represented by politically organised interest groups, such as parties and caucuses in and outside Parliament and County Assemblies. In effect, group interest and organised political activity dictate policy direction and legislation. To this end, legislators are reminded of their primary task of influencing policy development and reform to accommodate the social-economic and political interests of, among others, vulnerable groups and marginalised communities, whose views stand the risk of under-representation in the political processes in which the majority hold sway.

In particular, legislators should direct legislation towards gender equality and social inclusion of SIGs, both of which have for decades remained as critical issues of concern to the social development agenda. Below is an outline of the stages through which legislators would do well to move in their endeavor to influence policy change, reform and legislation.

6.2.1 Stages of Policy Development and Reform

Every stage of policy development and review is best undertaken in a participatory process in which the entire spectrum of interest groups, including SIGs, are meaningfully engaged. It is also prudent to engage civil society organisations and advocacy groups that have a direct or indirect interest in the issues to which the policy and prospective legislation relate. Moreover, it is easier to drive change in a participatory approach to minimise resistance or outright rejection of the outcomes, however beneficial.

Caution must be exercised to avoid the common mistake made by most policy development experts who often focus on the first and fourth stages (formulating the new policy) without due regard to the other stages, which are critical in legitimising social change. In other cases, critical steps are overlooked or considered to be too slow, difficult to undertake or unnecessary. Yet they form the building blocks of legitimate social change. Moreover, the ensuing legislation cannot gain acceptance if it is founded on flawed policy on account of either process or substance.

The participatory approach to policy development and review must take on board key stakeholders or players at the national and county government levels. This is because national policy influences national legislation, which binds county governments. If excluded, in the participatory process, county governments would likely find it difficult to implement what is in effect arbitrary policies relating to their assigned functions. Likewise, engagement of civil society organisations and public benefit organisations makes for minimising dissent or challenge where such policy has the effect of offending the rights of individuals or interest groups. Moreover, Public Benefit Organisations (PBOs), Civil Society Institutions (CSIs) and Community-Based Organisations (CBOs) play an important role in mobilising public views, influencing the development of, and communicating policies and legislation. In addition to their ability to advocate for change in domestic policy and legislation, these organisations are well placed to lobby and influence decision-makers at all levels of government to adopt international norms and standards.
In their endeavour to shape policy, legislators should bear in mind that such policy provides the foundation for national and county legislation, whose role is to implement and enforce it. In addition, legislation provides

effective administrative and regulatory mechanisms for the realisation of the national goals to which the policy relates. For this reason, legislation may be reformed to include the core elements of policy and support its objectives. Accordingly, the legal framework should lay emphasis on the key elements and principles expressed in the policy. The following factors should be taken into account in considering law reform to implement policy:

(a) the enabling institutional framework, including the legal roles and responsibilities of institutions and their inter-relationship;
(b) mechanisms for stakeholder consultation;
(c) principles of gender equity, equality, inclusion, fairness, affordability and protection of the most vulnerable groups and marginalised communities;
(d) Consumer protection mechanisms, such as timely and appropriate access to information, public participation and stakeholder engagement;
(e) equitable allocation of, and access to, public resources; and
(f) regulatory and enforcement mechanisms.

When formulating legislative proposals, the state agencies must take into account the following factors before submitting the draft Bill for enactment:

(a) the proposed legislation should be socially acceptable and administratively feasible (and, in effect, the related administrative functions to enforce the legislation should not be underestimated);
(b) the efficacy of the enforcement mechanisms are as important as the substance of the law itself;
(c) the law should tread a careful line between completeness and flexibility in that it needs to be flexible enough to reflect changing circumstances, and yet explicit and complete enough to ensure full consideration of the basic principles, policies and their implications;
(d) if insufficiently firm or clear, framework legislation may allow for arbitrary decision-making by implementers;
(e) national and county legislation must take into account national and international standards of gender equality and inclusion as prescribed in international conventions to which Kenya is party;

(f) change in legislation results in stress on existing rights, which should be secured against limitation (unless otherwise justified in accordance with Article 24; and

(g) the existing rights, uses and entitlements of rural and indigenous populations should be protected and transitional provisions made in that regard to avoid social exclusion of vulnerable groups and marginalised communities.

6.3 The Place of Language in Legislation for Gender Equality and Inclusion

6.3.1 Introduction

English speakers and writers have traditionally been taught to use masculine nouns and pronouns in situations where the gender of their subject(s) is unclear or variable, or when a group to which they are referring contains members of both sexes. For example, the US Declaration of Independence states that " . . . all men are created equal . . ." and most of us were taught in elementary school to understand the word "men" in that context includes both male and female Americans.

In recent decades, however, as women became increasingly involved in the public sphere of social life, writers have reconsidered the way they express gender identities and relationships. Because most English language readers no longer understand the word "man" to be synonymous with "people," writers today must think more carefully about the ways they express gender identity in order to convey their ideas clearly and accurately to their readers.[132] The situation in Kenya is not any different. The need for gender-sensitive and gender-neutral language in policy and legislation cannot be overemphasised.

132 UNH College of Arts and Science, The Writing Center 'Gender Sensitive Language' available at http://writingcenter.unc.edu/files/2012/09/Gender-Sensitive-Language-The-Writing-Center.pdf (last accessed on 6th July, 2017).

6.3.2 Gender-Sensitive and Gender-Neutral Language in Policy and Legislation

Gender-neutral (gender-sensitive or gender-free) language is a style of writing which is inclusive of both sexes. The ideas first came from feminist language reformers during the 1970s. The generic use of "man" and masculine pronouns when making references to persons of unspecified gender are considered sexist (Marlowe, 2001). Words do matter. If we believe in equality for both men and women, we ought to show it in our language use.[133]

Fortunately, there are a number of different strategies the gender-savvy writer can use to express gender relationships with precision. This handbook provides legislators with an overview of some of those strategies so that they can "mix and match" as may be necessary when drafting policy and legislation. Legislators might find the following suggestions appealing to their use of language in legislation.

The first option is to use the dual expressions: "she or he" or "she/he". The other simpler option the gender-savvy writer can use to deal with situations where a pronoun needs to refer to a person whose gender is unknown or unspecified is to write out both pronoun options as "she or he" or "she/he.".[134]

The other option is to alternate genders and pronouns. Notably, though, this option will work only in certain situations (usually hypothetical situations) in which the referent is equally likely to be male or female. Legislators may include both pronouns in each sentence by writing "her/his" or "her/him". Alternating "he" and "she" conveys the same sense of gender variability and is a little easier on the reader, who will not have to pause to process several different options every time a gendered pronoun is needed in the sentence. This example also provides a useful demonstration of how gender-savvy writers can take advantage of the many different options available by choosing the one that best suits the unique requirements of each piece of legislation they draft.[135]

133 Haja Mohideen Bin Mohamed Ali 'Awareness of Gender Sensitive Expressions in the Print Media' (paper developed for the print and online editions of the Malaysian daily newspaper, The Star, December,2009

134 UNH College of Arts and Science, The Writing Center 'Gender Sensitive Language' available at http://writingcenter.unc.edu/files/2012/09/Gender-Sensitive-Language-The-Writing-Center.pdf (last accessed on 6th July, 2017)

135 ibid

Like gendered pronouns, gendered nouns can also provide a stumbling block for the gender- savvy writer. The best way to avoid implications these words can carry is simply to be aware of how we tend to use them in speech and writing. Because gendered nouns are so commonly used and accepted by English writers and speakers, we often don't notice them or the implications they bring with them. Once you've recognised that a gender distinction is being made by such a word, though, conversion of the gendered noun into a gender-savvy one is usually simple. "Man" and words ending in "-man" are the most commonly used gendered nouns, so avoiding the confusion they bring can be as simple as watching out for these words and replacing them with words that convey your meaning more effectively. For example, if the founders of America had been gender-savvy writers, they might have written" . . . all people are created equal" instead of" ". . . all men are created equal …".[136] Gender-neutral assumptions, however, pose the risk of misconstruction. For example, the use of the word "people" or "every person" does not of itself guarantee the understanding that the provision makes reference to both men and women. To avoid such misconstruction, policy makers and legislators are bound to ascertain the possible effect that such a provision might have if applied to refer to only men or women.

To avoid gender-neutral assumptions, policy makers and legislators should be clear of the problem in respect of which the particular policy or legislative intervention is intended. This makes it possible to identify the specific gender to which the provision relates.

In addition to apposite policy and legislation, gender-neutral measures should be institutionalised in order to eradicate gender-based discriminatory practices and sexual harassment, among others. Institutional policies and other administrative instruments should address all matters gender and inclusion, and should be open to scrutiny to ascertain compliance with international, regional and constitutional obligations to guarantee gender equality and social inclusion of SIGs in all public and private institutions.

136 UNH College of Arts and Science, The Writing Center 'Gender Sensitive Language' available at http://writingcenter.unc.edu/files/2012/09/Gender-Sensitive-Language-The-Writing-Center.pdf (last accessed on 6th July, 2017)

Good Examples of Gender-Sensitive/Neutral Language

1. Children Act, 2001

Section 76. General principles with regard to proceedings in Children's Court

(6) **Any person** who contravenes the provisions of subsection (5 commits an offence and shall on conviction be liable to a fine not less than one hundred thousand shillings or to imprisonment for a term not less than one year or to both, and in the case of a body corporate, a fine of not less than one million shillings.

2. Basic Education Act, 2013

Section 12. Staff of the Board

The Cabinet Secretary may in consultation with the Board and upon such terms and conditions as may be prescribed, second such officers, agents and other staff as may be necessary for the efficient discharge of the functions of the Board under this Act.

3. Children and Families Act, 2014 United Kingdom

Section 34. Children and young people with special educational needs but no EHC plan

This section applies to a child or young person in England who has special educational needs but for whom no EHC plan is maintained, if **he or she** is to be educated in a school or post-16 institution.

4. The Sexual Offences Act, 2006

Section 4. Attempted rape

Any person who attempts to unlawfully and intentionally commit an act which causes penetration with **his or her** genital organs is guilty of the offence of attempted rape and is liable upon conviction for imprisonment for a term which shall not be less than five years but which may be enhanced to imprisonment for life.

Bad Examples of Gender-Sensitive Language

1. Children Act,2001

Section 47. Establishment of rehabilitation schools

(1) The Minister may establish such number of rehabilitation schools (hereinafter referred to as "rehabilitation school") as he may consider necessary to provide accommodation and facilities for the care and protection of children.

(3) If at any time the Minister is dissatisfied with the condition or management of a rehabilitation school he may—

(i) subject the manager to disciplinary proceedings; or

(ii) request him in writing to show cause why the certificate of approval should not be withdrawn, and upon the expiration of the notice to

2. National Youth Service Act, 1965

Section 9. Resignation from the Service

(1) An under officer or a serviceman may, at the discretion of the Director, or a gazetted officer authorized by him in that behalf, be permitted to resign from the Service before the expiration of his period of enlistment or re-enlistment on personal or compassionate grounds.

6.3.3 Checklist for Gender Revisions

To ensure that you've used gender savvy language in your piece of writing, try asking yourself the questions in the box below:

(a) Have you used "man" or "men" or words containing one of them to refer to people who may be female? If so, consider substituting with another word. For example, instead of "fireman", try "firefighter".

(b) If you have mentioned someone's gender, was it necessary to do so? If you identify someone as a "female architect", for example, do you (or would you) refer to someone else as a "male architect"? And if you then note that the woman is an attractive blonde mother of two, do you mention that the man is a muscular, dark-haired father of three? Unless gender and related matters—looks, clothes, parenthood—are relevant to your point, leave them unmentioned.

(c) Do you use any occupational stereotypes? Watch for the use of female pronouns for elementary school teachers and male ones for scientists, for example.

(d) Do you use language that in any way shows a lack of respect for either sex?

(e) Have you used "he", "him", "his", or "himself" to refer to people who may be female?

(f) Have you used "man" or "men" or words containing one of them to refer to people who may be female? If so, consider substituting with another word. For example, instead of "fireman", try "firefighter".

(g) Have you used "man" or "men" or words containing one of them to refer to people who may be female? If so, consider substituting with another word. For example, instead of "fireman", try "firefighter".

(h) If you have mentioned someone's gender, was it necessary to do so? If you identify someone as a "female architect", for example, do you (or would you) refer to someone else as a "male architect"? And if you then note that the woman is an attractive blonde mother of two, do you mention that the man is a muscular, dark-haired father of three? Unless gender and related matters—looks, clothes, parenthood—are relevant to your point, leave them unmentioned.

(i) Do you use any occupational stereotypes? Watch for the use of female pronouns for elementary school teachers and male ones for scientists, for example.

6.4 Budgetary Interventions Towards Equality and Inclusion

Women mostly operate in the informal economy and the reproductive/unpaid care economy sector. In addition, the productive mostly unpaid sector also carries within it the biases of socially constructed gender roles and distribution of resources in labour categorisation that affects income levels, and subsequently savings and investments. However, the current aggregates of economic policy and budgeting do not recognise the contribution of the unpaid care economy to the Gross National Product (GNP). Accordingly, the contribution of women continues to be underestimated.

In view of the foregoing, the government needs to step in where the economy or market fails to allocate resources efficiently and equitably. GRB tools can facilitate government intervention in addressing these challenges. The recent adoption of Programme Based Budgeting in ministries, state departments and agencies and county governments provides Kenya with yet another significant opportunity of systematically identifying gender inequities and allocating adequate resources and programmes to address these inequalities.

In principle, Gender Budget Initiatives (GBIs) can improve budgetary performance and optimize the use of limited resources (efficiency gains). Improved targeting through gender analysis of budgets can avoid "false economies", i.e. the reduction or containment of the financial costs in one sector through the transfer of actual costs to another sector. [137]

The concept of 'gender responsive budgeting' (GRB) is based on a number of critical premises:

(a) Government budgets are not just a technical compilation of incomes and expenditures. It is the most important policy statement made by the Executive in the course of the year;
(b) Budgets are the strongest expression of a government's political priorities and commitment;
(c) They constitute a declaration of the government's fiscal, financial and economic objectives and reflect its social and economic priorities.

National budgets are, however, not gender-neutral in impact. They have the potential to either increase or reduce the burdens and/or vulnerabilities of different social groups, or to improve their capacities and capabilities. They can also encourage positive and/or negative behavioural changes.

The Council of Europe (2005) defined 'gender responsive budgeting' (GRB) as: a gender based assessment of budgets, incorporating a gender perspective at all levels of the budgetary process and restructuring revenues and expenditures in order to promote gender equality. GRB approaches are therefore designed to enhance the responsiveness and accountability of government budgets and policies to commitments aimed at reducing gender-inequalities.

It is important to point out that GRB is not tantamount to separate budgets for females and males, respectively, or about the equal sharing of resources between males and females. Instead, GRB is a strategy for supporting gender mainstreaming in development processes. GRB seeks to incorporate a gender perspective at all stages of the budgetary

137 National Gender and Equality Commission "Guidelines for Gender Responsive Budgeting in Kenya" Edition One (2014).

process, and restructure revenues and expenditures to promote gender equality rather than contradict them. GRB merges the policy framework addressing gender equality and equity, with budget practice. It allows for the accounting of externalities that are the result of the budget and economic performance, due to gender disparities.

In practice, GRB links the macro policies with the micro picture. It ensures that the development paradigm and resource mobilisation options pursued by the government take into consideration the status of the different sexes in the economy, and factors that facilitate or hinder their productive potential and full achievement of their capabilities. Accordingly, GRB is a continuous process informed by the analysis of the status of men and women in the economy.

6.5 Effective Oversight for the Enhancement of Gender Equality and Inclusion

The representative role of legislators in Parliament and County Assemblies places them on a vantage position to exercise oversight in relation to executive functions at both levels of government. In their oversight role, legislators are best placed to scrutinize policy and legislation and ascertain the extent to which they live up to the universal standards of gender equality and inclusion. The periodic reports made to these legislative bodies by the corresponding state agencies presents to legislators a perfect opportunity to sanction respect for the right to equality and non-discrimination.

Similarly, the budgetary process presents legislators with yet another opportunity to scrutinize government performance in relation to policy, programmes, plans and actions designed to facilitate the realisation of gender equality and inclusion. Moreover, legislators are accountable to their electorate in relation to the legitimate expectations that their needs and interests will be met. It is in this context that the budgetary process becomes critical in addressing issues of concern to the electorate and, in particular, the minority groups who stand the risk of being overshadowed by the popular will of the majority. Accordingly, the effectiveness of legislators' oversight is gauged on the extent to which minority rights are secured in both theory and practice.

6.6 Judicial Enforcement of the Right to Equality and Inclusion

The right to equality and freedom from discrimination would count for little if they were incapable of enforcement. And so, would be policy and legislation that would otherwise be unworthy of the paper they are drafted on. Article 22(3) of the Constitution requires the Chief Justice to make rules governing proceedings brought under the Bill of Rights. It sets out criteria for the validity of such rules.

In addition to ensuring that the rights of standing in Article 22(2) are "fully facilitated", this clause sets out three important criteria. First, it requires that any formalities relating to proceedings should be kept to a minimum, and that the court should not be "unreasonably restricted by procedural technicalities", except as required by the rules of natural justice.[138] Secondly, it requires that fees must not be charged for the commencement of proceedings, an important condition given the significant poverty which afflicts many victims of discrimination.[139] Finally, it provides that interested parties with particular expertise may participate in proceedings as a friend of the court.[140] Taken together, these three measures are important steps to ensuring that victims of discrimination and social exclusion are able to access justice and appropriate remedies, an obligation under a number of international instruments to which Kenya is party.[141]

138 The Constitution of Kenya, 2010 Article 22 (3)(b) and (d).
139 Ibid., Article 22 (3)(c).
140 Ibid., Article 22(3)(e).
141 Convention on the Rights of Persons with Disabilities Article 13; Committee on the Elimination of Discrimination against Women, *General Recommendation* No.

Article 23 provides that the High Court has jurisdiction to hear and determine applications for redress under the Bill of Rights, and that parliament "shall enact legislation to give original jurisdiction in appropriate cases to subordinate courts". Clause (3) states that a court may grant appropriate relief, including an injunction, a declaration of invalidity of law, and an order for compensation. This extensive list of potential remedies – and in particular the provision for orders of compensation – is in line with Kenya's obligations under *inter alia* the ICCPR,[142] ICESCR,[143] CEDAW[144] and CERD.[145]

While a number of individuals and organisations have instituted proceedings on human rights violations before the courts, few have concerned the rights to equality and non-discrimination. Those cases which have raised issues of equality have mainly relied upon constitutional provisions in the 1963 and 2010 Constitutions. There has been little litigation based on Kenya's two pieces of specific anti-discrimination legislation (the Persons with Disabilities Act and the National Cohesion and Integration Act) or the equality provisions of the Employment Act. The quality of the judgements in cases concerned with equality is mixed.

Among the most significant cases brought under section 82 of the 1963 Co stitution is *Rangal Lemeiguran & Others v Attorney General and Others*[146] commonly known as the Il Chamus case. The Il Chamus, an indigenous minority community in Kenya, sought a declaration from the Court to have a special nomination seat in the National Assembly. The applicants argued that their rights as enshrined in the Bill of Rights, including the right to equal treatment, would continue to be violated if they did not have representation in Parliament. In giving an affirmative decision, the Court echoed the principles in a previous ruling by Ringera J, in *Njoya & 6 Others v AG & Others (No. 2)*, which stated that:

> *"The concept of equality before the law, citizens' rights in a democratic state and of the fundamental norm of non-discrimination all call for equal weight for equal votes and dictate that minorities should not*

142 Human Rights Committee
143 International Covenant on Civil and Political Rights, Para 40.
144 Committee on the Elimination of Discrimination against Women, Para 32.
145 Committee on the Elimination of Racial Discrimination, General Recommendation No. 26: Article 6 of the Convention, UN Doc. A/55/18, annex V, 2000, Para 2.
146 Rangal Lemeiguran & Others v Attorney General and Others, Miscellaneous Civil Application 305 of 2004, High Court, 18 December 2006.

> *be turned into majorities in decision making bodies of the State (...) However, that cannot be the only consideration in a democratic society. The other consideration is that minorities of whatever hue and shade are entitled to protection. And in the context of Constitution-making it is to be remembered that the Constitution is being made for all, majorities and minorities alike and, accordingly, the voices of all should be heard".*[147]

In determining whether customary law should apply to the division of property under the Succession Act in Rono v Rono and Another[148] (in which the Court of Appeal overturned a previous decision which granted more land to the deceased's sons, instead providing equal shares to all children), the Court considered the constitutional prohibition on discrimination in Article 82 and the anti-discrimination provisions of the Universal Declaration of Human Rights, ICESCR, ICCPR, CEDAW and the African Charter on Human and Peoples' Rights.

This judgement was followed in later cases including *Andrew Manunzyu Musyoka (Deceased)*[149]*; Teresia_Wanjiru Macharia v Kiuru Macharia and Phyllis Njeri Ngana*[150]*; In the Matter of the Estate of Mugo Wandia (deceased)*[151]*; and Elieen Kurumei and Mary Joan Cheono v Philip Tiren,*[152] *James Tiren and Thomas Tiren*. In the latter case, the judge rebuked the sons who had attempted to disinherit their sisters by explaining the content of international law on discrimination:

> *"I have referred to those instruments with the view of putting the respondents in the right perspective as to how to regard women dependents/children of their father. It is hoped that that has persuaded them to regard their sisters as the law treats them."*[153]

147 Njoya & 6 Others v Attorney General & 3 Others (No 2), Miscellaneous Civil Application 82 of 2004, High Court, 25 March 2004, pp. 687, 688, per Ringera, J.

148 *Rono v Rono and Another*, Civil Appeal 66 of 2002, Court of Appeal, 29 April 2005

149 *Andrew Manunzyu Musyoka (Deceased)*, Succession Cause 303 of 1998, High Court, 15 December 2005.

150 *In the Matter of the Estate of Mugo Wandia (deceased)*, Succession Cause 320 of 2007, High Court, 20 May 2009.

151 Elieen Kurumei and Mary Joan Cheono v Philip Tiren, James Tiren and Thomas Tiren, Succession Cause 52 of 1994, High Court, 28 July 2010.

152 *Ibid.*, per Mwilu, J.

153 *In the Matter of the Estate of Lerionka Ole Ntutu*, Succession Cause 1263 of 2000, High Court, 19 November 2008.

Rono v Rono was also followed *In the Matter of the Estate of Lerionka Ole Ntutu*[154] in which the judge stated that Article 82(4) of the Constitution "was not and cannot have been made so as to deprive any person of their social and legal right only on the basis of sex. Finding otherwise would be derogatory to human dignity and equality amongst sex universally applied."

In other areas, the response of the court to discriminatory customary law has been mixed. In relation to the custody of children, the court in *S.O v L.A.M*[155] stated that it was relevant for the trial magistrate to refer to Article 16 of CEDAW and Articles 3 and 14 of the African Charter on the Rights and Welfare of Children. The court stated that the custom of the Teso that children belonged to the father should not be taken into account as mothers would be discriminated against if such a custom were applied. The court noted that the principles of the African Charter on the Rights and Welfare of Children were relevant as they had been domesticated through the Children Act. In contrast, in relation to customary burial, the court in *Salina Soote Rotich v Caroline Cheptoo and 2 Others*[156] found that while Keiyo burial customs discriminate against women, as a daughter has no role to play in her father's funeral, they are removed from the operation of the non-discrimination provision in the Constitution by Article 82(4)(b), which excludes laws that make provision with respect to burial. It should be noted that this approach contrasts with that taken in the succession cases above. The judge in this case stated that the decision in *Rono v Rono* was irrelevant to the proceedings under consideration, as it dealt with succession and that burial and succession have no correlation in law.

Although the 2010 Constitution has only been in operation since August of the same year, there have already been some significant judgements on claims of discrimination under Article 27(4). In *Centre for Rights Education and Awareness (CREAW) & 7 Others v the Attorney-General,*[157] the court

154 *In the Matter of the Estate of Lerionka Ole Ntutu*, Succession Cause 1263 of 2000, High Court, 19 November 2008.

155 *S.O. v L.A.M.*, Civil Appeal 175 of 2006, Court of Appeal, 30 January 2009.

156 Salina Soote Rotich v Caroline Cheptoo and 2 Others, Civil Appeal 48 of 2010, High Court, 28 July 2010.

157 Centre for Rights Education and Awareness (CREAW) & 7 Others v the Attorney-General, Petition 16 of 2011, High Court, 3 February 2011.

found that a *prime facie* case had been established that Presidential nomination of the Chief Justice, Attorney General, Director of Public Prosecutions and Controller of the Budget were unconstitutional on a number of grounds, including the ground that they discriminated against women due to the fact that all appointees were men.

In addition to this, a number of positive judgements in relation to succession have also been handed down. These reflect the fact that the discrimination provision in the 2010 Constitution does not contain any exemptions for personal or customary law. *In the Matter of the Estate of M'mukindia M'ndegwa (deceased)*[158] , Lady Justice Mary Kasango found in favour of the wife and redistributed lands of the deceased to ensure his wife and daughters received a fair share. The judge cited the anti-discrimination provisions in Article 27(1)(5) of the Constitution, which include the grounds of race, sex pregnancy and marital status and Article 60(f) which specifically aims to eliminate gender discrimination in law, custom and practices related to land and property. Similar judgements can be seen *In the Matter of the Estate of Mburugu Nkaabu (deceased)* [159]*; In the Matter of the Estate of the Lawrence Douglas Magambo*[160]*; and In the Matter of the Estate of M'miriti MaAtune (deceased)*.[161]

The foregoing pronouncements on cases relating to equality and non-discrimination give impetus to human rights advocates to forge forward in their endeavour to enforce the promotion and protection of the right to equality and freedom from discrimination on any of the grounds specified in Article 27 of the Constitution. In addition, these judgements constitute the minimum standards that policy and legislation should attain to in compliance with international and regional treaty instruments to which Kenya is party.

Article 22(3) requires the Chief Justice to make rules governing proceedings brought under the Bill of Rights, and sets out criteria for

158 In the Matter of the Estate of M'mukindia M'ndegwa (deceased), Succession Cause 29'B' of 1988, High Court, 22 October 2010.

159 In the Matter of the Estate of Mburugu Nkaabu (deceased), Succession Cause 206 of 1995, High Court, 22 October 2010.

160 In the Matter of the Estate of the Lawrence Douglas Magambo, Succession Cause 309 of 2002, High Court, 22 October 2010.

161 In the Matter of the Estate of M'miriti MaAtune (deceased), Succession Cause 119 of 2003, High Court, 22 October 2010.

the validity of such rules. In addition to ensuring that the rights of standing in subsection (2) are "fully facilitated", this subsection sets out three important criteria. First, it requires that any formalities relating to proceedings should be kept to a minimum, and that the court should not be "unreasonably restricted by procedural technicalities", except as required by the rules of natural justice.[162] Second, it requires that fees must not be charged for the commencement of proceedings, an important condition given the significant poverty which afflicts many victims of discrimination.[163] Finally, it provides that interested parties with particular expertise may participate in proceedings as a friend of the court.[164] Taken together, these three measures are important steps to ensuring that victims of discrimination are able to access justice and remedies, an obligation under a number of international instruments to which Kenya is party.[165][166]

162 The Constitution of Kenya, 2010, Article 22(3)(b) and (d).
163 Ibid., Article 22(3)(c).
164 Ibid., Article 22(3)(e).
165 Convention on the Rights of Persons with Disabilities, Article 13; Committee on the Elimination of Discrimination against Women, General Recommendation No.
166 on the core obligations of State Parties under Article 2 of the Convention on the Elimination of All
Forms of Discrimination against Women, UN Doc. CEDAW/C/2010/47/GC.2, 2010, Para 34; Human Rights Committee, General Comment 31: The nature of the general legal obligation imposed on State Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add. 13, 2004, Para 16.

Chapter Seven

7.0 Inclusive Programmes, Plans and Actions

Maasai women attending a conference

7.1 Introduction

The Government of the Republic of Kenya has taken positive steps to facilitate interventions anchored on both policy and legal frameworks. These include:

(a) the Government's free primary education policy, which has accorded equal basic educational opportunities to boys and girls, resulting in almost gender parity in primary school enrolment;
(b) the Children Act enacted in 2001, which is intended to give effect to the principles of the Convention on the Rights of the Child (CRC), the African Charter on the Rights and Welfare of the Child, and address related issues such as early marriages; Female Genital Mutilation; the right to survival; health and medical care; education; protection

from child labour, sexual exploitation, prostitution, harmful drugs; and for legal assistance by the Government;

(c) affirmative action has also been taken to lower the entry mark for admission of more female students to public universities, and girls who drop out of primary and secondary schools due to pregnancies are allowed to re-enter and complete their education;

(d) the National Policy on Gender and Development, which identifies key forms of discrimination in respect of customary law, the law of succession, and citizenship, as well as cultural biases against women perpetuated by the patriarchal social structure; and which facilitates the mainstreaming of the needs and concerns of men and women in all areas in the development process;

(e) the formulation of a comprehensive National Employment Policy that mainstreams women's rights in employment and bans child labour; and

(f) the promulgation of the 2010 Constitution, which commits the Government to implement affirmative action in policies and programmes to benefit individuals and disadvantaged groups in accessing education and gainful employment, participation in governance, and which guarantees equal political rights and freedom from discrimination, exploitation and abuse.[167]

These interventions provide firm foundation on which legislators are well positioned to place additional building blocks through policy development, review and legislation to enhance gender equality and social inclusion of SIGs in mainstream society. Taking stock of hitherto robust reforms, legislators should flip their scorecard and satisfy themselves that adequate measures are continually taken by state and non-state agencies to prevent claw backs on the gains already realised in the quest for gender equality and inclusion. They are individually and collectively obligated to ensure that the current impediments to the realisation of the two-third gender rule are eliminated, and that effective affirmative action measures are taken to move Kenya to higher ground on the scale of gender equality and social inclusion of vulnerable groups and marginalised communities.

167 World Health Organisation Regional Office for Africa 'MDG Goal 3: Promote gender equality and empower women' available at http://www.aho.afro.who.int/profiles_information/index.php/Kenya:MDG_Goal_3:_Promote_gender_equality_and_empower_women (last accessed on 10th July, 2017).

7.2 Promoting Gender Equality and Inclusion of SIGs

7.2.1 At the National Level

Kenya is obligated by MDG Goal 3 to promote gender equality and empower women[168] towards full realisation of inclusive social development. MDG goal 5 mandates State Parties to improve maternal health, a function of county governments to which appropriate county legislation should be directed, and which goes a long way in women's empowerment. Notably, related treaty obligations binding on Kenya require social inclusion of vulnerable groups and marginalised communities in mainstream society.

The Millennium Declaration commits all UN member countries to the promotion of gender equality and empowerment of women as effective ways to combat poverty, hunger and disease, and as necessary means to stimulate development that is truly sustainable. On the other hand, persistent and pervasive gender inequalities hinder access to and control of resources while perpetuating unequal distribution of resources with greater bias against women. This state of affairs contributes to social insecurity, lack of opportunity, and instills a deep sense of powerlessness, lowering the quality of life for both men and women. Women empowerment and equality between women and men are issues of human rights and justice not just women's issues. They are the bedrock for lasting political, social, economic and cultural security among all people.

The fact that gender equality and inclusion are at the centre of the 2030 Agenda for Sustainable Development cannot be overemphasised. The Sustainable Development Goals (SDGs) were adopted by the United Nations on September 25, 2015 with the aim of ending poverty, protecting the planet and ensuring prosperity for all. Each goal has specific targets intended to be achieved over 15 years with effect from 2015. Among the 17 SDGs, Goal 5 focuses on gender equality and empowerment of all women and girls. It addresses nine issues pertaining to gender equality, which range from ending all forms of discrimination

168 Source World Health Organisation Regional Office for Africa 'MDG Goal 3: Promote gender equality and empower women' available at http://www.aho.afro.who.int/profiles_information/index.php/Kenya:MDG_Goal_3:_Promote_gender_equality_and_empower_women (last accessed on 10th July, 2017).

and violence against women and girls to ensuring women's full, effective and equal participation in decision-making processes, and from land and other forms of property rights. In addition, Goal 16, which addresses itself to peace, justice, the rule of law and institutions, ensures that the legal and policy frameworks recognise and protect women's rights.[169]

In principle, gender equality and the rule of law are complementary and mutually-reinforcing. These intertwined principles are cross-cutting throughout the entire set of Goals enshrined in the new development paradigm. The 2030 Agenda's vision of leaving no one behind is ambitious and only if women and girls are at the heart of the development efforts will the international community move the SDGs from paper to reality. Legislators at the two levels of government are bound to evaluate Kenya's progress to this end and satisfy themselves that adequate policy, legislative and administrative steps are taken to guarantee continuous progress towards full realisation of gender equality and inclusion of women and men in social development.

To make these goals a reality, legislators should at all times remember that such programmes and actions as are designed to meet these universal standards are dependent on adequate budgetary allocations in respect of which Parliament and County Assemblies play a critical role. The quest for gender equality and inclusion of SIGs is not the sole responsibility of civil society as it often appears. Kenya's international obligations in this regard can only be met if Parliamentary intervention is focused on sustainable budgets and financial streams in support of relevant programmes and actions driven as an integral part of the national development agenda.

Kenya's Vision 2030 envisions gender mainstreaming in all government policies, plans and programmes to ensure that the needs and interests of women and girls are addressed, which includes gender mainstreaming in policies, plans, budgets and programmes by government decision making organs. Vision 2030's social pillar has identified gender concerns, in particular, equity within resource distribution and power between the sexes as a priority. It aims at increasing holistic opportunities among

169 IDLO Director-General, Irene Khan 'Assessing ongoing reforms for gender equality in Kenya within the context of Constitutional transformation' (Nairobi) (5th May, 2017).

women and increasing the participation of women in all economic, social and political decision-making processes. The gender-mainstreaming theme for the Medium-Term Plan I (2008-12) was promoting gender equity in power and resource distribution, while the Medium-Term Plan II (2013-2017) has the theme of promoting equity in access, control and participation in resource distribution for improved livelihood for women.[170]

Despite sustained campaigns, notable progress and gains on gender issues in Kenya, wide gender gaps still exist in access to and control of resources, economic opportunities and political voice. Overall, women continue to have less access to social services and productive resources than men. Women remain vastly underrepresented in Parliament and county governments and account for only 8.3% of the seats in the National Assembly. Sadly, girls are less likely to attend school than boys. Even when there is gender parity at lower classes in primary school, girls are more likely to drop out, often due to unwanted pregnancies, early marriages, poverty mainly occasioned by deaths of parents, often due to HIV/AIDS. There are also large wage gaps between men and women and only a small proportion can be explained by gender differences in education, work experience or job characteristics.

With regard to employment, women trail men and only enjoy close-to-equal opportunity at lower levels of the employment sector. Even though, on average, the male labour force participation rates have remained higher than those of females, the gap between them is gradually narrowing.

Since independence, there has been gross underrepresentation of women in Kenya in both the political and other leadership spheres. In the recent past, this situation is changing with the Government appointing a number of women to key positions in the cabinet, civil service and the state corporations.

With regard to education, it is a national policy in Kenya that every child has a right to education, and the responsibility of both the Government

170 IDLO Director-General, Irene Khan 'Assessing ongoing reforms for gender equality in Kenya within the context of Constitutional transformation' (Nairobi) (5th May, 2017).

and parents to ensure this right. The Children Act enacted in 2001 ranks provision of basic education as a basic human right that every Kenyan child should enjoy. The Act promotes equal educational opportunities for both girls and boys through provisions for addressing likely cultural, religious and other forms of biases, particularly against girls. The 2001 Act is presently undergoing review to expand these rights and fortify the enforcement mechanisms to make them a reality. It is hoped that Parliament will expeditiously consider the proposed 2017 Bill to accommodate the substantial improvements proposed in the Bill.

The enrolment, retention, completion and progression rates for both boys and girls at primary and secondary levels are almost equal in Kenya. Primary education has shown impressive gains in enrolment since independence and has currently achieved near gender parity. Since the Government introduced the free primary education programme in 2003, there has been large increase in enrolment even though this has led to overcrowding and overstretched facilities. Similarly, the secondary school level has witnessed slight improvement in enrolment. However, some regions still have low enrolment and high dropout rates for girls due to customary values, limited infrastructure and amenities, especially water and sanitation, and the burden of household responsibilities. Girls also drop out of school on account of pregnancies, early marriages and gender violence within communities and school environments. Highest female illiteracy levels in the country have been recorded in the North-Eastern region.

7.2.2 At the County Level

In principle, devolution is all about social inclusion and participation of all persons on an equal basis in the development agenda. It presents an opportunity to champion gender equality and inclusion of SIGs in mainstream society. In effect, county governments have an opportunity to promote gender equality and inclusion of SIGs by providing opportunities for women of all ages to participate in county planning and budgeting processes.

County governments should be aware of the rights and needs of the disadvantaged groups in the community besides listening to their

concerns. Building county governments' capacities to analyse gender issues and address them in the County Integrated Development Plans goes a long way in facilitating joint initiatives towards the realisation of gender equality and inclusion. In addition, the need to sensitise men on the benefits of providing more space for women to participate in decision-making, both at home and in public spheres of life, and including men consistently in discussions related to gender equality cannot be overemphasised.[171] As people's political representatives, members of County Assemblies have the privilege of guiding this process. They are well placed to clarify policy and consolidate support for the realisation of the right to gender equality and inclusion.

To meet the need for gender responsiveness in planning and development, the principle of equity must be the underlying factor in the identification of priorities, planning, budgeting and service delivery. In preparation, collection of county disaggregated data is key to identification of development needs, and culturally acceptable solutions. In addition, community participation is crucial in ensuring that the voices of women and girls, the youth and the marginalised groups, will no longer go unheard.

Under the prevailing constitutional order and the devolved system of government, county governments have the opportunity to identify their own priorities and design their respective service delivery mechanisms suitable for their local needs. Notably, each county has its own unique challenges and circumstances, which impact on their development agenda. Moreover, they are endowed with different resources to solve their peculiar problems. Respecting and utilising valuable local traditions that do not violate human rights can be a rich resource from which county development plans can draw knowledge, legitimacy and public participation.

The agenda for inclusive social development at the national and county levels has not been without its fair share of challenges a few of which are highlighted below.

171 Ambassador Tarja Fernandez and Siddharth Chatterjee 'County Governments in Kenya Must Take Lead in Fight for Gender Equality' available at <http://www.ipsnews.net/2016/05/county-governments-in-kenya-must-take-lead-in-fight-for-gender-equality/> (last accessed on 11th July, 2017).

Although female to male ratios in primary and secondary schools are almost equal, emphasis on the traditional role of the girl child at the domestic setting, coupled with poverty and other cultural factors, limit the chances of her completion of primary school education, which culminates in early school dropout. Furthermore, enrolment of women in tertiary institutions and universities remains low nationally. In effect, regional variations of female to male literacy ratios pose serious challenges to the intended achievement of literacy nationwide.

The inordinately low number of women in decision-making positions in both public and private sector accounts for the persistent inequalities between women and men. Likewise, many women are deterred from seeking elective positions by the inordinately high costs of election campaigns, lack of campaign and leadership skills, political violence, intimidation and lack of adequate information to facilitate successful bids to Parliament or County Assemblies. Other challenges include the age-old cultural and traditional practices that perpetuate pervasive gender stereotypes, biases and abuses against women.[172]

7.3 Inclusive Socio -economic planning

In principle, inclusive economic planning ensures that the views of all citizens are considered in determining the priorities for the social development of their communities. In effect, inclusive development and the equalization of opportunity to influence planning lends legitimacy to the national and county development agenda. To this end, the National Policy on Gender and Development (NPGD), 2000 spells out the policy approach to Gender mainstreaming and empowerment of women and clearly states that it is the right of women, men, girls and boys to participate in and benefit equally from the development process. The NPGD provides a framework for mainstreaming gender

172 World Health Organisation Regional Office for Africa' MDG Goal 3: Promote gender equality and empower women' available at http://www.aho.afro.who.int/profiles_information/index.php/Kenya:MDG_Goal_3:_Promote_gender_equality_and_empower_women (last accessed on 10th July, 2017) FIDA Kenya 'Kenya Country Programme 2016-2020 Governance Thematic Programme – Support to Women's Rights and Empowerment Document' 2016.

in all policies, planning and programming in Kenya and puts in place institutional mechanisms to ensure effective implementation.[173]

The need for a national policy on gender equality arose from the government's realisation that without a coherent and comprehensive overall framework for guiding gender mainstreaming within the different sectors and line ministries involved in development, enormous resources may continue to be misplaced. The policy is anchored in Vision 2030 on which other social development policies are founded.

The 2030 vision for gender, youth and vulnerable groups, is the attainment of gender equity, improved livelihoods for vulnerable groups, and a responsible, globally competitive and prosperous youth. The goal is to increase opportunities all-round among women, youth and all disadvantaged groups. Specific strategies involve (a) increasing participation of women in all economic, social and political decision-making processes (through, among other things, higher representation in Parliament); (b) improving access by all disadvantaged groups to business opportunities, health and education services, housing and justice; and (c) minimising vulnerabilities through prohibition of retrogressive practices (such as female genital mutilation, child labour) and by up scaling training for people with disabilities and special needs).[174]

According to Vision 2030, Kenya aims to be a middle-income rapidly industrialising country by 2030, offering all its citizens a high quality of life. Its first Medium Term Plan was implemented between 2008 and 2012. The Second Medium Term Plan outlines the policies, programmes and projects which the Government intends to implement during the five year period, starting 2013 to 2017, in order to deliver accelerated and inclusive economic growth, higher living standards, better education and healthcare, increased job creation especially for youth, commercialised agriculture providing higher rural incomes and affordable food, improved manufacturing sector and more diversified exports.[175] Its aim is to guide

173 FIDA Kenya 'Kenya Country Programme 2016-2020 Governance Thematic Programme – Support to Women's Rights and Empowerment Document' 2016.

174 Kenya Vision 2030 Republic of Kenya July – August 2007 available at http://theredddesk.org/sites/default/files/vision_2030_brochure__july_2007.pdf (last accessed on 13th July, 2017).

175 Second Medium Term Plan (MTP II) 2013 – 2017 'Transforming Kenya: Pathway to devolution, socio-economic development, equity and national unity' September 2013.

development programmes for improved livelihoods of disadvantaged groups.

To facilitate gender mainstreaming, it is intended to employ the following specific interventions:

(a) coordinate monitoring of gender mainstreaming across MDAs:
(the sub-sector will enhance the capacities of the decentralised gender functions in order to effectively push forward the gender mainstreaming agenda);

(b) enactment of a national affirmative action policy and monitoring compliance:
(the sub-sector will operationalise and monitor compliance to the Constitution provision of not more than 2/3 of either gender representation in all appointive and elective positions);

(c) development and implementation of the National Gender and Development policy:
(the sub-sector will develop and implement a National Gender and Development policy in line with the Constitution, international and regional gender-related commitments and instruments);

(d) secure and disseminate gender disaggregated data to guide policy decision-making:
(the sub-sector will collect, analyse and utilise gender disaggregated data to update the gender development index);

(e) establish Gender Research and Documentation Centre:
(the sub-sector will establish and equip the centre with requisite resources);

(f) establishment of integrated one-stop sexual and gender based violence response centres in all healthcare facilities in Kenya:
(the proposed centres will offer medical, legal and psychosocial support to victims of SGBV); and

(g) public awareness campaign against FGM, early and forced marriages:
(the sub-sector will develop and implement a national sexual and gender based violence policy and operationalise the FGM Act 2011.The sub-sector will work closely with the National Gender and Equality Commission to impose appropriate sanctions and recommend prosecution on gender discrimination cases).

In addition to the foregoing interventions, the Sessional Paper No. 2 of May 2006 on Gender Equality and Development provides a framework for the operationalisation of gender mainstreaming in policy, planning and programming.[176] The Paper suitably guides national and county governments on appropriate strategies for mainstreaming gender in policy and social development. The Government has also developed a Gender Mainstreaming Implementation Plan of Action on Gender and Development towards implementing the strategy. The National Policy and Sessional Paper No. 2 recognises that it is the right of women, men, girls and boys to participate in, and benefit equally from, development initiatives. The policy framework recognises that equality between women and men is a matter of human rights, development and a condition for social justice.

7.4 Partnership Development

> *"We all learn in school that the judicial, legislative and executive branches of government must check and balance each other. But other non-state institutions must participate in this important system of checks and balances as well. These checking institutions include the media, religious institutions and Public Benefits Organisations" Anonymous*

In principle, gender equality and social inclusion of SIGs in mainstream society cannot be achieved by a single state or non-state agency. Similarly, no number of policies, statute laws or administrative procedures would adequately serve the intended goals without the collaborative approach of all state and non-state agencies. Partnership denotes joint strategies to advocate for women's rights and empowerments, taking advantage of each partner's comparative strength and sphere of influence.

The overarching presumption is that Kenyans are willing to embrace gender equality and that the various government departments, private institutions and community at large will cooperate in discharging their respective responsibilities to enable women to fully enjoy their rights.

176 Opaa Benard 'Institutionalizing Gender' April 2013.

It is also presumed that there will always be sustained political will to enact gender-sensitive legislation that will influence change towards full realisation of gender equality and inclusion.

In order to achieve the objectives of the proposed programmes, there is need to develop partnerships that enhance the country's commitment to eradicate the remaining barriers that hinder women from access to human resource endowments, rights and economic opportunities on an equal basis with men. Joint initiatives should be fostered to challenge the *status quo* in order to facilitate full realisation by women of their basic right to equality and non-discrimination.

The consortium of state and non-state agencies should recognise the fact that the empowerment of women and the promotion of gender equality are key to achieving sustainable development. Indeed, greater gender equality can enhance economic efficiency and improve other development outcomes.

7.5 Legislative Audit and Law Reform

7.5.1 Introduction

The term "audit" denotes evaluation, which is the analysis and assessment of the effect of legislation. The evaluation of legislation plays a significant role in the legislative process. In practice, evaluation takes place before and after enactment of statute law. Accordingly, we need to distinguish between an *ex ante* or prospective evaluation (i.e. evaluation before enactment) and an *ex post* or retrospective evaluation (i.e. evaluation undertaken after enactment).[177] Statute law has to be evaluated in order to ascertain its quality. Otherwise, the Legislature and the Executive would not know whether the statute law which they are to apply and enforce is of good quality, practicable and capable of being observed by the people. Evaluation is intended to bridge the gap between the legislative action and reality. It provides the legislator with information and knowledge about possible relations between legislative action and the behaviour and situations that can be observed in social reality. However, account must be taken

177 Dr. Iris Breutz 'Handbook for Legislation and Law Drafting for the Republic of Liberia (March 2006) 143.

of the fact that it is impossible to prove the impact of statute law on society, particularly before it is enacted. Evaluation strengthens the legislator's sensibility for the link between social reality and legislation. This is because legislative bodies base their actions mainly on assumptions. Even though evaluation does not, and cannot, prove that these assumptions are right or wrong, it is essential to improve the legislator's knowledge and assumptions about the effects of legislation.[178]

From a legal or juridical point of view, the improvement of our knowledge about the effect of legislative action may give a new sense and a new importance to general legal or constitutional principles, such as the principle of equality before the law, the protection against arbitrariness and, in particular, the principle of proportionality. Periodic evaluation of legislative action presents the opportunity for review, which helps to weigh the effect of statute law against policy objectives. It serves to inform legislators the extent to which the intended purpose has been achieved, and what other legislative or administrative interventions would be necessary to achieve those goals. In effect, review or evaluation of statute law lays ground for law reform.

Finally, we should not underestimate the political dimension of evaluation. On the one hand, it sheds light on the legislator's responsibility for the results of its decisions and sets the pace for improved legislative action in the future. The gap between the legislative goals or intentions and the results may give impetus to the necessary adaption of legal norms, but may also motivate critical examination of the integrity of the political institutions.

7.5.2 Evaluation Criteria

The criteria for evaluation of statute law is threefold, i.e., its effectiveness, efficacy and efficiency. These elements are of particular importance in the law-making process. ***Effectiveness*** refers to the extent to which the observable attitudes and behaviour of the subjects of the legislation (i.e. individuals, enterprises, public officials in charge of the implementation or enforcement of legislation) respond to the attitudes and behaviour prescribed by the legislator in the law. The process of evaluation on this

178 Dr. Iris Breutz 'Handbook for Legislation and Law Drafting for the Republic of Liberia (March 2006) 143.

score seeks to answer, among others, questions as to (a) whether the norm sought to be established by the statute is respected or voluntarily implemented; and (b) whether or not the statute law is the real reason for the people's attitudes and behaviour. For instance, knowing why the constitutional standard of gender equity has not yet met universal acceptance and application would help legislators and the Executive in taking appropriate measures to inspire positive attitudes and behaviour.

The term "**efficacy**" refers to the extent to which legislative action achieves its goal. Accordingly, the question to ask is to what extent the statute law in issue has achieved its goal. For instance, legislators may want to ascertain whether current statute law on equality and non-discrimination has achieved its objectives, and whether its application has resulted in the intended realisation of gender equality and social inclusion of SIGs. For this reason, it is important to clearly define the goals sought to be achieved by the proposed law. Without the definition of the legislative goal, it would be impossible to assess the efficacy of the legislation. However, this does not mean that the goals have to be explicitly mentioned in the law itself. They may be expressed in a report accompanying the legislative proposal (such as a Memorandum of Objects) or formulated during the parliamentary debate. Without such a politically "authorised" definition of the goals, the evaluators have to define what they consider to be the relevant goals of a particular piece of legislation.[179]

The term "**efficiency**" refers to the relationship between the "costs" and the "benefits" of the legislative action in issue. These words have to be used in a broader sense. "Costs" in this context do not only mean money and the financial consequences resulting from compliance with the implementation of legal norms. They also take into account immaterial elements, such as the psychological or emotional effects of the law, and the negative effects caused by a particular piece of legislation. The term "benefits" mainly refers to the goals of a particular legislative action. In effect, the results which are compatible with these goals can be considered as benefits. In other words, evaluating the efficiency of a legislative action involves considering, on the one hand, its costs and, on the other hand, the extent to which it achieves its objectives.

179 Dr. Iris Breutz 'Handbook for Legislation and Law Drafting for the Republic of Liberia (March 2006) 143.

7.5.3 The Process of Evaluation

It is impracticable to list and describe all tools and methods of evaluating statute law before and after enactment because they are far too many. In principle, though, the methods, tools and techniques to be applied to evaluate the effects of legislation depend heavily on the particularities of the specific case and criteria to be followed. Below is an outline of the most common methods and tools for evaluation of statute law before and after enactment. These tools and methods may be applied either separately or in combination.

Prospective Evaluation (before the Law is adopted and enacted):

Prospective evaluation is undertaken before taking formal legislative decisions in order to have insight into the possible or potential effects of the planned legislation. Such evaluation helps legislators in determining the most suitable legislative intervention to address the issue at hand. Prospective evaluators have to address the problem as a whole, beginning with the parties affected and ending with the expected costs. This approach requires foresight and clear understanding of the social-economic, cultural and political environment in which the proposed legislation is to be applied. The need for public participation at this initial stage cannot be overemphasised.

Retrospective Evaluation (after the Law has been adopted and enacted):

Evaluation of statute law after its enactment (retrospective or *ex post* evaluation) is recognised as best practice in the legislative process. *Ex post* evaluation substantially contributes to the effective review of the existing law. If properly done, it provides clear information on the effectiveness, efficacy and efficiency of the regulation, disclosing weaknesses and other shortcomings. It enables legislators to determine what additional legislative or administrative action (if any) should be taken. The evaluation reveals the success or failure of existing provisions, the extent to which the desired goals have been achieved, additional consequences and impact of the statute law, clarifies the approaches for its improvement and, if necessary, justifies its amendment or repeal.

An *ex post* evaluation should be carried out when general reviews of existing legislation take place. The time when *ex post* evaluation should take place may be decided on when the proposed legislation is being formulated. The timing for such review may, in proper cases, be

specified in the text. This may be necessary where there is considerable uncertainty about the risks being addressed by the legislation. In other circumstances, the appropriate time for an *ex post* evaluation may be determined as need arises.

As a general rule, it is prudent to specify the period within, or after which, review of legislation should be undertaken. This lays ground for timely evaluation of the effect of the legislation, or the society's response to, or the behaviour of those affected by, the legislation.

Typical Questions in *Ex Post* Evaluation

(a) Have the goals been achieved with the current provisions?

(b) What are the side effects of the legislation, and are they considerable?

(c) To what extent has the legislation become burdensome, or to what extent has it brought relief in relation to the problems it sought to address?

(d) Has the legislation proven itself as practicable, and will it be observed and obeyed?

(e) Is there need for its amendment or repeal?

After the decision to undertake an *ex post* evaluation has been made, legislators must then determine the criteria for the evaluation. The criteria must be guided by basic elements which have to be investigated when answering the foregoing questions. To answer these questions, one has to consider the following factors:

(a) the degree to which the legislation has achieved the desired goals;

(b) the social-cultural, economic and political cost of the legislation;

(c) the cost-benefit effect of the legislation;

(d) the acceptability of its specific provisions; and

(e) the practicability and subsidiary impacts of its enforcement.

Gathering information on the relevant elements for evaluation of statute law would require legislators and partner agencies to conduct interviews with the target groups and observe the social realities. As a people's representative, a legislator has to keep his or her ears on the ground and open their eyes to the social realities linked to the legislation under review. The legislators should observe the developments in society and try to link certain changes in people's behaviour and conduct to the particular statute law.

Undertaking an *ex post* evaluation, however, needs time, financial and technical human resources that might not be readily available. Moreover, *ex post* evaluation cannot result in absolute certainty about the causal connections between the implementation of new statute law and change in people's behaviour. However, such evaluation plays a critical role in raising the legislators' awareness in relation to what future legislative activity needs to be undertaken to eliminate uncertainty of law (if that is the case) and improve the substantive quality of legislation. On the other hand, the process of evaluation need not involve sophisticated tools and techniques to facilitate *ex post* evaluation of statute law.

This handbook is designed to outline the basic principles that guide the evaluation of legislation and to demonstrate the need to ensure that the statute law in issue has to be viewed in relation to the prevailing social realities in order to gauge its efficacy. In addition to evaluation, periodic sectoral reports, which may be required by the respective statutes, serve to highlight needed legislative or administrative intervention to

ensure that the law achieves the purpose for which it was enacted. In cases involving legislation containing "sunset clauses", evaluation is imperative to determine the next legislative action to address emerging issues or fill the gap created by the lapsed provision. In principle, "sunset laws" are limited in time and can only be renewed on the basis of a report confirming their necessity and appropriateness.

It is prudent to institutionalise law reform, as is the case in Kenya. The Kenya Law Reform Commission plays a significant role in undertaking evaluation of legislative actions before and after enactment of statute law. The Commission discharges its functions in a collaborative manner, engaging a diverse range of state and non-state agencies in technical review of legislative proposals and in the scrutiny of legislation and its effect on society. The Commission draws support from other specialised constitutional bodies, such as the National Gender and Equality Commission by whom this handbook is commissioned. Other strategies include (a) the establishment of ministerial departments charged with the responsibility of evaluating and recommending reform of sectoral legislation; (b) creation of an audit office in the parliamentary service dedicated to law reform; and (c) engagement of independent legislative counsel to undertake evaluation of legislation on behalf of either or both Houses of Parliament, County Assemblies or specific state departments.
The advantages of institutionalising law review and reform initiatives include:

(a) Institutionalisation of evaluation makes it easier to take into account methodological aspects and requirements at the initial stage of formulating legislation;
(b) it guarantees availability of the necessary financial and human resources;
(c) it favours an optimal synchronisation of the evaluation with the legislative decision-making process and optimises the integration of the results of the evaluation;
(d) it facilitates the collaboration of the administrative bodies responsible for the implementation of legislation and, in particular, access to, or availability of, relevant data;
(e) it leads to an impartial and more objective approach; and
(f) it lends legitimacy and political weight to the results of the evaluation.

7.6 Conclusion

Understanding the concepts of equality, gender equality, gender mainstreaming, inclusion and inclusive development lays sound foundation for policy development, legislative action and administrative interventions to facilitate full realisation of gender equality and social inclusion of SIGs in mainstream society.

To this end, legislators should acquaint themselves with the universal standards and treaty obligations enshrined in the Constitution to guide policy, legislation, programmes, plans and actions for the promotion and protection of the right to equality and freedom from discrimination on any of the recognised grounds. Their understanding of these standards serve to guide their evaluation of domestic legislation to ascertain their efficacy in addressing the perennial issues of gender inequality and social exclusion of vulnerable groups and marginalised communities.

To effectively discharge their legislative functions, legislators at both levels of government ought to understand their role as people's representatives in policy development, and in overseeing administrative action that impacts on the rights and freedoms to which this handbook relates. They also need to appreciate the fact that their legislative and oversight functions count for little in the absence of adequate budgetary allocations to lend support to appropriate programmes designed to implement policies and legislation towards an inclusive society characterised by gender equality and equality of opportunity for SIGs in social development.

In addition to the foregoing, understanding the legislative process in the two Houses of Parliament and County Assemblies lays sound ground for legislative intervention by legislators towards the promotion and protection of the right to equality and non-discrimination. The use of modern legislative techniques, such as gender-sensitive or gender-neutral language plays a significant role in the promotion of gender equality. They must constantly remember that any legislation that fails to meet the international standards for equality and non-discrimination and, in particular, gender equality and social inclusion of SIGs constitutes

fertile ground for judicial intervention from which we should endeavour to steer away.

Finally, legislators should appreciate the fact that full realisation of gender equality and inclusive development depends on sound planning and effective partnership development. The golden thread that runs across this handbook demonstrates the critical need for appropriate policy, legislation and administrative action suitably designed to achieve the democratic ideals of equality and non-discrimination in the context of social inclusion of minority groups, who must enjoy an equal voice in the development agenda. To this end, the quality of our legislative action counts. Hence the need for periodic review of legislation and evaluation to ascertain the extent to which it meets the desired goals and inform subsequent policy, legislative and administrative measures to facilitate full realisation of gender equality and inclusion of SIGs in mainstream society.

APPENDIX 1

Core UN Treaty Instruments on Equality and Inclusion

Kenya is a party to seven of the eight UN human rights treaties which are most relevant to discrimination, with the exception being the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. However, it has a very poor record of ratification of instruments allowing individual complaints.

United Nations Treaties

Treaty	Status	Date
International Covenant on Civil and Political Rights (1966)[511]	Ratified	1972
Optional Protocol I to the International Covenant on Civil and Political Rights (1966)[512]	No	
International Covenant on Economic, Social and Cultural Rights (1966)[513]	Ratified	1972
Optional Protocol I to the International Covenant on Economic, Social and Cultural Rights (2008)[514]	No	
International Convention on the Elimination of All Forms of Racial Discrimination (1965)[515]	Ratified	2001
Declaration under Article 14 allowing individual complaints	No	
Convention on the Elimination of All Forms of Discrimination against Women (1979)[516]	Ratified	1984
Optional Protocol to the Convention on the Elimination		
of All Forms of Discrimination against Women (1999)[517]	No	

Convention on the Rights of Persons with Disabilities (2006)[518]	Ratified	2008
Optional Protocol to the Convention on the Rights of Persons with Disabilities (2006)[519]	No	
Convention on the Rights of the Child (1989)[520]	Ratified	1990
Optional Protocol I to the Convention on the Rights of the Child (2000)[521]	Ratified	2002
Optional Protocol II the Convention on the Rights of the Child (2000)[522]	Signed	2000
International Convention on the Protection of the		
Rights of All Migrant Workers and Members of Their Families (1990)[523]	No	
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984)	Ratified	1997
Optional Protocol to the Convention against Torture		
and other Cruel, Inhuman or Degrading Treatment or Punishment (2002)	No	

APPENDIX 2

African Union Human Rights Treaties

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

Treaty	Status	Date
AU African Youth Charter (2006)	Ratified	2008
Protocol on the Rights of Women in Africa (2005)	Signed	2003
Protocol on the Establishment of an African Court on Human and People's Rights (1997)	Ratified	2005
African Charter on the Rights and Welfare of the Child (1990)	Acceded	2000
African Charter on Human and Peoples' Rights (1981)	Ratified	1992
Convention on Specific Aspects of Refugee Problems in Africa (1969)	Ratified	1992
AU Cultural Charter for Africa (1976)	Ratified	1981

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- International Convention on the Rights of Persons with Disabilities, 2008
- Convention on the Elimination of Discrimination against Women, 1979
- Convention on the Rights of the Child, 1989
- Convention on the Political Rights of Women, 1952
- Declaration on the Participation of Women in Promoting International Peace and Co-operation, 1982
- United Nations Principles for Older Persons, 1991
- Beijing Declaration and Plan for Action, 1995

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- International Labour Organisation Minimum Age Convention, 1973
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Regional Charters and Protocols

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- AU African Youth Charter, 2006
- African Charter on the Rights and Welfare of the Child, 1990
- Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2003
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